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 REGENTS OF THE UNIVERSITY OF
 CALIFORNIA; MARK G. YUDOF; MARYE
 ANNE FOX; GARY MATTHEWS

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO/OAKLAND DIVISION

TIMOTHY WHITE, ROBERT L. BETTINGER, and
 MARGARET SCHOENINGER,

Plaintiffs,

vs.

THE UNIVERSITY OF CALIFORNIA; THE
 REGENTS OF THE UNIVERSITY OF CALIFORNIA;
 MARK G. YUDOF, in his individual and official
 capacity as President of the University; MARYE ANNE
 FOX, in her individual and official capacity as
 Chancellor of the University of California, San Diego;
 GARY MATTHEWS, in his individual and official
 capacity as Vice Chancellor of the University of
 California, San Diego; and DOES 1-50, inclusive,

Defendants.

FILED

APR 20 2012

RICHARD W. WIEKING
 CLERK, U.S. DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND

ADR

JCS

JC

C12-01978

CASE NO.

NOTICE OF REMOVAL OF
 ACTION UNDER 28 U.S.C. §
 1441

(Alameda Superior Court Case No.
 RG12625891)

1 TO THE CLERK OF THE ABOVE-ENTITLED COURT:

2 PLEASE TAKE NOTICE that Defendants hereby remove the above-captioned
3 matter, which was commenced in the Superior Court of the State of California in and for the
4 County of Alameda as case number RG12625891, to the United States District Court for the
5 Northern District of California, San Francisco/Oakland Division.

6 In support of their Notice of Removal, Defendants state the following:

7 1. This is a civil action over which this District Court has original jurisdiction
8 under 28 U.S.C. §§ 1331 and 1367 and 25 U.S.C. § 3013, and which Defendants are entitled to
9 remove to this Court pursuant to 28 U.S.C. §§ 1441(a) and (b).

10 2. This action is removed on the basis of federal question jurisdiction because
11 it includes claims “arising under the Constitution, laws, or treaties of the United States.” 28
12 U.S.C. § 1331. In particular, the First Cause of Action alleges a violation of a federal statute, the
13 Native American Graves Protection and Repatriation Act (“NAGPRA”), 25 U.S.C. § 3001 et seq.
14 (Compl. ¶¶ 47-53); the Third Cause of Action invokes 42 U.S.C. § 1983 and the First
15 Amendment (Compl. ¶¶ 65-71); and the petition for writ of mandamus and/or administrative
16 mandamus arises under both NAGPRA and the Fourteenth Amendment (Compl. ¶¶ 36-38).

17 3. This action is also removed under NAGPRA itself, which states that “[t]he
18 United States district courts shall have jurisdiction over any action brought by any person alleging
19 a violation of this Act.” 25 U.S.C. § 3013. As noted, Plaintiffs’ First Cause of Action alleges a
20 violation of NAGPRA. (Compl. ¶¶ 47-53.)

21 4. Any state-law claims “form part of the same case or controversy” as the
22 federal claims; this Court thus has supplemental jurisdiction over them. 28 U.S.C. § 1367.

23 5. The Complaint in the Superior Court action was served on Defendants on
24 April 18, 2012. Thus, removal of this action is timely under 28 U.S.C. § 1446(b). *See Murphy*
25 *Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 354-55 (1999).

26 6. Removal to the United States District Court for the Northern District of
27 California, San Francisco/Oakland Division, is proper because the Northern District embraces the
28

1 Superior Court of California for the County of Alameda, where Plaintiffs filed their complaint.
2 28 U.S.C. § 1446(a).

3 7. Written notice of the filing of this Notice of Removal will be provided to
4 Plaintiffs, and a copy of this Notice will be filed in the appropriate state court, as required by 28
5 U.S.C. § 1446(d). This Notice of Removal is signed pursuant to Fed. R. Civ. P. 11. See 28
6 U.S.C. § 1446(a).

7 8. Attached as Exhibit A are true and correct copies all of the process,
8 pleadings, and orders received or served by Defendants in this action.

9 BASED ON THE FOREGOING, Defendants hereby remove this action, now
10 pending in the Superior Court of the State of California for the County of Alameda, Case Number
11 RG12625891, to the United States District Court for the Northern District of California.

12
13 DATED: April 20, 2012

MUNGER, TOLLES & OLSON LLP
BRADLEY S. PHILLIPS
MICHELLE FRIEDLAND
JOHN M. RAPPAPORT

14
15
16 By: 
17 JOHN M. RAPPAPORT

18 Attorneys for Defendants
19 THE UNIVERSITY OF CALIFORNIA; THE
20 REGENTS OF THE UNIVERSITY OF
21 CALIFORNIA; MARK G. YUDOF; MARYE
22 ANNE FOX; GARY MATTHEWS
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Exhibit A

Case Summary

RG12625891

White VS The University Of California

Register of Actions

Date	Action	Image (Java)	Image (TIFF)
04/16/12	Petition for Writ of Mandate Filed		
04/16/12	Civil Case Cover Sheet Filed for Timothy White		
04/16/12	Complex Designation Requested		
04/16/12	Summons Issued and Filed		
04/17/12	Temporary Restraining Order & OSC re Preliminary Injunction Reservation Set for dept: 31 date: 04/23		
04/18/12	Miscellaneous errata to petition for writ of mandamus Filed		
04/18/12	Application Re: Temporary Restraining Order & OSC re Preliminary Injunction Filed for Timothy White,		
04/19/12	Complex Determination Hearing 05/22/2012 08:45 AM D- 21		
04/19/12	Case Management Conference 06/25/2012 08:30 AM D- 21		

General
Information

Parties

Attorneys

Register
of ActionsFuture
Hearings

Minutes

Rulings &
CMC OrdersTentative
Rulings

Judgments

Related
Cases

1 JAMES McMANIS (40958)
CHRISTINE PEEK (234573)
2 BRANDON ROSE (269196)
JENNIFER MURAKAMI (273603)
3 McMANIS FAULKNER
A Professional Corporation
4 50 West San Fernando Street, 10th Floor
San Jose, California 95113
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ENDORSED
FILED
ALAMEDA COUNTY

APR 16 2012

CLERK OF THE SUPERIOR COURT
By Tasha Perry, Deputy

7 Attorneys for Petitioners and Plaintiffs,
TIMOTHY WHITE,
8 ROBERT L. BETTINGER, and
MARGARET SCHOENINGER
9

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 FOR THE COUNTY OF ALAMEDA

12 TIMOTHY WHITE, an individual; ROBERT
L. BETTINGER, an individual; and
13 MARGARET SCHOENINGER, an individual,

Case No. 12625891

14 Petitioners and plaintiffs,

15 vs.

16 THE UNIVERSITY OF CALIFORNIA; THE
17 REGENTS OF THE UNIVERSITY OF
CALIFORNIA; MARK G. YUDOF, in his
18 individual and official capacity as President of
the University; MARYE ANNE FOX, in her
19 individual and official capacity as Chancellor of
the University of California, San Diego; GARY
20 MATTHEWS, in his individual and official
capacity as Vice Chancellor of the University of
21 California, San Diego; and DOES 1-50,
inclusive,
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23 Respondents and defendants.
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PETITION FOR WRIT OF MANDAMUS
(CODE CIV. PROC., § 1085), OR IN THE
ALTERNATIVE, FOR WRIT OF
ADMINISTRATIVE MANDAMUS (CODE
CIV. PROC., § 1094.5); COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF (CODE CIV. PROC., §§ 526a,
1060)

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1 4. Defendant THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
2 ("REGENTS") is a public corporation that administers the UNIVERSITY. (Cal. Const., art. IX,
3 § 9, subd. (a).)

4 5. Defendant MARK YUDOF ("YUDOF") is an individual, who serves as President
5 of the UNIVERSITY. The President is the chief executive officer of the UNIVERSITY, and
6 governs through authority delegated by the REGENTS. The President is responsible directly to
7 the REGENTS. Moreover, the President "shall serve as the guardian of the public trust, ensuring
8 legal and ethical compliance, managing system risk, and providing information regarding
9 University activities." (See Regents Policy 1500, Statement Of Expectations Of The President
10 Of The University (March 2011) ("Regents Policy"), *available at*
11 <http://www.universityofcalifornia.edu/regents/policies/1500.html>.) YUDOF is sued here in his
12 individual and official capacities.

13 6. Defendant MARYE ANNE FOX ("FOX") is an individual employed by
14 employed by the UNIVERSITY as the Chancellor of its San Diego campus ("UCSD"). The
15 campus Chancellor is the chief campus officer and executive head of all campus activities. FOX
16 is sued here in her individual and official capacities.

17 7. Defendant GARY MATTHEWS ("MATTHEWS") is an individual employed by
18 the UNIVERSITY as Vice Chancellor, Resource Management and Planning, at UCSD. He is
19 sued here in his individual and official capacities.

20 8. Plaintiffs do not know the true names and capacities of Defendants DOES 1
21 through 50, inclusive, and therefore sue these Defendants by such fictitious names. Plaintiffs
22 may amend this Writ Petition and Complaint to allege their true names and capacities when
23 ascertained. Plaintiffs are informed and believe that each of the fictitiously named Defendants is
24 responsible in some manner for the occurrences herein alleged, and that the illegal acts as herein
25 alleged were proximately caused by their conduct.

26 9. At all times referenced herein, Defendants, including those named as DOES 1
27 through 50, were the agents, servants, and employees of their co-defendants, and in doing the
28 things alleged were acting in the scope of their authority as such agents, servants and employees,

1 under the direction and supervision and with the permission and consent of their co-defendants.

2 **GENERAL ALLEGATIONS**

3 10. In 1976, Professor Gail Kennedy of UCLA led an archaeological field excavation
4 project on University property in San Diego (the "site"). The Chancellor's official residence,
5 University House, is also located on the site. Professor Kennedy's team discovered a rare double
6 burial. The bones have great scientific significance due to the age of the two skeletons ("La Jolla
7 Skeletons"), which are estimated to date back 8977 to 9603 years ago. The La Jolla Skeletons
8 are extremely old by North American osteological standards. They are similar to, though likely
9 older than, another skeleton found in Kennewick in 1996, which was the subject of federal
10 litigation that resolved in 2004. (*See Bonnichsen v. United States* (9th Cir. 2004) 367 F.3d 864.)
11 Because of their extreme age and relatively good condition, the La Jolla Skeletons represent a
12 unique opportunity for all people to understand human origins in North America.

13 11. The SAN DIEGO ARCHAEOLOGICAL CENTER ("SDAC") presently has
14 physical custody of the La Jolla Skeletons, and holds them on behalf of the UNIVERSITY. The
15 SDAC is a California nonprofit corporation located in Escondido, California. By taking custody
16 of the La Jolla Skeletons on behalf of the UNIVERSITY, the SDAC is acting as the
17 UNIVERSITY's agent with respect to the La Jolla Skeletons.

18 12. In 1990, Congress passed the Native American Graves Protection and
19 Repatriation Act ("NAGPRA"). NAGPRA imposes various requirements on, inter alia, state
20 government agencies and institutions of higher learning that receive federal funds, and that hold
21 "Native American" human remains or cultural items. NAGPRA defines "Native American" as
22 follows:

23 'Native American' means of, or relating to, a tribe, people, or culture that is
24 indigenous to the United States.

25 (25 U.S.C. § 3001(9).) The Ninth Circuit has held that human remains must bear some
26 relationship to a presently existing tribe, people, or culture to be considered "Native American"
27 within the meaning of NAGPRA. (*See Bonnichsen v. United States, supra*, 367 F.3d at 875-76.)
28 NAGPRA does not apply to remains that are not "Native American" or "Native Hawaiian." For

1 remains or cultural items that are "Native American," NAGPRA may require that they be
2 "repatriated" or returned to a tribe, depending on whether or not certain conditions are met.
3 NAGPRA's statutory scheme does not require repatriation of "culturally unidentifiable" human
4 remains, however.

5 13. NAGPRA requires those entities subject to it to compile an inventory of "Native
6 American" human remains and cultural objects in their possession, and to submit the inventory
7 to the DOI. (25 U.S.C. § 3003.)

8 14. The UNIVERSITY has created a system-wide University Advisory Group on
9 Cultural Repatriation and Human Remains and Cultural Items ("Advisory Group"). (See
10 University of California Policies and Procedures On Curation and Repatriation of Human
11 Remains and Cultural Items ("Human Remains Policies").) The Human Remains Policies are
12 attached as Exhibit A. If a tribe requests repatriation, the Advisory Group must review all
13 campus determinations and report its findings and recommendations to the President or the
14 President's designee. The President or the President's designee has final authority to approve or
15 disapprove determinations regarding disposition of remains and cultural items.

16 15. Under the Human Remains Policies, each campus with a collection of Native
17 American remains or cultural items must designate a liaison to work with native communities
18 considering or requesting repatriation from the UNIVERSITY. Defendant MATTHEWS is the
19 liaison for the San Diego campus.

20 16. The Kumeyaay Nation ("Kumeyaay"), a coalition of 12 Native American tribes,
21 claims to have occupied the site on which the La Jolla Skeletons were found. Although the
22 Kumeyaay have asserted that the La Jolla Skeletons are culturally affiliated with their coalition
23 of tribes, there is insufficient evidence to support the conclusion that the Kumeyaay are
24 descended from the people who were buried at the site, approximately 10,000 years ago. In
25 addition, there is insufficient evidence to conclude that any Kumeyaay tribe actually occupied
26 the site at the time the La Jolla Skeletons were buried there. The evidence does not support a
27 finding that there is any link between the La Jolla Skeletons and any Kumeyaay tribe, or any
28 currently existing Native American tribe, for the following reasons, among other reasons:

1 a. The burial pattern of the La Jolla Skeletons differs from that of the
2 Kumeyaay as reported in early ethnographies. Before the Spanish explorers made
3 contact with North America, the Kumeyaay cremated, rather than buried, their dead.

4 b. Preliminary carbon and nitrogen stable isotope analysis of human bone
5 collagen from the La Jolla Skeletons is consistent with a year-round diet of open-ocean
6 and some nearshore marine fish or marine mammals. This contrasts with the diet of the
7 Kumeyaay, who lived on wild plants, supplemented with more small than large game,
8 and in some places, fish. Seasonal dependence on marine foods would produce lower
9 values of the isotope signals than those recovered from the La Jolla Skeletons.

10 c. The skeletal morphology of the La Jolla Skeletons does not show any link
11 to the Kumeyaay, or any other Native American tribe. The La Jolla Skeletons have long,
12 narrow cranial vaults and short, relatively narrow faces compared with extant Native
13 Americans. A detailed 2007 morphological study by Professor Douglas Owsley
14 concluded the La Jolla Skeletons were not Native American.

15 d. Because there has been no genetic testing of the La Jolla Skeletons
16 (because the UNIVERSITY has not allowed any testing), there is no genetic or DNA
17 evidence linking the Kumeyaay or any other Native American tribe to the La Jolla
18 Skeletons.

19 17. On or about October 22, 2008, the UNIVERSITY submitted a "Notice of
20 Inventory Completion" and inventory to the United States Department Of The Interior ("DOI"),
21 which included the La Jolla Skeletons and various other items said to be associated with the
22 remains. The DOI includes, as a bureau, the National Park Service ("NPS"). In turn, the NPS
23 includes the Native American Graves Protection and Repatriation Review Committee
24 ("NAGPRA Review Committee").

25 18. The inventory was based on a 2008 report written by the local UC San Diego
26 NAGPRA Review Committee. The 2008 report was silent on whether the La Jolla Skeletons
27 were "Native American" within the meaning of NAGPRA, and made no attempt to determine
28 whether or not the La Jolla Skeletons were subject to NAGPRA. The 2008 report did conclude,

1 however, that there was insufficient evidence to conclude the remains were culturally affiliated
2 with the Kumeyaay.

3 19. Because there is insufficient evidence to conclude the La Jolla Skeletons are
4 "Native American" within the meaning of NAGPRA, Defendants' decision to include them on
5 the October 22, 2008 inventory was legally erroneous. NAGPRA and its accompanying
6 regulations do not apply to the La Jolla Skeletons at all, because the La Jolla Skeletons do not
7 fall within the class of human remains that NAGPRA covers. Therefore, the La Jolla Skeletons
8 should not have been included on any federal inventory.

9 20. On or about February 23, 2009, MATTHEWS submitted to the DOI, through its
10 NAGPRA Review Committee; a Request by a Museum or Federal Agency that the Review
11 Committee Act on an Agreement Concerning the Disposition of Human Remains and Associated
12 Funerary Objects Determined to be Unidentifiable ("2009 Repatriation Request").
13 MATTHEWS requested that the DOI approve an agreement between FOX and the Kumeyaay
14 Cultural Repatriation Committee ("KCRC") to transfer custody of the La Jolla Skeletons to the
15 KCRC. The KCRC is a coalition of 12 different Kumeyaay tribes of San Diego County. The
16 2009 Repatriation Request was later withdrawn.

17 21. In 2010, the DOI and its Secretary Ken Salazar ("Salazar") purported to
18 promulgate a new federal regulation governing the disposition of "culturally unidentifiable"
19 human remains that meet NAGPRA's definition of "Native American." For all "culturally
20 unidentifiable" "Native American" human remains, Salazar and the DOI purported to impose the
21 following requirements, among other requirements:

22 a. Requirements that the federal agency or museum in possession of the
23 remains consult with tribal representatives concerning culturally unidentifiable remains
24 and associated funerary objects;

25 b. Requirements that federal agencies and museums offer to transfer control
26 of such remains to "(i) [t]he Indian tribe . . . from whose tribal land, at the time of the
27 excavation or removal, the human remains were removed; or (ii) [t]he Indian tribe or
28 tribes that are recognized as aboriginal to the area from which the human remains were

1 removed," unless the agency or museum can prove a right of possession;

2 c. Authorization for federal agencies and museums to transfer control to
3 other tribes or Native Hawaiian organizations, in the event no tribe described above
4 agrees to accept the remains; and

5 d. Notification requirements.

6 22. On or about June 4, 2010, YUDOF wrote to FOX, stating that he planned to give
7 "significant deference" to the Chancellors of the respective UC campuses regarding decisions
8 about the disposition of remains. YUDOF instructed FOX that the UCSD campus had the
9 responsibility to conduct consultations and analysis required under NAGPRA, and to make
10 initial determinations and recommendations regarding cultural affiliation. YUDOF further
11 instructed FOX that once UCSD completed its assessment, it should determine whether it needed
12 to amend the previous NAGPRA inventory or prepare a new draft Notice of Inventory
13 Completion.

14 23. The La Posta Band of Diegueno Mission Indians of the La Posta Reservation ("La
15 Posta Band of Mission Indians") is a federally recognized tribe of Kumeyaay people.

16 24. On or about August 2, 2010, Steve Banegas, a spokesperson for the KCRC, wrote
17 to the UCSD campus and requested that the La Jolla Skeletons be repatriated to the La Posta
18 Band of Mission Indians, along with certain other objects previously excavated from the site.

19 25. On or about October 21, 2010, MATTHEWS circulated a new Draft Notice of
20 Inventory Completion ("Draft Notice") for review by the Advisory Group. The new notice was
21 deficient for many reasons. It referred to "associated funerary items," even though the published
22 paper describing the burials stated that no cultural items were found in association with the La
23 Jolla Skeletons. It asserted that stone and shell recovered from the site was "reasonably believed
24 to have been placed with or near" the La Jolla Skeletons, "at the time of death or later as part of
25 the death rite or ceremony," without any factual support, and in apparent contradiction to Gail
26 Kennedy's account of the excavation. The Draft Notice referred to the La Jolla Skeletons as
27 "Native American," despite a detailed 2007 morphological study by Professor Owsley
28 concluding they were not Native American. Finally, the Draft Notice stated that a detailed

1 assessment of the La Jolla Skeletons had been made by UC professional staff, when in fact, the
 2 only staff who had seen the La Jolla Skeletons included Gail Kennedy (who did not refer to them
 3 as Native American), Philip Walker (now deceased, who concluded they were not Native
 4 American), and plaintiff SCHOENINGER. SCHOENINGER never made any determination that
 5 the remains were "Native American" within the meaning of NAGPRA, nor was she asked to do
 6 so. In its responses to comments published along with the final version of 43 C.F.R. § 10.11, the
 7 DOI included language indicating that museums must make a "threshold determination" that
 8 culturally unidentifiable remains are "Native American" before including them on a federal
 9 inventory. (*See* 75 Fed.Reg. 12387 (response to Comment 55).)

10 26. On or about March 2, 2011, the Advisory Group considered MATTHEWS' Draft
 11 Notice and submitted a summary and report. The Advisory Group recommended that UCSD
 12 should not forward the Draft Notice without further consultation with tribes other than the
 13 Kumeyaay. The Advisory Group also recommended that the San Diego campus reanalyze
 14 whether the supposed "associated funerary objects" are, in fact, funerary objects, and if not, to
 15 revise the Draft Notice accordingly. The Advisory Group did not reach a consensus on any other
 16 recommendations.

17 27. On or about May 11, 2011, YUDOF wrote to FOX, stating that he intended to
 18 defer to the campus's determination on the issue of whether or not the remains were "Native
 19 American" under NAGPRA, and to authorize the campus to proceed under the NAGPRA
 20 process. YUDOF authorized UCSD to dispose of the La Jolla Skeletons under NAGPRA,
 21 subject to the following directions and recommendations:

22 a. UCSD was required to reanalyze, including through expert analysis,
 23 whether the materials listed on the Draft Notice were funerary objects, and if not, to
 24 revise the Draft Notice.

25 b. YUDOF advised UCSD to revise its Notice of Inventory Completion to
 26 acknowledge an alleged "division among experts" on the issue of whether the La Jolla
 27 Skeletons are "Native American" within the meaning of NAGPRA.

28 c. YUDOF instructed UCSD to consult more broadly with other tribes in the

1 region. Following this consultation, if UCSD determined that additional tribes were
2 aboriginal to the site, YUDOFF instructed UCSD to revise its Notice of Inventory
3 Completion accordingly. If there were no competing claims, however, YUDOF
4 authorized FOX to dispose of the La Jolla Skeletons to the La Posta Band of Mission
5 Indians in accordance with NAGPRA, 30 days after publication in the Federal Register.

6 28. The La Jolla Skeletons are in good enough condition that it may be possible to
7 retrieve DNA samples and perform DNA sequencing. Not only would this provide a wealth of
8 information of interest to the general public, such sequences also could be used to assess whether
9 or not the remains share any genetic affiliation with modern Native American groups.

10 29. FOX and UCSD have authority to grant requests to study the La Jolla Skeletons,
11 but have refused to allow any research to be conducted.

12 30. On or about August 16, 2010, BETTINGER requested permission to study the La
13 Jolla Skeletons. He proposed to perform (1) macro-morphological work; (2) stable isotope
14 analyses to determine diet and place of origin; and (3) ancient DNA work to establish genetic
15 affinity. These studies are essential to understanding the colonization of California and Western
16 North America, and of the New World generally. These studies are also central to
17 BETTINGER's long-standing research on hunter gatherers and hunter gatherer expansions. Dr.
18 Art Ellis, UCSD Vice Chancellor for Research, replied that UCSD was finalizing procedures for
19 dealing with such requests and that while he (Ellis) was shortly leaving UCSD, he had forwarded
20 BETTINGER's request to Associate Vice Chancellor George Tynan, whom BETTINGER could
21 look forward to hearing from. BETTINGER never heard back from Tynan. If the repatriation
22 does not go forward, BETTINGER and other experts in the field of ancient DNA and stable
23 isotope analysis plan to pursue these studies. Because they are so well preserved, and because
24 there are two of them, the La Jolla Skeletons present a unique opportunity to study patterns at a
25 population level rather than an individual level, enabling scientists to apply the results of the
26 studies in a wide variety of other contexts. No other set of New World remains holds such a high
27 degree of research potential.

28 31. In or about April, 2009, WHITE asked to study the La Jolla Skeletons. He

1 engaged in communications with various UNIVERSITY representatives regarding his request
2 from 2009 to 2011 without ever receiving a final response to his request. For WHITE, the La
3 Jolla Skeletons represent part of a worldwide sample of early humanity, which is critical to the
4 understanding of the species, *Homo sapiens*. If the La Jolla Skeletons are not repatriated,
5 WHITE still plans to study them.

6 32. In 2009, SCHOENINGER spoke informally to the Senior Vice Chancellor for
7 Academic Affairs, Paul Drake, and the then Vice Chancellor for Research at UCSD, Art Ellis,
8 about studying the La Jolla Skeletons. She gave a presentation to the Academic Senate Council
9 regarding the research value of the skeletons in 2009. The Academic Senate Council told
10 SCHOENINGER she could not study the La Jolla Skeletons or involve herself further in any
11 requests to study them, because she allegedly had a "conflict of interest." SCHOENINGER
12 wants to preserve the opportunity to study the La Jolla Skeletons in the future, especially in the
13 event that studies by BETTINGER or WHITE implicate new research questions in her area of
14 focus.

15 33. On or about December 5, 2011, defendants published, or caused to be published,
16 in the Federal Register, a Notice of Inventory Completion: The University of California, San
17 Diego, San Diego, CA ("Repatriation Notice"). The Repatriation Notice is attached as Exhibit
18 B. The Repatriation Notice stated that if no one else came forward and claimed the La Jolla
19 Skeletons by January 4, 2012, the La Jolla Skeletons would be repatriated to the La Posta Band
20 of Mission Indians after that date. The Repatriation Notice also made the following purported
21 findings, among other findings:

22 a. The La Jolla Skeletons are "Native American," pursuant to 25 U.S.C. §
23 3001(9).

24 b. Pursuant to 25 U.S.C. § 3001(2), a relationship of shared group identity
25 cannot be reasonably traced between the La Jolla Skeletons and any present-day Indian
26 tribe.

27 c. Pursuant to 25 U.S.C. § 3001(3)(A), approximately 25 objects found at the
28 site are "reasonably believed to have been placed with or near" the La Jolla Skeletons, "at

1 the time of death or later as part of the death rite or ceremony.”

2 d. Pursuant to 43 C.F.R. § 10.11(c)(1), and based upon request from the
3 Kumeyaay Cultural Repatriation Committee, on behalf of the 12 associated Kumeyaay
4 tribes, disposition of the La Jolla Skeletons is to the La Posta Band of Diegueno Mission
5 Indians of the La Posta Indian Reservation, California.

6 34. On or about January 25, 2012, the parties entered into a Tolling Agreement, by
7 which respondents and defendants agreed that, “any and all statutes of limitation applicable to
8 any claims whatsoever that plaintiffs may have against defendants relating to the La Jolla
9 Skeletons that have not already expired shall be tolled to and including April 16, 2012.”

10 **PETITION FOR WRIT OF MANDAMUS (Code Civ. Proc. § 1085),**
11 **OR IN THE ALTERNATIVE, FOR WRIT OF ADMINISTRATIVE MANDAMUS**
12 **(Code Civ. Proc. § 1094.5)**

13 **[All Petitioners Against All Respondents]**

14 35. Petitioners hereby incorporate by reference paragraphs 1 through 33, inclusive.

15 36. NAGPRA only applies to the La Jolla Skeletons if they meet the legal definition
16 of “Native American” under NAGPRA. Title 43, part 10.11, subdivision (a) of the Code of
17 Federal Regulations also specifically states that it applies “to human remains previously
18 determined to be Native American under § 10.9, but for which no lineal descendant or culturally
19 affiliated Indian tribe or Native Hawaiian organization has been identified.”

20 37. Under NAGPRA and its accompanying regulations, Respondents have a clear,
21 present, mandatory and ministerial duty to make a formal determination whether or not the La
22 Jolla Skeletons are “Native American” within the meaning of NAGPRA, before repatriating
23 them under the alleged authority of 43 C.F.R. § 10.11.

24 38. Under article I, sections 7 and 15 of the California Constitution, and the
25 Fourteenth Amendment to the United States Constitution, Respondents have a clear, present,
26 mandatory and ministerial duty to comply with the minimum requirements of due process,
27 including a clear, present, mandatory and ministerial duty to avoid imposition of arbitrary
28 adjudicative procedures.

1 39. In addition, Respondents have a clear, present, mandatory and ministerial duty to
 2 administer the UNIVERSITY as a public trust, pursuant to the state constitutional mandate.
 3 “[D]ecisions are to be made solely to promote the best interests of the University as a public
 4 trust, rather than the interests of a particular constituency, and that Board members will disclose
 5 personal, familial, business relationships, or other potential conflicts of interest as appropriate.”
 6 (See Regents Policy 1100, Statement Of Expectations Of The Members Of The Board Of
 7 Regents (Jan. 2010), *available at* [http://www.universityofcalifornia.edu/regents/policies/](http://www.universityofcalifornia.edu/regents/policies/1100.html)
 8 1100.html.) The public has an interest in preserving scientifically and historically significant
 9 items, as does the UNIVERSITY.

10 40. Petitioners are beneficially interested in the issuance of a writ of mandamus,
 11 because they have a clear, present, substantial and vested right in Respondents’ performance of
 12 their duty to determine whether or not NAGPRA and its accompanying regulations actually
 13 apply to the La Jolla Skeletons, before Respondents dispose of them to the Kumeyaay. A
 14 disposition without such a formal determination would arbitrarily and illegally destroy the La
 15 Jolla Skeletons’ incalculable scientific value to Petitioners, and to the public at large, and would
 16 violate NAGPRA.

17 41. In addition, Petitioners are beneficially interested as citizens and taxpayers in
 18 Respondents’ performance of their duties under the law. Respondents’ threatened act of
 19 repatriation not only would deprive Petitioners’ of any opportunity to research the La Jolla
 20 Skeletons, it would also arbitrarily and illegally deprive all members of the public of the
 21 opportunity to understand the origins of humanity in North America.

22 42. The above-described actions of Respondents, including but not limited to,
 23 Respondents’ inclusion of the La Jolla Skeletons on the October 22, 2008 Notice of Inventory
 24 Completion and the Repatriation Notice, were arbitrary and capricious, in excess of
 25 Respondents’ jurisdiction, a prejudicial abuse of their discretion, and/or there was not a fair trial,
 26 for, *inter alia*, the following reasons:

27 a. Respondents failed to make a formal and adequate finding or
 28 determination whether or not the La Jolla Skeletons are “Native American” under

1 NAGPRA. On information and belief, Respondents failed to consider any evidence or
2 conduct a hearing on this issue. In failing to make this decision using procedures that
3 meet minimum constitutional standards, and in making their purported "findings" without
4 considering any evidence or providing Petitioners a full and fair opportunity to present
5 evidence, Respondents acted in an arbitrary and capricious manner, in violation of
6 Petitioners' fundamental due process rights, and in violation of Respondents' duty to
7 administer the University as a public trust;

8 b. For the same reasons, Respondents' decision to include the La Jolla
9 Skeletons on the October 22, 2008 Notice of Inventory Completion and the Repatriation
10 Notice was not supported by an adequate finding or determination that the La Jolla
11 Skeletons are "Native American" under NAGPRA;

12 c. To the extent Respondents made a formal finding or determination that the
13 La Jolla Skeletons were "Native American" under NAGPRA, their determination was
14 arbitrary and capricious, not supported by the weight of the evidence, and/or was not
15 supported by substantial evidence in light of the whole record. Respondents' decision
16 was further flawed in that Respondents apparently based their decision on the geographic
17 relationship of the Kumeyaay to the UCSD site, even though the "aboriginal territories"
18 occupied and defined for historic Indian tribes are not in any way linked to the prehistoric
19 territories that their lineal ancestors may have occupied;

20 d. Petitioners were not allowed to present evidence in opposition to
21 Respondents' summary conclusion that the La Jolla Skeletons were "Native American"
22 within the meaning of NAGPRA;

23 e. On information and belief, Respondents did not reanalyze whether the
24 materials listed on the Draft Notice were funerary objects, as required by YUDOF's May
25 11, 2011 letter;

26 f. On information and belief, Respondents' purported finding that the 25
27 objects were "reasonably believed" to have been placed at the site at or near the time of
28 death or later as part of the "death rite or ceremony" is not supported by any evidence in

1 the record, and/or Petitioners were not allowed to present evidence in opposition to
2 Respondents' summary conclusion. Respondents' purported finding is arbitrary and
3 capricious ;

4 g. The Human Remains Policies Respondents followed in drafting and
5 submitting the Notice of Inventory Completion and Repatriation Notice are fatally
6 flawed, because they provide no guidelines for determining whether remains are "Native
7 American" within the meaning of NAGPRA. Furthermore, they provide no standards
8 governing what evidence is admissible on the question of whether the remains are
9 "Native American" within the meaning of NAGPRA, or what weight the evidence is to
10 be given. The lack of standards renders it impossible for Petitioners to challenge the
11 evidence presented or Respondents' summary conclusion. The Human Remains Policies
12 do not provide notice of what evidence may be relied upon in the evaluation of whether
13 remains are or are not "Native American." The lack of procedures and standards renders
14 the Human Remains Policies unconstitutionally vague and violates due process.

15 43. By including the La Jolla Skeletons on the October 22, 2008 Notice of Inventory
16 Completion and Repatriation Notice, Respondents acted in an arbitrary and capricious manner
17 and in violation of Petitioners' and the public's right to a fair determination of whether or not the
18 La Jolla Skeletons are "Native American" within the meaning of NAGPRA.

19 44. Petitioners have no plain, speedy, and adequate remedy in the ordinary course of
20 law other than the relief sought by this petition.

21 45. Petitioners have exhausted all administrative procedures required of them by law.

22 46. If the relief sought by this petition is not granted, Petitioners and the general
23 public will suffer irreparable injury and harm, in that the ability to study the La Jolla Skeletons
24 will be lost forever. Petitioners are informed and believe that Respondents will repatriate the
25 remains to the La Posta Band of Mission Indians as soon as possible after January 4, 2012,
26 unless Respondents are restrained by this Court. Petitioners are informed and believe that the La
27 Posta Band of Mission Indians will fail to maintain the skeletons in a manner that preserves their
28 scientific value, and therefore the skeletons' scientific value will be destroyed, unless

1 Respondents are restrained by this Court.

2 WHEREFORE, Petitioners pray for judgment against Respondents as set forth below.

3 **COMPLAINT**

4 **FIRST CAUSE OF ACTION – DECLARATORY AND INJUNCTIVE RELIEF -**
 5 **VIOLATION OF NAGPRA (Code Civ. Proc. §§ 526a, 1060)**

6 **[All Plaintiffs Against All Defendants]**

7 47. Plaintiffs hereby incorporate by reference paragraphs 1 through 45, inclusive.

8 48. NAGPRA only applies to the La Jolla Skeletons if they meet the legal definition
 9 of "Native American" under NAGPRA. Title 43, part 10.11, subdivision (a) of the Code of
 10 Federal Regulations also specifically states that it applies "to human remains previously
 11 determined to be Native American under § 10.9, but for which no lineal descendant or culturally
 12 affiliated Indian tribe or Native Hawaiian organization has been identified." Defendants' actions
 13 in approving the transfer of the La Jolla Skeletons to the La Posta Band of Mission Indians are
 14 illegal, invalid, null and void, because Defendants failed to make a finding or determination, or
 15 failed to make an adequate finding or determination, that the remains are "Native American"
 16 within the meaning of NAGPRA. Defendants' actions are also illegal, invalid, null and void to
 17 the extent Defendants concluded the remains were "Native American," because their conclusion
 18 is not supported by the evidence.

19 49. Defendants have expended public funds in support of their illegal efforts to
 20 repatriate the La Jolla Skeletons, without determining whether they are "Native American"
 21 within the meaning of NAGPRA, and/or without considering all of the evidence concerning
 22 whether or not the La Jolla Skeletons are "Native American" within the meaning of NAGPRA.

23 50. An actual, present controversy exists between Plaintiffs and Defendants, because
 24 Plaintiffs contend and Defendants deny that that Defendants' actions in approving the transfer of
 25 the La Jolla Skeletons to the La Posta Band of Mission Indians are illegal, invalid, null and void.

26 51. Plaintiffs desire a judicial determination that Defendants' actions in approving the
 27 transfer of the La Jolla Skeletons to the La Posta Band of Mission Indians are illegal, invalid,
 28 null and void. A judicial declaration is necessary and appropriate at this time, so that Plaintiffs

1 may ascertain their rights, the rights of the general public, and Defendants' duties under the law.

2 52. Unless Defendants are enjoined, Plaintiffs and the general public will suffer
3 irreparable injury and harm, in that the ability to study the La Jolla Skeletons will be lost forever.
4 Plaintiffs are informed and believe that Defendants will repatriate the remains to the La Posta
5 Band of Mission Indians as soon as possible after January 4, 2012, unless Defendants are
6 restrained by this Court. Plaintiffs are informed and believe that the La Posta Band of Mission
7 Indians will fail to maintain the skeletons in a manner that preserves their scientific value, and
8 therefore the skeletons' scientific value will be destroyed, unless Defendants are restrained by
9 this Court.

10 53. Plaintiffs and the general public have no plain, adequate, or speedy remedy at law
11 and are entitled to injunctive relief against Defendants. Plaintiffs and the general public have no
12 administrative remedy because Defendants' procedures for approving the transfer of the La Jolla
13 Skeletons, and the short timeframe for repatriation after Defendants published their Repatriation
14 Notice, preclude any administrative relief.

15 **SECOND CAUSE OF ACTION – DECLARATORY AND INJUNCTIVE RELIEF -**
16 **BREACH OF PUBLIC TRUST**

17 **[All Petitioners Against Defendants REGENTS, YUDOF, FOX and MATTHEWS]**

18 54. Plaintiffs hereby incorporate by reference paragraphs 1 through 52, inclusive.

19 55. The UNIVERSITY is a public trust established by article nine of the California
20 Constitution.

21 56. The La Jolla Skeletons are part of the public trust that is the UNIVERSITY. In
22 addition, the UNIVERSITY maintains its collections of human remains and cultural items – to
23 which the La Jolla Skeletons belong – as a public trust.

24 57. Defendants REGENTS and YUDOF are trustees of the UNIVERSITY. FOX is
25 an agent of YUDOF when she is performing YUDOF's duties as trustee of the UNIVERSITY.
26 MATTHEWS is an agent of YUDOF when acting as an agent of FOX when she is performing
27 YUDOF's duties as trustee of the UNIVERSITY. Plaintiffs are informed and believe that
28 YUDOF and the REGENTS neglected to take reasonable steps to compel FOX and

1 MATTHEWS to correct what defendants knew or should have known were violations of
2 NAGPRA.

3 58. Plaintiffs and the general public are beneficiaries of the public trust, of which the
4 La Jolla Skeletons are a part.

5 59. Defendants have a duty to administer the UNIVERSITY as a public trust,
6 pursuant to the state constitutional mandate. (See Regents Policy 1100 (REGENTS are to serve
7 as trustees for the people of the State of California and as stewards for the University of
8 California, "acting to govern the University in fulfillment of its educational, research, and public
9 service missions in the best interests of the people of California"); *see also* Regents Policy 1500
10 ("The President is expected to direct the management and administration of the University of
11 California system consistent with the Bylaws and Standing Orders, administering the University
12 in fulfillment of its educational, research, and public service missions in the best interests of the
13 people of California").) Defendants have a duty to fulfill the UNIVERSITY's educational,
14 research, and public service missions in the best interests of the people of California.

15 60. Defendants breached their duty to Plaintiffs and to the public to administer the
16 public trust for the public interest by (1) arbitrarily and capriciously including the La Jolla
17 Skeletons on the October 22, 2008 Notice of Inventory Completion and Repatriation Notice,
18 even though defendants lacked a reasonable or good faith belief that the remains are "Native
19 American" within the meaning of NAGPRA; (2) approving the transfer of the La Jolla Skeletons
20 to the La Posta Band of Mission Indians, even though defendants lacked a reasonable or good
21 faith belief that the remains are "Native American" within the meaning of NAGPRA, or that they
22 had any relationship to the tribe known as the La Posta Band of Mission Indians; (3) failing to
23 conduct a good faith inquiry and make a formal determination whether or not the remains are
24 "Native American" within the meaning of NAGPRA; and (4) misrepresenting that "25 objects"
25 were "reasonably believed" to have been placed at the site at or near the time of death or later as
26 part of the "death rite or ceremony," contrary to Gail Kennedy's account of the excavation.

27 61. An actual, present controversy exists between Plaintiffs and Defendants, because
28 Plaintiffs contend and Defendants deny that that Defendants' actions alleged above constitute a

1 breach of trust.

2 62. Plaintiffs desire a judicial determination that Defendants' actions constitute a
3 breach of trust. A judicial declaration is necessary and appropriate at this time, so that Plaintiffs
4 may ascertain their rights and the rights of the general public, and Defendants' duties under the
5 law.

6 63. Plaintiffs seek to compel the trustees to perform their duties and to enjoin the
7 trustees from committing future breaches. Plaintiffs are informed and believe that Defendants
8 will repatriate the remains to the La Posta Band of Mission Indians as soon as possible after
9 January 4, 2012, unless defendants are restrained by this Court. Plaintiffs are informed and
10 believe that the La Posta Band of Mission Indians will fail to maintain the skeletons in a manner
11 that preserves their scientific value, and therefore the skeletons' scientific value will be
12 destroyed, contrary to the public interest, unless defendants are restrained by this Court.

13 64. Plaintiffs and the general public have no plain, adequate, or speedy remedy at law
14 and are entitled to injunctive relief against Defendants. Plaintiffs and the general public have no
15 administrative remedy because Defendants' procedures for approving the transfer of the La Jolla
16 Skeletons, and the short timeframe for repatriation after Defendants published their Repatriation
17 Notice, preclude any administrative relief.

18 **THIRD CAUSE OF ACTION – 42 U.S.C. § 1983 AND THE UNITED STATES**
19 **CONSTITUTION – FIRST AMENDMENT**

20 **[All Plaintiffs Against Defendants YUDOF, FOX, and MATTHEWS]**

21 65. Plaintiffs hereby incorporate by reference paragraphs 1 through 63, inclusive.

22 66. Plaintiffs have a First Amendment right to receive information and ideas. The
23 opportunity to use the La Jolla Skeletons for research purposes is the only means of accessing the
24 information and ideas contained within them.

25 67. Defendants' actions alleged above have deprived, and will continue to deprive,
26 Plaintiffs of their right to receive information under the First Amendment to the United States
27 Constitution. Plaintiffs have been unable to study the remains, despite having made study
28 requests. The government may not, "consistently with the spirit of the First Amendment,

1 contract the spectrum of available knowledge.” (*See Griswold v. Connecticut* (1965) 381 U.S.
2 479, 482.)

3 68. In committing the acts herein alleged, Defendants were acting under color of state
4 law.

5 69. Plaintiffs desire a judicial determination that Defendants’ actions violate
6 Plaintiffs’ First Amendment right to receive information. A judicial declaration is necessary and
7 appropriate at this time, so that Plaintiffs may ascertain their rights and the rights of the general
8 public, and Defendants’ duties under the law.

9 70. An actual and immediate controversy has arisen and now exists between Plaintiffs
10 and Defendants related to their respective rights and duties. Plaintiffs contend, and Defendants
11 deny, that Defendants’ actions have deprived, and will continue to deprive, Plaintiffs of their
12 right to receive information under the First Amendment to the United States Constitution.

13 71. Plaintiffs and the general public have no plain, adequate, or speedy remedy at law
14 and are entitled to injunctive relief against Defendants. Unless Defendants are enjoined,
15 Plaintiffs and the general public will suffer irreparable injury and harm, in that the ability to
16 study the La Jolla Skeletons will be lost forever. Plaintiffs are informed and believe that
17 Defendants will repatriate the remains to the La Posta Band of Mission Indians as soon as
18 possible after January 4, 2012, unless Defendants are restrained by this Court. Plaintiffs are
19 informed and believe that the La Posta Band of Mission Indians will fail to maintain the
20 skeletons in a manner that preserves their scientific value, and therefore the skeletons’ scientific
21 value will be destroyed, unless Defendants are restrained by this Court.

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PRAYER FOR RELIEF

Petitioners and Plaintiffs pray for judgment against Respondents and Defendants as follows:

1. On the petition for writ of traditional mandamus, or in the alternative, writ of administrative mandamus:

(a) For a peremptory writ directing Respondents to set aside the Notice of Inventory Completion of October 22, 2008 and December 5, 2011, respectively; AND

(b) For a peremptory writ directing Respondents to make a formal determination whether or not the La Jolla Skeletons are "Native American" within the meaning of NAGPRA; AND

(c) For a peremptory writ directing Respondents to set aside and cease and desist from any actions taken to implement the decision to transfer possession of the La Jolla Skeletons to the La Posta Band of Mission Indians, unless and until Respondents have made a formal determination that the remains are "Native American" within the meaning of NAGPRA.

OR IN THE ALTERNATIVE:

(a) For a peremptory writ directing Respondents to set aside the Notice of Inventory Completion of October 22, 2008 and December 5, 2011, respectively; AND

(b) For a peremptory writ prohibiting Respondents from transferring possession of the La Jolla Skeletons to the La Posta Band of Mission Indians, on the ground that they are not "Native American" within the meaning of NAGPRA.

2. On the first cause of action for declaratory and injunctive relief:

(a) A declaration, order and judgment that the La Jolla Skeletons are not "Native American" within the meaning of NAGPRA; AND

(b) A declaration, order and judgment that Defendants, in attempting to transfer possession of the La Jolla Skeletons to the La Posta Band of Mission Indians, acted arbitrarily and without jurisdiction or authority, and that Defendants' decision to approve such transfer, and all subsequent actions to implement such transfer, are illegal,

1 invalid, null and void; AND

2 (c) A preliminary and permanent injunction requiring Defendants to set aside
3 and cease and desist from any and all actions implementing the decision to transfer
4 possession of the La Jolla Skeletons to the La Posta Band of Mission Indians; AND

5 (d) A permanent injunction prohibiting Defendants from taking any action in
6 the future to approve or implement a transfer of possession of the La Jolla Skeletons to
7 the La Posta Band of Mission Indians, or any other Native American tribe.

8 3. On the second cause of action for breach of trust:

9 (a) A declaration, order and judgment Defendants' actions constituted a
10 breach of trust; AND

11 (b) A preliminary and permanent injunction requiring Defendants to compel
12 the Defendants to perform their duties as trustees of the UNIVERSITY and protect the
13 UNIVERSITY's research assets from destruction; AND

14 (c) A preliminary and permanent injunction requiring Defendants set aside
15 and cease and desist from any and all actions implementing the decision to transfer
16 possession of the La Jolla Skeletons to the La Posta Band of Mission Indians; AND

17 (d) A permanent injunction prohibiting Defendants from taking any action in
18 the future to approve or implement a transfer of possession of the La Jolla Skeletons to
19 the La Posta Band of Mission Indians, or any other Native American tribe.

20 4. On the third cause of action for violation of the First Amendment:

21 (a) A declaration, order and judgment that Defendants' actions violate
22 Plaintiffs' First Amendment right to receive information; AND

23 (b) A preliminary and permanent injunction requiring Defendants set aside
24 and cease and desist from any and all actions implementing the decision to transfer
25 possession of the La Jolla Skeletons to the La Posta Band of Mission Indians; AND

26 (c) A permanent injunction prohibiting Defendants from taking any action in
27 the future to approve or implement a transfer of possession of the La Jolla Skeletons to
28 the La Posta Band of Mission Indians, or any other Native American tribe.

5. For Petitioners' and Plaintiffs' costs of suit;
6. For Petitioners' and Plaintiffs' attorneys' fees; AND
7. For any other and further relief that this Court may deem just and proper.

DATED: April 16, 2012

McMANIS FAULKNER

Christine E. Peek

JAMES MCMANIS
CHRISTINE PEEK

Attorneys for Petitioners and Plaintiffs,

TIMOTHY WHITE,
ROBERT L. BETTINGER, and
MARGARET SCHOENINGER

FROM :

FAX NO. :

Apr. 09 2012 02:01PM P1

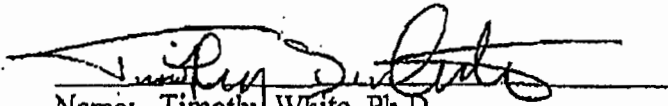
1 VERIFICATION TO PETITION FOR WRIT OF MANDAMUS
2 (CODE CIV. PROC., § 1085), OR IN THE ALTERNATIVE,
3 FOR WRIT OF ADMINISTRATIVE MANDAMUS (CODE CIV. PROC., § 1094.5)

4 I, Timothy White, Ph.D., declare:

5 I am one of the Petitioners and Plaintiffs in the instant action. I have read the Petition For
6 Writ Of Mandamus (Code Civ. Proc., § 1085), Or In The Alternative, For Writ Of
7 Administrative Mandamus (Code Civ. Proc., § 1094.5) against Respondents and know its
8 contents. The allegations of the Petition For Writ Of Mandamus (Code Civ. Proc., § 1085), Or
9 In The Alternative, For Writ Of Administrative Mandamus (Code Civ. Proc., § 1094.5) are true
10 of my own knowledge, except as to those matters which are alleged on information and belief,
11 and as to those matters, I believe them to be true.

12 I declare under penalty of perjury under the laws of the State of California that the
13 foregoing is true and correct.

14 Date: APRIL 9, 2012

15 
16 Name: Timothy White, Ph.D.
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Verification to Petition for Writ of Mandate, Case No.

CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): James McManis (40958) McManis Faulkner 50 W. San Fernando St., 10th Fl. San Jose, CA 95113 TELEPHONE NO.: (408) 279-8700 FAX NO.: (408) 279-3244 ATTORNEY FOR (Name): Timothy White, Robert Bettinger, Margaret Schoeninger SUPERIOR COURT OF CALIFORNIA, COUNTY OF Alameda STREET ADDRESS: 1225 Fallon Street MAILING ADDRESS: CITY AND ZIP CODE: Oakland, California 94612 BRANCH NAME: Rene C. Davidson Courthouse	FOR COURT USE ONLY ENDORSED FILED ALAMEDA COUNTY APR 16 2012 CLERK OF THE SUPERIOR COURT <i>Ry Tasha Perry Deputy</i>			
CASE NAME: White v. The University of California				
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 35%; vertical-align: top;"> CIVIL CASE COVER SHEET ☒ Unlimited (Amount demanded exceeds \$25,000) ☐ Limited (Amount demanded is \$25,000 or less) </td> <td style="width: 35%; vertical-align: top;"> Complex Case Designation ☐ Counter ☐ Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402) </td> <td style="width: 30%; vertical-align: top;"> CASE NUMBER: 12625891 JUDGE: DEPT: </td> </tr> </table>		CIVIL CASE COVER SHEET ☒ Unlimited (Amount demanded exceeds \$25,000) ☐ Limited (Amount demanded is \$25,000 or less)	Complex Case Designation ☐ Counter ☐ Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)	CASE NUMBER: 12625891 JUDGE: DEPT:
CIVIL CASE COVER SHEET ☒ Unlimited (Amount demanded exceeds \$25,000) ☐ Limited (Amount demanded is \$25,000 or less)	Complex Case Designation ☐ Counter ☐ Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)	CASE NUMBER: 12625891 JUDGE: DEPT:		

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:
- | | | |
|--|--|--|
| Auto Tort
☐ Auto (22)
☐ Uninsured motorist (46)
Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort
☐ Asbestos (04)
☐ Product liability (24)
☐ Medical malpractice (45)
☐ Other PI/PD/WD (23)
Non-PI/PD/WD (Other) Tort
☐ Business tort/unfair business practice (07)
☐ Civil rights (08)
☐ Defamation (13)
☐ Fraud (16)
☐ Intellectual property (19)
☐ Professional negligence (25)
☐ Other non-PI/PD/WD tort (35)
Employment
☐ Wrongful termination (36)
☐ Other employment (15) | Contract
☐ Breach of contract/warranty (06)
☐ Rule 3.740 collections (09)
☐ Other collections (09)
☐ Insurance coverage (18)
☐ Other contract (37)
Real Property
☐ Eminent domain/inverse condemnation (14)
☐ Wrongful eviction (33)
☐ Other real property (26)
Unlawful Detainer
☐ Commercial (31)
☐ Residential (32)
☐ Drugs (38)
Judicial Review
☐ Asset forfeiture (05)
☐ Petition re: arbitration award (11)
☐ Writ of mandate (02)
☐ Other judicial review (39) | Provisionally Complex Civil Litigation
(Cal. Rules of Court, rules 3.400-3.403)
☐ Antitrust/Trade regulation (03)
☐ Construction defect (10)
☐ Mass tort (40)
☐ Securities litigation (28)
☐ Environmental/Toxic tort (30)
☐ Insurance coverage claims arising from the above listed provisionally complex case types (41)
Enforcement of Judgment
☐ Enforcement of judgment (20)
Miscellaneous Civil Complaint
☐ RICO (27)
☒ Other complaint (not specified above) (42)
Miscellaneous Civil Petition
☐ Partnership and corporate governance (21)
☐ Other petition (not specified above) (43) |
|--|--|--|
2. This case ☒ is ☐ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- | | |
|---|--|
| a. ☐ Large number of separately represented parties
b. ☒ Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve
c. ☐ Substantial amount of documentary evidence | d. ☐ Large number of witnesses
e. ☐ Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
f. ☐ Substantial postjudgment judicial supervision |
|---|--|
3. Remedies sought (check all that apply): a. ☐ monetary b. ☒ nonmonetary; declaratory or injunctive relief c. ☐ punitive
4. Number of causes of action (specify): Writ petition plus complaint with three causes of action.
5. This case ☐ is ☒ is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: April 16, 2012

Christine Peek

(TYPE OR PRINT NAME)

Christine E. Peek

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

CM-010

INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET

To Plaintiffs and Others Filing First Papers. If you are filing a first paper (for example, a complaint) in a civil case, you must complete and file, along with your first paper, the *Civil Case Cover Sheet* contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must complete items 1 through 6 on the sheet. In item 1, you must check one box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the primary cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 2.30 and 3.220 of the California Rules of Court.

To Parties In Rule 3.740 Collections Cases. A "collections case" under rule 3.740 is defined as an action for recovery of money owed in a sum stated to be certain that is not more than \$25,000, exclusive of interest and attorney's fees, arising from a transaction in which property, services, or money was acquired on credit. A collections case does not include an action seeking the following: (1) tort damages, (2) punitive damages, (3) recovery of real property, (4) recovery of personal property, or (5) a prejudgment writ of attachment. The identification of a case as a rule 3.740 collections case on this form means that it will be exempt from the general time-for-service requirements and case management rules, unless a defendant files a responsive pleading. A rule 3.740 collections case will be subject to the requirements for service and obtaining a judgment in rule 3.740.

To Parties in Complex Cases. In complex cases only, parties must also use the *Civil Case Cover Sheet* to designate whether the case is complex. If a plaintiff believes the case is complex under rule 3.400 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

CASE TYPES AND EXAMPLES

Auto Tort Auto (22)—Personal Injury/Property Damage/Wrongful Death Uninsured Motorist (48) <i>(if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto)</i> Other P/DPD/W (Personal Injury/Property Damage/Wrongful Death) Tort Asbestos (04) Asbestos Property Damage Asbestos Personal Injury/Wrongful Death Product Liability <i>(not asbestos or toxic/environmental)</i> (24) Medical Malpractice (45) Medical Malpractice—Physicians & Surgeons Other Professional Health Care Malpractice Other P/DPD/W (23) Premises Liability (e.g., slip and fall) Intentional Bodily Injury/DPD/W (e.g., assault, vandalism) Intentional Infliction of Emotional Distress Negligent Infliction of Emotional Distress Other P/DPD/W Non-P/DPD/W (Other) Tort Business Tort/Unfair Business Practice (07) Civil Rights (e.g., discrimination, false arrest) <i>(not civil harassment)</i> (08) Defamation (e.g., slander, libel) (13) Fraud (18) Intellectual Property (19) Professional Negligence (25) Legal Malpractice Other Professional Malpractice <i>(not medical or legal)</i> Other Non-P/DPD/W Tort (35) Employment Wrongful Termination (36) Other Employment (15)	Contract Breach of Contract/Warranty (06) Breach of Rental/Lease Contract <i>(not unlawful detainer or wrongful eviction)</i> Contract/Warranty Breach—Seller Plaintiff <i>(not fraud or negligence)</i> Negligent Breach of Contract/Warranty Other Breach of Contract/Warranty Collections (e.g., money owed, open book accounts) (09) Collection Case—Seller Plaintiff Other Promissory Note/Collections Case Insurance Coverage <i>(not provisionally complex)</i> (18) Auto Subrogation Other Coverage Other Contract (37) Contractual Fraud Other Contract Dispute Real Property Eminent Domain/Inverse Condemnation (14) Wrongful Eviction (33) Other Real Property (e.g., quiet title) (26) Writ of Possession of Real Property Mortgage Foreclosure Quiet Title Other Real Property <i>(not eminent domain, landlord/tenant, or foreclosure)</i> Unlawful Detainer Commercial (31) Residential (32) Drugs (38) <i>(if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential)</i> Judicial Review Asset Forfeiture (05) Petition Re: Arbitration Award (11) Writ of Mandate (02) Writ—Administrative Mandamus Writ—Mandamus on Limited Court Case Matter Writ—Other Limited Court Case Review Other Judicial Review (39) Review of Health Officer Order Notice of Appeal—Labor Commissioner Appeals	Provisionally Complex Civil Litigation (Cal. Rules of Court Rules 3.400–3.403) Antitrust/Trade Regulation (03) Construction Defect (10) Claims Involving Mass Tort (40) Securities Litigation (28) Environmental/Toxic Tort (30) Insurance Coverage Claims <i>(arising from provisionally complex case type listed above)</i> (41) Enforcement of Judgment Enforcement of Judgment (20) Abstract of Judgment (Out of County) Confession of Judgment <i>(non-domestic relations)</i> Sister State Judgment Administrative Agency Award <i>(not unpaid taxes)</i> Petition/Certification of Entry of Judgment on Unpaid Taxes Other Enforcement of Judgment Case Miscellaneous Civil Complaint RICO (27) Other Complaint <i>(not specified above)</i> (42) Declaratory Relief Only Injunctive Relief Only <i>(non-harassment)</i> Mechanics Lien Other Commercial Complaint Case <i>(non-tort/non-complex)</i> Other Civil Complaint <i>(non-tort/non-complex)</i> Miscellaneous Civil Petition Partnership and Corporate Governance (21) Other Petition <i>(not specified above)</i> (43) Civil Harassment Workplace Violence Elder/Dependent Adult Abuse Election Contest Petition for Name Change Petition for Relief From Late Claim Other Civil Petition
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SUMMONS (CITACION JUDICIAL)



(SOLO PARA USO DE LA CORTE)

FILED ALAMEDA COUNTY

APR 16 2012

CLERK OF THE SUPERIOR COURT

By: Nasha Perry Deputy

NOTICE TO DEFENDANT: THE UNIVERSITY OF CALIFORNIA; THE REGENTS (AVISO AL DEMANDADO): OF THE UNIVERSITY OF CALIFORNIA; MARK G. YUDOF, in his individual and official capacity as President of the University; MARYE ANNE FOX, in her individual and official capacity as Chancellor of the University of California, San Diego; GARY MATTHEWS, in his individual and official capacity as Vice Chancellor of the University of California, San Diego, and DOES 1-50, inclusive,

YOU ARE BEING SUED BY PLAINTIFF: TIMOTHY WHITE, an (LO ESTÁ DEMANDANDO EL DEMANDANTE): individual; ROBERT L. BETTINGER; an individual; and MARGARET SCHOENINGER, an individual,

File on Demand

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. **AVISO!** Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. **AVISO:** Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 o más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:
(El nombre y dirección de la corte es):

CASE NUMBER: 12625891
(Número del Caso)

Alameda County Superior Court
1225 Fallon Street

Oakland, CA 94612

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

James McManis (40958) Christine Peek (234573) (408) 279-8700 (408) 279-3244

McManis Faulkner

50 W. San Fernando Street

San Jose, CA 95113

DATE:

APR 16 2012

Pat S. Sweeten

Clerk, by

Nasha Perry

Deputy

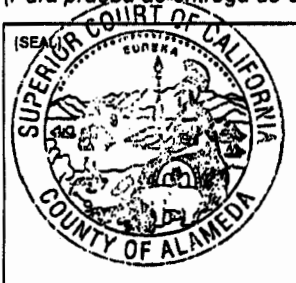
(Fecha)

(Secretario)

(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).



NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of (specify):

3. ☐ on behalf of (specify):

- under:
- | | |
|--|---|
| ☐ CCP 416.10 (corporation) | ☐ CCP 416.60 (minor) |
| ☐ CCP 416.20 (defunct corporation) | ☐ CCP 416.70 (conservatee) |
| ☐ CCP 416.40 (association or partnership) | ☐ CCP 416.90 (authorized person) |
| ☐ other (specify): | |

4. ☐ by personal delivery on (date):

Page 1 of 1

SUMMONS (CITACION JUDICIAL)

SUM-100

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

ENDORSED
FILED
ALAMEDA COUNTY

APR 16 2012

CLERK OF THE SUPERIOR COURT
By Tasha Perry Deputy

NOTICE TO DEFENDANT: THE UNIVERSITY OF CALIFORNIA; THE REGENTS (AVISO AL DEMANDADO): OF THE UNIVERSITY OF CALIFORNIA; MARK G. YUDOF, in his individual and official capacity as President of the University; MARYE ANNE FOX, in her individual and official capacity as Chancellor of the University of California, San Diego; GARY MATTHEWS, in his individual and official capacity as Vice Chancellor of the University of California, San Diego, and DOES 1-50, inclusive,

YOU ARE BEING SUED BY PLAINTIFF: TIMOTHY WHITE, an (LO ESTÁ DEMANDANDO EL DEMANDANTE): individual; ROBERT L. BETTINGER; an individual; and MARGARET SCHOENINGER, an individual,

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. NOTE: The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. **¡AVISO!** Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

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The name and address of the court is:
(El nombre y dirección de la corte es):

Alameda County Superior Court
1225 Fallon Street

CASE NUMBER:
(Número del Caso): 12625891

Oakland, CA 94612

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

James McManis (40958) Christine Peek (234573) (408) 279-8700 (408) 279-3244
McManis Faulkner

50 W. San Fernando Street

San Jose, CA 95113

DATE:

(Fecha) APR 16 2012

Pat S. Sweeten

Clerk, by

(Secretario)

Tasha Perry

Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of (specify):

3. ☒ on behalf of (specify): Marye Ann Fox

- under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☒ CCP 416.90 (authorized person)
☐ other (specify):

4. ☐ by personal delivery on (date):

Page 1 of 1

**SUMMONS
(CITACION JUDICIAL)**

SUM-100

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

**ENDORSED
FILED
ALAMEDA COUNTY**

APR 16 2012

CLERK OF THE SUPERIOR COURT
By Tasha Perry Deputy

NOTICE TO DEFENDANT: THE UNIVERSITY OF CALIFORNIA; THE REGENTS (AVISO AL DEMANDADO): OF THE UNIVERSITY OF CALIFORNIA; MARK G. YUDOF, in his individual and official capacity as President of the University; MARYE ANNE FOX, in her individual and official capacity as Chancellor of the University of California, San Diego; GARY MATTHEWS, in his individual and official capacity as Vice Chancellor of the University of California, San Diego, and DOES 1-50, inclusive,

YOU ARE BEING SUED BY PLAINTIFF: TIMOTHY WHITE, an (LO ESTÁ DEMANDANDO EL DEMANDANTE): individual; ROBERT L. BETTINGER; an individual; and MARGARET SCHOENINGER, an individual,

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

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Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumple con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. **AVISO:** Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:
(El nombre y dirección de la corte es):

Alameda County Superior Court
1225 Fallon Street

CASE NUMBER:
(Número del Caso) 12625891

Oakland, CA 94612

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

James McManis (40958) Christine Peek (234573) (408) 279-8700 (408) 279-3244
McManis Faulkner

50 W. San Fernando Street

San Jose, CA 95113

DATE:

(Fecha) APR 16 2012

Pat S. Sweeten

Clerk, by

(Secretario)

Tasha Perry

Deputy
(Adjunto)

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(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of (specify):

3. ☒ on behalf of (specify): The University of California

- under:
- | | |
|--|--|
| ☐ CCP 416.10 (corporation) | ☐ CCP 416.60 (minor) |
| ☐ CCP 416.20 (defunct corporation) | ☐ CCP 416.70 (conservatee) |
| ☐ CCP 416.40 (association or partnership) | ☒ CCP 416.90 (authorized person) |
| ☐ other (specify): | |

4. ☐ by personal delivery on (date):

Page 1 of 1

**SUMMONS
(CITACION JUDICIAL)**

SUM-100

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

**ENDORSED
FILED
ALAMEDA COUNTY**

APR 16 2012

CLERK OF THE SUPERIOR COURT
By *Tasha Perry*

NOTICE TO DEFENDANT: THE UNIVERSITY OF CALIFORNIA; THE REGENTS (A VISO AL DEMANDADO): OF THE UNIVERSITY OF CALIFORNIA; MARK G. YUDOF, in his individual and official capacity as President of the University; MARYE ANNE FOX, in her individual and official capacity as Chancellor of the University of California, San Diego; GARY MATTHEWS, in his individual and official capacity as Vice Chancellor of the University of California, San Diego, and DOES 1-50, inclusive,

YOU ARE BEING SUED BY PLAINTIFF: TIMOTHY WHITE, an (LO ESTÁ DEMANDANDO EL DEMANDANTE): individual; ROBERT L. BETTINGER; an individual; and MARGARET SCHOENINGER, an individual,

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The name and address of the court is:

(El nombre y dirección de la corte es):

Alameda County Superior Court
1225 Fallon Street

CASE NUMBER
(Número del Caso) **12625891**

Oakland, CA 94612

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

James McManis (40958) Christine Peek (234573) (408) 279-8700 (408) 279-3244

McManis Faulkner

50 W. San Fernando Street

San Jose, CA 95113

DATE:

(Fecha)

APR 16 2012

Pat S. Sweeten

Clerk, by

(Secretario)

Tasha Perry

Deputy

(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.

2. ☐ as the person sued under the fictitious name of (specify):

3. ☒ on behalf of (specify): The Regents of the University of California

under: ☐ CCP 416.10 (corporation)

☐ CCP 416.20 (defunct corporation)

☐ CCP 416.40 (association or partnership)

☐ other (specify):

☐ CCP 416.60 (minor)

☐ CCP 416.70 (conservatee)

☒ CCP 416.90 (authorized person)

4. ☐ by personal delivery on (date):

Page 1 of 1

SUMMONS (CITACION JUDICIAL)

SUM-100

FOR COURT USE ONLY
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ENDORSED
FILED
ALAMEDA COUNTY

APR 16 2012

CLERK OF THE SUPERIOR COURT
By Tasha Perry Deputy

NOTICE TO DEFENDANT: THE UNIVERSITY OF CALIFORNIA; THE REGENTS (A VISO AL DEMANDADO): OF THE UNIVERSITY OF CALIFORNIA; MARK G. YUDOF, in his individual and official capacity as President of the University; MARYE ANNE FOX, in her individual and official capacity as Chancellor of the University of California, San Diego; GARY MATTHEWS, in his individual and official capacity as Vice Chancellor of the University of California, San Diego, and DOES 1-50, inclusive,

YOU ARE BEING SUED BY PLAINTIFF: TIMOTHY WHITE, an (LO ESTÁ DEMANDANDO EL DEMANDANTE): individual; ROBERT L. BETTINGER; an individual; and MARGARET SCHOENINGER, an individual,

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. **AVISO!** Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. **AVISO:** Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:

(El nombre y dirección de la corte es):

Alameda County Superior Court
1225 Fallon Street

CASE NUMBER
(Número del Caso) 12625891

Oakland, CA 94612

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

James McManis (40958) Christine Peek (234573) (408) 279-8700 (408) 279-3244

McManis Faulkner

50 W. San Fernando Street

San Jose, CA 95113

DATE:

(Fecha)

APR 16 2012

Pat S. Sweeten

Clerk, by

(Secretario)

Tasha Perry

Deputy

(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of (specify):

3. ☒ on behalf of (specify): Gary Matthews

under: ☐ CCP 416.10 (corporation)

☐ CCP 416.20 (defunct corporation)

☐ CCP 416.40 (association or partnership)

☐ other (specify):

☐ CCP 416.60 (minor)

☐ CCP 416.70 (conservatee)

☒ CCP 416.90 (authorized person)

4. ☐ by personal delivery on (date):

Page 1 of 1

SUMMONS (CITACION JUDICIAL)

SUM-100

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

ENDORSED
FILED
ALAMEDA COUNTY

APR 16 2012

CLERK OF THE SUPERIOR COURT
By Tasha Perry Deputy

NOTICE TO DEFENDANT: THE UNIVERSITY OF CALIFORNIA; THE REGENTS (AVISO AL DEMANDADO): OF THE UNIVERSITY OF CALIFORNIA; MARK G. YUDOF, in his individual and official capacity as President of the University; MARYE ANNE FOX, in her individual and official capacity as Chancellor of the University of California, San Diego; GARY MATTHEWS, in his individual and official capacity as Vice Chancellor of the University of California, San Diego, and DOES 1-50, inclusive,

YOU ARE BEING SUED BY PLAINTIFF: TIMOTHY WHITE, an (LO ESTÁ DEMANDANDO EL DEMANDANTE): individual; ROBERT L. BETTINGER; an individual; and MARGARET SCHOENINGER, an individual,

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(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

James McManis (40958) Christine Peek (234573) (408) 279-8700 (408) 279-3244

McManis Faulkner

50 W. San Fernando Street

San Jose, CA 95113

DATE:

(Fecha)

APR 16 2012

Pat S. Sweeten

Clerk, by
(Secretario)

Tasha Perry

Deputy
(Adjunto)

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NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of (specify):

3. ☒ on behalf of (specify): Mark G. Yudof

- under:
- | | |
|--|--|
| ☐ CCP 416.10 (corporation) | ☐ CCP 416.60 (minor) |
| ☐ CCP 416.20 (defunct corporation) | ☐ CCP 416.70 (conservatee) |
| ☐ CCP 416.40 (association or partnership) | ☒ CCP 416.90 (authorized person) |
| ☐ other (specify): | |

4. ☐ by personal delivery on (date):

Page 1 of 1

1 JAMES McMANIS (40958)
 2 CHRISTINE PEEK (234573)
 3 BRANDON ROSE (269196)
 4 JENNIFER MURAKAMI (273603)
 5 McMANIS FAULKNER
 6 A Professional Corporation
 7 50 West San Fernando Street, 10th Floor
 8 San Jose, California 95113
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Attorneys for Petitioners and Plaintiffs,
 TIMOTHY WHITE,
 ROBERT L. BETTINGER, and
 MARGARET SCHOENINGER

SUPERIOR COURT OF THE STATE OF CALIFORNIA
 FOR THE COUNTY OF ALAMEDA

TIMOTHY WHITE, an individual; ROBERT
 L. BETTINGER, an individual; and
 MARGARET SCHOENINGER, an individual,

Petitioners and plaintiffs,

vs.

THE UNIVERSITY OF CALIFORNIA; THE
 REGENTS OF THE UNIVERSITY OF
 CALIFORNIA; MARK G. YUDOF, in his
 individual and official capacity as President of
 the University; MARYE ANNE FOX, in her
 individual and official capacity as Chancellor of
 the University of California, San Diego; GARY
 MATTHEWS, in his individual and official
 capacity as Vice Chancellor of the University of
 California, San Diego; and DOES 1-50,
 inclusive,

Respondents and defendants.

ENDORSED
 FILED
 ALAMEDA COUNTY

APR 19 2012

CLERK OF THE SUPERIOR COURT
 By [Signature] Deputy

Case No. RG 12-625891

**ERRATA TO PETITION FOR WRIT OF
 MANDAMUS (CODE CIV. PROC., §
 1085), OR IN THE ALTERNATIVE, FOR
 WRIT OF ADMINISTRATIVE
 MANDAMUS (CODE CIV. PROC., §
 1094.5); COMPLAINT FOR
 DECLARATORY AND INJUNCTIVE
 RELIEF (CODE CIV. PROC., §§ 526a,
 1060)**

1 Petitioners and plaintiffs respectfully submit this Errata to their Petition For Writ Of
2 Mandamus (Code Civ. Proc., § 1085), Or In The Alternative, For Writ Of Administrative
3 Mandamus (Code Civ. Proc., § 1094.5); Complaint For Declaratory And Injunctive Relief (Code
4 Civ. Proc., §§ 526a, 1060), which inadvertently was filed without Exhibits A and B. Attached as
5 Exhibit 1 is a true and correct copy of the Petition For Writ Of Mandamus (Code Civ. Proc., §
6 1085), Or In The Alternative, For Writ Of Administrative Mandamus (Code Civ. Proc., §
7 1094.5); Complaint For Declaratory And Injunctive Relief (Code Civ. Proc., §§ 526a, 1060) filed
8 on April 16, 2012, which includes Exhibits A and B.

9 DATED: April 18, 2012

McMANIS FAULKNER

10
11 *Christine F. Peek*
12 JAMES MCMANIS
CHRISTINE PEEK

13 Attorneys for Petitioners and Plaintiffs,

14 TIMOTHY WHITE,
15 ROBERT L. BETTINGER, and
16 MARGARET SCHOENINGER
17
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11 Email: cpeek@mcmmanislaw.com

12 Attorneys for Petitioners and Plaintiffs,
13 TIMOTHY WHITE,
14 ROBERT L. BETTINGER, and
15 MARGARET SCHOENINGER

16 SUPERIOR COURT OF THE STATE OF CALIFORNIA

17 FOR THE COUNTY OF ALAMEDA

18 TIMOTHY WHITE, an individual; ROBERT
19 L. BETTINGER, an individual; and
20 MARGARET SCHOENINGER, an individual,

21 Petitioners and plaintiffs,

22 vs.

23 THE UNIVERSITY OF CALIFORNIA; THE
24 REGENTS OF THE UNIVERSITY OF
25 CALIFORNIA; MARK G. YUDOF, in his
26 individual and official capacity as President of
27 the University; MARYE ANNE FOX, in her
28 individual and official capacity as Chancellor of
the University of California, San Diego; GARY
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capacity as Vice Chancellor of the University of
California, San Diego; and DOES 1-50,
inclusive,

Respondents and defendants.

ENDORSED
FILED
ALAMEDA COUNTY

APR 16 2012

CLERK OF THE SUPERIOR COURT
By Tasha Perry, Deputy

Case No. 12625891

PETITION FOR WRIT OF MANDAMUS
(CODE CIV. PROC., § 1085), OR IN THE
ALTERNATIVE, FOR WRIT OF
ADMINISTRATIVE MANDAMUS (CODE
CIV. PROC., § 1094.5); COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF (CODE CIV. PROC., §§ 526a,
1060)

1. Petitioners and Plaintiffs, TIMOTHY WHITE ("WHITE"), ROBERT L. BETTINGER ("BETTINGER"), and MARGARET SCHOENINGER ("SCHOENINGER"), (collectively "Petitioners" or "Plaintiffs"), allege as follows:

PARTIES

2. Plaintiff WHITE is an individual who lives in Berkeley, California. He is a real property owner in and resident of the County of Alameda and the State of California, and pays federal, state, and local taxes. WHITE is a professor of Integrative Biology at the University of California, Berkeley. He holds Bachelor of Science degrees in both Biology and Anthropology from the University of California, Riverside, and a Master of Arts and Ph.D. in Biological Anthropology from the University of Michigan, Ann Arbor. He is renowned for his work in the study of ancient humans. For example, in the 1990's, WHITE led an expedition in Ethiopia that resulted in the discovery of a 4.4 million-year-old skeleton, dubbed "Ardi," which predated Lucy by 1.2 million years.

3. Plaintiff BETTINGER is an individual who lives in Davis, California. He is a real property owner in and resident of the County of Solano and the State of California, and pays federal, state, and local taxes. BETTINGER is a professor of Anthropology at the University of California, Davis. He holds a Bachelor of Arts and a Ph.D. in Anthropology from the University of California, Riverside. BETTINGER's scholarship and fieldwork have focused on hunter-gatherers and the population expansions of hunter-gatherers.

4. Plaintiff SCHOENINGER is an individual who lives in Encinitas, California. She is a real property owner in and resident of the County of San Diego and the State of California, and pays federal, state, and local taxes. SCHOENINGER is a professor of Anthropology at the University of California, San Diego. She holds a Bachelor of Arts in Anthropology from the University of Florida, a Master of Arts in Anthropology from the University of Cincinnati, and a Ph.D. in Anthropology from the University of Michigan. SCHOENINGER's research centers on the subsistence strategies of early humans.

5. Defendant UNIVERSITY OF CALIFORNIA ("UNIVERSITY") is a public trust established by article IX of the California Constitution.

1 4. Defendant THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
2 ("REGENTS") is a public corporation that administers the UNIVERSITY. (Cal. Const., art. IX,
3 § 9, subd. (a).)

4 5. Defendant MARK YUDOF ("YUDOF") is an individual, who serves as President
5 of the UNIVERSITY. The President is the chief executive officer of the UNIVERSITY, and
6 governs through authority delegated by the REGENTS. The President is responsible directly to
7 the REGENTS. Moreover, the President "shall serve as the guardian of the public trust, ensuring
8 legal and ethical compliance, managing system risk, and providing information regarding
9 University activities." (See Regents Policy 1500, Statement Of Expectations Of The President
10 Of The University (March 2011) ("Regents Policy"), *available at*
11 <http://www.universityofcalifornia.edu/regents/policies/1500.html>.) YUDOF is sued here in his
12 individual and official capacities.

13 6. Defendant MARYE ANNE FOX ("FOX") is an individual employed by
14 employed by the UNIVERSITY as the Chancellor of its San Diego campus ("UCSD"). The
15 campus Chancellor is the chief campus officer and executive head of all campus activities. FOX
16 is sued here in her individual and official capacities.

17 7. Defendant GARY MATTHEWS ("MATTHEWS") is an individual employed by
18 the UNIVERSITY as Vice Chancellor, Resource Management and Planning, at UCSD. He is
19 sued here in his individual and official capacities.

20 8. Plaintiffs do not know the true names and capacities of Defendants DOES 1
21 through 50, inclusive, and therefore sue these Defendants by such fictitious names. Plaintiffs
22 may amend this Writ Petition and Complaint to allege their true names and capacities when
23 ascertained. Plaintiffs are informed and believe that each of the fictitiously named Defendants is
24 responsible in some manner for the occurrences herein alleged, and that the illegal acts as herein
25 alleged were proximately caused by their conduct.

26 9. At all times referenced herein, Defendants, including those named as DOES 1
27 through 50, were the agents, servants, and employees of their co-defendants, and in doing the
28 things alleged were acting in the scope of their authority as such agents, servants and employees,

1 under the direction and supervision and with the permission and consent of their co-defendants.

2 GENERAL ALLEGATIONS

3 10. In 1976, Professor Gail Kennedy of UCLA led an archaeological field excavation
4 project on University property in San Diego (the "site"). The Chancellor's official residence,
5 University House, is also located on the site. Professor Kennedy's team discovered a rare double
6 burial. The bones have great scientific significance due to the age of the two skeletons ("La Jolla
7 Skeletons"), which are estimated to date back 8977 to 9603 years ago. The La Jolla Skeletons
8 are extremely old by North American osteological standards. They are similar to, though likely
9 older than, another skeleton found in Kennewick in 1996, which was the subject of federal
10 litigation that resolved in 2004. (*See Bonnichsen v. United States* (9th Cir. 2004) 367 F.3d 864.)
11 Because of their extreme age and relatively good condition, the La Jolla Skeletons represent a
12 unique opportunity for all people to understand human origins in North America.

13 11. The SAN DIEGO ARCHAEOLOGICAL CENTER ("SDAC") presently has
14 physical custody of the La Jolla Skeletons, and holds them on behalf of the UNIVERSITY. The
15 SDAC is a California nonprofit corporation located in Escondido, California. By taking custody
16 of the La Jolla Skeletons on behalf of the UNIVERSITY, the SDAC is acting as the
17 UNIVERSITY's agent with respect to the La Jolla Skeletons.

18 12. In 1990, Congress passed the Native American Graves Protection and
19 Repatriation Act ("NAGPRA"). NAGPRA imposes various requirements on, inter alia, state
20 government agencies and institutions of higher learning that receive federal funds, and that hold
21 "Native American" human remains or cultural items. NAGPRA defines "Native American" as
22 follows:

23 'Native American' means of, or relating to, a tribe, people, or culture that is
24 indigenous to the United States.

25 (25 U.S.C. § 3001(9).) The Ninth Circuit has held that human remains must bear some
26 relationship to a presently existing tribe, people, or culture to be considered "Native American"
27 within the meaning of NAGPRA. (*See Bonnichsen v. United States, supra*, 367 F.3d at 875-76.)
28 NAGPRA does not apply to remains that are not "Native American" or "Native Hawaiian." For

1 remains or cultural items that are "Native American," NAGPRA may require that they be
2 "repatriated" or returned to a tribe, depending on whether or not certain conditions are met.
3 NAGPRA's statutory scheme does not require repatriation of "culturally unidentifiable" human
4 remains, however.

5 13. NAGPRA requires those entities subject to it to compile an inventory of "Native
6 American" human remains and cultural objects in their possession, and to submit the inventory
7 to the DOI. (25 U.S.C. § 3003.)

8 14. The UNIVERSITY has created a system-wide University Advisory Group on
9 Cultural Repatriation and Human Remains and Cultural Items ("Advisory Group"). (See
10 University of California Policies and Procedures On Curation and Repatriation of Human
11 Remains and Cultural Items ("Human Remains Policies").) The Human Remains Policies are
12 attached as Exhibit A. If a tribe requests repatriation, the Advisory Group must review all
13 campus determinations and report its findings and recommendations to the President or the
14 President's designee. The President or the President's designee has final authority to approve or
15 disapprove determinations regarding disposition of remains and cultural items.

16 15. Under the Human Remains Policies, each campus with a collection of Native
17 American remains or cultural items must designate a liaison to work with native communities
18 considering or requesting repatriation from the UNIVERSITY. Defendant MATTHEWS is the
19 liaison for the San Diego campus.

20 16. The Kumeyaay Nation ("Kumeyaay"), a coalition of 12 Native American tribes,
21 claims to have occupied the site on which the La Jolla Skeletons were found. Although the
22 Kumeyaay have asserted that the La Jolla Skeletons are culturally affiliated with their coalition
23 of tribes, there is insufficient evidence to support the conclusion that the Kumeyaay are
24 descended from the people who were buried at the site, approximately 10,000 years ago. In
25 addition, there is insufficient evidence to conclude that any Kumeyaay tribe actually occupied
26 the site at the time the La Jolla Skeletons were buried there. The evidence does not support a
27 finding that there is any link between the La Jolla Skeletons and any Kumeyaay tribe, or any
28 currently existing Native American tribe, for the following reasons, among other reasons:

1 a. The burial pattern of the La Jolla Skeletons differs from that of the
2 Kumeyaay as reported in early ethnographies. Before the Spanish explorers made
3 contact with North America, the Kumeyaay cremated, rather than buried, their dead.

4 b. Preliminary carbon and nitrogen stable isotope analysis of human bone
5 collagen from the La Jolla Skeletons is consistent with a year-round diet of open-ocean
6 and some nearshore marine fish or marine mammals. This contrasts with the diet of the
7 Kumeyaay, who lived on wild plants, supplemented with more small than large game,
8 and in some places, fish. Seasonal dependence on marine foods would produce lower
9 values of the isotope signals than those recovered from the La Jolla Skeletons.

10 c. The skeletal morphology of the La Jolla Skeletons does not show any link
11 to the Kumeyaay, or any other Native American tribe. The La Jolla Skeletons have long,
12 narrow cranial vaults and short, relatively narrow faces compared with extant Native
13 Americans. A detailed 2007 morphological study by Professor Douglas Owsley
14 concluded the La Jolla Skeletons were not Native American.

15 d. Because there has been no genetic testing of the La Jolla Skeletons
16 (because the UNIVERSITY has not allowed any testing), there is no genetic or DNA
17 evidence linking the Kumeyaay or any other Native American tribe to the La Jolla
18 Skeletons.

19 17. On or about October 22, 2008, the UNIVERSITY submitted a "Notice of
20 Inventory Completion" and inventory to the United States Department Of The Interior ("DOI"),
21 which included the La Jolla Skeletons and various other items said to be associated with the
22 remains. The DOI includes, as a bureau, the National Park Service ("NPS"). In turn, the NPS
23 includes the Native American Graves Protection and Repatriation Review Committee
24 ("NAGPRA Review Committee").

25 18. The inventory was based on a 2008 report written by the local UC San Diego
26 NAGPRA Review Committee. The 2008 report was silent on whether the La Jolla Skeletons
27 were "Native American" within the meaning of NAGPRA, and made no attempt to determine
28 whether or not the La Jolla Skeletons were subject to NAGPRA. The 2008 report did conclude,

1 however, that there was insufficient evidence to conclude the remains were culturally affiliated
2 with the Kumeyaay.

3 19. Because there is insufficient evidence to conclude the La Jolla Skeletons are
4 "Native American" within the meaning of NAGPRA, Defendants' decision to include them on
5 the October 22, 2008 inventory was legally erroneous. NAGPRA and its accompanying
6 regulations do not apply to the La Jolla Skeletons at all, because the La Jolla Skeletons do not
7 fall within the class of human remains that NAGPRA covers. Therefore, the La Jolla Skeletons
8 should not have been included on any federal inventory.

9 20. On or about February 23, 2009, MATTHEWS submitted to the DOI, through its
10 NAGPRA Review Committee, a Request by a Museum or Federal Agency that the Review
11 Committee Act on an Agreement Concerning the Disposition of Human Remains and Associated
12 Funerary Objects Determined to be Unidentifiable ("2009 Repatriation Request").
13 MATTHEWS requested that the DOI approve an agreement between FOX and the Kumeyaay
14 Cultural Repatriation Committee ("KCRC") to transfer custody of the La Jolla Skeletons to the
15 KCRC. The KCRC is a coalition of 12 different Kumeyaay tribes of San Diego County. The
16 2009 Repatriation Request was later withdrawn.

17 21. In 2010, the DOI and its Secretary Ken Salazar ("Salazar") purported to
18 promulgate a new federal regulation governing the disposition of "culturally unidentifiable"
19 human remains that meet NAGPRA's definition of "Native American." For all "culturally
20 unidentifiable" "Native American" human remains, Salazar and the DOI purported to impose the
21 following requirements, among other requirements:

22 a. Requirements that the federal agency or museum in possession of the
23 remains consult with tribal representatives concerning culturally unidentifiable remains
24 and associated funerary objects;

25 b. Requirements that federal agencies and museums offer to transfer control
26 of such remains to "(i) [t]he Indian tribe . . . from whose tribal land, at the time of the
27 excavation or removal, the human remains were removed; or (ii) [t]he Indian tribe or
28 tribes that are recognized as aboriginal to the area from which the human remains were

1 removed," unless the agency or museum can prove a right of possession;

2 c. Authorization for federal agencies and museums to transfer control to
3 other tribes or Native Hawaiian organizations, in the event no tribe described above
4 agrees to accept the remains; and

5 d. Notification requirements.

6 22. On or about June 4, 2010, YUDOF wrote to FOX, stating that he planned to give
7 "significant deference" to the Chancellors of the respective UC campuses regarding decisions
8 about the disposition of remains. YUDOF instructed FOX that the UCSD campus had the
9 responsibility to conduct consultations and analysis required under NAGPRA, and to make
10 initial determinations and recommendations regarding cultural affiliation. YUDOF further
11 instructed FOX that once UCSD completed its assessment, it should determine whether it needed
12 to amend the previous NAGPRA inventory or prepare a new draft Notice of Inventory
13 Completion.

14 23. The La Posta Band of Diegueno Mission Indians of the La Posta Reservation ("La
15 Posta Band of Mission Indians") is a federally recognized tribe of Kumeyaay people.

16 24. On or about August 2, 2010, Steve Banegas, a spokesperson for the KCRC, wrote
17 to the UCSD campus and requested that the La Jolla Skeletons be repatriated to the La Posta
18 Band of Mission Indians, along with certain other objects previously excavated from the site.

19 25. On or about October 21, 2010, MATTHEWS circulated a new Draft Notice of
20 Inventory Completion ("Draft Notice") for review by the Advisory Group. The new notice was
21 deficient for many reasons. It referred to "associated funerary items," even though the published
22 paper describing the burials stated that no cultural items were found in association with the La
23 Jolla Skeletons. It asserted that stone and shell recovered from the site was "reasonably believed
24 to have been placed with or near" the La Jolla Skeletons, "at the time of death or later as part of
25 the death rite or ceremony," without any factual support, and in apparent contradiction to Gail
26 Kennedy's account of the excavation. The Draft Notice referred to the La Jolla Skeletons as
27 "Native American," despite a detailed 2007 morphological study by Professor Owsley
28 concluding they were not Native American. Finally, the Draft Notice stated that a detailed

1 assessment of the La Jolla Skeletons had been made by UC professional staff, when in fact, the
2 only staff who had seen the La Jolla Skeletons included Gail Kennedy (who did not refer to them
3 as Native American), Philip Walker (now deceased, who concluded they were not Native
4 American), and plaintiff SCHOENINGER. SCHOENINGER never made any determination that
5 the remains were "Native American" within the meaning of NAGPRA, nor was she asked to do
6 so. In its responses to comments published along with the final version of 43 C.F.R. § 10.11, the
7 DOI included language indicating that museums must make a "threshold determination" that
8 culturally unidentifiable remains are "Native American" before including them on a federal
9 inventory. (*See* 75 Fed.Reg. 12387 (response to Comment 55).)

10 26. On or about March 2, 2011, the Advisory Group considered MATTHEWS' Draft
11 Notice and submitted a summary and report. The Advisory Group recommended that UCSD
12 should not forward the Draft Notice without further consultation with tribes other than the
13 Kumeyaay. The Advisory Group also recommended that the San Diego campus reanalyze
14 whether the supposed "associated funerary objects" are, in fact, funerary objects, and if not, to
15 revise the Draft Notice accordingly. The Advisory Group did not reach a consensus on any other
16 recommendations.

17 27. On or about May 11, 2011, YUDOF wrote to FOX, stating that he intended to
18 defer to the campus's determination on the issue of whether or not the remains were "Native
19 American" under NAGPRA, and to authorize the campus to proceed under the NAGPRA
20 process. YUDOF authorized UCSD to dispose of the La Jolla Skeletons under NAGPRA,
21 subject to the following directions and recommendations:

22 a. UCSD was required to reanalyze, including through expert analysis,
23 whether the materials listed on the Draft Notice were funerary objects, and if not, to
24 revise the Draft Notice.

25 b. YUDOF advised UCSD to revise its Notice of Inventory Completion to
26 acknowledge an alleged "division among experts" on the issue of whether the La Jolla
27 Skeletons are "Native American" within the meaning of NAGPRA.

28 c. YUDOF instructed UCSD to consult more broadly with other tribes in the

1 region. Following this consultation, if UCSD determined that additional tribes were
2 aboriginal to the site, YUDOFF instructed UCSD to revise its Notice of Inventory
3 Completion accordingly. If there were no competing claims, however, YUDOF
4 authorized FOX to dispose of the La Jolla Skeletons to the La Posta Band of Mission
5 Indians in accordance with NAGPRA, 30 days after publication in the Federal Register.

6 28. The La Jolla Skeletons are in good enough condition that it may be possible to
7 retrieve DNA samples and perform DNA sequencing. Not only would this provide a wealth of
8 information of interest to the general public, such sequences also could be used to assess whether
9 or not the remains share any genetic affiliation with modern Native American groups.

10 29. FOX and UCSD have authority to grant requests to study the La Jolla Skeletons,
11 but have refused to allow any research to be conducted.

12 30. On or about August 16, 2010, BETTINGER requested permission to study the La
13 Jolla Skeletons. He proposed to perform (1) macro-morphological work; (2) stable isotope
14 analyses to determine diet and place of origin; and (3) ancient DNA work to establish genetic
15 affinity. These studies are essential to understanding the colonization of California and Western
16 North America, and of the New World generally. These studies are also central to
17 BETTINGER's long-standing research on hunter gatherers and hunter gatherer expansions. Dr.
18 Art Ellis, UCSD Vice Chancellor for Research, replied that UCSD was finalizing procedures for
19 dealing with such requests and that while he (Ellis) was shortly leaving UCSD, he had forwarded
20 BETTINGER's request to Associate Vice Chancellor George Tynan, whom BETTINGER could
21 look forward to hearing from. BETTINGER never heard back from Tynan. If the repatriation
22 does not go forward, BETTINGER and other experts in the field of ancient DNA and stable
23 isotope analysis plan to pursue these studies. Because they are so well preserved, and because
24 there are two of them, the La Jolla Skeletons present a unique opportunity to study patterns at a
25 population level rather than an individual level, enabling scientists to apply the results of the
26 studies in a wide variety of other contexts. No other set of New World remains holds such a high
27 degree of research potential.

28 31. In or about April, 2009, WHITE asked to study the La Jolla Skeletons. He

1 engaged in communications with various UNIVERSITY representatives regarding his request
2 from 2009 to 2011 without ever receiving a final response to his request. For WHITE, the La
3 Jolla Skeletons represent part of a worldwide sample of early humanity, which is critical to the
4 understanding of the species, *Homo sapiens*. If the La Jolla Skeletons are not repatriated,
5 WHITE still plans to study them.

6 32. In 2009, SCHOENINGER spoke informally to the Senior Vice Chancellor for
7 Academic Affairs, Paul Drake, and the then Vice Chancellor for Research at UCSD, Art Ellis,
8 about studying the La Jolla Skeletons. She gave a presentation to the Academic Senate Council
9 regarding the research value of the skeletons in 2009. The Academic Senate Council told
10 SCHOENINGER she could not study the La Jolla Skeletons or involve herself further in any
11 requests to study them, because she allegedly had a "conflict of interest." SCHOENINGER
12 wants to preserve the opportunity to study the La Jolla Skeletons in the future, especially in the
13 event that studies by BETTINGER or WHITE implicate new research questions in her area of
14 focus.

15 33. On or about December 5, 2011, defendants published, or caused to be published,
16 in the Federal Register, a Notice of Inventory Completion: The University of California, San
17 Diego, San Diego, CA ("Repatriation Notice"). The Repatriation Notice is attached as Exhibit
18 B. The Repatriation Notice stated that if no one else came forward and claimed the La Jolla
19 Skeletons by January 4, 2012, the La Jolla Skeletons would be repatriated to the La Posta Band
20 of Mission Indians after that date. The Repatriation Notice also made the following purported
21 findings, among other findings:

22 a. The La Jolla Skeletons are "Native American," pursuant to 25 U.S.C. §
23 3001(9).

24 b. Pursuant to 25 U.S.C. § 3001(2), a relationship of shared group identity
25 cannot be reasonably traced between the La Jolla Skeletons and any present-day Indian
26 tribe.

27 c. Pursuant to 25 U.S.C. § 3001(3)(A), approximately 25 objects found at the
28 site are "reasonably believed to have been placed with or near" the La Jolla Skeletons, "at

1 the time of death or later as part of the death rite or ceremony."

2 d. Pursuant to 43 C.F.R. § 10.11(c)(1), and based upon request from the
3 Kumeyaay Cultural Repatriation Committee, on behalf of the 12 associated Kumeyaay
4 tribes, disposition of the La Jolla Skeletons is to the La Posta Band of Diegueno Mission
5 Indians of the La Posta Indian Reservation, California.

6 34. On or about January 25, 2012, the parties entered into a Tolling Agreement, by
7 which respondents and defendants agreed that, "any and all statutes of limitation applicable to
8 any claims whatsoever that plaintiffs may have against defendants relating to the La Jolla
9 Skeletons that have not already expired shall be tolled to and including April 16, 2012."

10 **PETITION FOR WRIT OF MANDAMUS (Code Civ. Proc. § 1085),**
11 **OR IN THE ALTERNATIVE, FOR WRIT OF ADMINISTRATIVE MANDAMUS**
12 **(Code Civ. Proc. § 1094.5)**

13 **[All Petitioners Against All Respondents]**

14 35. Petitioners hereby incorporate by reference paragraphs 1 through 33, inclusive.

15 36. NAGPRA only applies to the La Jolla Skeletons if they meet the legal definition
16 of "Native American" under NAGPRA. Title 43, part 10.11, subdivision (a) of the Code of
17 Federal Regulations also specifically states that it applies "to human remains previously
18 determined to be Native American under § 10.9, but for which no lineal descendant or culturally
19 affiliated Indian tribe or Native Hawaiian organization has been identified."

20 37. Under NAGPRA and its accompanying regulations, Respondents have a clear,
21 present, mandatory and ministerial duty to make a formal determination whether or not the La
22 Jolla Skeletons are "Native American" within the meaning of NAGPRA, before repatriating
23 them under the alleged authority of 43 C.F.R. § 10.11.

24 38. Under article I, sections 7 and 15 of the California Constitution, and the
25 Fourteenth Amendment to the United States Constitution, Respondents have a clear, present,
26 mandatory and ministerial duty to comply with the minimum requirements of due process,
27 including a clear, present, mandatory and ministerial duty to avoid imposition of arbitrary
28 adjudicative procedures.

39. In addition, Respondents have a clear, present, mandatory and ministerial duty to administer the UNIVERSITY as a public trust, pursuant to the state constitutional mandate. "[D]ecisions are to be made solely to promote the best interests of the University as a public trust, rather than the interests of a particular constituency, and that Board members will disclose personal, familial, business relationships, or other potential conflicts of interest as appropriate." (See Regents Policy 1100, Statement Of Expectations Of The Members Of The Board Of Regents (Jan. 2010), *available at* <http://www.universityofcalifornia.edu/regents/policies/1100.html>.) The public has an interest in preserving scientifically and historically significant items, as does the UNIVERSITY.

40. Petitioners are beneficially interested in the issuance of a writ of mandamus, because they have a clear, present, substantial and vested right in Respondents' performance of their duty to determine whether or not NAGPRA and its accompanying regulations actually apply to the La Jolla Skeletons, before Respondents dispose of them to the Kumeyaay. A disposition without such a formal determination would arbitrarily and illegally destroy the La Jolla Skeletons' incalculable scientific value to Petitioners, and to the public at large, and would violate NAGPRA.

41. In addition, Petitioners are beneficially interested as citizens and taxpayers in Respondents' performance of their duties under the law. Respondents' threatened act of repatriation not only would deprive Petitioners' of any opportunity to research the La Jolla Skeletons, it would also arbitrarily and illegally deprive all members of the public of the opportunity to understand the origins of humanity in North America.

42. The above-described actions of Respondents, including but not limited to, Respondents' inclusion of the La Jolla Skeletons on the October 22, 2008 Notice of Inventory Completion and the Repatriation Notice, were arbitrary and capricious, in excess of Respondents' jurisdiction, a prejudicial abuse of their discretion, and/or there was not a fair trial, for, inter alia, the following reasons:

- a. Respondents failed to make a formal and adequate finding or determination whether or not the La Jolla Skeletons are "Native American" under

1 NAGPRA. On information and belief, Respondents failed to consider any evidence or
2 conduct a hearing on this issue. In failing to make this decision using procedures that
3 meet minimum constitutional standards, and in making their purported "findings" without
4 considering any evidence or providing Petitioners a full and fair opportunity to present
5 evidence, Respondents acted in an arbitrary and capricious manner, in violation of
6 Petitioners' fundamental due process rights, and in violation of Respondents' duty to
7 administer the University as a public trust;

8 b. For the same reasons, Respondents' decision to include the La Jolla
9 Skeletons on the October 22, 2008 Notice of Inventory Completion and the Repatriation
10 Notice was not supported by an adequate finding or determination that the La Jolla
11 Skeletons are "Native American" under NAGPRA;

12 c. To the extent Respondents made a formal finding or determination that the
13 La Jolla Skeletons were "Native American" under NAGPRA, their determination was
14 arbitrary and capricious, not supported by the weight of the evidence, and/or was not
15 supported by substantial evidence in light of the whole record. Respondents' decision
16 was further flawed in that Respondents apparently based their decision on the geographic
17 relationship of the Kumeyaay to the UCSD site, even though the "aboriginal territories"
18 occupied and defined for historic Indian tribes are not in any way linked to the prehistoric
19 territories that their lineal ancestors may have occupied;

20 d. Petitioners were not allowed to present evidence in opposition to
21 Respondents' summary conclusion that the La Jolla Skeletons were "Native American"
22 within the meaning of NAGPRA;

23 e. On information and belief, Respondents did not reanalyze whether the
24 materials listed on the Draft Notice were funerary objects, as required by YUDOF's May
25 11, 2011 letter;

26 f. On information and belief, Respondents' purported finding that the 25
27 objects were "reasonably believed" to have been placed at the site at or near the time of
28 death or later as part of the "death rite or ceremony" is not supported by any evidence in

1 the record, and/or Petitioners were not allowed to present evidence in opposition to
 2 Respondents' summary conclusion. Respondents' purported finding is arbitrary and
 3 capricious ;

4 g. The Human Remains Policies Respondents followed in drafting and
 5 submitting the Notice of Inventory Completion and Repatriation Notice are fatally
 6 flawed, because they provide no guidelines for determining whether remains are "Native
 7 American" within the meaning of NAGPRA. Furthermore, they provide no standards
 8 governing what evidence is admissible on the question of whether the remains are
 9 "Native American" within the meaning of NAGPRA, or what weight the evidence is to
 10 be given. The lack of standards renders it impossible for Petitioners to challenge the
 11 evidence presented or Respondents' summary conclusion. The Human Remains Policies
 12 do not provide notice of what evidence may be relied upon in the evaluation of whether
 13 remains are or are not "Native American." The lack of procedures and standards renders
 14 the Human Remains Policies unconstitutionally vague and violates due process.

15 43. By including the La Jolla Skeletons on the October 22, 2008 Notice of Inventory
 16 Completion and Repatriation Notice, Respondents acted in an arbitrary and capricious manner
 17 and in violation of Petitioners' and the public's right to a fair determination of whether or not the
 18 La Jolla Skeletons are "Native American" within the meaning of NAGPRA.

19 44. Petitioners have no plain, speedy, and adequate remedy in the ordinary course of
 20 law other than the relief sought by this petition.

21 45. Petitioners have exhausted all administrative procedures required of them by law.

22 46. If the relief sought by this petition is not granted, Petitioners and the general
 23 public will suffer irreparable injury and harm, in that the ability to study the La Jolla Skeletons
 24 will be lost forever. Petitioners are informed and believe that Respondents will repatriate the
 25 remains to the La Posta Band of Mission Indians as soon as possible after January 4, 2012,
 26 unless Respondents are restrained by this Court. Petitioners are informed and believe that the La
 27 Posta Band of Mission Indians will fail to maintain the skeletons in a manner that preserves their
 28 scientific value, and therefore the skeletons' scientific value will be destroyed, unless

1 Respondents are restrained by this Court.

2 WHEREFORE, Petitioners pray for judgment against Respondents as set forth below.

3 **COMPLAINT**

4 **FIRST CAUSE OF ACTION – DECLARATORY AND INJUNCTIVE RELIEF -**
 5 **VIOLATION OF NAGPRA (Code Civ. Proc. §§ 526a, 1060)**

6 **[All Plaintiffs Against All Defendants]**

7 47. Plaintiffs hereby incorporate by reference paragraphs 1 through 45, inclusive.

8 48. NAGPRA only applies to the La Jolla Skeletons if they meet the legal definition
 9 of "Native American" under NAGPRA. Title 43, part 10.11, subdivision (a) of the Code of
 10 Federal Regulations also specifically states that it applies "to human remains previously
 11 determined to be Native American under § 10.9, but for which no lineal descendant or culturally
 12 affiliated Indian tribe or Native Hawaiian organization has been identified." Defendants' actions
 13 in approving the transfer of the La Jolla Skeletons to the La Posta Band of Mission Indians are
 14 illegal, invalid, null and void, because Defendants failed to make a finding or determination, or
 15 failed to make an adequate finding or determination, that the remains are "Native American"
 16 within the meaning of NAGPRA. Defendants' actions are also illegal, invalid, null and void to
 17 the extent Defendants concluded the remains were "Native American," because their conclusion
 18 is not supported by the evidence.

19 49. Defendants have expended public funds in support of their illegal efforts to
 20 repatriate the La Jolla Skeletons, without determining whether they are "Native American"
 21 within the meaning of NAGPRA, and/or without considering all of the evidence concerning
 22 whether or not the La Jolla Skeletons are "Native American" within the meaning of NAGPRA.

23 50. An actual, present controversy exists between Plaintiffs and Defendants, because
 24 Plaintiffs contend and Defendants deny that that Defendants' actions in approving the transfer of
 25 the La Jolla Skeletons to the La Posta Band of Mission Indians are illegal, invalid, null and void.

26 51. Plaintiffs desire a judicial determination that Defendants' actions in approving the
 27 transfer of the La Jolla Skeletons to the La Posta Band of Mission Indians are illegal, invalid,
 28 null and void. A judicial declaration is necessary and appropriate at this time, so that Plaintiffs

1 may ascertain their rights, the rights of the general public, and Defendants' duties under the law.

2 52. Unless Defendants are enjoined, Plaintiffs and the general public will suffer
3 irreparable injury and harm, in that the ability to study the La Jolla Skeletons will be lost forever.
4 Plaintiffs are informed and believe that Defendants will repatriate the remains to the La Posta
5 Band of Mission Indians as soon as possible after January 4, 2012, unless Defendants are
6 restrained by this Court. Plaintiffs are informed and believe that the La Posta Band of Mission
7 Indians will fail to maintain the skeletons in a manner that preserves their scientific value, and
8 therefore the skeletons' scientific value will be destroyed, unless Defendants are restrained by
9 this Court.

10 53. Plaintiffs and the general public have no plain, adequate, or speedy remedy at law
11 and are entitled to injunctive relief against Defendants. Plaintiffs and the general public have no
12 administrative remedy because Defendants' procedures for approving the transfer of the La Jolla
13 Skeletons, and the short timeframe for repatriation after Defendants published their Repatriation
14 Notice, preclude any administrative relief.

15 **SECOND CAUSE OF ACTION – DECLARATORY AND INJUNCTIVE RELIEF -**
16 **BREACH OF PUBLIC TRUST**

17 **[All Petitioners Against Defendants REGENTS, YUDOF, FOX and MATTHEWS]**

18 54. Plaintiffs hereby incorporate by reference paragraphs 1 through 52, inclusive.

19 55. The UNIVERSITY is a public trust established by article nine of the California
20 Constitution.

21 56. The La Jolla Skeletons are part of the public trust that is the UNIVERSITY. In
22 addition, the UNIVERSITY maintains its collections of human remains and cultural items – to
23 which the La Jolla Skeletons belong – as a public trust.

24 57. Defendants REGENTS and YUDOF are trustees of the UNIVERSITY. FOX is
25 an agent of YUDOF when she is performing YUDOF's duties as trustee of the UNIVERSITY.
26 MATTHEWS is an agent of YUDOF when acting as an agent of FOX when she is performing
27 YUDOF's duties as trustee of the UNIVERSITY. Plaintiffs are informed and believe that
28 YUDOF and the REGENTS neglected to take reasonable steps to compel FOX and

1 MATTHEWS to correct what defendants knew or should have known were violations of
2 NAGPRA.

3 58. Plaintiffs and the general public are beneficiaries of the public trust, of which the
4 La Jolla Skeletons are a part.

5 59. Defendants have a duty to administer the UNIVERSITY as a public trust,
6 pursuant to the state constitutional mandate. (See Regents Policy 1100 (REGENTS are to serve
7 as trustees for the people of the State of California and as stewards for the University of
8 California, "acting to govern the University in fulfillment of its educational, research, and public
9 service missions in the best interests of the people of California"); see also Regents Policy 1500
10 ("The President is expected to direct the management and administration of the University of
11 California system consistent with the Bylaws and Standing Orders, administering the University
12 in fulfillment of its educational, research, and public service missions in the best interests of the
13 people of California").) Defendants have a duty to fulfill the UNIVERSITY's educational,
14 research, and public service missions in the best interests of the people of California.

15 60. Defendants breached their duty to Plaintiffs and to the public to administer the
16 public trust for the public interest by (1) arbitrarily and capriciously including the La Jolla
17 Skeletons on the October 22, 2008 Notice of Inventory Completion and Repatriation Notice,
18 even though defendants lacked a reasonable or good faith belief that the remains are "Native
19 American" within the meaning of NAGPRA; (2) approving the transfer of the La Jolla Skeletons
20 to the La Posta Band of Mission Indians, even though defendants lacked a reasonable or good
21 faith belief that the remains are "Native American" within the meaning of NAGPRA, or that they
22 had any relationship to the tribe known as the La Posta Band of Mission Indians; (3) failing to
23 conduct a good faith inquiry and make a formal determination whether or not the remains are
24 "Native American" within the meaning of NAGPRA; and (4) misrepresenting that "25 objects"
25 were "reasonably believed" to have been placed at the site at or near the time of death or later as
26 part of the "death rite or ceremony," contrary to Gail Kennedy's account of the excavation.

27 61. An actual, present controversy exists between Plaintiffs and Defendants, because
28 Plaintiffs contend and Defendants deny that that Defendants' actions alleged above constitute a

1 breach of trust.

2 62. Plaintiffs desire a judicial determination that Defendants' actions constitute a
3 breach of trust. A judicial declaration is necessary and appropriate at this time, so that Plaintiffs
4 may ascertain their rights and the rights of the general public, and Defendants' duties under the
5 law.

6 63. Plaintiffs seek to compel the trustees to perform their duties and to enjoin the
7 trustees from committing future breaches. Plaintiffs are informed and believe that Defendants
8 will repatriate the remains to the La Posta Band of Mission Indians as soon as possible after
9 January 4, 2012, unless defendants are restrained by this Court. Plaintiffs are informed and
10 believe that the La Posta Band of Mission Indians will fail to maintain the skeletons in a manner
11 that preserves their scientific value, and therefore the skeletons' scientific value will be
12 destroyed, contrary to the public interest, unless defendants are restrained by this Court.

13 64. Plaintiffs and the general public have no plain, adequate, or speedy remedy at law
14 and are entitled to injunctive relief against Defendants. Plaintiffs and the general public have no
15 administrative remedy because Defendants' procedures for approving the transfer of the La Jolla
16 Skeletons, and the short timeframe for repatriation after Defendants published their Repatriation
17 Notice, preclude any administrative relief.

18 **THIRD CAUSE OF ACTION – 42 U.S.C. § 1983 AND THE UNITED STATES**
19 **CONSTITUTION – FIRST AMENDMENT**

20 **[All Plaintiffs Against Defendants YUDOF, FOX, and MATTHEWS]**

21 65. Plaintiffs hereby incorporate by reference paragraphs 1 through 63, inclusive.

22 66. Plaintiffs have a First Amendment right to receive information and ideas. The
23 opportunity to use the La Jolla Skeletons for research purposes is the only means of accessing the
24 information and ideas contained within them.

25 67. Defendants' actions alleged above have deprived, and will continue to deprive,
26 Plaintiffs of their right to receive information under the First Amendment to the United States
27 Constitution. Plaintiffs have been unable to study the remains, despite having made study
28 requests. The government may not, "consistently with the spirit of the First Amendment,

1 contract the spectrum of available knowledge." (*See Griswold v. Connecticut* (1965) 381 U.S.
2 479, 482.)

3 68. In committing the acts herein alleged, Defendants were acting under color of state
4 law.

5 69. Plaintiffs desire a judicial determination that Defendants' actions violate
6 Plaintiffs' First Amendment right to receive information. A judicial declaration is necessary and
7 appropriate at this time, so that Plaintiffs may ascertain their rights and the rights of the general
8 public, and Defendants' duties under the law.

9 70. An actual and immediate controversy has arisen and now exists between Plaintiffs
10 and Defendants related to their respective rights and duties. Plaintiffs contend, and Defendants
11 deny, that Defendants' actions have deprived, and will continue to deprive, Plaintiffs of their
12 right to receive information under the First Amendment to the United States Constitution.

13 71. Plaintiffs and the general public have no plain, adequate, or speedy remedy at law
14 and are entitled to injunctive relief against Defendants. Unless Defendants are enjoined,
15 Plaintiffs and the general public will suffer irreparable injury and harm, in that the ability to
16 study the La Jolla Skeletons will be lost forever. Plaintiffs are informed and believe that
17 Defendants will repatriate the remains to the La Posta Band of Mission Indians as soon as
18 possible after January 4, 2012, unless Defendants are restrained by this Court. Plaintiffs are
19 informed and believe that the La Posta Band of Mission Indians will fail to maintain the
20 skeletons in a manner that preserves their scientific value, and therefore the skeletons' scientific
21 value will be destroyed, unless Defendants are restrained by this Court.

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PRAYER FOR RELIEF

Petitioners and Plaintiffs pray for judgment against Respondents and Defendants as follows:

1. On the petition for writ of traditional mandamus, or in the alternative, writ of administrative mandamus;

(a) For a peremptory writ directing Respondents to set aside the Notice of Inventory Completion of October 22, 2008 and December 5, 2011, respectively; AND

(b) For a peremptory writ directing Respondents to make a formal determination whether or not the La Jolla Skeletons are "Native American" within the meaning of NAGPRA; AND

(c) For a peremptory writ directing Respondents to set aside and cease and desist from any actions taken to implement the decision to transfer possession of the La Jolla Skeletons to the La Posta Band of Mission Indians, unless and until Respondents have made a formal determination that the remains are "Native American" within the meaning of NAGPRA.

OR IN THE ALTERNATIVE:

(a) For a peremptory writ directing Respondents to set aside the Notice of Inventory Completion of October 22, 2008 and December 5, 2011, respectively; AND

(b) For a peremptory writ prohibiting Respondents from transferring possession of the La Jolla Skeletons to the La Posta Band of Mission Indians, on the ground that they are not "Native American" within the meaning of NAGPRA.

2. On the first cause of action for declaratory and injunctive relief:

(a) A declaration, order and judgment that the La Jolla Skeletons are not "Native American" within the meaning of NAGPRA; AND

(b) A declaration, order and judgment that Defendants, in attempting to transfer possession of the La Jolla Skeletons to the La Posta Band of Mission Indians, acted arbitrarily and without jurisdiction or authority, and that Defendants' decision to approve such transfer, and all subsequent actions to implement such transfer, are illegal,

1 invalid, null and void; AND

2 (c) A preliminary and permanent injunction requiring Defendants to set aside
3 and cease and desist from any and all actions implementing the decision to transfer
4 possession of the La Jolla Skeletons to the La Posta Band of Mission Indians; AND

5 (d) A permanent injunction prohibiting Defendants from taking any action in
6 the future to approve or implement a transfer of possession of the La Jolla Skeletons to
7 the La Posta Band of Mission Indians, or any other Native American tribe.

8 3. On the second cause of action for breach of trust:

9 (a) A declaration, order and judgment Defendants' actions constituted a
10 breach of trust; AND

11 (b) A preliminary and permanent injunction requiring Defendants to compel
12 the Defendants to perform their duties as trustees of the UNIVERSITY and protect the
13 UNIVERSITY's research assets from destruction; AND

14 (c) A preliminary and permanent injunction requiring Defendants set aside
15 and cease and desist from any and all actions implementing the decision to transfer
16 possession of the La Jolla Skeletons to the La Posta Band of Mission Indians; AND

17 (d) A permanent injunction prohibiting Defendants from taking any action in
18 the future to approve or implement a transfer of possession of the La Jolla Skeletons to
19 the La Posta Band of Mission Indians, or any other Native American tribe.

20 4. On the third cause of action for violation of the First Amendment:

21 (a) A declaration, order and judgment that Defendants' actions violate
22 Plaintiffs' First Amendment right to receive information; AND

23 (b) A preliminary and permanent injunction requiring Defendants set aside
24 and cease and desist from any and all actions implementing the decision to transfer
25 possession of the La Jolla Skeletons to the La Posta Band of Mission Indians; AND

26 (c) A permanent injunction prohibiting Defendants from taking any action in
27 the future to approve or implement a transfer of possession of the La Jolla Skeletons to
28 the La Posta Band of Mission Indians, or any other Native American tribe.

5. For Petitioners' and Plaintiffs' costs of suit;
6. For Petitioners' and Plaintiffs' attorneys' fees; AND
7. For any other and further relief that this Court may deem just and proper.

DATED: April 16, 2012

McMANIS FAULKNER

Christine E. Peek
JAMES MCMANIS
CHRISTINE PEEK

Attorneys for Petitioners and Plaintiffs,

TIMOTHY WHITE,
ROBERT L. BETTINGER, and
MARGARET SCHOENINGER

FAX NO. :

Apr. 09 2012 02:01PM P1

I, Timothy White, Ph.D., declare:

I am one of the Petitioners and Plaintiffs in the instant action. I have read the Petition For Writ Of Mandamus (Code Civ. Proc., § 1085), Or In The Alternative, For Writ Of Administrative Mandamus (Code Civ. Proc., § 1094.5) against Respondents and know its contents. The allegations of the Petition For Writ Of Mandamus (Code Civ. Proc., § 1085), Or In The Alternative, For Writ Of Administrative Mandamus (Code Civ. Proc., § 1094.5) are true of my own knowledge, except as to those matters which are alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: APR 16 9 2012

Name: Timothy White, Ph.D.

Verification to Petition for Writ of Mandate, Case No.