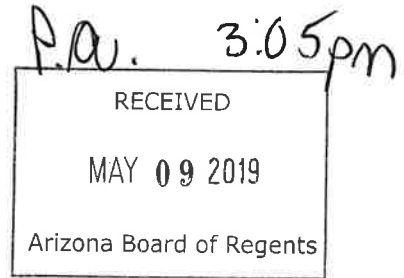


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May 9, 2019

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**VIA HAND DELIVERY**

Arizona Board of Regents  
Kate Linder, Secretary to the Board  
2020 North Central Avenue, Suite 230  
Phoenix, AZ 85004-4593

University of Arizona  
Kate Linder, Secretary to the Board  
2020 North Central Avenue, Suite 230  
Phoenix, AZ 85004-4593

Dr. Robert C. Robbins, President  
University of Arizona  
Old Main, Room 200  
1200 East University Boulevard  
Tucson, Arizona 85721-0021

Dr. Robert C. Robbins, President  
2141 East Third Street  
Tucson, Arizona 85719

Dr. Michael D. Dake, Senior Vice President for  
Health Sciences  
University of Arizona  
Drachman Hall, Room A274  
1295 North Martin Avenue  
Tucson, Arizona 85721-0203

Dr. Michael D. Dake, Senior Vice President for  
Health Sciences  
1830 North Potter Place  
Tucson, Arizona 85719

Re: **Notice of Claim Pursuant to A.R.S. § 12-821.01**

Dear Secretary Linder, President Robbins and Senior Vice President Dake:

This letter constitutes a Notice of Claim pursuant to Arizona Revised Statute § 12-821.01 against the Arizona Board of Regents ("Board"), the University of Arizona ("University"), President Dr. Robert C. Robbins and Senior Vice President Dr. Michael D. Dake. This Notice of Claim is served on behalf of Assistant Vice President Anthony T. DeFrancesco ("Mr.

# MILLER BARONDESS, LLP

Arizona Board of Regents  
Kate Linder, Secretary to the Board  
May 9, 2019  
Page 2

DeFrancesco” or “Claimant”) whom this office represents. The conduct of other Board and/or University employees, officers, agents or others acting with the authority and/or at the direction of the Board, the University, President Robbins and/or Dr. Dake (together “Responsible Parties”) may also have contributed to the injuries suffered by Claimant as discussed here within, and when their identities become known, this claim may be supplemented to include them.

This Notice of Claim is given without the benefit of formal discovery and is subject to amendment or supplementation. Claimant reserves the right to amend this Notice of Claim. If for any reason you believe this Notice of Claim is not in compliance with A.R.S. § 12-821.01, or if you need additional facts or information to evaluate the claim, please contact me. Mr. DeFrancesco will exhaust his administrative remedies to the extent required by law.

The terms and contents of this Notice of Claim are subject to Rule 408 of the Arizona Rules of Evidence and Rule 408 of the Federal Rules of Evidence.

## **I. FACTUAL BASIS FOR CLAIM**

### **A. Mr. DeFrancesco**

Mr. DeFrancesco is an award-winning dietitian with over two decades of experience in business administration for large health care organizations and institutions. Among other awards and accolades, Mr. DeFrancesco has earned a board certification in healthcare management from the American College of Healthcare Executives, signifying his achievement in the profession.

Mr. DeFrancesco is a University graduate with strong family ties to the University. Three generations of the DeFrancesco family have graduated from the University. His grandfather was a University graduate and retired Air Force Officer who taught radio electronics in the University’s ROTC program. Mr. DeFrancesco’s father, uncle and two younger brothers also graduated from the University. The fourth generation of the family, Mr. DeFrancesco’s nephew, is set to enroll this coming Fall.

### **B. The University Fails to Promote Mr. DeFrancesco**

For years, Mr. DeFrancesco has served as the de facto Associate Vice President of Finance and Administration but without the title and compensation commensurate with his job. In January 2015, the University of Arizona Health Sciences (“UAHS”) hired Mr. DeFrancesco as its Senior Director of Operations. When the Assistant Vice President (“AVP”) of Finance and Administration, Karen Filippelli, resigned two months after Mr. DeFrancesco joined UAHS, Mr. DeFrancesco was required to assume Ms. Filippelli’s responsibilities in addition to his own.

Arizona Board of Regents  
Kate Linder, Secretary to the Board  
May 9, 2019  
Page 3

Subsequently, in February 2017, when Senior Associate Vice President Mike Jonen departed the university, Mr. DeFrancesco assumed all of his duties as well.

As the de facto Associate Vice President, Mr. DeFrancesco has been responsible for approving the UAHS budget (which is in excess of \$1 billion) and financing expenditures for the colleges and research centers under the UAHS umbrella. In addition, Mr. DeFrancesco has served as the de facto head of human resources for the roughly 500 employees who work for UAHS. These are high-level, executive functions that demand adequate compensation well in excess of Mr. DeFrancesco's current pay. Mr. DeFrancesco has asked for salary increases and a formal promotion commensurate with his work responsibilities. UAHS rejected Mr. DeFrancesco's requests and kept the position open for years while actively seeking candidates with the same relevant qualifications of Mr. DeFrancesco.

Recently, UAHS informed Mr. DeFrancesco that he will be terminated on June 30, 2019. It is our understanding that Mr. DeFrancesco is the only executive at his level of seniority that received a termination notice. It is also our understanding that Mr. DeFrancesco is the only homosexual male at the executive level at the UAHS.

The termination of Mr. DeFrancesco cannot be explained by legitimate reasons. Over the past four years, Mr. DeFrancesco has earned a stellar employment record. He has not received a single complaint, and he has consistently been asked to take on more responsibility to help grow and improve UAHS.

**C. The University Terminates Mr. DeFrancesco**

Mr. DeFrancesco is married to Gregg Goldman, the former Senior Vice President and CFO of the University. Mr. Goldman has left the University, but before leaving he opposed President Robbins' decision to hire Dr. Dake. When Dr. Dake was hired, Mr. Goldman was no longer working for the University, and so Dr. Dake decided to retaliate against Mr. Goldman's spouse, Mr. DeFrancesco. The facts supporting Dr. Dake's retaliation are set forth below.

In 2017, President Robbins and the University of Arizona put together a search committee to find a new Senior Vice President to run UAHS. Mr. Goldman served as co-chair of the search committee. At the request of President Robbins, the university retained an executive search firm, Russell Reynolds ("RR"), to assist the committee. Several current and former high-ranking employees of RR are close personal friends of President Robbins.

President Robbins' longtime friend, Dr. Dake, was encouraged and asked by President Robbins to apply for the position. Dr. Dake applied and was interviewed by the committee. No one on the committee recommended the hiring of Dr. Dake, nor were there any of the standard public

# MILLER BARONDESS, LLP

Arizona Board of Regents  
Kate Linder, Secretary to the Board  
May 9, 2019  
Page 4

forums or interviews outside of the President and the committee as is normal and customary on Senior Vice President level searches.

In December 2017, while the search committee worked to narrow the field of candidates, President Robbins lobbied heavily for Dr. Dake. President Robbins asked search committee members to ensure that Dr. Dake remained a candidate through the selection process. The search committee ranked each candidate, with many committee members ranking Dr. Dake at or near the bottom of the list.

At the end of the first round process, as Mr. Goldman was driving President Robbins to the airport, he asked Mr. Goldman how he thought the vote would turn out. Mr. Goldman told President Robbins that Dr. Dake did poorly in the interview with the committee members, and that he could not guarantee any outcome. President Robbins replied that he wasn't worried because it was taken care of.

RR tallied the votes and did not share the voting data or voting slips with Mr. Goldman or the other co-chair. Despite the fact that Dr. Dake was viewed as the weakest candidate by the committee, Dr. Dake was selected among the 5 remaining candidates, which allowed him to advance to the next round. The committee asked RR to disclose the actual vote count but RR refused. When pressed, one of the RR representatives candidly admitted that the vote had turned out how President Robbins wanted.

The 5 finalists were then subjected to a more rigorous interview process that was again bifurcated between rotating smaller search committee interviews and a separate interview with President Robbins. The committee interviews did not turn out well for Dr. Dake. For example, committee members found that Dr. Dake: (1) had little or no understanding of the academic part of the job; (2) had minimal experience running academic departments, including a questionable short tenure at another university ten years ago; (3) was abrasive, dismissive and impatient with interviewers; (4) seemed to not grasp the complexities of running a large department; (5) grossly oversimplified the challenges of the position; (6) was overconfident and lacking in substance, claiming—without mentioning specifics—that he could solve large scale problems facing the university with “innovation”; and (7) had a questionable past that involved allegations of unethical billing and research practices.

President Robbins knew that Dr. Dake had performed poorly in both the initial and second round of committee interviews. Before receiving formal feedback from the committee and with only verbal feedback from Mr. Goldman, President Robbins intervened and declared that there were only 2 candidates remaining: Paul Lee (far and away the search committee's first choice) and the President's best friend, Dr. Dake.

# MILLER BARONDESS, LLP

Arizona Board of Regents  
Kate Linder, Secretary to the Board  
May 9, 2019  
Page 5

On March 2, 2018, in a meeting to discuss the candidates, Mr. Goldman told President Robbins that hiring Dr. Dake “would be the worst possible mistake you could make and in the end I believe it could very likely cost you your presidency.” President Robbins responded “how do I take it back, as I finally convinced him to apply and in essence *have already offered* him the job.” After the meeting, President Robbins sabotaged Paul Lee’s candidacy, causing Mr. Lee to withdraw his application.

President Robbins hired Dr. Dake as Senior Vice President in March 2018. President Robbins told Dr. Dake about how Mr. Goldman objected to his candidacy and recommended against his hiring. Dr. Dake took this personally and decided to retaliate against Mr. Goldman’s husband, Mr. DeFrancesco.

When he joined the University, Dr. Dake informed Mr. DeFrancesco that he was fired and would have to reapply for his job. Dr. Dake claimed that this was a wide-sweeping policy applied to others at UAHS, but Mr. DeFrancesco is the only executive that we are aware of who was terminated.

Before receiving his termination notice, on October 26, 2018, Mr. DeFrancesco met with Dr. Dake. At this meeting, Dr. Dake said that he intended to post a job opening for the Associate Vice President and that there would be a national recruitment effort. Disturbingly, Dr. Dake told Mr. DeFrancesco that he “has a decision to make” given that Mr. DeFrancesco’s husband had left the University to become the Vice Chancellor and CFO of UCLA. Dr. Dake’s comment signaled his intent to force out Mr. DeFrancesco from the University.

On March 28, 2019, Mr. DeFrancesco received a formal letter notifying him that his administrative appointment as Associate Vice President would conclude on June 30, 2019 without further renewal. It is our understanding that no one else at Mr. DeFrancesco’s level received a non-renewal.

## **II. LEGAL BASIS FOR CLAIM**

### **A. Sexual Orientation Discrimination: Title VII & 42 U.S.C. § 1983**

Title VII prohibits discrimination on the basis of “sex.” 42 U.S.C. § 2000e-2(a). Sexual orientation discrimination is a form of “sex” discrimination prohibited by section 2000e-2(a). *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 107-08 (2d Cir. 2018) (en banc) (holding that sexual orientation discrimination claims are cognizable under Title VII); *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en banc) (same); *Pratt v. Dep’t of Public Safety*, 2018 WL 5850177, \*11 (D. Haw. Nov. 8, 2018) (same); *Somers v. Digital Realty*

Arizona Board of Regents  
Kate Linder, Secretary to the Board  
May 9, 2019  
Page 6

*Trust Inc.*, 2018 WL 3730469, \*7 (N.D. Cal. Aug. 6, 2018) (same). Title VII also prohibits firing an employee in retaliation for notifying the employer about illegal sexual orientation discrimination. 42 U.S.C. § 2000e-3.

Sexual orientation discrimination is also a violation of the Equal Protection Clause. As early as 1990, the Ninth Circuit Court of Appeals has recognized that “state employees who treat individuals differently on the basis of their sexual orientation violate the constitutional guarantee of equal protection.” *Collins v. Brewer*, 727 F. Supp. 2d 797, 803 (D. Ariz. 2010) (quoting *Flores v. Morgan Hill Unified School Dist.*, 324 F.3d 1130, 1137 (9th Cir. 2003)). Sexual orientation is a protected class under the Equal Protection Clause, and any classification made on the basis of sexual orientation is subject to heightened scrutiny. *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 484 (9th Cir. 2014) (holding “that heightened scrutiny applies to classifications based on sexual orientation”).

In addition to federal law, the University’s own Nondiscrimination and Anti-Harassment Policy (the “Policy”) “prohibits discrimination, including harassment and retaliation, based on a protected classification, including race, color, religion, sex, national origin, age, disability, veteran status, *sexual orientation*, gender identity, or genetic information.”<sup>1</sup> Further, the City of Tucson has adopted an Administrative Directive, No. 2.05-8, which prohibits employment discrimination on the basis of sexual orientation.

Because President Robbins and Dr. Dake work for a state university, their conduct is actionable under 42 U.S.C. § 1983. *E.g.*, *Arizona Students’ Association v. Arizona Board of Regents*, 824 F.3d 858 (9th Cir. 2016) (holding that university employees who violate individuals’ constitutional rights can be subject to a federal lawsuit under section 1983). As the victim of discrimination on account of his sexual orientation, Mr. DeFrancesco has the right to file a lawsuit against President Robbins and Dr. Dake and seek money damages, injunctive relief and other remedies. *Hafer v. Melo*, 502 U.S. 21, 31 (1991). Mr. DeFrancesco also has the right to file a lawsuit against the Board and the University for injunctive relief to prevent ongoing discrimination. *Arizona Students’ Association*, 824 F.3d at 865.

**B. First Amendment Retaliation: 42 U.S.C. § 1983**

It is unlawful for an officer of a state university to retaliate against a university employee because of the protected activity of the employee’s spouse. *Adler v. Pataki*, 185 F.3d 35, 44 (2d Cir.

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<sup>1</sup> Available at <https://policy.arizona.edu/human-resources/nondiscrimination-and-anti-harassment-policy>.

Arizona Board of Regents  
Kate Linder, Secretary to the Board  
May 9, 2019  
Page 7

1999) (reversing grant of summary judgment, holding that the plaintiff, a state employee, possessed a valid claim of First Amendment retaliation when he was discharged because his wife filed a lawsuit against state officials); *Sowards v. Loudon County*, 203 F.3d 426, 433 (6th Cir. 2000) (reversing summary judgment, holding that the plaintiff stated a claim for retaliation in violation of her First Amendment right of intimate association when she was fired as a jailer because her husband was a political opponent of the county sheriff); *Adkins v. Board of Educ.*, 982 F.2d 952, 955-56 (6th Cir. 1993) (reversing directed verdict, holding that the plaintiff, a school teacher, presented sufficient evidence of unlawful retaliation when the superintendent fired her as a result of a disagreement between the superintendent and the plaintiff's husband); *Gray v. Bruneau-Grand View School Dist. No. 365*, Case No. 06-cv-069, 2007 WL 1381785 (D. Idaho Mar. 27, 2007) (denying summary judgment, holding that plaintiff presented sufficient evidence of First Amendment retaliation when the defendant placed her on probation in retaliation for her husband raising objections to school policy).

First Amendment retaliation is actionable under 42 U.S.C. § 1983 against President Robbins, Senior Vice President Michael Dake, the University of Arizona and the Arizona Board of Regents. *E.g.*, *Arizona Students' Association*, 824 F.3d 858. As the victim of retaliation, Mr. DeFrancesco has the right to file a lawsuit against President Robbins and Dr. Dake and seek money damages, injunctive relief and other remedies. *Hafer v. Melo*, 502 U.S. 21, 31 (1991). Mr. DeFrancesco also has the right to file a lawsuit against the Board and the University for injunctive relief to prevent ongoing discrimination. *Arizona Students' Association*, 824 F.3d at 865.

### III. AMOUNT OF CLAIM

Mr. DeFrancesco has suffered significant economic and non-economic harm as a result of Defendants' conduct, currently estimated to be approximately \$10,138,022.00. This includes Mr. DeFrancesco's lost wages, emotional distress and punitive damages. The lost wages are estimated as follows. First, Mr. DeFrancesco was underpaid in 2017-2018. His salary was \$250,000, but he should have been paid approximately \$361,000. He was underpaid by approximately \$110,000 in 2017 and \$121,830 in 2018 (assuming a growth rate of 3%). Thus, Mr. DeFrancesco was underpaid by \$231,830 in 2017-2018. Second, Mr. DeFrancesco's lost wages from 2019 going forward are calculated at \$370,800 for the next 11 years until his anticipated retirement in 2029, assuming a 3% salary growth rate. Adding these lost wages to the amount of underpayment in 2017-2018, a reasonable estimate of Mr. DeFrancesco's lost wages is \$5,138,022. In addition to lost wages, Defendants are liable for approximately \$5,000,000 in emotional distress and punitive damages.

To settle his claims against the University, the Board, President Robbins and Dr. Dake, Mr. DeFrancesco will accept \$10,000,000.00.

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Arizona Board of Regents  
Kate Linder, Secretary to the Board  
May 9, 2019  
Page 8

Nothing contained herein is intended to waive any and all rights and remedies held by Mr. DeFrancesco, and all such rights and remedies are expressly reserved.

Sincerely,

A handwritten signature in black ink, appearing to read "Skip" followed by a stylized flourish that extends to the right.

Louis R. Miller

LRM:DWS