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The Honorable John V. Acosta
Wayne L. Morse United States Courthouse
405 East Eighth Avenue, Room 5600
Eugene, Oregon 97401-2706

Re: Gilley v. Stabin, No. 6:22-cv-01181-AA
OPPOSITION TO REQUEST FOR AWARD OF ATTORNEYS' FEES

Dear Judge Acosta:

The University of Oregon is profoundly grateful for Your Honor's assistance in settling this case and for agreeing to decide appropriate attorneys' fees. The parties' agreement allows a fee award within a range of $95,000 to $382,000. For the reasons that follow, the University of Oregon respectfully requests that Your Honor awards $95,000 and no more.

I. This Case Should Have Been Resolved Prefiling with a Single Phone Call

This has been a frustrating case from the day it was filed.

As Your Honor knows, this case is about a single occasion when a low-level University employee, tova stabin, mistakenly blocked Bruce Gilley from interacting with a subaccount for the University's Division of Equity and Inclusion ("Division") because she thought his post was off topic. Senior officials at the University first learned that Gilley was blocked when they received media inquiries about his lawsuit the day after it was filed.

After stabin blocked Gilley, he apparently went to work engaging the Institute for Free Speech as his counsel, which then strategized a lawsuit and formulated a media offensive. In this time, neither Gilley nor his counsel made any effort to challenge or even question the blocking. They did not reach out to the University's Communications Department, General Counsel Office, or anyone else at the University about their concerns. Indeed, Gilley—a professor at Portland State University who easily could have made contact with any number of University of Oregon administrators—did not even send an email to stabin or her supervisor to ask to be unblocked.

As the University has said many times in the past two and a half years: **this case could have been—and should have been—resolved with a single phone call.** If Gilley had picked up the phone and called Richie Hunter, the then-Vice President for Communications and stabin's boss (or any other administrator in the Communications Department), he would have been unblocked immediately—Vice President Hunter said so in her deposition. (Isaak Decl. Ex. 1 at 2.) If he had called Kevin Reed, the University's General Counsel, or Yvette Alex-Assensoh, the University's

Vice President for Equity and Inclusion, he likewise would have been unblocked immediately. In fact, as soon as senior University officials learned that Gilley was blocked—after he sued—they directed that he be unblocked immediately. (Isaak Decl. Ex. 2.)

The reason Gilley and his counsel launched their surprise attack is obvious: they wanted a lawsuit, not a solution. Gilley said as much in a media interview: "'I knew immediately that this was a clear-cut, made-in-heaven case.'" Jennifer Kabbany, "Professor blocked for tweeting 'all men are created equal' files First Amendment lawsuit," The College Fix (Aug. 13, 2022). Gilley has made a name for himself as a provocateur and crusader against "cancel culture" by inviting controversy and then using the backlash he causes to promote himself by claiming he is a victim. Resolving the issue would do nothing for Gilley because he had no real interest in interacting with the Division's Twitter page.[1] He didn't want to be unblocked; he wanted to sue.

There was also a strategic reason for Gilley's calculated decision to sue without first reaching out to the University. If the University had unblocked Gilley before he filed his lawsuit, he would have had no standing. *See Langer v. Kiser*, 57 F.4th 1085, 1092 (9th Cir. 2023) ("[W]hether a plaintiff has standing depends upon the facts 'as they exist when the complaint is filed[.]'"). But if he sued while still blocked, the University's immediate unblocking would not necessarily moot his case—as a divided Ninth Circuit panel ultimately concluded here. *See Gilley v. Stabin*, No. 23-35097, 2024 WL 1007480 (9th Cir. Mar. 8, 2024). Thus, whether justiciability of his case would be decided based on standing or mootness turned on a single phone call and 24 hours. Suspecting that the University immediately would resolve the issue if they called, Gilley and his counsel manipulated the Court's jurisdiction by filing their lawsuit as a sneak-attack.

Gilley and his counsel made that strategic choice in violation of the requirements of the Federal Rules of Civil Procedure, the District of Oregon's Local Rules, and the norms of professionalism in our community. Gilley filed with his complaint a "Motion for Temporary Restraining Order and Preliminary Injunction." (ECF #2.) As Judge Hernández ruled the same day, Rule 65(b)(1)(B) requires that TRO movants must "certif[y] in writing any efforts made to give notice[.]"[2] (ECF #7.) The Rule's notice requirement is "consistent with notions of fair play and the general spirit of the federal rules[.]" 11A Wright & Miller, *Fed. Prac. & Proc.* § 2952 (3d ed. 2024). Despite the Rule's requirement, Gilley gave the University no notice of his forthcoming lawsuit and motion for TRO.

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[1] It is not mere supposition that Gilley had no serious interest in engaging with the Division's Twitter page. He said so to a reporter when the case was filed. *See* Jennifer Kabbany, "Professor blocked for tweeting 'all men are created equal' files First Amendment lawsuit," The College Fix (Aug. 13, 2022) ("'Clearly it's not that I need to read the University of Oregon's Twitter account[.]'") (quoting Gilley).

[2] In the alternative, TRO movants may certify "the reasons why [notice] should not be required" when notice is impracticable or when surprise is necessary to avoid irreparable injury. This was not such a case.

In addition to the Federal Rules' notice requirement, our District's Local Rules also required, not just notice, but good-faith conferral. *See* LR 7-1(a). Although the conferral certification requirement has an exception for TRO motions (in deference to the requirements of Rule 65), there is no such exception for motions for preliminary injunction—which, as mentioned, Gilley filed with his complaint. Thus, in addition to Federal Rule 65(b)(1)(B), Local Rule 7-1(a) required the courtesy of a phone call and a discussion before Gilley's filing.

Gilley's conscious disregard of prefiling notice and conferral was much more than a mere technical breach, however. By pointing to the controlling Federal and Local Rules, the University does not mean to diminish the significance of Gilley's lapse. In our community, norms of professionalism require that lawyers give the courtesy of a phone call before launching a strike against another's client, where possible. In our community, norms of professionalism demand that we not expend the Court's scarce time and resources with disputes that can be worked out through good-faith conferral. Our code of professionalism also helps save clients' resources (and, in the University's case, public resources), as evidenced by the fact that this entire case would have been resolved with a simple call. These norms animate Local Rule 83-8, which mandates cooperation among counsel. Indeed, the duty of cooperation expressly applies "***in all phases of the litigation process***[.]" LR 83-8(a) (emphasis added). Likewise, the District of Oregon's Statement of Professionalism embraces the norms that "[p]rofessionalism fosters respect and trust among lawyers and between lawyers and the public" and "promotes the efficient resolution of disputes[.]" Guideline 1.13 of the Statement of Professionalism provides: "We believe lawyers should solve problems, not create or exacerbate them."

Gilley's and his counsels' strategy of deliberately launching a sneak-attack was an egregious breach of our norms and controlling federal court rules. It should not be rewarded. It should be deterred not only for this case, but for future cases and parties.

II. Gilley Pursued Wasteful and Vexatious Litigation Tactics Which Imposed Significant Costs on the University

Gilley litigated this case in ways that seemed designed to pick unnecessary and expensive fights with the University. The most prominent example of Gilley's strategy involved his demand to depose Yvette Alex-Assensoh, the University's Vice President of Equity and Inclusion.

a. Deposition of Vice President Alex-Assensoh

Vice President Alex-Assensoh had nothing whatsoever to do with the events that gave rise to this case. She was not even tova stabin's boss; stabin worked in the University's Communications Department under Richie Hunter, who was then Vice President of the University Communications Department, which is unit in charge of the University's social media policies. Accordingly, when Gilley demanded a Rule 30(b)(6) "corporate representative" deposition, the University designated Hunter as its witness.

When Gilley's counsel learned of the University's designation, he demanded a deposition of Vice President Alex-Assensoh during the period of expedited discovery that Judge Hernández allowed before the preliminary injunction hearing. At the time, we did not understand why. In attorney conferrals by phone and email, we explained to Gilley's counsel that Vice President Alex-Assensoh had no involvement in or knowledge of the facts of this case. Indeed, at the time stabin blocked Gilley and, days later, when he made a public records request, Vice President Alex-Assensoh was leading a University trip in Ghana. She knew nothing about this. We offered to provide Gilley with a sworn declaration to that effect.

Gilley's counsel refused to back down and pressed the issue before Judge Hernández, who allowed a two-hour deposition. (Isaak Decl. Ex. 3.) Days before the deposition, however, Vice President Alex Assensoh's husband became severely ill and was hospitalized. When we notified Gilley's counsel that the deposition would need to be postponed, he responded by accusing us of lying and demanded that Vice President Alex-Assensoh appear for the deposition as scheduled, despite the fact that she was sitting at her husband's hospital bed. (Isaak Decl. Ex. 4.) We then sought relief from the Court; Judge Hernández admonished Gilley's counsel and directed that the deposition be rescheduled. (ECF #41.)

Vice President Alex-Assensoh's husband remained hospitalized for a prolonged period. Although the deposition was rescheduled to a later date, she still needed to leave her husband's hospital bedside to submit to the (rescheduled) two-hour deposition.

The deposition was as painful as it was irrelevant and unnecessary. As expected and as we previously told Gilley's counsel, Vice President Alex-Assensoh knew virtually nothing about the events at issue in the case. It turned out, that was not the reason for the deposition.

Gilley's counsel spent much of the deposition interrogating Vice President Alex-Assensoh about her scholarly writings and views. "Interrogating" is perhaps a charitable description; the questioning was at times more like mocking. We provide an excerpt of the deposition with this letter. (Isaak Decl. Ex. 5.) We hope Your Honor reads it. Gilley's counsel pressed aggressively for Vice President Alex-Assensoh's deposition not to learn facts that would assist with their preliminary injunction, but, rather—apparently—to denigrate her scholarship and views.

In one part of the deposition, Gilley's counsel badgered Vice President Alex-Assensoh about whether she considers herself to be "an antiracist," whether she believes that "it is simply impossible for racism to be absent from any situation," whether she believes that "the University of Oregon [is] a white supremacist institution," whether she believes that "the university is a colonial concept," whether she has said that "testing is a Europeanized concept," whether she has said that "the university is Anglo Saxon," whether she has said that "only faculty who change society deserve tenure," whether she has said that "the University of Oregon sits on stolen land," whether she views "colonialism" as "good or bad," whether she "believe[s] that race is embedded in contemporary American society," and so on. (Isaak Decl. Ex. 5 at 7-12.)

Of course, none of this had anything to do with Gilley's claims arising from having been blocked on a single occasion by stabin (who reported to Vice President Hunter), which Vice President Alex-Assensoh knew nothing about. The deposition of Vice President Alex-Assensoh revealed that the actual motivation for Gilley's lawsuit was to punish the University and the head of its Division of Equity and Inclusion for their commitment to DEI. Far from the case being about free speech, it was apparently about a set of views that Gilley and his counsel deem unacceptable, worthy of condemnation, and inappropriate for senior university officials to hold. It was not about the free flow of ideas but rather promoting Gilley's orthodoxy.

On this episode alone—the deposition of Vice President Alex-Assensoh—we estimate that the University spent roughly $18,500 in fees for its outside counsel's time, including litigating the necessity and timing of the deposition, preparing the witness, and defending the deposition. Although the episode involving Vice President Alex-Assensoh was particularly egregious, it is one of many examples of Gilley's counsel driving up litigation costs by picking gratuitous fights and wasting effort on matters collateral to prosecution of Gilley's legal claims.[3]

b. Litigation of the Preliminary Injunction

The vast majority of the two-and-a-half-year litigation has been spent disputing whether a preliminary injunction should issue against the Division. This whole effort was an epic waste of time, effort, and money for everyone involved. Although Gilley eventually won a preliminary injunction, the injunction had no practical consequence. It required the University to continue doing what it was doing, what it had always done (except for the single occasion when Gilley was blocked), what it planned to continue doing in the future, and what it specifically told Gilley it would do with respect to him in particular.

This case unfolded on the following schedule:

[3] The University could offer many other examples of wasteful and burdensome litigation tactics by Gilley; the page limit on this submission does not permit a full accounting. As another example, when Gilley appealed Judge Hernández's order denying his motion for preliminary injunction, the University cross-appealed to present arguments about mootness (which is an element of subject-matter jurisdiction). Of course, every federal court always has jurisdiction to decide its subject-matter jurisdiction and the Ninth Circuit has repeatedly held that the doctrine of pendent appellate jurisdiction allows cross-appeals in these circumstances. *See Smith v. Arthur Andersen LLP*, 421 F.3d 989, 998 (9th Cir. 2005); *Wong v. United States*, 373 F.3d 952, 960 (9th Cir. 2004). Yet, Gilley moved to dismiss the University's cross-appeal anyway. This forced the University to incur the costs of researching and writing an opposition to Gilley's frivolous motion. The University estimates that it spent roughly $12,000 on this flare-up alone.

DATE	PHASE
Aug. 11, 2022 – Aug. 16. 2022	Complaint is filed (Aug. 11, 2022); Gilley is unblocked (Aug. 12, 2022); UO General Counsel emails a letter to Gilley's counsel saying that Gilley has been unblocked and won't be blocked again, asking for the case to be dismissed (Aug. 16, 2022).
Sept. 8, 2022 – Dec. 16, 2022	Expedited discovery on motion for preliminary injunction. (Defendants served no discovery requests and took no depositions; all discovery in this period was prosecuted by Plaintiff.)
Dec. 16, 2022	Half-day evidentiary hearing on motion for preliminary injunction, with oral argument about Defendants' motion to dismiss for mootness.
Jan. 26, 2023	Opinion and Order issued denying motion for preliminary injunction and motion to dismiss for mootness.
Feb. 6, 2023	Plaintiff files an appeal from denial of the motion for preliminary injunction.
Feb. 6, 2023 – May 23, 2024	Appeal pending; district court proceedings stayed.
May 29, 2024 – July 10, 2024	Briefing on effect of appeal and whether a preliminary injunction should issue.
July 23, 2024	Opinion and Order granting motion for preliminary injunction in part.
Oct. 23, 2024	Status conference with Court.
Feb. 6, 2025	Judicial settlement conference.

As the above case schedule shows, virtually the entire case focused on whether a preliminary injunction should issue, including the 15-month period that the case was on appeal.

While Gilley assuredly felt victorious when he "won" the preliminary injunction appeal, one must ask: **what did he actually win?** Since the time Gilley was unblocked from interacting with the @UOEquity Twitter page the day after he sued, he was free to interact without restriction of any kind. As the University told him the week his lawsuit was filed and then repeatedly thereafter, the Division had no intention of blocking him again or otherwise interfering with his ability to interact with the @UOEquity Twitter subaccount in any way. Indeed, the letter sent by University General Counsel Kevin Reed to Gilley's lawyers on August 16, 2022—five days after the lawsuit was filed—said:

> Prof. Gilley (@BruceDGilley) was unblocked from the Twitter account at issue (@UOEquity) last Friday, August 12, 2022, and the Division of Equity and Inclusion does not intend to block him or anyone else in the future based on their

> exercise of protected speech. My office has reinforced to our colleagues who control the University's multiple social media channels that, if they open such channels to comments, they may not block commentary on the basis of the viewpoints expressed. I have further confirmed that those social media channels controlled by UO's central communications unit have no blocked users.

(Isaak Decl. Ex. 2.) After Gilley received this letter, he then spent nearly ***two years*** fighting for a preliminary injunction. But when he finally received it, the relief he was awarded added nothing to what he already had. To put a finer point on it: if the University's counsel had never told stabin's successor that a preliminary injunction had issued, as a practical matter Gilley's rights would have been unaffected.

The preliminary injunction barred anyone managing the @UOEquity Twitter subaccount from "(1) muting, deleting, or hiding his [Gilley's] posts on @UOEquity because they are 'hateful,' 'racist,' 'otherwise offensive,' or 'out of context,' 'off topic,' or 'not relevant'; and (2) blocking Plaintiff from interacting with @UOEquity." (ECF #80 at 11.) The preliminary injunction did not extend to any social media account other than the Division's @UOEquity subaccount and it did not apply to any user other than Gilley. In other words, the preliminary injunction ordered that Gilley be allowed to interact with @UOEquity without restriction, which is what the University had promised Gilley two years earlier it would do and what it in fact had been doing already. Plaintiff's pyrrhic victory won for him absolutely nothing.[4]

III. The Settlement Cannot Itself Be a Basis to Award Fees Against the University

Gilley may argue that the concessions he won in the settlement agreement are significant and worthy of a substantial fee award. The University respectfully disagrees.

There was never much daylight between Gilley's and the University's position on what the First Amendment requires of public employees who control and monitor the social media accounts of government institutions. The University agrees that social media moderation is subject to First Amendment limitations, that viewpoint discrimination is impermissible, and that content-based moderation actions are permissible only under narrow circumstances. That was the University's position before Gilley sued and it is reflected in the fact that Gilley could find evidence of only two other occasions when users were blocked from interacting with University social media accounts—in the entire history of the University.[5] (As a point of reference, over the past decade, there have been 2,558 retweets and replies directed at the @UOEquity subaccount. (ECF #46.))

[4] The only thing that could justify fighting for the injunction is if the University demonstrated bad faith in keeping its word in the past and Gilley's counsel had a basis to assume the University's counsel would exercise bad faith in this case too and go back their word. Nothing supports such an assumption.

[5] Even with respect to these two incidents it is not clear that anything inappropriate or unlawful occurred. Not enough is known to draw any conclusions about why these blockings occurred.

The broad agreement between Gilley and the University is reflected in the fact that most of the negotiation between the parties before and during the judicial settlement conference focused on other elements of the deal, like attorneys' fees, terms of a joint stipulation, and whether the University would pay nominal damages by check on which its logo is printed. After the judicial settlement conference, Gilley's counsel proposed specific terms for how the University's social media guidelines could be clarified; the University accepted the proposal with only minor edits.

At most, Gilley's lawsuit shows that the University's social media guidelines were not written as clearly as they could be (although the way the University interpreted its guidelines was constitutional). As a result of the settlement, the University will now clarify the guidelines so that their text unambiguously aligns with how they already were understood and implemented. That is what Gilley achieved with this case: clarification of the social media guidelines so their text conforms more clearly to existing practice.

In the settlement agreement, the University also agrees to publish on its website a way for users to challenge a future blocking decision. This, too, was an easy concession because it merely formalizes what is already in place. As explained at length in this letter, if Gilley had raised stabin's decision to block him to her supervisor or even the General Counsel's Office, he would have been unblocked immediately. So too for any other blocked user. Now an email address will be publicized, which will save anyone blocked in the future the inconvenience of having to google Kevin Reed's contact information (which is on his University webpage bio).

These are not significant litigation achievements, as the University's social media moderation practices were not unconstitutional when this case was filed. If Gilley's two-and-a-half-year-long litigation effort proved anything, it is that the University's social media moderation practices are fairly good. There was never a widespread problem of blocking or censoring users who interact with University subaccounts. Rather, as Judge Hernández found, stabin's mistake was a one-off "anomaly" by a single, now-retired employee. (ECF #57 at 33.)

IV. The Most Lasting Impact of This Case Is an Issue Gilley Lost

In addition to the modest achievements of Gilley's litigation efforts, one must consider a significant issue on which Gilley lost. Gilley argued that a social media channel opened by the University should be held to the First Amendment standards of a "designated public forum." (ECF #57 at 21.) Judge Hernández rejected this argument and instead adopted the University's position that the @UOEquity Twitter page was a "limited public forum," which is subject to content-based speech restrictions (such as deletion of off-topic posts). (ECF #57 at 22-23.) Judge Hernández reiterated this holding in his preliminary injunction ruling after the Ninth Circuit appeal. (ECF #80 at 10 ("The Court held that the @UOEquity account was a limited public forum, meaning that any restrictions on speech must be reasonable and viewpoint-neutral. … The Ninth Circuit did not disturb that conclusion.").)

If anything—far from expanding First Amendment protections for users of social media—Gilley's case created what he and the Institute for Free Speech must consider to be "bad law." Although the University appreciates that it won this legal argument, the long-term impact of this case will generally be maintenance of the status quo, rather than change catalyzed by Gilley and his counsel. Gilley should get no fees for pressing and then losing that argument.

V. The Court Should Award Gilley No More Than The $95,000 Minimum

Thus far, this submission has not addressed what legal standards should guide Your Honor's decision on the amount of fees to be awarded. That is not an oversight. Gilley is not the "prevailing party" in this case and is not entitled to an award of fees based on prevailing party status. *See Lackey v. Stinnie*, 145 S. Ct. 659, 668-71 (2025) (holding that to recover fees as a prevailing party under Section 1988, "a court [must have] conclusively resolve[d] [the] claim by granting enduring relief on the merits" and that "a voluntary change in the defendant's conduct" does not suffice). Indeed, the two stipulated dismissals entered in this case expressly provide that Gilley is *not* the prevailing party. (ECF #95, #96.)

While the parties negotiated a settlement agreement that deferred a decision on fees to Your Honor, the parties did not agree that any particular set of legal rules or doctrines would cabin that decision. The University trusts Your Honor's sound judgment, informed by decades of experience, to decide an appropriate award in the exercise of Your Honor's discretion.

Having said that, several legal principles may be helpful to Your Honor in thinking through the amount of an appropriate fee award.

First, as mentioned, Gilley is not entitled to an award of fees on account of "prevailing party" status. He did not prevail in this case and, the University maintains, he would not have prevailed if the litigation had continued. *See* Defs' Mot. for Sum. Judgm't (ECF #91).[6]

Second, in the absence of prevailing party status, Section 1983 plaintiffs have sometimes persuaded federal courts to award fees when their efforts catalyzed a voluntary change in the defendant's conduct. The Supreme Court recently disclaimed this rationale for awarding fees, *see Lackey*, 145 S. Ct. at 668 (discussing the holding of *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res.*, 532 U.S. 598 (2001)), but, in any event, as discussed

[6] As discussed at the judicial settlement conference, the University had a strong probability of obtaining summary judgment on Gilley's claims against stabin based on qualified immunity, per on-point controlling Ninth Circuit cases. Whether Judge Aiken would have granted summary judgment on Gilley's claims for prospective relief is perhaps a closer question; but, even if she had denied summary judgment on the prospective claims, the University did not perceive a substantial risk that Judge Aiken would exercise her discretion to impose a permanent injunction. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) ("The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court[.]").

above, Gilley's lawsuit has not catalyzed significant change by the University.

Relatedly—***third***—federal courts routinely reduce fee awards where the amount of fees sought is disproportionate to the magnitude of what the plaintiff achieved. *See, e.g.*, *McGinnis v. Kentucky Fried Chicken*, 51 F.3d 805, 808 (9th Cir. 1994) ("[T]he district court must reduce the attorneys' fee award so that it is commensurate with the extent of the plaintiff's success."). Here, that reasoning applies in spades. Gilley did not win a single dime in damages. Further, as discussed, most of what the plaintiff spent this litigation achieving—the preliminary injunction—he could have gotten with a single prefiling phone call. And Gilley's modest settlement agreement achievements are entirely offset by the significant point of law on which Judge Hernández ruled against him (i.e., whether the @UOEquity subaccount was a "designated" or "limited public forum). (ECF #57 at 21-23; ECF #80 at 10.)

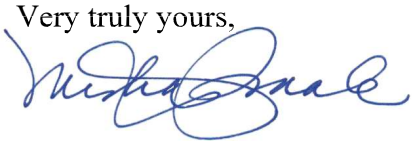
Fourth, federal courts routinely reduce fee awards when parties are found to have engaged in wasteful and unnecessary litigation, needlessly occupying scarce judicial resources and driving up the litigation costs of their adversaries. *See, e.g.*, *Bell v. VF Jeanswear LP*, 819 F. App'x 531, 534 (9th Cir. 2020) ("[T]he district court did not abuse its discretion in reducing the lodestar formula by 40 percent based on its finding that Bell's counsel substantially protracted the litigation."). The concern about driving up litigation costs is particularly acute where, as here, the adversary is a public entity and it is the taxpayers' money being wasted.

The University respectfully submits that these factors counsel toward awarding no fees. However, as a concession to allow the case to settle, the University accepted Your Honor's proposal that at least $95,000 be awarded. Accordingly, the University respectfully requests that fees be awarded for $95,000 and no more.

* * * * *

In this case, Gilley and his counsel turned an isolated mistake by a low-level University employee (who is now retired) into major federal court litigation. They could have avoided the expenses and burdens of litigation entirely with a single phone call. They did not. Instead, they dragged the University through a two-and-a-half-year-long legal battle that has cost the pubic fisc more than $500,000. These tactics should not be rewarded. For the foregoing reasons, the University respectfully requests that a fee award should not exceed $95,000.

Very truly yours,



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