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Special Committee on Litigation Meeting - Open Session Packet 10/20/2022

UC Hastings Board of Directors

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Special Committee on Litigation Minutes

University of California Hastings College of the Law

October 13, 2022

Willkie, Farr & Gallagher, 1 Front Street, San Francisco, CA 94111. Participants and members of the public were also able to join the open session via the web link or dial-in numbers listed in the public notice of this meeting linked here: <https://www.uchastings.edu/our-story/board-of-directors/board-meeting-notices-agendas-and-materials/>.

1. Roll Call

The Vice Chair called the meeting to order at approximately 9:00 a.m., and the Secretary called the roll.

Committee Members Present

Director Simona Agnolucci, Acting Chair

Director Andrew Giacomini

Director Chip Robertson

Committee Members Absent

Director Courtney Power, Chair

Other Directors Present

Director Shashi Deb

Director Mary Noel Pepys

Director Albert Zecher

Staff Participating

Chancellor & Dean David Faigman

General Counsel & Secretary John DiPaolo

Assistant Chancellor & Dean/Chief of Staff to the Chancellor & Dean Jenny Kwon

Deputy General Counsel Laura Wilson-Youngblood

Others Participating

Theane Evangelis, Esq., Gibson, Dunn & Crutcher

Matthew Kahn, Esq., Gibson, Dunn & Crutcher

2. Public Comment

The Acting Chair invited public comment. No member of the public offered comment.

3. Approval of Meeting Minutes
 - 3.1. Meeting of September 09, 2022
 - 3.2. Meeting of September 27, 2022

Motion:

The Acting Chair called for a motion to approve both sets of minutes, with an edit to the September 9, 2022 minutes to note that Director Pepys was present at that meeting.

Motion made and motion seconded. The motion carried.

The Board entered closed session pursuant to Education Code Section 92032(b)(5). All persons present for the open session were also present for the closed session.

Discussion of Litigation Regarding Name of the College

- 3.3. Discussion with Counsel re Assessment of the Case; College Strategy; Plaintiffs' Strategy; Current Work.

Mr. Kahn updated the Committee on the status of the litigation. He indicated that the complaint's naming individual Directors and the Dean as opposed to the College as defendants was a surprise, especially since that opens plaintiffs up to an anti-SLAPP motion. He said that the Bill of Attainder and Ex Post Facto claims also came as a surprise. The plaintiffs have not yet served the complaint, but the litigation strategy continues to include moving the case forward quickly. Ms. Evangelis said that one of benefits of filing an anti-SLAPP motion is that it allows defendants to seek attorneys fees. The Gibson Dunn team recommended filing an anti-SLAPP motion in connection with a demurrer, which is consistent with the College's narrative. They also noted that the denial of an anti-SLAPP motion is automatically appealable, where a demurrer is not. Dean Faigman asked for more information regarding dismissal under demurrer and the likelihood of success if all allegations in the complaint are taken as true. Mr. Kahn said that Gibson Dunn thinks that even accepting all allegations as true in the demurrer, there is a good basis for the College to win given standing issues and the lack of a contract. One way in which the College could lose is if the court thinks there are factual issues that need to be decided as matter of law. Dean Faigman also asked whether the complaint will be dismissed with prejudice if the College wins the anti-SLAPP motion. The Gibson Dunn team confirmed that the complaint would be dismissed with prejudice if the College wins the Anti-SLAPP motion. They also

indicated that the anti-SLAPP motion would require the plaintiffs to submit evidence to support their claims and shifts the burden. The Committee asked about timing for the filings, and Mr. Kahn responded that the demurrer would need to be filed within 30 days after service and the anti-SLAPP motion within 60 days after service. He noted that the defendants do not have to wait to be served to file.

The Committee, Gibson Dunn, and the College administration discussed the strategy of filing a demurrer and/or anti-SLAPP motion and the order in which to do so. The Committee asked about coordination with Attorney General's office on these efforts. Mr. Kahn responded that he has had conversations with the Attorney General's and Governor's offices about this. Their plan is to wait until they are served, and they have yet to decide which section of the Attorney General's office will handle the case. He expects that coordinating with them would mean that the case moves more slowly, which is not what the College wants. Director Giacomini pointed out that if the claims against the Directors and Dean are dismissed on the Anti-SLAPP motion, the claims against the state remain. The Committee discussed strategic issues and potential for coordination with the Attorney General's office on the remaining claims even if the claims against the Directors and the Dean are dismissed, including on the possibility of specific performance with respect to the plaintiff's contract claim.

Director Agnolucci asked about the possibility of dismissing Dean Faigman and the Directors as defendants. Mr. Kahn said that all are properly named, though there may be grounds for dismissal. Dean Faigman indicated that the College would not want to pursue that strategically. Dean Faigman raised the issue of insurance coverage if the College files an Anti-SLAPP motion. Mr. Kahn indicated that he cannot speak to insurance coverage, but noted that such a motion is not analogous to a counterclaim or crossclaim. Rather, it is a strategy to end the lawsuit quickly. To that end, he said that the Gibson Dunn team would like to be able to file as soon as possible. They are already working on the demurrer, and they propose filing the Anti-SLAPP motion first. He also said that Gibson Dunn has a meet-and-confer on the demurrer on Monday, but that they do not need to meet and confer with plaintiffs on the anti-SLAPP motion. The Committee asked about timing for briefing, hearing and a decision. Mr. Kahn said that if filing is done this month, there could be a hearing in late November and a decision in December. He noted that the motion would be heard by Judge Ulmer, which Gibson Dunn thinks is a good draw. Mr. DiPaolo noted that if the College wins,

then it would be relying on the state to win on the contract claim and the specific performance issue. Mr. Kahn said that is a downside risk of demurrer, but that based on Director Robertson's insights and his experience, the Attorney General's office would probably allow Gibson Dunn and the College to be involved in practice if not in theory in litigating the remaining claims. Director Robertson asked about the likelihood that plaintiffs would move forward with the claims after the College files. Ms. Evangelis and Mr. Kahn expressed that filing the Anti-SLAPP motion could make the plaintiffs drop all claims against the College. Ms. Evangelis also suggested that if the College won, it could negotiate to settle the case by telling plaintiffs that it would decline to pursue attorney fees in exchange for dismissal of claims against the state as well. Dean Faigman, Director Giacomini, Director Agnolucci, Director Robertson, Mr. DiPaolo, and Ms. Wilson-Youngblood indicated their support of moving forward with Gibson Dunn's proposed strategy of filing the Anti-SLAPP motion and demurrer. Director Robertson suggested that Gibson Dunn reach out to brief the Attorney General's office on this strategy before moving forward. Mr. Kahn and Ms. Angelis left the meeting.

3.4. Discussion of Committee and Administration re Insurance and Other Matters

Mr. DiPaolo informed the Committee that he and Ms. Wilson-Youngblood met with three potential coverage counsel last week. Dean Faigman also joined for one of those meetings. The meetings provided an opportunity to hear different coverage analyses. The potential coverage counsel included Byrne Conley, Debra Sturman, and Tyler Gerking. Mr. DiPaolo said that he and Ms. Wilson-Youngblood particularly liked Mr. Conley and Mr. Gerking. He also said that he, Ms. Wilson-Youngblood, and Dean Faigman conferred, and their inclination is toward Tyler Gerking. He is from a firm of similar repute to Gibson Dunn, and he presented a strategic approach that Mr. DiPaolo, Ms. Wilson-Youngblood, and Dean Faigman liked. His billing rate is higher than Byrne Conley, but he also uses associates and he will go back to his committee and see what he can do on reduced fees. Director Agnolucci said that she has worked with Mr. Gerking before and has a positive opinion of him as coverage counsel. Mr. DiPaolo said that both Mr. Conley and Mr. Gerking think that the College has coverage for at least some of the defense costs even if the claim is not for money damages. They identified a potential dispute over the selection of a defense firm. There are equitable arguments for attorney hiring, including that the College went to United Educators at the outset and the response received was that they did not have an immediate opinion given the relative novelty of the claims. There is a potential

conflict between an insured and insurer if the insurer reserves rights on some claims that would allow the College to select its own counsel. Mr. DiPaolo said that Mr. Conley indicated that there might be coverage under the College's General Liability Policy as well because some of the claims sound like defamation claims. Mr. DiPaolo said that the College would not have coverage counsel do work until it receives a formal coverage position from United Educators.

4. Adjournment

The Acting Chair reconvened the open session at 10:01 a.m. She indicated that there were no actions to report from the closed session, and adjourned the meeting at 10:02 a.m.

Respectfully submitted,

John K. DiPaolo, Secretary