

From: J <jeevacation@gmail.com>
To: Lawrence Krauss <[REDACTED]>
Subject: Re: Krauss settlement agreement - revised draft
Date: Sat, 20 Oct 2018 12:15:54 +0000

yes, terminate

On Sat, Oct 20, 2018 at 8:08 AM Lawrence Krauss <[REDACTED]> wrote:

So here is the situation.. I need to get retirement letter done before I go to bed tonight, by, say 1 am my time. Also, I would like to terminate Justin, and contact Kim and Cynthia and indicate that I will deal with them directly on redacting the documents. If you agree with this course, I suggest I send that on to them after I send in the retirement letter.

Next, given that they have specifically said that they are releasing both the settlement agreement (which I would have thought should be confidential) and the retirement letter as early as Monday, along with the Provosts determination, which includes all the OEI results before my appeal, I think we need to do the full retirement letter with all the bells and whistles. Because otherwise the information that the material in the Provosts determination is wrong will not get out.. any letter I write to the president following my retirement letter will not be released to the press at that time, and if it gets out eventually, it will be after all this has appeared to the press.. So, we go back to plan A I think.

Thoughts?

Begin forwarded message:

From: Justin Dillon <[REDACTED]>
Subject: Fwd: Krauss settlement agreement - revised draft
Date: October 20, 2018 at 1:51:17 PM GMT+2
To: Lawrence Krauss <[REDACTED]>

Lawrence,

The deal is done—see attached. But re the PRR, I had a feeling this was going to happen—they are going to release everything Monday and aren't going to wait for you to talk about it next week. See below for details.

If you are going to handle this yourself, let me know, and I will tell Kim that you will deal with her or Cynthia directly and that you will respond substantively to her email. But now that we have signed the deal, I don't want to be sending emails you dictate anymore. I was willing to go along with that when we were in the final stages of getting the deal done, but it's not how I practice law.

Thanks, and please let me know.

Justin

Justin Dillon

KaiserDillon PLLC
1401 K St. NW
Suite 600
Washington, DC 20005
[REDACTED]

From: Kimberly Demarchi <[REDACTED]>
Sent: Friday, October 19, 2018 11:29 PM
To: Justin Dillon
Subject: RE: Krauss settlement agreement - revised draft

Justin,

Enclosed please find a fully executed copy of the settlement agreement.

With regard to the public records, the University will not be able to delay releasing records in response to already pending requests once it makes a public statement that the agreement has been reached, since the pending proceedings were the reason that we did not respond previously (and those proceedings are now concluded). So please get your client's comments to us as soon as possible so that we may consider them before we release the documents. We expect to release our statement and the documents on Monday, after we receive your client's written retirement letter.

In turning the comments around quickly, it may help to focus on the potentially relevant pages, which are only 10 of the pages provided to you.

The documents are in two files, named PRR Response part 1 and PRR Response part 2. PRR Response Part 1 contains only five pages of letters relating to Dr. Krauss's employment – his 2008 offer letter, a 2014 letter confirming funding commitments, and the 2018 letter providing notice of the non-renewal of his Foundation Professorship and his administrative appointment. The salaries, titles, and dates of employment of University faculty and administrators are generally public information and we do not customarily redact these types of documents, with the exception of having already redacted Dr. Krauss's non-public email address on the 2018 letter.

PRR Response Part 2 contains the 33-page letter from Provost Searle to Dr. Krauss providing him with Determinations on the complaints filed against him.

However, pages 11-33 are just copies of various University policies referenced in the letter, which are publicly available on the University's website and which we would therefore not redact. So you're really just looking at pages 1-10, which are the letter and the attached Determinations. I therefore hope you will be able to address this quickly so that we may consider your input before the release of the documents.

Please note that we will also be releasing the executed settlement agreement and your client's written retirement letter.

Best wishes,
Kim

Kimberly A. Demarchi

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From: Justin Dillon <[REDACTED]>
Sent: Friday, October 19, 2018 1:32 PM
To: Kimberly Demarchi <[REDACTED]>
Subject: Re: Krauss settlement agreement - revised draft

Thanks, Kim. We'll get back to you about this early next week, once he's back from Germany.

Justin Dillon

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[REDACTED]
[REDACTED]

On Oct 19, 2018, at 12:52 PM, Kimberly Demarchi <[REDACTED]> wrote:

Justin,

In terms of additional redactions, why don't you and Dr. Krauss mark up the documents to indicate what else you think should be redacted so we can consider those potential additional redactions? I've reattached the copies for your convenience.

Thanks,
Kim

Kimberly A. Demarchi

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From: Justin Dillon <[REDACTED]>
Sent: Friday, October 19, 2018 9:35 AM
To: Kimberly Demarchi <[REDACTED]>
Subject: Re: Krauss settlement agreement - revised draft

Kim,

Thank you for clarifying ASU's position. Attached is the Agreement, signed by both me and Professor Krauss. I did not make any changes to the non-redlined version you sent.

Now, as to the PRR response: Professor Krauss's concern is that what ASU proposes to release would invade the privacy of and disparage not only him, but other people, too—Amelia, Lucy Hawking, etc. He therefore feels that the documents would need to be redacted further, and he's happy to work with you on that. The same is true if his own appeal were to be released, which is why he wanted to know if you intended to release that, too. So after we get this signed, he would like to work cooperatively with ASU to comply with the PRR in a manner that protects everyone—ASU, him, and the people named in the documents. If ASU doesn't want to work with him, that's certainly their right, but he's making this request in genuine good faith.

Thanks,

Justin

Justin Dillon

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[REDACTED]
[REDACTED]

On Oct 18, 2018, at 11:47 PM, Kimberly Demarchi <[REDACTED]> wrote:

Justin,

I have provided you with exactly what we intend to release, complete with the redactions that have been applied in preparation for their release. If you check those documents carefully, the OEI reports are not there. The only documents in that set that reference the allegations against your client are the letter from Dean Searle and the attached, brief descriptions of OEI's determinations. (See the file titled PRR Response part 2 at pages 1-10.) The other file (PRR Response part 1) includes only contract documents, including the non-renewal of your client's administrative appointment, which does not make any reference to the allegations. We would also expect to release the fully executed agreement (which you will have seen) and your client's written retirement letter (which we do not yet have).

At present, we do not intend to produce Dean Kenney's recommendation of dismissal (which has a longer description of the underlying allegations), the three documents you sent this morning, or the OEI reports. I've explained to you why we believe we can withhold those documents under applicable law, including the University's interest in not chilling participation in investigations by identifying complainants or witnesses. I can't guarantee that we will prevail in our interpretation of the law, but that is our current plan. And the notice provisions of the draft agreement would apply to any future release of public records, meaning that your client would receive notice if further documents were to be released in the future.

Should your client choose to make any statements, including releasing documents in which he names complainants and witnesses and makes statements about them, he should be cognizant of both the non-disparagement provisions and the practical effect that such a release may have on the University's ability to maintain its position regarding the release of other documents in response to public records requests. That doesn't mean he can't say anything. But in light of your email this morning indicating that he intended to release documents and that it would make the University look like it was trying to hide something if he had to do so, it seemed important to provide that reminder.

Kim

From: Justin Dillon <[REDACTED]>
Sent: Thursday, October 18, 2018 7:13 PM
To: Kimberly Demarchi <[REDACTED]>
Subject: Re: Krauss settlement agreement - revised draft

Thanks, Kim. I'll forward this and talk to Professor Krauss tomorrow morning. In the meantime, can you clarify something: are you saying that it would not constitute disparagement for ASU to release what he considers to be a terribly biased and unfair report by OEI, but it would constitute disparagement for him to release his appeal of that report? I'm not asking this rhetorically. I really do want to understand your position, because I cannot imagine that I am interpreting you correctly. Am I misinterpreting you, and you did not previously indicate that ASU intended to release the OEI report? Thank you very much.

Justin

Justin Dillon

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[REDACTED]

From: Kimberly Demarchi <[REDACTED]>
Sent: Thursday, October 18, 2018 10:05:05 PM
To: Justin Dillon
Subject: RE: Krauss settlement agreement - revised draft

Justin,

Enclosed please find a revised agreement. I accepted all your changes, then redlined my changes against that version. Both clean and redline versions are attached.

EFTA01019077

Cindy will not be available tomorrow to approve the form, so I've switched her name for mine since I am available to sign. I also added a missing underline in one of the headings.

The donations paragraph now provides for a return of funds to the donors rather than a transfer from the Foundation. That reduces the ASU Foundation's involvement with determining to whom they can transfer. An added benefit for your client is that he doesn't necessarily need to have another organization available to accept funds within 90 days – he just has to have the donors ask for their money back, and then he can ask them to re-donate it when he is ready to do so.

My clients will not agree to add the effective date of retirement to the statement as that, without more, fails to convey that Dr. Krauss will remain on leave, away from campus, and without authority to take actions on behalf of ASU between now and May. They might agree to a longer statement that explained all those things, along the following lines:

The University has accepted Dr. Krauss's request to retire from his position as Professor at Arizona State University. His resignation will take effect at the end of the academic year, May 16, 2019. Until that time, Dr. Krauss will remain on leave, will not be on campus, and will have no authority to act for or on behalf of ASU.

To the extent that your client is concerned that the statement alone suggests he is leaving immediately, you should keep in mind that we are likely to need to release the agreement and your client's resignation letter at or near the time we make the statement, because of the pending public records requests and the ones we may get in response to the statement itself. So to the extent the press gets the shorter statement, they will get the full picture.

That brings me to the topic of public records, and your suggestion that ASU should release the three documents attached to your email so that Dr. Krauss does not do so.

ASU does not intend to release either Dean Kenney's recommendation of dismissal or Professor Krauss's appeal or, similarly, the other two documents you have attached. We do not believe we have an obligation under public records law to release these documents. If we are able to reach an agreement under which Dr. Krauss retires, then these are not discipline records within the meaning of ARS 39-128 and ABOR 6-912. Moreover, disclosing these records would have a chilling effect on persons coming forward to make complaints of possible policy violations and participating as witnesses in internal investigations. Even with names redacted, the records reveal sufficient information to permit identification of the witnesses.

I will leave it to you to advise Dr. Krauss regarding whether and how he decides to act, but would suggest that you consider both the non-disparagement obligations of the settlement agreement and the potential that Dr. Krauss releasing these records could make it more likely that the University will have to release additional records arising from this investigation.

I will be in and out of meetings tomorrow, but will endeavor to keep a close eye on email in case you have any questions. Please keep in mind that any further changes require me to talk to multiple individuals to obtain approval, and those individuals are becoming increasingly concerned that these negotiations are continuing to extend and that if we cannot conclude them soon we will have to move forward with the administrative procedures in order to complete them in a timely manner.

Best wishes,
Kim

Kimberly A. Demarchi

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From: Justin Dillon <[REDACTED]>
Sent: Thursday, October 18, 2018 7:02 AM
To: Kimberly Demarchi <[REDACTED]>
Subject: Re: Krauss settlement agreement - revised draft

Kim,

Here's my redline back. In short, we're fine with the Origins language. My other changes are mainly cosmetic, as you'll see. I've changed the caption on the statement to make clear that it is ASU's statement, not a mutual statement, and also changed language to clarify that the statement won't be released until he has tendered his written retirement under Paragraph 1, which he is required to do within 24 hours of the last party's signature. I also put back into the public statement when his retirement will become effective, so that it does not falsely imply that he has been forced out immediately. I also corrected the spelling of my name, added his middle initial in two places, and so on.

Also, and apart from the agreement, we'd like to talk about what ASU is going to release in response to the PRR and when it will release it. Prof. Krauss is concerned that some of the material in the report could be defamatory of Amelia and should be redacted. He would also like ASU to release the three attached documents he submitted as part of his appeal, all of which I've attached here. If ASU won't do that, then obviously he will, but he thought it would look better if ASU didn't look like it was trying to hide from anything.

Finally, we would appreciate notice about when ASU plans to release the public statement, so that he can be ready for the inevitable deluge of press questions.

Thanks, and please let me know if you have any questions.

EFTA01019078

Justin

Justin Dillon

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On Oct 17, 2018, at 9:22 PM, Justin Dillon <[REDACTED]> wrote:

Thanks, Kim. This is a lot to digest, and Professor Krauss is currently on a plane to Germany. I will try to get back to you tomorrow, but I thought we were done with manufactured deadlines now that we've been going back and forth in good faith for almost a week. Doing that strikes me as needlessly aggressive, bordering on bad faith by your client, so I'd be grateful if you could tell them to cut that out and let us continue to do this the way we've been doing it.

Thanks,

Justin

Justin Dillon

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On Oct 17, 2018, at 8:34 PM, Kimberly Demarchi <[REDACTED]> wrote:

Justin,

Attached is a revised draft agreement in clean and redline versions. My clients have authorized me to extend this offer through 5:00 p.m. Arizona time tomorrow, October 18.

The substantive changes are in two sections – the donated funds and the mutual release. Let me provide some context in the hope that it may be helpful.

With regard to the donated funds, please understand that what your client is asking for is highly unusual. Gifts to the ASU Foundation are irrevocable and the ASU Foundation does not generally return or transfer funds absent unusual circumstances. In addition, because the fund maintained by the ASU Foundation to accept gifts to support the Origins Project has had hundreds of donors over a period of nearly ten years, making a determination of how much of any particular donor's funds are available for transfer is complex and must be done with appropriate care for the Foundation's accounting obligations and its obligations toward other donors who gave to the fund and have not consented to the transfer. This is different from a research grant, which is accounted for individually and for which transfer is not uncommon as principal investigators move to different institutions. The attached draft reflects the complex and unusual nature of this request and the necessity that the Foundation make any determinations regarding the calculation of funds and regarding any requirements for the form in which it needs the donor's consent or direction regarding the transfer.

With regard to the mutual statement, we have removed the global reference to confidentiality and re-captioned this paragraph. We don't want to suggest that we're making an agreement prohibited by A.R.S. 12-720(D), which we aren't, given the specific provisions regarding non-disparaging statements and the release of public records. At this point, the provisions of the agreement doing the work are really the public records and non-disparagement provisions.

There are also a handful of non-substantive changes – adding a missing possessive apostrophe and changing the line spacing to keep the signature lines together and on a page with other text.

Also, in the spirit of compliance with what will be paragraph 5(b) if we reach agreement, I am attaching two sets of documents that the University anticipates releasing in response to pending public records requests at or near the time of the release of the public statement (should we reach agreement). Under our public records statute, we have been able to hold off on making these responses during the pending proceedings, but once we make a public statement we won't be able to hold onto them and still comply with a requirement of prompt disclosure. Given the requirements of Rule 4.2, I don't think I can send these to your client directly (as we contemplate would be the case for any future disclosures once the agreement is signed), so I am providing them to you instead.

I look forward to your response.

Best wishes,
Kim

Kimberly A. Demarchi

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From: Justin Dillon <[REDACTED]>
Sent: Tuesday, October 16, 2018 7:41 AM
To: Kimberly Demarchi <[REDACTED]>
Subject: Re: Krauss settlement agreement - revised draft

Kim,

Thanks for the quick response. And yes, I think that change makes a lot of sense.

Justin

Justin Dillon

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[REDACTED]
[REDACTED]

On Oct 16, 2018, at 10:39 AM, Kimberly Demarchi <[REDACTED]> wrote:

Justin,

I think I understand where you're going with these revisions, and I will follow up with my clients.

One quick clarifying question, though. Should the paragraphs be broken up as follows, rather than having the sentence "Only...." as part of subparagraph (b)?

4. If, in the next 90 days, any of the following donors to the ASU Foundation to support the Origins Project makes a request to transfer funds (outlined below) to another nonprofit organization, ASU will not oppose the transfer of funds and will request that the ASU Foundation make the requested transfer:

(a) All funds from major donors (those who contributed or pledged \$5,000 or more, including multiple donations from a single family) since January 1, 2017;

(b) unexpended funds from single major donors in excess of \$300,000 since 2010. Professor Krauss will provide a list directly to the ASU Foundation of the donors that, to his knowledge, fall in these categories, and the ASU Foundation will be solely responsible for confirming its validity, and if necessary reporting back to Professor Krauss with names added or removed from this list.

Only requests from these individuals or groups will be considered for transfer. It is expected that this list will include fewer than 20 donors, and based on the estimates available at the current time of ASU Foundation funds not expended as of October 2018, it is expected that the total available funds for this purpose will not be less than \$1 million dollars, and not more than \$1.3 million dollars. However, the ASU Foundation shall be solely responsible for providing an accounting of the amount of funds available for transfer under this arrangement.

Thanks,
Kim

From: Justin Dillon <[REDACTED]>
Sent: Tuesday, October 16, 2018 7:20 AM
To: Kimberly Demarchi <[REDACTED]>
Subject: Re: Krauss settlement agreement - revised draft

Kim,

Attached is my redline back. I made only two changes—one small change making clear that the agreed-upon public statement will be released "by ASU," and one big change about the Origins money. I think it might make sense for us to discuss this by phone. I completely understand ASU's money-is-fungible concerns, but I think this gets around it (especially since this money was donated for the Origins Project, and there is no more Origins Project). In any event, please let me know what you think. As you might imagine, this is a very important issue for Professor Krauss.

Thanks,

Justin

Justin Dillon

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On Oct 15, 2018, at 9:31 PM, Kimberly Demarchi <[REDACTED]> wrote:

Thanks, Justin. That's fine.

Kimberly A. Demarchi

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From: Justin Dillon <[REDACTED]>

Sent: Monday, October 15, 2018 5:17 PM

To: Kimberly Demarchi <[REDACTED]>

Subject: Re: Krauss settlement agreement - revised draft

Thanks, Kim. Given the lateness of the hour here and Professor Krauss's travel schedule, I will get back to you tomorrow about this.

Justin Dillon

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[REDACTED]
[REDACTED]

On Oct 15, 2018, at 8:00 PM, Kimberly Demarchi <[REDACTED]> wrote:

Justin,

I've attached a revised agreement for your review. As you've requested, I've revised the disclaimer obligation to extend to any ASU employee, rather than just the Participating Employees. I've also made some grammatical and clarifying revisions to that sentence.

I've also now gotten the information needed to respond on the proposed terms regarding donors who gave money to the ASU Foundation for the Origins Project. As it turns out, there are hundreds of unique donors, many of whom have given small amounts of money over the last ten years. Agreeing to unravel exactly how much of each of those donors' money is left at this point in time just is not feasible. However, the University is willing to agree that it would not oppose a request from the Black Family Foundation to transfer any of its donations that remain unspent and would request that the ASU Foundation honor the request. The ASU Foundation would of course have to have final responsibility for calculating the amount of funds unspent and available for transfer. I've made those revisions on the attached as well.

Please let me know your thoughts.

Best wishes,

Kim

Kimberly A. Demarchi

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From: Justin Dillon <[REDACTED]>
Sent: Monday, October 15, 2018 8:52 AM
To: Kimberly Demarchi <[REDACTED]>
Subject: Re: Krauss settlement agreement - revised draft

Kim,

I think what you propose is fine, but I think the word "Participating" in the last sentence is a typo. I think ASU is agreeing to, if asked, make the disavowal statement regarding any ASU employee (Participating or not) who purports to speak on ASU's behalf, right? That doesn't mean suppression, of course—just disavowal. Let me know what you think.

Also, Prof. Krauss is flying to Mexico today, so just to manage your own timing concerns, I suspect we won't be inking this until tomorrow. He should be fine once he's settled into the hotel.

Thanks, and feel free to call me if [REDACTED] like to discuss anything else.

Justin

Justin Dillon

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[REDACTED]

On Oct 15, 2018, at 1:11 AM, Kimberly Demarchi <[REDACTED]> wrote:

Justin,

I've reviewed your revisions, and I have some concerns about the non-disparagement provision. One of them (in the text preceding the lettered provisions) is just grammatical, but the others are substantive.

ASU can't bind the participating employees not to speak in their private capacities. The most we can agree is that we will respond if they speak in a way that suggests they're speaking for ASU, and clarify that they are not doing so. We also can and have proposed to agree to bind the relevant administrators who would, by virtue of their positions, be deemed to speak on behalf of the University.

In addition, while I'm sensitive to your concerns about the difficulty of defining media, I think we can agree that the need for such correction would only be necessary for statements that were in a public context.

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please note

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