

STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO ex rel.  
UNM SANDOVAL REGIONAL MEDICAL  
CENTER, INC.,

Petitioner,

v.

No. D-202-CV-2021-06067

NEW MEXICO PUBLIC EMPLOYEE  
LABOR RELATIONS BOARD,

Respondent,

and

UNITED HEALTH PROFESSIONALS  
OF NEW MEXICO, AFT, AFL-CIO,

Real Party in Interest.

**ALTERNATIVE WRIT OF MANDAMUS**

This Alternative Writ of Mandamus is hereby issued to Respondent New Mexico Public Employee Labor Relations Board.

The Court has jurisdiction over this matter under NMSA 1978, § 44-2-3 (1884). Venue is proper under NMSA 1978, § 38-3-1(A) (1988).

Petitioner UNM Sandoval Regional Medical Center, Inc. (“SRMC”) has come before the Court and submitted the verified petition attached hereto as Exhibit 1, setting forth grounds sufficient for issuance of this alternative writ.

Respondent is a statutorily-created state government board that has jurisdiction over collective bargaining and labor relations of “public employees” in New Mexico. NMSA 1978, § 10-7E-8(A) (2003) (creating PELRB); § 10-7E-2. Petitioner SRMC is a nonprofit “research

park corporation” created pursuant to the New Mexico University Research Park and Economic Development Act, NMSA 1978, §§ 21-28-1 to -25 (2007) (“URPEDA”) and the Nonprofit Corporation Act<sup>1</sup>, NMSA 1978, §§ 53-8-1 to -99 that owns a community teaching hospital in Rio Rancho, New Mexico. Real Party in Interest United Health Professionals of New Mexico, AFT, AFL-CIO (“Union”) filed a Petition for Certification with the PELRB on August 13, 2021, seeking to represent nurses and other employees of SRMC as the exclusive representative for collective bargaining.

As demonstrated in the verified petition attached hereto, the PELRB has unlawfully asserted jurisdiction over SRMC and its employees, thereby refusing to comply with URPEDA’s command that research park corporations “shall not be deemed” political subdivisions of the state. The PELRB’s refusal to give effect to both URPEDA and the PEBA, the PELRB has violated both New Mexico statute, NMSA 1978, § 12-2A-10(A), and long-standing New Mexico common law, *see, e.g., Wilburn v. Territory*, 1900-NMSC-028, ¶ 7, 10 N.M. 402 62 P.2d; *State v. Moore*, 1936-NMSC-044, ¶ 11, 40 N.M. 344, 59 P.2d 902 (“Where there is an apparent conflict between the two acts, without any repeal, the two will be reconciled”); *Clothier v. Lopez*, 1985-NMSC-088, ¶ 11, 103 N.M. 593, 711 P.2d 870 (the presumption should be that the legislature “did not intend to enact a provision inconsistent with any existing law.”).

Based on the showing made in the verified petition, Respondent’s refusal to comply with New Mexico law and respect its jurisdictional limits will cause SRMC and its employees to lose

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<sup>1</sup> “Any university may form, pursuant to the provisions of the Nonprofit Corporation Act or the Business Corporation Act, one or more research park corporations, separate and apart from the state and the university, to promote, develop and administer research parks or technological innovations for scientific, educational and economic development opportunities in accordance with bylaws adopted by the research park corporation or economic development initiatives that support the teaching, research or service mission of the university.” NMSA 1978, § 21-28-4(A).

fundamental rights guaranteed by federal law. This Writ of Mandamus is therefore warranted and shall issue.

It is therefore ORDERED that Respondent shall file a pleading responsive to the attached petition within thirty (30) days after being served with this alternative writ, or at the time of the hearing described below, whichever is sooner, and shall also either:

- A. Cease all proceedings related to the Petition for Certification filed by the United Health Professionals of New Mexico, AFT, AFL-CIO; *and*
- B. dismiss the Petition for Certification for lack of jurisdiction; or
- C. show cause why it should not be compelled to comply with (A) and (B) above.


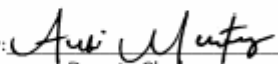
It is further ORDERED that if Respondent chooses to show cause rather than comply with the commands of Sections A and B, above, Respondent shall do so at a hearing to be held on November 30, 2021, at 8:30 a.m., at the Bernalillo County Courthouse, Albuquerque, New Mexico. Respondent is directed to notify the Court at once if Respondent takes action sufficient under the terms of this alternative writ to render the hearing unnecessary. **\*\*TELEPHONIC- PARTIES ARE DIRECTED TO CALL 1-800-747-5150 AND ENTER ACCESS CODE 4340781 AT THE TIME OF THE HEARING\*\***

  
\_\_\_\_\_  
DISTRICT COURT CLERK

  
\_\_\_\_\_  
DISTRICT COURT JUDGE

Petitioner's attorneys:

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.  
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Katina Watson  
SECOND JUDICIAL DISTRICT COURT  
CLERK OF THE COURT  
  
By:   
Deputy Clerk

**STATE OF NEW MEXICO  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

**In re:**

**UNITED HEALTH PROFESSIONALS  
OF NEW MEXICO, AFT, AFL-CIO**

**Petitioner,**

**And**

**PELRB Case No. \_\_\_\_\_**

**UNIVERSITY OF NEW MEXICO  
SANDOVAL REGIONAL MEDICAL  
CENTER,**

**Respondent.**

**PETITION FOR CERTIFICATION**

COMES NOW Petitioner, United Health Professionals of New Mexico, AFT, AFL-CIO (“AFT”), by and through its counsel of record, Youtz & Valdez, P.C. (Shane Youtz, Stephen Curtice, James Montalbano), and hereby seeks certification as the exclusive bargaining representative for purposes of collective bargaining, for the below-described unit of public employees employed by the University of New Mexico Sandoval Regional Medical Center, and as grounds therefore states as follows:

1. The Contact information for Petitioner is:

United Health Professionals  
of New Mexico, AFT, AFL-CIO  
530 Jefferson St. NE  
Albuquerque, NM 87108  
Tel.: (505) 266-6638  
Fax: (505) 266-1967  
*Petitioner*

Shane Youtz  
[shane@youtzvaldez.com](mailto:shane@youtzvaldez.com)  
Stephen Curtice

**Exhibit 1**

[stephen@youtzvaldez.com](mailto:stephen@youtzvaldez.com)

James Montalbano

[james@youtzvaldez.com](mailto:james@youtzvaldez.com)

Youtz & Valdez, P.C.

900 Gold Ave. SW

Albuquerque, NM 87102

Tel.: (505) 244-1200

Fax: (505) 244-9700

*Petitioner's Representative*

State or National Affiliation: AFT, AFL-CIO

2. The Contact information for University of New Mexico Sandoval Regional Medical Center is:

Correen Bales, HR Director

UNM Sandoval Regional Medical Center

3001 Broadmoor Blvd. NE

Rio Rancho, NM 87144

[mbales@srmc.unm.edu](mailto:mbales@srmc.unm.edu)

Tel.: (505) 994-7464

*Respondent*

3. The petitioned-for unit consists of all full-time, regular part-time, and per diem, non-probationary registered nurses and educators, excepting case managers, employed by the University of New Mexico Sandoval Regional Medical Center at its acute care hospital.

4. The petitioned-for unit excludes all supervisory, managerial, and confidential employees.

5. The geographic work location of the petitioned-for unit is Sandoval County.

6. The Petitioner estimates the proposed unit includes approximately 140 employees.

7. There is not a collective bargaining agreement covering any of the employees in the proposed bargaining unit.

8. The required showing of interest is hereby filed contemporaneously with this Petition. Petitioner seeks a card check pursuant to NMSA 1978, § 10-7E-14(C) (2020).

**DECLARATION**

I declare that I have read the above petition and certify under penalty of perjury that the statements herein are true to the best of my knowledge and belief.

Dated: August 13, 2021

Respectfully Submitted,

**YOUTZ & VALDEZ, P.C.**

/s/ Shane Youtz

Shane Youtz

[shane@youtzvaldez.com](mailto:shane@youtzvaldez.com)

Stephen Curtice

[stephen@youtzvaldez.com](mailto:stephen@youtzvaldez.com)

James Montalbano

[james@youtzvaldez.com](mailto:james@youtzvaldez.com)

900 Gold Avenue S.W.

Albuquerque, NM 87102

(505) 244-1200 – Telephone

*Counsel for Petitioner*

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was served on all parties to this action pursuant to 11.21.2.9 NMAC this 13<sup>th</sup> day of August, 2021.

Correen Bales, HR Director  
UNM Sandoval Regional Medical Center  
3001 Broadmoor Blvd. NE  
Rio Rancho, NM 87144  
[mbales@srmc.unm.edu](mailto:mbales@srmc.unm.edu)  
Tel.: (505) 994-7464  
*Respondent*

/s/ Shane Youtz

Shane Youtz

STATE OF NEW MEXICO  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

UNITED HEALTH PROFESSIONALS  
OF NEW MEXICO, AFT, AFL-CIO,

Petitioner,

And

PELRB Case No 306-21

UNIVERSITY OF NEW MEXICO  
SANDOVAL REGIONAL MEDICAL  
CENTER,

Respondent.

**RESPONDENT'S MOTION TO DISMISS PETITION FOR CERTIFICATION**

Respondent UNM Sandoval Regional Medical Center, Inc., (“SRMC”) moves to dismiss Petitioner United Health Professionals of New Mexico, AFT, AFL-CIO’s Petition for Certification filed on or about August 13, 2021, because SRMC is not a “public employer” within the meaning of the New Mexico Public Employees Bargaining Act (“PEBA”) and the Public Employee Labor Relations Board (“PELRB”) lacks jurisdiction over SRMC. As grounds for this motion, SRMC states as follows:

1. SRMC is a community teaching hospital in Rio Rancho, New Mexico.
2. SRMC is a nonprofit “research park corporation” created pursuant to the New Mexico University Research Park and Economic Development Act, NMSA 1978, § 21-28-1 to -25 (“URPEDA”). *See* SRMC Articles of Incorporation, relevant portions attached as Ex. A, at 1.
3. PEBA applies to “public employers” and “public employees” of New Mexico and was enacted “to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers

and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions.” NMSA 1978, § 10-7E-2.

4. A “public employee” is defined as “a regular nonprobationary employee of a public employer.” *Id.* § 10-7E-4(Q).

5. A “public employer” is “the state or a political subdivision of thereof, including a municipality that has adopted a home rule charter ... provided that [constitutionally-created state educational institutions] shall be considered public employers other than the state for collective bargaining purposes only.” *Id.* § 10-7E-4(R).

6. The URPEDA, under which SRMC was formed, provides as follows:

A. A research park corporation shall not be deemed an agency, public body or other political subdivision of New Mexico, including for purposes of applying statutes and laws relating to personnel, procurement of goods and services, meetings of the board of directors, gross receipts tax, disposition or acquisition of property, capital outlays, per diem and mileage and inspection of records.

B. A research park corporation shall be deemed an agency or other political subdivision of the state for purposes of applying statutes and laws relating to the furnishing of goods and services to the university that operates it and the risk management fund.

NMSA 1978, § 21-28-7.

7. For “personnel” matters like labor relations and collective bargaining, Section 21-28-7(A) of URPEDA makes clear that research park corporations like SRMC shall *not* be deemed a public employer. *See, e.g., Local 2238 v. Stratton*, 1989-NMSC-003, ¶ 21, 108 N.M. 163, 769 P.2d 76 (1989) (in pre-PEBA case, the comprehensive regulation of “personnel” matters in the state Personnel Act included collective bargaining).

8. In addition, the absence of “collective bargaining” specifically and labor relations generally in the short list of topics for which research park corporations *should* be considered public employers in Section 21-28-7(B) of URPEDA further supports the conclusion that the

legislature did not intend for research park corporations to be considered “public employers” under PEBA.

9. As a non-public employer for labor relations and collective bargaining purposes, SRMC does not fall within the scope of PEBA, and the PELRB does not have jurisdiction over it with respect to the Petition or other collective-bargaining and labor relations matters.

10. SRMC does not dispute that the National Labor Relations Board would have jurisdiction over a petition for representation filed with it by Petitioner.

WHEREFORE, SRMC respectfully requests the PELRB to dismiss the Petition in its entirety and with prejudice for lack of jurisdiction.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By /s/ Thomas L. Stahl

Thomas L. Stahl

Jeffrey L. Lowry

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Albuquerque, New Mexico 87103

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tstahl@rodey.com

[jlowry@rodey.com](mailto:jlowry@rodey.com)

*Attorneys for Respondent*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on August 19, 2021, a copy of the forgoing was served by electronic means as follows:

Shane Youtz  
shane@youtzvaldez.com

Stephen Curtice  
Stephen@youtzvaldez.com

James Montalbano  
james@youtzvaldez.com

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By /s/ Thomas L. Stahl  
Thomas L. Stahl

**STATE OF NEW MEXICO  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

**In re:**

**UNITED HEALTH PROFESSIONALS  
OF NEW MEXICO, AFT, AFL-CIO**

**Petitioner,**

**And**

**PELRB Case No. 306-21**

**UNIVERSITY OF NEW MEXICO  
SANDOVAL REGIONAL MEDICAL  
CENTER,**

**Respondent.**

**RESPONSE TO MOTION TO DISMISS**

COMES NOW Petitioner, United Health Professionals of New Mexico, AFT, AFL-CIO (“AFT”), by and through its counsel of record, Youtz & Valdez, P.C. (Shane Youtz, Stephen Curtice, James Montalbano), and files this Response to Respondent’s Motion to Dismiss. For the following reasons, that Motion should be denied.

**Introduction**

University of New Mexico Sandoval Regional Medical Center (SRMC) is, without question, a public employer, as defined by PEBA. It is, by its own description in its most recent audited Financial Statement, a **“component unit” and “subsidiary of University of New Mexico.”** Significantly, this “component unit” status means that “the University appoints a voting majority of SRMC’s board **and is able to impose its will on SRMC.**” As also detailed below, another UNM entity has argued in Federal Court that UNM’s URPEDA entities are **“an agency of the State of New Mexico . . . as an arm of the state.”** *STC.UNM v. Qwest Diagnostics Inc.*,

Case No. 1:17-cv-01123 MCA-KBM (filed Mar. 3, 2019)

**Exhibit 3**

Respondent relies solely upon a statutory provision (URPEDA) which, it claims, exempts it from PEBA. That statutory exemption, however, is subordinate to PEBA (Section 3): “In the event of conflict with other laws, the provisions of PEBA shall supersede other previously enacted legislation.” PEBA’s Section 3 does identify six statutes which do supersede PEBA; the statute identified by Respondent is conspicuously absent from this list.

In the absence of the one sentence of URPEDA cited by Respondent, there is no question that Respondent would be considered a “public employer” under PEBA. It is an arm of the state, entitled to sovereign immunity. It receives public taxation money in the form of the County Mill Levy. It was created by a public employer to be its “instrumentality.” It is a “component unit” of that public employer which is its “sole member.” The public employer appoints a voting majority of its board, and is able to “impose its will” on it. The public employer operates the “UNM Health System” (including Respondent) as a “fully integrated, academic health center and healthcare delivery system.” That system is “collectively administered” along with other public entities such as UNM Hospital under the “operating aegis” of the public employer.

These facts create a simple conflict of laws; the resolution of that conflict was contemplated by the legislature and can be found in Section 3 of PEBA.

### **Response to Motion to Dismiss**

1. As the Articles of Incorporation attached to the Motion note, Respondent was formed “as an instrumentality of the Regents of the University of New Mexico.” Indeed, the most recent audited Financial Statement of Respondent (excerpts of which are attached as Ex. 1 hereto) describes it thus in the “Overview of Entity” Section:

The Regents of the University of New Mexico (UNM) approved the formation of the Medical Center, a New Mexico non-profit corporation under and pursuant to the New Mexico University Research Park and Economic Development Act. The corporation is formed *as an instrumentality of the Regents of UNM*, to promote

the social welfare of New Mexico through the advancement of healthcare. The corporation is organized for the development, construction and operation of a licensed general, community teaching hospital located in Sandoval County, New Mexico in support of ***and under the operating aegis*** of the Health Sciences Center of the University of New Mexico (UNM HSC) and, in connection therewith, to facilitate and develop the clinical and medical practices of the faculty of the University of New Mexico School of Medicine (UNM SOM). ***The Medical Center is a component unit of UNM.***

Ex. 1, at 3 (emphasis added).

2. That document also notes that Respondent “is a corporation organized by the Regents of the University of New Mexico (UNM) and exists as ***a New Mexico government nonprofit*** and University Research Park and Economic Development Act (URPEDA) corporation. [SRMC] is governed by its Board of Directors (the Board), which is empowered to do all things necessary for the proper operation of the [SRMC]. UNM, by and through its Board of Regents, is the sole member of the Medical Center.” *Id.* at 21 (emphasis added). It also describes SRMC as a “URPEDA subsidiary[y]” of UNM. *Id.*

3. Elsewhere, that document notes that SRMC “is a separately incorporated but UNM-affiliated entity, which is the basis for intercompany or related-party transactions between SRMC and any UNM or UNM-affiliated entity. The clinical elements of UNM HSC are ***fully integrated***, academic health center and healthcare delivery system, and are ***collectively administered*** as the UNM Health System. The UNM Health System consists of SRMC, UNM Hospitals, UNM Behavioral Health Operations, UNM Cancer Center, and UNM Medical Group, Inc. (UNMMG).” *Id.* at 38 (emphasis added).

4. The University of New Mexico’s own 2020 audited financial statement (excerpts of which are attached as Ex. 2 hereto) reports on the “Blended Component Units” of the University of New Mexico. It defines that term thus:

Component units that are blended generally include those in which 1) the component unit provides services entirely, or almost entirely, to the University or otherwise exclusively, or almost exclusively, benefits the University, 2) the component unit's governing body is substantively the same as the governing body of the University and there is either a financial benefit or burden relationship between the University and the component unit or management of the University has operational responsibility for the component unit, or 3) the University is the sole corporate member of the component unit.

*Id.* at 34.

5. Respondent is considered to meet that definition: “Sandoval Regional Medical Center (SRMC) is a teaching hospital located in Sandoval County that was formed by the UNM Regents in August 2009 and is a New Mexico nonprofit corporation organized under and pursuant to the New Mexico University Research Park and Economic Development Act. ***SRMC was determined to be a component unit, because the University appoints a voting majority of SRMC's board and is able to impose its will on SRMC.***” *Id.* at 35 (emphasis added).

6. Another of the “component units” of UNM is STC.UNM, formed by UNM pursuant to the same law as Respondent. *Id.* (describing STC.UNM). That entity argued in federal court that it was “an agency of the State of New Mexico, and is therefore entitled to sovereign immunity.” *See* Motion to Dismiss Counterclaims, *STC.UNM v. Qwest Diagnostics Inc.*, Case No. 1:17-cv-01123 MCA-KBM (filed Dec. 7, 2017), attached hereto as Exhibit 3, at 8; *see also id.*, at 2 (“STC.UNM is owned and controlled by The Regents of the University of New Mexico as an arm of the state. STC.UNM is a sovereign entity and not subject to suits to which it has not consented or waived its immunity.”). This argument was successful. *See* Proposed Findings of Fact and Recommended Disposition, *STC.UNM v. Qwest Diagnostics Inc.*, Case No. 1:17-cv-01123 MCA-KBM (filed Mar. 3, 2019) and Order Adopting the same (filed Mar. 27, 2019), collectively attached hereto as Exhibit 4.

7. Because it is an “arm of the state” and a “New Mexico government nonprofit,” Respondent is able to, and does, receive public money in the form of property taxation. In 2018, the voters of Sandoval County approved the following Mill Levy Ballot Question:

For the purpose of providing operating revenues for medical services including new substance abuse treatment and trauma care, and a return of behavioral health services, shall Sandoval County, New Mexico impose a mill levy of one and ninety hundredths (1.90) mills each year for eight (8) years on each dollar of net taxable value of property in Sandoval County, to pay to Sandoval Regional Medical Center in accordance with a health care facilities contract with Sandoval County.”

See Sandoval County Health Facilities Agreement, attached hereto as Exhibit 5, at Ex. A thereto.

8. Ultimately, the question whether this Board has jurisdiction to process the Petition is a question of statutory interpretation. There is no question that this Board has jurisdiction over “public employer[s].” Nor is there any question that the UNM Board of Regents is such a public employer; indeed, it is specifically called out as such in the definition of public employer in PEBA: NMSA 1978, § 10-7E-4(R) (2020) (providing that “state educational institutions as provided in Article 12, Section 11 of the constitution of New Mexico shall be considered public employers other than the state for collective bargaining purposes only”). Rather, the question is simply whether a “New Mexico government nonprofit” corporation formed by such a public employer, to act as its “instrumentality” and as one of its “component units,” is also a public employer under PEBA.

9. This Board has determined (under PEBA I) that the definition of “public employer” must be read in conjunction with the description of “appropriate governing body” in NMSA 1978, § 10-7E-7 (2003). See *USWA & Gila Regional Medical Ctr.*, 1-PELRB-14 (Nov. 17, 1995), Recommended Decision, at 22. Because the UNM Board of Regents is the “sole member” of Respondent, appoints a voting majority to its Board of Directors, and is “able to impose its will”

on Respondent, the Board of Regents would be the “appropriate governing body” of Respondent pursuant to NMSA 1978, § 10-7E-7 (2003). This is consistent with the University Research Park Economic Development Act (“URPEDA”) pursuant to which Respondent was formed as an instrumentality of the UNM Board of Regents. That Act grants the Board of Regents broad authority over the formation and operation of corporations such as Respondent. NMSA 1978, § 21-28-5 (2007). STC.UNM relied on this control to successfully argue it was a State agency and an arm of the state. Ex. 3, at 9 (“The powers given to STC.UNM by The State of New Mexico are subordinate to the broad powers given to The University of New Mexico Board of Regents to ‘operate,’ ‘finance’ and otherwise establish guidelines controlling STC.UNM. Compare NMSA § 21-28-6 (“Powers of research park corporation) with NMSA § 21-28-5 (“Powers of university as related to research parks”).

10. There is ample precedent under New Mexico law that such an entanglement between the two entities would render Respondent a “public” body subject to laws governing such entities. In *Memorial Med. Ctr. v. Tasch Constr., Inc.*, 2000-NMSC-030, 129 N.M. 677, 12 P.3d 431, the New Mexico Supreme Court had to determine the standards for evaluating whether an otherwise private corporation would be subject to the Public Works Minimum Wage Act or the State Procurement Code. It noted that, in general “a private organization, despite its name or legal status, may have so many public attributes it can no longer be considered private” and that “a private entity may be controlled, organized, and conducted in such a manner that it becomes an arm of a public entity.” *Id.* ¶ 34. As a result, “It is therefore our view that under current New Mexico law there are circumstances in which a private corporation must be deemed a political subdivision or a local public body because the private entity has so many public attributes, is so controlled and conducted, or otherwise is so affiliated with a public entity that as a matter of

fairness it must be considered the same entity.” *Id.* The standard to be applied in such an analysis “is whether under the totality of the circumstances the government entity is so intertwined with the private entity that the private entity has become an alter ego of the public entity.” *Id.* ¶ 35.

11. It should be clear that, in the absence of the one sentence of URPEDA cited by Respondent, there is no question that Respondent would be considered a “public employer” under PEBA. It is an arm of the state, entitled to sovereign immunity. It receives public taxation money in the form of the County Mill Levy. It was created by a public employer to be its “instrumentality.” It is a “component unit” of that public employer which is its “sole member.” The public employer appoints a voting majority of its board, and is able to “impose its will” on it. The public employer operates the “UNM Health System” (including Respondent) as a “fully integrated, academic health center and healthcare delivery system.” That system is “collectively administered” along with other public entities such as UNM Hospital under the “operating aegis” of the public employer.

12. Respondent relies upon NMSA 1978, § 21-28-7(A) (1998), which provides that it “shall not be deemed an agency, public body or other political subdivision of New Mexico, including for purposes of applying statutes and laws relating to personnel, procurement of goods and services, meetings of the board of directors, gross receipts tax, disposition or acquisition of property, capital outlays, per diem and mileage and inspection of records.”

13. However, a subsection of that very statute not cited by Respondent provides that a “research park corporation, its officers, directors *and employees* shall be granted immunity from liability for any tort as provided in the Tort Claims Act.” Section 21-28-7(C) (emphasis added). That is significant; the Tort Claims Act reinstated New Mexico’s sovereign immunity for a “governmental entity and *any public employee* while acting within the scope of duty.” NMSA

1978, § 41-4-4(A) (2001) (emphasis added). Thus, the very statute cited by Respondent to argue it should not be deemed a “public employer” under PEBA, provides that it is to be considered a “governmental entity” under the Tort Claims Act, and that its employees are “public employees” under that Act.

14. Even if PEBA’s conflicts provision is ignored, it cannot be said that the operative provision of URPEDA is explicit enough to exempt SRMC from PEBA. URPEDA exempts Respondent from laws regarding “personnel.” It should be obvious that this provision was intended to apply to the State *Personnel* Act but not to PEBA. However, assuming that URPEDA would provide that Respondent is not a “public employer” under PEBA, such a provision would conflict with PEBA. For, as noted above, under PEBA there is no question that Respondent would otherwise be considered a public employer.

15. Because there is a conflict between PEBA and URPEDA, this question of statutory interpretation is governed by NMSA 1978, § 10-7E-3 (2020). That section, originally enacted in 2003 well after the URPEDA, and as amended in 2020, provides:

In the event of conflict with other laws, the provisions of the Public Employee Bargaining Act *shall supersede other previously enacted legislation and rules*; provided that the Public Employee Bargaining Act shall not supersede the provisions of the Bateman Act [6-6-11 NMSA 1978], the Personnel Act [Chapter 10, Article 9 NMSA 1978], the Group Benefits Act [Chapter 10, Article 7B NMSA 1978], the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978], the Retiree Health Care Act [10-7C-1 to 10-7C-16 NMSA 1978], public employee retirement laws or the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978].

(Emphasis added). URPEDA is not one of the enumerated prior enactments that survives the conflict with PEBA. Thus, because PEBA would consider Respondent a public employer, it “supersede[s]” a contrary declaration in URPEDA.

16. This is a much more explicit, and stronger, articulation of the general notion that “when two statutes conflict, the most recent expression of legislative intent will control over an

earlier statute to the extent of any inconsistency.” *Martin v. Middle Rio Grande Conservancy Dist.*, 2008-NMCA-151, ¶ 12, 145 N.M. 151, 194 P.3d 766 (quotation marks and quoted authority omitted). This rule, in turn, is based on the notion that fact that “[t]he legislature is presumed to know existing law and judicial pronouncements.” *State v. Alderette*, 1990-NMCA-132, ¶ 8, 111 N.M. 297, 804 P.2d 1116. Thus, knowing that it had previously made the general pronouncement that URPEDA corporations are not subject to “personnel” laws, the Legislature enacted PEBA which, as it relates specifically to collective bargaining, imposed on all “public employers” the obligation to bargain with unions and granted this Board jurisdiction to handle petitions such as this one. *See also* NMSA 1978, § 12-2A-10(A) (1997) (“If statutes appear to conflict, they must be construed, if possible, to give effect to each. If the conflict is irreconcilable, *the later-enacted statute governs*. However, an earlier-enacted specific, special or local statute prevails over a later-enacted general statute *unless the context of the later-enacted statute indicates otherwise*.” (Emphasis added)). PEBA expressly provided that it governs over prior enactments in Section 3.

17. The legislature certainly knew how to exclude some otherwise public entities from the definition of “public employer.” Indeed, the definition expressly provides that it “does not include a government of an Indian nation, tribe or pueblo.” Having identified this one exclusion, it can be presumed that the Legislature did not intend to exclude other public entities. “The doctrine of *expressio unius est exclusio alterius* [means that] the expression or inclusion of one thing indicates exclusion of the other....” *Vives v. Verzino*, 2009-NMCA-083, ¶ 17, 146 N.M. 673, 213 P.3d 823.

### **Conclusion**

WHEFORE, for the foregoing reasons, Petitioner respectfully requests that this Board conclude: (1) that Respondent is a “public employer,” (2) that to the extent that URPEDA provides

otherwise, that declaration has been “superseded” by PEBA pursuant to Section 10-7E-3, and (3) that this Board has jurisdiction over Respondent and the Petition.

Dated: September 2, 2021

Respectfully Submitted,

**YOUTZ & VALDEZ, P.C.**

/s/ Shane Youtz

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(505) 244-1200 – Telephone

*Counsel for Petitioner*

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was served on all parties to this action pursuant to 11.21.2.9 NMAC this 2<sup>nd</sup> day of September, 2021.

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Shane Youtz



**UNM SANDOVAL REGIONAL MEDICAL CENTER, INC.**  
(A Component Unit of the University of New Mexico)

Financial Statements

June 30, 2020 and 2019

(With Independent Auditors' Report Thereon)



**UNM SANDOVAL REGIONAL MEDICAL CENTER, INC.**  
(A Component Unit of the University of New Mexico)

Official Roster

June 30, 2020

**Board of Directors**

Paul Roth, MD	Chairperson (Term expires 6/30/20, Regent appointed)
Michael Richards, MD	Member (Term expires 12/31/22, Regent appointed)
Martha McGrew, MD	Member (Term expires 12/31/22, Regent appointed)
Matthew Wilks, MD	Member (Term expires 12/31/21, Regent appointed)
Joanna Boothe	Member (Term expires 12/31/21, Regent appointed)
Charlotte Garcia	Member (Term expires 12/31/21, Regent appointed)
Donnie Leonard	Member (Term expires 12/31/20, Regent appointed)
Kim Hedrick	Member (Term expires 12/31/20, County appointed)
Dave Panana	Member (Term expires 12/31/21, Regent appointed)

**UNM SANDOVAL REGIONAL MEDICAL CENTER, INC.**  
(A Component Unit of the University of New Mexico)

Official Roster

June 30, 2020

**Administrative Officers**

Paul Roth, M.D.	Chancellor – UNM Health Sciences Center Dean, School of Medicine – UNM Health Sciences Center
Michael Richards, M.D.	Vice Chancellor of Clinical Affairs – UNM Health System
Ava Lovell	Senior Executive Financial Officer – UNM Health Sciences Center
Jamie Silva-Steele	Chief Executive Officer and President – Sandoval Regional Medical Center
Gurdeep Singh	Interim Chief Medical Officer – Sandoval Regional Medical Center
Pamela Demarest	Chief Nursing Officer and Chief Operating Officer – Sandoval Regional Medical Center
Darlene Fernandez	Chief Financial Officer – Sandoval Regional Medical Center

**UNM SANDOVAL REGIONAL MEDICAL CENTER, INC.**  
(A Component Unit of the University of New Mexico)

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KPMG LLP  
Two Park Square, Suite 700  
6565 Americas Parkway, N.E.  
Albuquerque, NM 87110-8179

## Independent Auditors' Report

The Board of Directors  
UNM Sandoval Regional Medical Center, Inc. and  
Mr. Brian Colón, New Mexico State Auditor:

### *Report on the Financial Statements*

We have audited the accompanying financial statements of UNM Sandoval Regional Medical Center, Inc. (the Medical Center), a component unit of the University of New Mexico, State of New Mexico, as of and for the years ended June 30, 2020 and 2019, and the related notes to the financial statements, which collectively comprise the Medical Center's basic financial statements for the years then ended as listed in the table of contents.

### *Management's Responsibility for the Financial Statements*

Management is responsible for the preparation and fair presentation of these financial statements in accordance with U.S. generally accepted accounting principles; this includes the design, implementation, and maintenance of internal control relevant to the preparation and fair presentation of financial statements that are free from material misstatement, whether due to fraud or error.

### *Auditors' Responsibility*

Our responsibility is to express opinions on these financial statements based on our audits. We conducted our audits in accordance with auditing standards generally accepted in the United States of America and the standards applicable to financial audits contained in *Government Auditing Standards*, issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free from material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on the auditors' judgment, including the assessment of the risks of material misstatement of the financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the entity's preparation and fair presentation of the financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity's internal control. Accordingly, we express no such opinion. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of significant accounting estimates made by management, as well as evaluating the overall presentation of the financial statements.

We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

### *Opinion*

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of the Medical Center as of June 30, 2020 and 2019, and the changes in its financial position and its cash flows for the years then ended in accordance with U.S. generally accepted accounting principles.



## Other Matters

### *Required Supplementary Information*

U.S. generally accepted accounting principles require that the management's discussion and analysis on pages 3-16 be presented to supplement the basic financial statements. Such information, although not a part of the basic financial statements, is required by the Governmental Accounting Standards Board who considers it to be an essential part of financial reporting for placing the basic financial statements in an appropriate operational, economic, or historical context. We have applied certain limited procedures to the required supplementary information in accordance with auditing standards generally accepted in the United States of America, which consisted of inquiries of management about the methods of preparing the information and comparing the information for consistency with management's responses to our inquiries, the basic financial statements, and other knowledge we obtained during our audits of the basic financial statements. We do not express an opinion or provide any assurance on the information because the limited procedures do not provide us with sufficient evidence to express an opinion or provide any assurance.

### *Other Reporting Required by Government Auditing Standards*

In accordance with *Government Auditing Standards*, we have also issued our report dated December 8, 2020 on our consideration of the Medical Center's internal control over financial reporting and on our tests of its compliance with certain provisions of laws, regulations, contracts, and grant agreements and other matters. The purpose of that report is solely to describe the scope of our testing of internal control over financial reporting and compliance and the results of that testing, and not to provide an opinion on the effectiveness of the Medical Center's internal control over financial reporting or on compliance. That report is an integral part of an audit performed in accordance with *Government Auditing Standards* in considering the Medical Center's internal control over financial reporting and compliance.

**KPMG LLP**

Albuquerque, New Mexico  
December 8, 2020

**UNM SANDOVAL REGIONAL MEDICAL CENTER, INC.**  
(A Component Unit of the University of New Mexico)

Management's Discussion and Analysis

June 30, 2020 and 2019

The following discussion and analysis provides an overview of the financial position and activities of UNM Sandoval Regional Medical Center, Inc. (the Medical Center or SRMC) as of and for the years ended June 30, 2020, 2019, and 2018. This discussion should be read in conjunction with the accompanying financial statements and notes. Management has prepared the basic financial statements and the related note disclosures along with this discussion and analysis. As such, the financial statements, notes, and this discussion are the responsibility of the Medical Center's management.

**Using This Annual Report**

This annual report consists of financial statements prepared in accordance with Governmental Accounting Standards Board (GASB) Statement No. 34, *Basic Financial Statements – and Management's Discussion and Analysis – for State and Local Governments*, as amended. The Medical Center is reporting as a special-purpose government engaged in business-type activities (BTA). In accordance with BTA reporting, the Medical Center presents management's discussion and analysis, statements of net position, statements of revenues, expenses, and changes in net position, statements of cash flows, and notes to the financial statements. The financial statements are prepared under the accrual basis of accounting, whereby revenues and assets are recognized when the service is provided and expenses and liabilities are recognized when others provide the service or goods are received, regardless of when cash is exchanged.

The statements of net position include all assets and liabilities. Over time, increases or decreases in net position (the difference between assets and liabilities) are one indicator of the improvement or erosion of the Medical Center's financial health when considered with nonfinancial facts, such as patient statistics and the condition of facilities. This statement includes all assets and liabilities using the accrual basis of accounting, which is consistent with the accounting method used by nongovernmental hospitals and healthcare organizations.

The statements of revenues, expenses, and changes in net position present the revenues earned and expenses incurred during the year. Activities are reported as either operating or nonoperating. A public hospital's dependency on governmental funding can result in an operating deficit since the financial reporting model classifies such aid as nonoperating revenues. The utilization of capital assets is reflected in the financial statements as depreciation, which amortizes the cost of an asset over its expected useful life.

The statements of cash flows present information related to cash inflows and outflows summarized by operating, capital and noncapital financing, and investing activities.

**Overview of Entity**

The Regents of the University of New Mexico (UNM) approved the formation of the Medical Center, a New Mexico nonprofit corporation organization under and pursuant to the New Mexico University Research Park and Economic Development Act. The corporation is formed as an instrumentality of the Regents of UNM, to promote the social welfare of New Mexico through the advancement of healthcare. The corporation is organized for the development, construction, and operation of a licensed general, community teaching hospital located in Sandoval County, New Mexico in support of and under the operating aegis of the Health Sciences Center of the University of New Mexico (UNM HSC) and, in connection therewith, to facilitate and develop the clinical and medical practices of the faculty of the University of New Mexico School of Medicine (UNM SOM). The Medical Center is a component unit of UNM.

**UNM SANDOVAL REGIONAL MEDICAL CENTER, INC.**  
(A Component Unit of the University of New Mexico)

Management's Discussion and Analysis

June 30, 2020 and 2019

The Medical Center's mission is to improve the overall health of the community by providing the highest-quality healthcare services that meet the needs of Sandoval County's diverse population, as well as providing, increasingly over time, healthcare and medical educational opportunities.

The following summarizes the healthcare services that are offered by the Medical Center:

*Inpatient Care* – Acute care provided by practitioners in 48 acute medical-surgical beds and 12 intensive care unit beds. The Medical Center is equipped with an emergency department with 11 exam rooms, 2 trauma rooms, and 2 triage rooms. Additionally, the Medical Center is equipped with 6 operating rooms, 3 minor procedure rooms, and 1 interventional radiology lab.

*Outpatient Care* – Comprehensive offering of primary care, sleep disorders center, laboratory, radiology, diagnostic services, rehabilitation services, behavioral health, infusion, medical, and surgical clinics.

*Surgical Services* – Anesthesia, general surgery, bariatric, podiatry, otolaryngology, urologic, gynecologic, urogynecologic, gastrointestinal, breast, minimally invasive spine surgery, and outpatient laparoscopic surgery.

*Physician Services* – The Medical Center has an "open" medical staff, allowing community physicians in addition to the UNM SOM providers to be members of the active medical staff and to admit and follow their patients at the Medical Center. There are currently 559 physicians credentialed, of which 469 are UNM SOM physicians and 90 are community physicians.

**UNM SANDOVAL REGIONAL MEDICAL CENTER, INC.**  
(A Component Unit of the University of New Mexico)

Notes to the Financial Statements

June 30, 2020 and 2019

**(1) Description of Business**

UNM Sandoval Regional Medical Center Inc. (SRMC or the Medical Center) is a corporation organized by the Regents of the University of New Mexico (UNM) and exists as a New Mexico government nonprofit and University Research Park and Economic Development Act (URPEDA) corporation. The Medical Center is governed by its Board of Directors (the Board), which is empowered to do all things necessary for the proper operation of the Medical Center. UNM, by and through its Board of Regents, is the sole member of the Medical Center.

The healthcare-related education, research, and clinical programs and services offered by UNM and/or provided in UNM's facilities and those of certain of its URPEDA subsidiaries are designated as the UNM Health Sciences Center (UNM HSC), which is a component unit of UNM. The clinical elements of UNM HSC are intended to be a fully integrated academic health center and healthcare delivery system and are collectively administered as the UNM Health System. As part of ongoing operations, the Medical Center engages in certain related-party transactions as described further in note 13.

SRMC operates as a licensed acute care hospital along with numerous onsite clinics located in Rio Rancho, New Mexico. The Medical Center is a community-teaching component unit of UNM HSC and provides primary and specialty health services in Sandoval County, New Mexico. SRMC, together with UNM Hospital (UNMH), operates the clinical settings through which the UNM School of Medicine (SOM) educates medical and graduate students, trains residents and clinical fellows, and supports faculty and community clinicians.

SRMC consists of an approximately 200,000 square foot community-teaching Medical Center, with 48 acute medical/surgical beds and 12 intensive care unit beds. There is also an onsite 40,000 square foot medical office building. The Medical Center is adjacent to the City Center in Rio Rancho, New Mexico. The Medical Center is located on land owned by UNM and is next to the UNM Health Sciences Rio Rancho campus. The Medical Center is a blended component unit of UNM and is reported as such in the basic financial statements of UNM. The Medical Center has no component units.

**(2) Summary of Significant Accounting Policies**

**(a) Basis of Presentation**

The accompanying financial statements have been prepared using the economic resource measurement focus and the accrual basis of accounting in accordance with U.S. generally accepted accounting principles for healthcare organizations, and are presented in accordance with the reporting model as prescribed in Governmental Accounting Standards Board (GASB) Statement No. 34, *Basic Financial Statements – and Management's Discussion and Analysis – for State and Local Governments*, as amended by GASB Statement No. 37, *Basic Financial Statements – and Management's Discussion and Analysis – for State and Local Governments: Omnibus*, and GASB Statement No. 38, *Certain Financial Statement Note Disclosures*. The Medical Center follows the business-type activities requirements of GASB Statement No. 34. This approach requires the following components of the Medical Center's financial statements:

- Management's discussion and analysis

**UNM SANDOVAL REGIONAL MEDICAL CENTER, INC.**  
(A Component Unit of the University of New Mexico)

Notes to the Financial Statements

June 30, 2020 and 2019

general liability claims. The NMTCA provides that total liability for all claims that arise out of a single occurrence shall not exceed \$750,000 set forth as follows: (a) \$200,000 for real property; (b) up to \$300,000 for past and future medical and medically related expenses; and (c) up to \$400,000 for past and future noneconomic losses (such as pain and suffering) incurred or to be incurred by the claimant. While the language of the NMTCA does not expressly provide for claims of loss of consortium, New Mexico appellate court decisions have allowed claimants to seek loss of consortium. As a result, if loss of consortium claims is presented, those claims cannot exceed \$350,000 in the aggregate. Thus, it appears that if a claim presents both direct claims and third-party claims, the maximum exposure of the Public Liability Fund and, therefore, the Medical Center, cannot exceed \$1,050,000. The NMTCA prohibits the award of punitive or exemplary damages against the Medical Center. These limitations of liability are subject to adjustment by the New Mexico Legislature.

The URPEDA authorizes URPEDA corporations to obtain their liability coverages from RMD for those torts where the legislature has waived the state's immunity up to the damages limits of the NMTCA, as described above, plus the cost incurred in defending any claims and/or lawsuits (including attorney fees and expenses), with no deductible and with no self-insured retention by the Medical Center. As stated previously, the Medical Center did elect to purchase, and did in fact purchase, its coverage-basis medical malpractice, professional, and general liability coverage from RMD. As a result of this, the Medical Center is fully covered up to the maximum liability set forth in the NMTCA for tort claims and/or lawsuits relating to medical malpractice or professional liability occurring at its hospital.

**(13) Related-Party Transactions**

The Medical Center is a separately incorporated but UNM-affiliated entity, which is the basis for intercompany or related-party transactions between SRMC and any UNM or UNM-affiliated entity. The clinical elements of UNM HSC are a fully integrated, academic health center and healthcare delivery system and are collectively administered as the UNM Health System. The UNM Health System consists of SRMC, UNM Hospitals, UNM Behavioral Health Operations, UNM Cancer Center, and UNM Medical Group, Inc. (UNMMG).

The Medical Center enters into intercompany transactions with UNM and other entities associated with UNM, which includes UNMH (division of UNM) and UNMMG (separately incorporated but UNM-affiliated entity). These costs include, but are not limited to, medical services, payroll and employee benefits, malpractice insurance, liability insurance, safety and risk services, and physician coverage incurred on behalf of the Medical Center. The Medical Center incurred expenses, included in total expenses in the accompanying statements of revenues, expenses, and changes in net position, related to the following entities during the years ended June 30:

	<b>2020</b>	<b>2019</b>
UNM (excluding UNM Hospital)	\$ 832,195	741,399
UNM Hospital	3,144,998	2,712,841
UNM Medical Group	690,840	399,979
	<b>\$ 4,668,033</b>	<b>3,854,219</b>

# Audit Report 2020

*for the fiscal year ended June 30, 2020*



THE UNIVERSITY OF  
NEW MEXICO®

EXHIBIT

2

# THE UNIVERSITY OF NEW MEXICO

June 30, 2020

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# THE UNIVERSITY OF NEW MEXICO

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## NOTES TO THE BASIC FINANCIAL STATEMENTS

June 30, 2020 and 2019

### (1) Creation and Purpose of Entity

The University of New Mexico (the University or UNM) was founded in 1889 and created by the Constitution of New Mexico, Sections 21-7-4 through 21-7-25, New Mexico Statutes Annotated, 1978 Compilation, under which it is responsible for providing the inhabitants of the State of New Mexico (State) and such others as the Board of Regents may determine with the means of acquiring a thorough knowledge of the various branches of literature, science, and the arts.

The University is part of the primary government of the State, and its financial data is included with the financial data in the State's Comprehensive Annual Financial Report. These financial statements present financial information that is attributable to the University and does not purport to present the financial position of the State.

### (2) Basis of Presentation and Summary of Significant Accounting Policies

#### (A) Basis of Presentation

The University and its component units present their financial statements in accordance with U.S. generally accepted accounting principles as prescribed in applicable pronouncements of the Governmental Accounting Standards Board (GASB). The statement presentation required by GASB Statement 35, *Basic Financial Statements—and Management's Discussion and Analysis—for Public Colleges and Universities—an amendment of GASB Statement No. 34*, provides a comprehensive entity-wide perspective of the University's assets, liabilities, and net position, revenues, expenses and changes in net position, and cash flows.

GASB Statement 14, *The Financial Reporting Entity*, as amended by GASB Statement 39, *Determining Whether Certain Organizations Are Component Units*, GASB Statement 61, *The Financial Reporting Entity: Omnibus*, and GASB Statement 80, *Blending Requirements for Certain Component Units*, provides guidance in determining whether certain organizations are component units and the presentation of these component units in the financial statements. Criteria for determining whether related organizations are component units include the following circumstances:

- Appointment of a voting majority of an organization's governing authority and the ability of the University to either impose its will on that organization or the potential for the organization to provide specific financial benefits to, or impose specific financial burdens on, the University, or;
- An organization is fiscally dependent on the University and provides specific financial benefits to, or imposes specific financial burdens on, the University, or;
- It is determined that it would be misleading to exclude the related organization from the University's financial statements because of the nature of the entity or because the entity is closely related to or financially integrated with the University.

Component units that are blended generally include those in which 1) the component unit provides services entirely, or almost entirely, to the University or otherwise exclusively, or almost exclusively, benefits the University, 2) the component unit's governing body is substantively the same as the governing body of the University and there is either a financial benefit or burden relationship between the University and the component unit or management of the University has operational responsibility for the component unit, or 3) the University is the sole corporate member of the component unit. Based on the criteria set forth in GASB Statements 14, 39, 61, and 80, the entities presented below have been determined to be component units of the University. Summary financial statement information for the blended and discretely presented component units is provided in schedules 5 through 14.

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# THE UNIVERSITY OF NEW MEXICO

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## NOTES TO THE BASIC FINANCIAL STATEMENTS

June 30, 2020 and 2019

### **Blended Component Units**

- **STC.UNM**

STC.UNM (formerly known as Science & Technology Corporation @ UNM) is a nonprofit corporation formed under the auspices of the 1989 New Mexico University Research Park Act and the New Mexico Nonprofit Corporation Act. The business of the corporation is to manage the commercialization of technologies developed by the University's faculty and manage the real estate development of the Science & Technology Park at The University of New Mexico on the South Campus. STC.UNM was determined to be a component unit, because it is fiscally dependent on the University. STC.UNM, 101 Broadway Blvd. NE, Suite 1100, Albuquerque, NM 87102.

- **Lobo Development Corporation**

Lobo Development Corporation (LDC) was established in October 2007, under the State of New Mexico's University Research Park and Economic Development Act. LDC was established to benefit UNM's Regents in the management and development of University-owned real estate. The activities of LDC include the acquisition, development, disposition, and rental of University real estate. LDC was determined to be a component unit, because the University appoints a voting majority of LDC's board and is able to impose its will on LDC. Lobo Development Corporation, 801 University Blvd. SE, Suite 207, Albuquerque, NM 87106.

- **Lobo Energy, Inc.**

Lobo Energy, Inc. (LEI) was formed by the UNM Regents in June 1998, under the University Research Park Act to be a separate 501(c)(3) corporation wholly owned by UNM. Its responsibilities include the procurement of natural gas and electricity, operations, and maintenance of all production facilities, and energy measurement and management systems. LEI was determined to be a component unit, because the University appoints a voting majority of LEI's board and is able to impose its will on LEI. Lobo Energy, Inc., 800 Bradbury Dr. SE, Suite 216, Albuquerque, NM 87106.

- **University of New Mexico Medical Group**

University of New Mexico Medical Group (UNMMG) is a nonprofit corporation that was organized to promote, advance, and support the clinical, scientific, educational, research, and charitable purposes of the School of Medicine (SOM) and the University of New Mexico Health Sciences Center (HSC). UNMMG was determined to be a component unit, because the University appoints a voting majority of UNMMG's board and is able to impose its will on UNMMG. University of New Mexico Medical Group, 933 Bradbury Street SE, Suite 2222, Albuquerque, NM 87106.

- **Sandoval Regional Medical Center**

Sandoval Regional Medical Center (SRMC) is a teaching hospital located in Sandoval County that was formed by the UNM Regents in August 2009 and is a New Mexico nonprofit corporation organized under and pursuant to the New Mexico University Research Park and Economic Development Act. SRMC was determined to be a component unit, because the University appoints a voting majority of SRMC's board and is able to impose its will on SRMC. Sandoval Regional Medical Center, 3001 Broadmoor Blvd. NE, Rio Rancho, NM 87144.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

STC.UNM,

*Plaintiff,*

QUEST DIAGNOSTICS  
INCORPORATED and QUEST  
DIAGNOSTICS CLINICAL  
LABORATORIES, INC.,

*Defendants.*

CASE NO. 1:17-cv-01123 MCA-KBM

**STC.UNM'S MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS**

STC.UNM moves to dismiss Quest Diagnostics Incorporated and Quest Diagnostics Clinical Laboratories, Inc.'s (collectively, "Quest") declaratory judgment Counterclaims under Federal Rule of Civil Procedure 12(b)(1), STC.UNM asserts both its common law and Eleventh Amendment sovereign immunity and has waived neither. Additionally, no immediate case and controversy exists as to Quest's declaratory judgment claims. Pursuant to D.N.M.LR-Civ. 7.1, STC.UNM requested Defendants' concurrence to this motion. Defendants are opposed to the relief requested in this motion.

**I. INTRODUCTION**

STC.UNM sued Quest in New Mexico state court seeking specific performance of the audit provisions in a license agreement (the "License Agreement")<sup>1</sup> between Quest and

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<sup>1</sup> The License Agreement refers to Exhibit A to STC.UNM's state court complaint (the "State Court Action"), which will be subsequently filed under seal.



STC.UNM.<sup>2</sup> STC.UNM's claims are narrow, purely contractual in nature, and based entirely on state law. The State Court Action requires only that the state court interpret the relevant License Agreement provisions and determine if Quest's conduct met its contractual obligations.

Quest removed the case and later asserted declaratory judgment counterclaims of patent non-infringement and invalidity. Those counterclaims must be dismissed for two reasons.<sup>3</sup> First, the counterclaims violate both STC.UNM's common law and Eleventh Amendment sovereign immunity from such suits. STC.UNM is a state university research park corporation organized under the laws of The State of New Mexico. STC.UNM is owned and controlled by The Regents of the University of New Mexico as an arm of the state. STC.UNM is a sovereign entity and not subject to suits to which it has not consented or waived its immunity.

Quest's counterclaims also fail because there is no case or controversy regarding infringement or the validity of the licensed patents. STC.UNM sued Quest for specific performance of the License Agreement's audit provisions, a declaration seeking an interpretation of the record keeping and audit provisions, and breach of the License Agreement's implied duty of good faith and fair dealing due to Quest's failure to provide

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<sup>2</sup> A copy of the State Court Action is available at Dkt. 1-1. The State Court Action included ancillary claims to have the court determine the proper scope of the License Agreement's audit and record-keeping provisions and a claim for breach of the implied covenant of good faith and fair dealing, both claims based upon Quest's refusal to allow an audit.

<sup>3</sup> This case should be remanded to New Mexico state court. STC.UNM will file a Motion to Remand subsequent to this Motion to Dismiss.

records or the requested audit. No patent issues are raised in the State Court Action.

STC.UNM has never accused Quest of “infringement” in violation of 35 U.S.C. § 271.

The Federal Circuit has held, on facts and claims virtually identical to those presented here, that Quest’s counterclaims do not allege a case or controversy sufficient to invoke federal declaratory judgment jurisdiction. Quest’s declaratory judgment counterclaims are an attempt to avoid its audit obligations under the License Agreement, nothing more. A full-blown patent infringement lawsuit is not a prerequisite to an audit or Quest’s reporting obligations under the License Agreement. Quest’s counterclaims should be summarily dismissed.

## **II. FACTUAL BACKGROUND**

STC.UNM and Quest entered into the License Agreement on or about May 22, 2006.<sup>4</sup> Under the License Agreement, Quest is required to “keep at its principal place of business true and accurate records of all operations affecting payments to be made to STC hereunder in such a form and manner so that all royalties owed to STC may be readily and accurately determined.”<sup>5</sup> Further, “at the expense of STC, the accounting records maintained by [Quest] for the purpose of establishing the amount of payments due to STC under [the License Agreement] (including earned royalties and sublicensing fees) shall be subject, at all reasonable times, and upon at least thirty (30) days written notice to [Quest], to audit by an STC auditor for the purposes of determining and verifying the royalty payments made under” the License Agreement.<sup>6</sup>

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<sup>4</sup> Compl. at ¶ 23.

<sup>5</sup> License Agreement § 6.1.

<sup>6</sup> *Id.* § 6.2 (emphasis added).

Since the License Agreement's effective date, Quest has neither reported gross receipts nor paid any earned royalties.<sup>7</sup> As a result, STC.UNM requested Quest's accounting records pursuant to the reporting and audit provisions on March 6, 2017.<sup>8</sup> Quest refused to comply with that request.<sup>9</sup> Quest also denied STC.UNM's contractual right to audit Quest's records to verify Quest's royalty calculations on Quest's bald assertion that "there have not been any sales under the [License Agreement] so Quest does not have any records of such sales" and that "there are no relevant records to audit."<sup>10</sup> After discussions between the parties reached an impasse, on August 10, 2017, STC.UNM sent Quest a Proposed Audit Protocol that requested records and information designated by an auditor in order to evaluate Quest's compliance with the License.<sup>11</sup> Quest again refused to produce these documents, and it admits its refusal, claiming the documents "fall outside the scope of the License."<sup>12</sup> STC.UNM did not accuse Quest of infringement in a single instance of the parties' six months of correspondence before suit was filed.<sup>13</sup>

STC.UNM filed the State Court Action asserting purely state law claims for breach of contract, declaratory judgment, and breach of the duty of good faith and fair dealing. All of these claims are based upon Quest's refusal to allow the contracted for audit. STC.UNM's breach of contract claim narrowly "requests specific performance of both the records access and the audit provisions of" the License Agreement and seeks in damages for

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<sup>7</sup> Compl. at ¶ 32.

<sup>8</sup> Compl. at Ex. B.

<sup>9</sup> Dkt. 4 at ¶ 44.

<sup>10</sup> Compl. at Ex. C.

<sup>11</sup> *Id.* at Ex. F.

<sup>12</sup> Dkt. 4 at ¶ 44.

<sup>13</sup> Comp. at Exs. B, D.

“not receiving the required records and audits required by the [License Agreement] and being required to hire the undersigned and a professional auditor.”<sup>14</sup> STC.UNM further seeks a declaration that Quest is required to provide both records and an audit regarding “all potential LICENSED PRODUCTS identified by STC” as well as regarding “all operations affecting payments to be made to STC, including without limitation, any efforts undertaken by QUEST to bring LICENSED PRODUCTS to market.”<sup>15</sup> And STC.UNM seeks a finding that Quest has violated its duty of good faith and fair dealing by failing to provide the requested records and audit.<sup>16</sup> None of these claims require an interpretation of patent scope; rather, the scope of the *License Agreement* is the only issue properly before the court. Indeed, even Quest admits that STC.UNM’s Complaint relates to “the parties’ duties and obligations” under the License Agreement.<sup>17</sup>

But Quest removed the case to this Court on November 9, 2017, citing 28 U.S.C. 1441(a).<sup>18</sup> In its Notice of Removal, Quest claimed federal jurisdiction existed under 28 U.S.C. §§ 1332(a), 1331, and 1338, because, allegedly, there was diversity of citizenship, and because, allegedly, the State Court Action involved a federal patent law question.<sup>19</sup> As a further alleged basis for jurisdiction, Quest invoked 28 U.S.C. § 1454(a), which provides for removal of a civil action “in which any party asserts a claim for relief arising under any Act of Congress relating to patents.” However, at the time of removal, Quest had not filed any

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<sup>14</sup> Compl. ¶¶ 54, 55.

<sup>15</sup> *Id.* ¶¶ 61, 63.

<sup>16</sup> *Id.* ¶ 76.

<sup>17</sup> Counterclaims at ¶ 1.

<sup>18</sup> Dkt. 1.

<sup>19</sup> *Id.*

patent law claim or patent law counterclaim in the State Court Action. Neither had STC.UNM.

The current dispute between the parties is narrowly focused on the interpretation of the scope of the reporting and audit provisions contained in the License Agreement.<sup>20</sup> Thus, STC.UNM's claims, which only require a review and interpretation of certain provisions of the License Agreement, are purely contractual in nature. STC.UNM has not asserted a claim for unpaid royalties because until STC.UNM concludes the contractually-authorized audit, it does not know whether any such claim exists.

### **III. ARGUMENTS AND AUTHORITY**

#### **A. STC.UNM is Protected by Eleventh Amendment Sovereign Immunity.**

As an arm of The University of New Mexico, STC.UNM enjoys sovereign immunity. STC.UNM has not waived its immunity or otherwise consented to be sued for patent infringement in this Court. "STC expressly reserve[d], and [did] not waive, its sovereign immunity to any non-compulsory counterclaims, federal proceedings, or administrative actions by filing this contract-based state court action."<sup>21</sup> Quest's claims, therefore, must be dismissed.

The Eleventh Amendment codified, in part, the principles of common law sovereign immunity and provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United

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<sup>20</sup> See e.g. Exhibit E to STC.UNM's Complaint ("Quest disagrees with STC's interpretation of the Agreement.")

<sup>21</sup> Compl. ¶ 12.

States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>22</sup> This Amendment “guarantees that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State.”<sup>23</sup> A “State’s constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued.”<sup>24</sup> Sovereign immunity applies “regardless of whether a private plaintiff’s suit is for monetary damages or some other type of relief.... Sovereign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit.”<sup>25</sup> Here, STC.UNM is immune from suit.

1. *STC.UNM is an instrumentality of The State of New Mexico.*

In determining whether an entity is an arm of the state for Eleventh Amendment purposes, Tenth Circuit courts examine two general issues: (1) “the degree of autonomy given to the agency, as determined by the characterization of the agency by state law and the extent of guidance and control exercised by the state”; and (2) “the extent of financing the agency receives independent of the state treasury and its ability to provide for its own financing.”<sup>26</sup> The governmental entity is immune from suit if the money judgment sought is to be satisfied out of the state treasury.”<sup>27</sup> Under this broad inquiry, courts may consider four factors: 1) the characterization of the governmental unit under state law; 2) the degree

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<sup>22</sup> U.S. Const. Amend. XI.

<sup>23</sup> *Board of Regents of University of Wisconsin Sys. v. Phoenix Int’l Software, Inc.*, 653 F.3d 448, 457 (Fed. Cir. 2011).

<sup>24</sup> *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (emphasis in original).

<sup>25</sup> *Federal Maritime Commission v. South Carolina State Ports Authority*, 5354 U.S. 743, 765-66 (2002).

<sup>26</sup> *Sturdevant v. Paulsen*, 218 F.3d 1160, 1165 (10th Cir. 2001) (quoting *Watson v. Univ. of Utah Med. Ctr.*, 75 F.3d 569, 574-75 (10th Cir. 1996)).

<sup>27</sup> *Id.* at 1164 (10th Cir. 2000).

of guidance and control exercised by the state over the governmental unit; 3) the degree of state funding received; and 4) the governmental unit's ability to issue bonds and levy taxes on its own behalf.<sup>28</sup> Ultimately, the question to be answered is whether the particular government entity is “more like a county or city than ... like an arm of the state?”<sup>29</sup>

Applying these factors, STC.UNM is an agency of The State of New Mexico, and is therefore entitled to sovereign immunity. As an initial matter, “[i]t is clear that New Mexico considers its institutions of higher learning,” including The University of New Mexico and its Board of Regents, to be “state agencies and a state function.”<sup>30</sup> STC.UNM is a New Mexico nonprofit research park corporation formed, owned, and controlled entirely by The University of New Mexico and its Board of Regents, both of which are arms of The State of New Mexico.<sup>31</sup>

STC.UNM was formed under the University Research Park and Economic Development Act (the “Act”). The Act provides that a research park corporation, like STC.UNM, is “an agency or other political subdivision of the state for purposes of applying statutes and laws relating to the furnishing of goods and services to the university that operates it and the risk management fund.” NMSA 1978 § 21-28-7 (B). The Act further states that the research park corporation, its officers, directors and employees are granted

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<sup>28</sup> *Id.* at 1166.

<sup>29</sup> *Id.* at 1164 (quoting *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 280 (1977)) (internal quotation marks omitted).

<sup>30</sup> *Korgich v. Regents of New Mexico Sch. of Mines*, 582 F.2d 549, 551 (10th Cir. 1978); see *Mohammad v. Metro. Court et al.*, No. 16-473 MV/KK, 2017 WL 3172838, at \*4 (D.N.M. May 31, 2017) (holding that the University of New Mexico “is an arm of the state and thus not a ‘person’ that may be sued under Section 1983”).

<sup>31</sup> See *Regents of University of New Mexico v. Knight*, 321 F.3d 1111 (Fed. Cir. 2003).

immunity from tort liability pursuant to the Tort Claims Act and that any losses suffered by a research park corporation “may be included among losses covered by the risk management fund of New Mexico.” NMSA 1978 § 21-28-7 (C). There can be no reasonable dispute that The State of New Mexico characterizes STC.UNM as an arm of the state entitled to assert sovereign immunity, particularly regarding the resolution of claims against STC.UNM.

Next, the Act gives the Board of Regents considerable control and oversight regarding STC.UNM’s management and operations. For example, the Act requires STC.UNM to perform annual independent audits and provide copies thereof to the Board of Regents and to the New Mexico Secretary of State. NMSA 1978 §21-28-17. The Board of Regents is charged with appointing STC.UNM’s board of directors. NMSA 1978 § 21-28-4 (B). The powers given to STC.UNM by The State of New Mexico are subordinate to the broad powers given to The University of New Mexico Board of Regents to “operate,” “finance” and otherwise establish guidelines controlling STC.UNM. *Compare* NMSA § 21-28-6 (“Powers of research park corporation) *with* NMSA § 21-28-5 (“Powers of university as related to research parks”).

STC.UNM’s articles of incorporation state that it is to be “operated, exclusively for the benefit of, to perform the functions of, or carry out the purposes of, The University of New Mexico.”<sup>32</sup> STC.UNM’s articles of incorporation also confirm that the corporation “shall be operated, supervised, or controlled by The University of New Mexico.”<sup>33</sup>

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<sup>32</sup> *See* Decl. of Elizabeth Kuuttila, Ex. A. at Art. III (b); Ex. B. at Art. I.

<sup>33</sup> *Id.* at Ex. A. at Art. III (c).

STC.UNM's sole corporate "member" is The University of New Mexico Board of Regents.<sup>34</sup> Upon dissolution of STC.UNM, "its assets shall be distributed to the Regents of the University of New Mexico."<sup>35</sup>

STC.UNM's bylaws further confirm that "the corporation is organized, and at all times hereafter shall be operated, **exclusively for the benefit** of, to perform the functions of, or to carry out the purposes of The University of New Mexico."<sup>36</sup> "The Regents of the University of New Mexico, a New Mexico institution of higher education, is the only member of the corporation."<sup>37</sup> Special meetings of the member may be called by "any member of the Regents."<sup>38</sup>

STC.UNM's Board includes several University of New Mexico officials including its President, the university's Provost and Executive Vice President for Academic Affairs, its Vice President for Research, its Executive Vice President for Administration, its Executive Vice President for Health Sciences, an academic dean, two members of The University of New Mexico faculty, and one regent.<sup>39</sup> Any nominations for the board "shall be presented to the Regents for their approval or disapproval" and the "UNM President shall appoint the UNM academic dean and members of the UNM faculty" to the STC.UNM board.<sup>40</sup> Any director can be removed by The University of New Mexico Board of Regents.<sup>41</sup> Requiring

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<sup>34</sup> *Id.* at Ex. A. at Art. VI.

<sup>35</sup> *Id.* at Ex. A at Art. V.

<sup>36</sup> *Id.* at Ex. B. at Art. I.

<sup>37</sup> *Id.* at Ex. B. at Art. III.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at Ex. B. at Art. IV, §1.

<sup>40</sup> *Id.* at Ex. B. at Art. IV, § 2.

<sup>41</sup> *Id.* at Ex. B. at Art. IV, § 7.

university officials to serve on STC.UNM's Board operates as a control on STC.UNM's decision-making power, demonstrating significant guidance and control over STC.UNM by The University of New Mexico.

With respect to STC.UNM's finances, the Act grants research park corporations the authority to issue bonds and other obligations which "shall be deemed issued on behalf of the university." NMSA 1978 §21-28-9. All income from bonds issued by a research park corporation are free from taxation within The State of New Mexico. NMSA 1978 § 21-28-16. Moreover, STC.UNM is deemed by statute to be an "agency or other political subdivision of the state for purposes of ... the risk management fund." NMSA 1978 § 21-28-7 (B). STC.UNM's enabling statute further contemplates that STC.UNM's losses "may be included among losses covered by the risk management fund of New Mexico." NMSA 1978 § 21-28-7 (C). Generally, that fund covers governmental entities for risks for which sovereign immunity has been waived under the Tort Claims Act. NMSA 1978 § 41-4-20, *et. seq.* Indeed, the State of New Mexico General Services Department, Risk Management Division, has expressly confirmed that it considers STC.UNM, "its officers, directors and employees" to be "covered **the same as the University of New Mexico under the public liability fund.**"<sup>42</sup> The Risk Management Division issued an Evidence of Coverage in which the insured are the "State of New Mexico" and STC.UNM,<sup>43</sup> and confirms that STC.UNM is treated in an identical manner to the State of New Mexico for purposes of sovereign

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<sup>42</sup> *Id.* at Ex. C.

<sup>43</sup> *Id.* at Ex. D.

immunity. Thus, STC.UNM's potential liability is treated the same as any other arm of The State of New Mexico.<sup>44</sup>

Thus, considering the various *Sturdevant* factors, STC.UNM is an arm of The State of New Mexico. Indeed, several cases within the Tenth Circuit confirm that STC.UNM—a university-operated research park corporation—would be considered an arm of The State of New Mexico. In 1996, in *Watson v. Univ. of Utah Med. Ctr.*, 75 F.3d 569, 576-77 (10th Cir. 1996), for example, the Tenth Circuit held that a university-operated medical center was an arm of the state where, as here, the medical center “clearly [wa]s not autonomous from the University or the state.”<sup>45</sup> As an initial matter, the court found held that the University of Utah was an arm of the state and that “[o]ur cases have consistently found state universities are arms of the state.”<sup>46</sup> Further, like STC.UNM, the medical center in *Watson* was governed by a board appointed by the university and subject to its control.<sup>47</sup> Moreover, as here, the University of Utah retained considerable power over the medical center, including authority to approve long range plans, budget appropriation requests, capital financing, fund raising programs, and major construction, among other things.<sup>48</sup> And while the medical center described in *Watson* had some ability to generate its own funding, it was also entitled to participate in the state's risk management fund, which suggested judgments against the medical center would expose the state to liability.<sup>49</sup> Thus, while the court found the funding

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<sup>44</sup> See *Colby v. Herrick*, 849 F.3d 1273, 1277 (10<sup>th</sup> Cir. 2017) (stating that entity's participation in Colorado risk management fund “supports consideration . . . as an arm of the state”).

<sup>45</sup> 75 F.3d at 576.

<sup>46</sup> See *id.* at 757-576.

<sup>47</sup> See *id.*

<sup>48</sup> *Id.* at 576

<sup>49</sup> *Id.*

issue created “a close case,” on balance the factors favored a finding that the medical center was an arm of the state entitled to Eleventh Amendment immunity.<sup>50</sup>

And earlier this year, in *Colby*, the Tenth Circuit held that a state brand inspection division was an arm of the state under similar circumstances.<sup>51</sup> There, as here, Colorado law treated the division as a state agency.<sup>52</sup> Like STC.UNM, the division was subject to control by state officials, including because the division’s stock inspection commissioners were appointed and removed by the state.<sup>53</sup> Further, as here, the division was “entitled to participate in the Colorado risk management fund, which obtains money from state appropriations.”<sup>54</sup> “This use of state money supports consideration of the Division as an arm of the state.”<sup>55</sup> Furthermore, because these factors largely favored arm-of-the-state status, the court found the division was an arm of the state, even though it could not conclusively determine whether the State of Colorado’s treasury would be legally obligated to satisfy a judgment against the division.<sup>56</sup> Because STC.UNM exhibits many of the same characteristics, it is an arm of the state, and is protected by sovereign immunity. Quest’s claims cannot proceed.

2. *STC.UNM has not waived sovereign immunity.*

STC.UNM is protected by sovereign immunity unless it has waived its immunity. STC.UNM has not done so. “[T]he Eleventh Amendment enacts a waivable immunity from

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<sup>50</sup> *Id.*

<sup>51</sup> 849 F.3d 1273.

<sup>52</sup> *Id.* at 1277.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1277-78.

suit, not ‘a nonwaivable limit on the federal judiciary’s subject-matter jurisdiction.’”<sup>57</sup>

“Waiver is generally found either when the state makes a clear declaration that it intends to waive immunity, such as by statute ... or when the state voluntarily invokes federal jurisdiction....”<sup>58</sup> STC.UNM has done neither—no statute waives its immunity, and STC.UNM has done nothing to avail itself of this Court’s jurisdiction.

STC.UNM’s State Court Action complaint refers only to rights under the License Agreement. The State Court Action does not raise any patent issue and does not give rise to waiver. Waiver must be clear and explicit. For example, even if a state files a patent infringement suit in one district, it has not waived sovereign immunity in any other district.<sup>59</sup> Even if a state files a patent infringement suit in one district, it has not waived its immunity in a later action, even if it involves the same parties and same patents.<sup>60</sup> Alleged waivers of sovereign immunity are so narrowly applied that even a later litigation involving the *same parties* and the *same patents* brought in the *same district* court as an earlier consented-to action is precluded by sovereign immunity.<sup>61</sup> STC.UNM has not explicitly waived its immunity.

The Federal Circuit has held that a complaint seeking a declaration of ownership in a patent under a contract does not implicate federal jurisdiction under the patent laws. In such

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<sup>57</sup> *Tegic Commc’n Corp. v. Board of Regents of University of Tex. Sys.*, 458 F.3d 1335, 1340 (Fed. Cir. 2006) (quoting *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 267 (1997)).

<sup>58</sup> *Id.* at 1340 (internal citations omitted).

<sup>59</sup> *Tegic*, 458 F.3d at 1344; (“UT’s waiver of Eleventh Amendment immunity in a patent infringement suit [on the same patent] in the Northern District of Texas did not result in a waiver of immunity in this separate infringement action.”).

<sup>60</sup> *A123 Systems, Inc. v. Hydro-Quebec*, 626 F.3d 1213 (Fed. Cir. 2010)

<sup>61</sup> *Biomedical Patent Mgmt. Corp. v. Cal., Dep’t of Health Servs.*, 505 F.3d 1328 (Fed. Cir. 2007).

a case, a district court should decline to exercise jurisdiction because doing so would “certainly disrupt Congress’s intended division of labor between state and federal court.”<sup>62</sup> Such is the case here—the narrow issues in controversy are the scope of the agreed-upon audit rights granted to STC.UNM under the License Agreement and whether the Quest’s refusal to cooperate with an audit violates the License Agreement’s audit clauses and Quest’s duties of good faith. STC.UNM has not invoked the jurisdiction of this Court by seeking to enforce its contractual audit rights against Quest in New Mexico state court.

**B. Quest’s Counterclaim Does Not Present a Case or Controversy.**

Quest’s counterclaim must also be dismissed for a different, yet equally dispositive, reason—it fails to allege a case or controversy that is ripe for adjudication in this Court. Because Quest purports to assert claims arising under the patent laws, Federal Circuit law governs whether a case or controversy ripe for a declaratory judgment exists.<sup>63</sup> The federal Declaratory Judgment Act is not “an independent basis for subject matter jurisdiction, but provides a remedy available only if the court has jurisdiction from some other source.”<sup>64</sup> The analysis is fact-specific, “with the basic standard being whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, *of sufficient immediacy and reality* to warrant the issuance of a declaratory judgment.”<sup>65</sup> A party seeking a declaratory judgment must demonstrate the

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<sup>62</sup> *Krauser v. BioHorizons, Inc.*, 753 F.3d 1263, 1269 (Fed. Cir. 2014) (internal citations omitted).

<sup>63</sup> *Adenta GmbH v. OrthoArm, Inc.*, 501 F.3d 1364, 1368 (Fed. Cir. 2007).

<sup>64</sup> *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1335 (Fed. Cir. 2008).

<sup>65</sup> *Benitec Australia, Ltd. v. Nucleonics, Inc.*, 495 F.3d 1340, 1344 (Fed. Cir. 2007).

existence of an actual controversy.<sup>66</sup> Parties are not permitted to seek “an advisory opinion as to the validity of a defense” through a declaratory judgment action.<sup>67</sup> Additionally, a party “cannot bring a declaratory judgment action just to resolve one isolated issue in a possible future controversy.”<sup>68</sup>

Here, Quest has not alleged an actual, ripe controversy sufficient to invoke this Court’s jurisdiction. The Federal Circuit has confirmed as much based on facts identical to those presented here. In *Univ. of Florida Research Foundation, Inc. v. Medtronic PLC*, No. 16-2422, Dkt. 29 (Fed. Cir. Jan. 27, 2017), the Plaintiff (“UFRF”) sued Medtronic in Florida state court based upon Medtronic’s refusal to comply with audit requirements contained in a license agreement.<sup>69</sup> As is the case here, UFRF asserted purely contractual claims: breach of contract, declaratory judgment, and breach of the duty of good faith and fair dealing. *Id.* at 2. Medtronic counterclaimed for a declaratory judgment of non-infringement and invalidity of patents covered by the license agreement. *Id.* Medtronic asserted the same theory espoused by Quest here—that the disputed products in that case were not “licensed products” because they did not infringe valid patents and thus were outside the scope of the license. *Id.* at 4.

Following removal, the district court remanded the case for the reasons discussed above regarding sovereign immunity: (1) UFRF was entitled to sovereign immunity, and

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<sup>66</sup> *Id.*

<sup>67</sup> *General Protecht Group, Inc. v. Leviton Mfg. Co., Inc.*, No. CIV 10–1020 JB/LFG, 2012 WL 1684573, at \*19 (citing *Coffman v. Breeze Corps., Inc.*, 323 U.S. 316, 324 (1945)).

<sup>68</sup> *Id.* (citing *Columbian Fin. Corp. v. BancInsure, Inc.*, 650 F.3d 1372, 1380 (10th Cir.2011)).

<sup>69</sup> Counsel for STC also represented UFRF in Florida state court and before the Federal Circuit.

could not be sued in federal court; and (2) UFRF had not voluntarily waived its immunity by asserting contract claims seeking an audit in state court. Medtronic appealed, and UFRF moved to dismiss the appeal, arguing that the court lacked jurisdiction because issues of state law were properly before the regional circuit. *Id.* at 3. The Federal Circuit agreed, holding that UFRF’s state court action asserted “a contract claim seeking an accounting that is not dependent on whether the products as to which that accounting is sought qualify as ‘Licensed Products’ under the license agreement.” *Id.* at 4. The court determined that although UFRF’s ultimate right to relief for any breach of Medtronic’s obligation to pay royalties could potentially give rise to a patent counterclaim, “[UFRF’s] current claims do not depend on resolution of patent infringement issues.” *Id.* The Federal Circuit dismissed the appeal. *Id.* at 5.<sup>70</sup>

Because this case presents the same set of facts and an identical procedural posture, the same result must follow here. Quest’s counterclaim for declarations of non-infringement

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<sup>70</sup> The Federal Circuit similarly refused patent jurisdiction over a party’s challenge to an arbitration award regarding the breach of a license agreement on the express basis that the arbitrator refused to invalidate the licensed patent. *Ballard Med. Prods. v. Wright*, 823 F.2d 527, 529 (Fed. Cir. 1987). Even though patent issues were present in that appeal, the Federal Circuit declined jurisdiction. *Id.* Appellant “erroneously suggests that this court’s jurisdiction ... should be determined by the mere presence of patent issues. As did Congress when it created [the Federal Circuit], we have expressly rejected that suggestion.” *Id.* at 530-31. But just because “patent validity or infringement issues may have been injected” into a contract suit, that fact “forms no basis for asserting that the district court’s jurisdiction was based on § 1338 and hence forms no basis for asserting jurisdiction in this court.” *Id.* at 531. Further, even claims regarding contractual ownership of a patent are insufficient to create federal question jurisdiction. *See Krauser v. Biohorizons, Inc.*, 753 F.3d 1263, 1269 (Fed. Cir. 2014). Because ownership required only interpreting a contract, “there is no federal issue in this case [and] an exercise of federal question jurisdiction would certainly disrupt ‘Congress’s intended division of labor between state and federal courts.’” *Id.* (quoting *Gunn v. Minton*, 133 S. Ct. 1059, 1065 (2013)).

and invalidity bear no valid relationship to STC.UNM's state court contract claims seeking to enforce audit rights. The only real and immediate controversy between the parties pertains to the scope of the audit and reporting rights granted under the License Agreement, and whether Quest has breached its obligation to cooperate with the requested audit and reporting. STC.UNM has not accused Quest of patent infringement, and none of STC.UNM's claims depend upon resolution of any patent issues. As discussed in *Medtronic*, any issues of invalidity or infringement are premature and will not be ripe unless and until an auditor issues a report. *Medtronic PLC*, No. 16-2422, Dkt. 29 at 4. Patent infringement litigation may never be necessary, and even if it does become necessary, the scope of any such later dispute will be dependent on the auditor's findings and potentially limited to the extent one or more parties reject such findings. Thus, at this stage, Quest's claim is nothing more than a "possible future controversy" which improperly asks this Court to issue a purely advisory opinion.<sup>71</sup>

**C. The Court Should Exercise its Discretion to Decline to Hear Quest's Counterclaims.**

Declaratory Judgment jurisdiction is not mandatory. "The Declaratory Judgment Act provides that a court *may* declare the rights and other legal relations of any interested

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<sup>71</sup> See *General Protecht Group, Inc.*, 2012 WL 1684573, at \*26. Courts in other circuits have similarly declined jurisdiction over similar counterclaims where plaintiffs asserted contract claims, but not patent infringement. See *Micro Focus (US), Inc. v. Genesys Software Sys., Inc.*, No. 14-14049-NMG, 2015 WL 4480358, at \*2-3 (D. Mass. July 21, 2015) (finding licensee failed to establish any infringement of sufficient immediacy and reality to warrant a declaratory judgment since plaintiff only sought to enforce contractual rights); *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 851 (2014) (addressing fears of unnecessarily turning a contract case into a patent infringement case).

party, 28 U.S.C. § 2201(a), not that it must do so.”<sup>72</sup> Federal courts have “unique and substantial discretion in deciding whether to declare the rights of litigants.”<sup>73</sup> To that end, “[i]n the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.”<sup>74</sup>

In evaluating whether a court should exercise discretionary jurisdiction over a declaratory judgment action, the Tenth Circuit applies the following five-factor test: (1) whether a declaratory judgment would settle the controversy; (2) whether it would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of “procedural fencing” or “to provide an arena for a race to res judicata”; (4) whether use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective.<sup>75</sup> None of those factors support declaratory judgment jurisdiction.

In this case Quest’s declaratory action would not settle a controversy (because there is no controversy), nor does it serve any other “useful purpose” in clarifying the parties’ legal relationship. At this point, the legal relationship between STC.UNM and Quest is

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<sup>72</sup> *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136 (2007) (emphasis in original); *see also General Protecht Group, Inc.*, 2012 WL 1684573, at \*13 (noting the Supreme Court explained that courts are “under no compulsion to exercise” Declaratory Judgment jurisdiction in *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491 (1942)).

<sup>73</sup> *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286–88 (1995).

<sup>74</sup> *Id.*

<sup>75</sup> *General Protecht Group, Inc.*, 2012 WL 1684573, at \*13 (citing *St. Paul Fire and Marine Ins. Co. v. Runyon*, 53 F.3d 1167, 1169 (10th Cir.1995)).

defined by contract law and the License Agreement, and nothing else. STC.UNM claims that Quest breached the parties' contract, and there is nothing in STC.UNM's claims that could be read as presenting a case or controversy related to anything beyond the parties' relationship as defined in the License Agreement. The Tenth Circuit recognizes that while a state law claim for breach of contract might implicate rights or obligations that concern patents, such a claim does not, in the abstract, raise substantial issues of federal patent law.<sup>76</sup> Indeed, it was proper for a court to apply "contract principles to determine the parties' respective rights under the licensing agreement" and to "declin[e] to address the parties' ownership rights as against the rest of the world pursuant to federal patent principles."<sup>77</sup>

Here, STC.UNM's rights under the License Agreement are governed by state contract law, and do not require adjudication of non-infringement, invalidity, or any other matters arising under federal patent law. STC.UNM has asserted claims that depend upon contract interpretation, *not* the interpretation of the scope and validity of patents.

Entertaining Quest's claims would transform a simple breach of contract action seeking to enforce audit rights into full-blown patent litigation, requiring an enormous waste of the Court's and the parties' resources in handling infringement contentions, non-infringement and invalidity contentions, claim construction, and associated expert and discovery time and expenses, among many other things. None of these undertakings are necessary or warranted, and the Court should therefore exercise its discretion to dismiss Quest's claims.

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<sup>76</sup> *Naimie v. Cytozyme Laboratories, Inc.*, 174 F.3d 1104, 1109 (10th Cir. 1999) (citing *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979)) (holding that state law governed claims for breach of contract and declaratory judgment relating to a license, rather than federal patent law).

<sup>77</sup> *Id.* at 1108-09.

The necessity of this result is underscored by the affront to STC.UNM's sovereign immunity implicated by the federal court's assertion of jurisdiction over a non-consenting arm-of-the-state.

#### IV. CONCLUSION

STC.UNM is a sovereign arm of The State of New Mexico, entitled to Eleventh Amendment immunity and common law immunity from this action. STC.UNM has not waived its immunity or consented to this suit. STC.UNM brought simple contract claims in state court, arising under state law, which only require a determination of STC.UNM's rights to an audit. Quest's attempt to move this case into federal court is nothing more than procedural gamesmanship designed to avoid its audit obligations or making enforcement of them into a multi-million dollar patent suit with complex issues regarding federal patent law completely unrelated to the audit rights in the License Agreement.<sup>78</sup> The Federal Circuit has already addressed the identical gamesmanship and found it meritless. For any or all of these reasons, the Court should dismiss Quest's counterclaims.

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<sup>78</sup> STC.UNM is required to pay for any License Agreement audit, so Quest's refusal to cooperate indicates to STC.UNM that Quest does not really believe its pre-suit claims that nothing is owed. If nothing were owed, no justification exists for refusing the audit, much less filing a complex patent infringement/invalidity suit before any audit took place. Quest is attempting to coerce STC.UNM into choosing between accepting a lowball settlement offer without the benefit of an audit or paying multi-millions of dollars in attorneys' fees fighting a lawsuit as a precondition to an audit that might reveal nothing is due.



**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

STC.UNM,

Plaintiff,

v.

CIV 17-1123 MV/KBM

QUEST DIAGNOSTICS INCORPORATED  
and QUEST DIAGNOSTICS CLINICAL  
LABORATORIES, INC.,

Defendants.

**PROPOSED FINDINGS OF FACT  
AND RECOMMENDED DISPOSITION**

THIS MATTER comes before the Court on two motions filed by Plaintiff STC.UNM ("STC"): its Motion to Dismiss (*Doc. 10*), filed December 7, 2017, and its Motion to Remand (*Doc. 12*), filed December 8, 2017. These motions were not fully briefed until October 29, 2018, when STC filed its Consolidated Reply *Doc. 67*. By two separate Orders of Reference, entered January 31, 2018 and July 30, 2018, the motions were referred to me by the presiding judge to conduct hearings if warranted, including evidentiary hearings, and to perform any legal analysis required to recommend to the Court an ultimate disposition of this case. *Doc. 37, 59*. Having reviewed the motions, the memoranda and exhibits submitted by the parties, and the relevant authorities, the Court recommends that STC's Motion to Remand be granted and that Defendant's Motion to Dismiss be denied as moot, as the Court lacks subject matter jurisdiction.



I. **BACKGROUND**

Plaintiff STC is a nonprofit research park corporation formed, owned and controlled by the University of New Mexico's ("UNM's") Board of Regents. *Doc. 1-1* ¶ 5. STC's purpose is to "nurture innovation and catalyze economic development of new technologies developed at UNM." *Id.* ¶ 6. STC furthers its role by "protecting technologies developed at UNM and transferring those technologies to the marketplace, connecting the business community to UNM for access to UNM's expertise, facilities, and research activities, and facilitating UNM's role as a contributor to New Mexico's economic development." *Id.* ¶ 7. STC allows UNM to "more efficiently transfer technology developed at [UNM] to the marketplace through the creation of start-up companies and the negotiation of license agreements with start-ups and established companies." *Doc. 63-1*, at 169 (2015 Designation Application).<sup>1</sup> In short, through the creation of STC, UNM has delegated to it the commercialization of intellectual property. *Doc. 63-1* at 24, Kuuttilla Dep. at 90:3-9.<sup>2</sup>

In 2006, STC entered into a License Agreement with Quest Diagnostics Incorporated. *Doc. 63-1*, Ex. 6 at 173-188. Thereafter, STC filed its Complaint, on September 25, 2017, in the Second Judicial District Court, County of Bernalillo, State of New Mexico, asserting claims against Defendant Quest Diagnostics Incorporated and Quest Diagnostic Clinical Laboratories, Inc. (the "Quest

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<sup>1</sup> Because Quest Defendants uploaded multiple exhibits consolidated into one document, *Doc. 63-1*, the Court refers throughout to the CM/ECF page numbers of that consolidated exhibit, rather than to the internal pagination.

<sup>2</sup> Elizabeth J. Kuuttilla serves as the Chief Executive Officer and Chief Economic Development Officer of STC.UNM.

Defendants”) for breach of contract, declaratory judgment, and breach of the implied covenant of good faith and fair dealing. *Doc. 1-1*. Quest Defendants removed the case to federal court on November 9, 2017, and they indicated that “[w]ithin (7) days of filing this Notice of Removal, Quest will file its Answer to Plaintiff’s Complaint along with a compulsory counterclaim . . . .” *Doc. 1* ¶3.

The Notice of Removal asserted three bases for subject matter jurisdiction in federal court. *Doc. 1*. **First**, Quest Defendants contend that subject matter jurisdiction exists because STC alleges a cause of action in which “its rights to relief necessarily depends [sic] on the resolution of a substantial question of federal patent law.” *Id.* at 4. Accordingly, they maintain that jurisdiction exists pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1338(a). *Id.* **Second**, they suggest that the Court has exclusive jurisdiction under 28 U.S.C. § 1338(a) and 28 U.S.C. § 1454(a), given their plan to later assert a compulsory federal patent counterclaim. *Id.* at 6-7. In their Notice of Removal, Quest Defendants explained that they “will seek a declaratory judgment” regarding the non-infringement of Licensed Patents. *Id.* at 6. To the extent that STC’s claims do not depend upon the resolution of a substantial question of federal patent law, Quest Defendants submit that the Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a). *Id.* at 7. **Finally**, Quest Defendants assert that the Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332, because the action is between citizens of different states and the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs. *Id.*

One week after the removal of this action, Quest Defendants indeed filed an Answer asserting counterclaims for declaratory judgments of non-infringement and invalidity. See *Doc. 4* at 21-28. Specifically, Quest Defendants seek a declaration that “Disputed Products” are not “Licensed Products” as defined in the parties’ License Agreement because none of the “Disputed Products infringes any valid claim of the ‘Licensed Patents.’” *Id* at 17.

## II. LEGAL STANDARD

An action is removable if the federal district court would have original jurisdiction over the matter. 28 U.S.C. § 1441(a). It is the obligation of the removing party, here Quest Defendants, to establish the subject matter jurisdiction of the federal court. *Huffman v. Saul Holdings Ltd. P’ship*, 194 F.3d 1072, 1079 (10th Cir. 1999). There is a presumption against removal jurisdiction. *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995).

Federal district courts have original jurisdiction over civil actions which arise under “the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. Additionally, they have original jurisdiction over civil actions between citizens of different states when the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs. 28 U.S.C. § 1332. For purposes of diversity jurisdiction, both the existence of diversity and the requisite amount in controversy must be affirmatively established by a preponderance of the evidence on the face of either the complaint or the removal notice. *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1290 (10th Cir. 2001). Diversity jurisdiction requires complete diversity in that no plaintiff be the citizen of the

same state as any defendant. *Gadlin v. Sybron Int'l Corp.*, 222 F.3d 797, 799 (10th Cir. 2000). Furthermore, a defendant may only remove the action to federal court if no defendant “is a citizen of the State in which such action is brought.” 28 U.S.C. § 1441(b).

### **III. ANALYSIS**

Before reaching the merits of the parties’ claims, the Court must resolve the jurisdictional issue raised by STC’s Motion to Remand. Quest Defendants maintain, both in their Notice of Removal and in their Combined Memorandum in Opposition to STC.UNM’s Motion to Dismiss and Motion to Remand, that the Court has federal question jurisdiction, patent jurisdiction, patent counterclaim jurisdiction, and diversity jurisdiction. *Docs. 1; 63*. STC, in contrast, insists that the Court lacks subject matter jurisdiction altogether. *See Doc. 12*. Although the Court concludes that it must determine, first, whether the case must be remanded for lack of subject matter jurisdiction, it concurrently considers the arguments in STC’s Motion to Dismiss to the extent that they bear on this analysis.

Quest Defendants invoked the Court’s jurisdiction upon removal and therefore bear the burden of establishing that jurisdiction exists, *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002), with “all doubts [being] resolved against removal.” *Fajen v. Found. Reserve Ins. Co.*, 683 F.2d 331, 333 (10th Cir. 1982). The Court considers each of the three grounds of jurisdiction asserted by Quest Defendants in turn.

**A. Federal Question or Patent Jurisdiction under 28 U.S.C. § 1331 or 28 U.S.C. § 1338**

Under the well-pleaded complaint rule, a suit “arises under” federal law and is appropriate for removal to federal court, when a federal question is presented on the face of the plaintiff’s properly-pleaded complaint. *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 9-12 (1983). Here, examination of STC’s Complaint, which asserts only state law contract claims, fails to reveal a federal question on its face. Yet, this does not end the inquiry, because federal district courts also “have original jurisdiction of any civil action arising under any Act of Congress relating to patents . . . .” 28 U.S.C. § 1338(a). Borrowing from its interpretation of federal question jurisdiction, the United States Supreme Court explained that § 1338(a) jurisdiction extends:

only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.

*Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808-09 (1988). Put another way, a case arises under federal patent laws when patent law creates the cause of action or the claims asserted “necessarily raise” an “actually disputed” and “substantial” question of patent law “capable of resolution in federal court without disrupting the federal-state balance approved by Congress.” *Gunn v. Minton*, 133 S. Ct. 1059 (2013). The Supreme Court has clarified that alternative theories in a complaint may not form the basis for § 1338(a) jurisdiction if patent law is not essential to each of those theories. *Christianson*, 486 U.S. at 801.

STC's state-law claims for breach of contract, declaratory judgment, and breach of the implied covenant of good faith and fair dealing relate to the parties' License Agreement. STC's claims were not created by federal patent law but by state contract law. The question becomes, then, whether STC's right to relief on these claims necessarily depends on resolution of a substantial question of federal patent law. In answering that question, STC urges the Court to follow the rationale applied by the Federal Circuit Court of Appeals in *University of Florida Research Foundation, Inc. v. Medtronic plc*, No. 16-2422, 2017 WL 6210801, at \*2 (Fed. Cir. Jan. 27, 2017). The factual similarities between *Medtronic* and the present case are striking. Indeed, the only factual difference that the Court can discern is a slight variation in the procedural posture: *Medtronic* being decided on appeal by the Federal Circuit, the appellate court with jurisdiction over patent appeals, and the present case being decided in the first instance by a federal district court.

In *Medtronic*, the University of Florida Research Foundation ("the research foundation") moved to dismiss or transfer an appeal to the Eleventh Circuit Court of Appeals. *Id.* at \*1. The case involved a license agreement, into which the research foundation had previously entered with a company later acquired by Medtronic. *Id.* Under the license agreement, the licensee agreed to pay royalties to the research foundation on "Licensed Products." *Id.* The agreement defined "Licensed Products" as those covered by specified patents. *Id.* The licensee agreed to provide a "certified full accounting statement" of the royalty amounts payable to the research foundation and to maintain "books and records sufficient

to verify the accuracy and completeness” of the accounting. *Id.* Moreover, the licensee agreed to “take all steps necessary so that” the research foundation could “audit, review, and/or copy all books and records” in order to “verify the accuracy of [the] accounting.” *Id.* When Medtronic refused a request by the research foundation to audit records, the research foundation filed suit in Florida state court, asserting claims for breach of contract and breach of the implied duty of good faith and fair dealing and seeking a declaratory judgment on its right to an accounting. *Id.* Medtronic counterclaimed for declaratory judgments of “noninfringement and invalidity” and for a determination that the disputed products were not “Licensed Products” because they did not infringe valid patents. *Id.* Medtronic removed the action to federal court, asserting both diversity jurisdiction and patent jurisdiction. *Id.* The federal district court granted the research foundation’s motion to remand and Medtronic appealed. *Id.*

Medtronic argued that the research foundation’s claims to an audit arose under patent laws, because its right to relief on its audit claim depended on whether the disputed products qualified as “Licensed Products” covered by the parties’ license agreement. *Id.* at \*2. The research foundation countered, arguing that the claims in its complaint, including its request for a declaratory judgment of entitlement to an audit of Medtronic’s accounting, did not require the court to determine patent infringement issues. *Id.*

Critically, the Federal Circuit offered the following rationale in determining that it lacked patent jurisdiction: “We interpret the Research Foundation’s complaint to assert a contract claim seeking an accounting that is not dependent

on whether the products as to which that accounting is sought qualify as ‘Licensed Products’ under the license agreement.” *Id.* The Federal Circuit explained that although the research foundation’s “*ultimate* right to monetary relief” stemming from the failure to pay royalties might give rise to *future* compulsory patent counterclaims by Medtronic, the immediate claims at issue – those asserted by the research foundation in its complaint – could be resolved without resort to patent law. *Id.* (emphasis added). Because the research foundation’s claims did not arise under federal patent law, the Federal Circuit concluded that it therefore lacked jurisdiction over the appeal. *Id.*

*Cellport Systems Inc. v. Peiker Acoustic GMBH & Co. KG*, 762 F.3d 1016 (10th Cir. 2014) is also instructive, though not as factually similar as *Medtronic*. In *Cellport Systems*, the plaintiff sued its licensee for refusing to pay royalties or to provide an accounting on certain products allegedly covered by a license agreement. *Id.* at 1019. The licensee maintained that the plaintiff could only claim royalties on products that practiced the plaintiff’s patents. *Id.* at 1022. The plaintiff insisted that it was entitled to royalties on sales of “Licensed Products,” as defined by the license agreement, and that the agreement did not require any patent infringement analysis. *Id.* After the district court determined that the licensee owed royalties on only two of seven products, the plaintiff appealed. *Id.* at 1018. The licensee cross-appealed and moved to transfer the appeal to the Federal Circuit based upon federal patent jurisdiction. *Id.* at 1021. The Tenth Circuit denied the licensee’s motion to transfer, holding that patent law was not essential to determining whether the licensee breached its royalty obligations

under the parties' license agreement. *Id.* at 1023. The court emphasized that the plaintiff's "complaint state[d] claims based on contract law, not patent law." *Id.* at 1021. Moreover, the court found that it could ascertain whether royalties were owed on certain products without resolution of a substantial question of federal patent law. *Id.* at 1023. As a result, the plaintiff's breach of contract claims did not give rise to federal patent jurisdiction. *Id.*

As in *Medtronic* and *Cellport Systems*, STC's right to relief on its contract claims does not depend on the resolution of a substantial question of federal patent law. A court need not determine whether patents have been infringed in order to resolve STC's contract claims. Instead, a court need only decide: (1) whether Quest Defendants breached the parties' License Agreement by failing to permit an audit; (2) whether Quest Defendants breached their duty of good faith and fair dealing in failing to cooperate and provide a meaningful audit; and (3) whether STC is entitled to a declaratory judgment in its favor concerning the scope of the contemplated audit. A court can construe the parties' License Agreement's audit provisions and Quest Defendants' duties thereunder without determining whether any products infringe the licensed patents. Accordingly, Quest Defendants have failed to establish federal question or patent jurisdiction based upon STC's claims, and the Court therefore recommends a finding that no such jurisdiction exists.

#### **B. Removal Jurisdiction under 28 U.S.C. § 1454**

In their Notice of Removal, Quest Defendants also assert jurisdiction pursuant to 28 U.S.C. § 1454, which provides removal jurisdiction in a case in

which “*any party* asserts a claim for relief arising under any Act of Congress relating to patents.” § 1454 (emphasis added). According to Quest Defendants, § 1454 jurisdiction arises here because they assert “a Counterclaim where [STC’s] right to relief necessarily depends on the resolution of a substantial issue of federal patent law.” *Doc. 1* at 6. “[B]y enacting Section 1454, Congress has broadened federal court removal jurisdiction to better ensure that whenever claims arise under federal patent law, they are removable, irrespective of who asserted them.” *Univ. of Ken. Research Found., Inc. v. Niadyne, Inc.*, No. Civ. 13-16-GFVT, 2013 WL 5943921, at \*5 (E.D. Ky. Nov. 5, 2013).

Curiously, at the time they removed this case, Quest Defendants had not yet asserted a counterclaim at all. It was a week *after* removal to this Court that they filed their Answer to STC’s Complaint and Counterclaims. *Compare Doc. 1* (filed Nov. 9, 2017), *with Doc. 4* (filed Nov. 16, 2017). The Notice of Removal itself merely indicated that Quest Defendants “*will seek* a declaratory judgment that none of the products identified in Exhibit F to STC’s Complaint in the State Court Action infringes any of the Licensed Patents, and are, therefore, not Licensed Products.” *Doc. 1* at 7 (emphasis added). As such, no party had technically asserted – at least not in any pleading before the Court – a claim for relief under any Act of Congress relating to patents at the time of removal. This begs the question whether Quest Defendants’ reference to *anticipated* patent counterclaims in its Notice of Removal conferred patent counterclaim jurisdiction upon this Court.

STC contends that removal under § 1454 was improper prior to the formal filing of Quest Defendants' patent counterclaims in a pleading, citing *Masimo Corp. v. Mindray DS USA, Inc.*, No. 14-0405 SDW/SCM, 2015 WL 93759 (D.N.J. Jan. 7, 2015). In *Masimo*, the plaintiff filed suit in state court alleging state law contract claims against the defendant in connection with a purchasing and license agreement under which the plaintiff agreed to license patented technology to the defendants. 2015 WL 93759, at \*1. The defendant removed the action to federal court, alleging that the court had original jurisdiction over patent infringement claims that were implicated by the plaintiff's claims. *Id.* The plaintiff moved to remand, noting that no counterclaims had been filed in any pleading and maintaining that removal had therefore been improper. *Id.* After the motion to remand was fully briefed, the defendant filed its answer with counterclaims and argued that the motion to remand was thereby rendered moot. *Id.* The plaintiff responded that removal under § 1454 remained improper given the lack of any formally-asserted patent claims at the time of removal. *Id.*

Guided by the plain language of § 1454, which requires a party to “assert[] a claim for relief,” and the strict construction of removal statutes, the District of New Jersey determined that the defendant’s “reference to potential patent law counterclaims in its Notice of Removal [was] insufficient to establish jurisdiction pursuant to Section 1454.” *Id.* at \*3. That the defendant did *eventually* assert removable counterclaims in its answer, after removal, did not alter the Court’s conclusion. *Id.* at \*4. The court offered the following rationale:

This Court would be hard-pressed to find that simply referencing an anticipated patent counterclaim in a Notice of Removal is

sufficient to establish jurisdiction under Section 1454. To permit such a finding, would allow for certain anomalous results. For example, a defendant could file a Notice of Removal on the basis of anticipated patent counterclaims, and then subsequently file a motion to dismiss before ever actually filing the answer and counterclaims. A court could then assert jurisdiction and rule on a motion without ever having any patent claims asserted in the case in federal court. In such a case, a federal court would be ruling on pure state law issues. Essentially, [it] would allow federal courts to obtain jurisdiction over cases in which federal patent claims are never in fact asserted. Such results could not be in line with the intentions of Congress when it enacted Section 1454.

*Id.* at \*4.

This Court finds the District of New Jersey's rationale compelling. To the extent that Quest Defendants removed this matter on the basis of patent counterclaim jurisdiction in the absence of any properly-asserted patent counterclaims, removal was indeed improper. The Court recommends against a finding of patent counterclaim jurisdiction.

### **C. Diversity Jurisdiction**

Quest Defendants insist that the Court may also exercise diversity jurisdiction, pursuant to 28 U.S.C. § 1332, because this action is between citizens of different states and the amount in controversy exceeds the sum or value of \$75,000, exclusive of costs and interest. See *Doc. 1* ¶ 24. Quest Defendants assert that they are citizens of Delaware and New Jersey, as they were each incorporated in Delaware but maintain principal places of business in New Jersey. See *Doc. 1* ¶ 8-9. They suggest that STC, on the other hand, is a citizen of New Mexico as a "New Mexico nonprofit research park corporation, with a principal place of business in Albuquerque, New Mexico." *Id.* ¶ 25.

STC maintains that it cannot be considered a “citizen” of New Mexico, because it is an arm of the state that enjoys Eleventh Amendment Immunity. *Doc. 12* at 6. Indeed, diversity jurisdiction only exists for actions “between citizens of different states,” 28 U.S.C. § 1332, and an “arm or alter ego of a state” cannot be characterized as a “citizen” for diversity purposes, *Dougherty v. Univ. of Okla. Bd. of Regents*, 415 F. App’x 23, 25 (10th Cir. 2011); *Moor v. Alameda Cty.*, 411 U.S. 693, 717 (1973).

The Eleventh Amendment to the United States Constitution provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. Amend. XI. Although the explicit terms of the Eleventh Amendment do not include citizens’ suits against their own state, federal courts have broadly construed the amendment to render states immune from suits brought by private parties in federal court. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996). Absent a waiver of immunity, the Eleventh Amendment shields states, and governmental entities that are “arms of the state,” from suit in federal court, leaving parties to pursue claims against such parties in state court. *See Duke v. Grady Mun. Schs.*, 127 F.3d 972, 974 (10th Cir. 1997).

To determine whether a party is an “arm of the state” for purposes of Eleventh Amendment immunity, the Tenth Circuit requires two general inquiries. *See id.* at 974. First, a court should examine the degree of autonomy given to the entity. *Id.* Second, and most importantly, the court should consider the extent of

financial independence enjoyed by the entity. *Id.* An entity is immune, for instance, if a “money judgment sought is to be satisfied out of treasury.” *Id.* According to the Supreme Court, “the vulnerability of the State’s purse [i]s the most salient factor in Eleventh Amendment determinations.” *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994).

From these general inquiries, the Tenth Circuit has derived five factors to be considered in the arm-of-the-state analysis: (1) how the entity is characterized under state law; (2) how much guidance and control the state exercises over the entity; (3) how much funding the entity receives from the state; (4) whether the entity enjoys the ability to issue bonds and levy taxes; and (5) whether the state would bear legal liability to pay a judgment against the entity. *Colby v. Herrick*, 849 F.3d 1273, 1276 (10th Cir. 2017).

As a starting point in its analysis, the Court acknowledges that the State’s institutions of higher learning and their boards of regents are arms of the State of New Mexico. *See, e.g., Watson v. Univ. of Utah Med. Ctr.*, 75 F.3d 569, 575 (10th Cir. 1996) (“Our cases have consistently found state universities are arms of the state.”); *Korgich v. Regents of N.M. Sch. of Mines*, 582 F.2d 549, 551 (10th Cir. 1979); *Mohammad v. Metro. Ct.*, No. 16-473 MV/KK, 2017 WL 3172838, at \*4 (D.N.M. May 31, 2017). Therefore, at this juncture, the Court must determine whether such Eleventh Amendment immunity extends to STC, a New Mexico nonprofit research park corporation formed by a state university and its board of regents.

## 1. Characterization Under State Law

In addressing the characterization of STC under state law, the Court may consider relevant state statutes, regulations, and constitutional provisions characterizing the entity, as well as relevant holdings of state courts. See *Kan. State Univ. v. Prince*, 673 F. Supp. 2d 1287, 1300 (D. Kan. 2009). The legislation under which STC was created, the University Research Park and Economic Development Act (“the Act” or “URPEDA”), is the most critical legislation for the Court’s consideration under this factor. The language of the Act, however, cuts both ways. It explicitly provides that a research park corporation should be deemed an agency or other political subdivision of the state for some purposes but not for others. More specifically, under the Act, a research park corporation

shall *not* be deemed an agency, public body or other political subdivision of New Mexico, including for purposes of applying statutes and laws relating to personnel, procurement of goods and services, meetings of the board of directors, gross receipts tax, disposition or acquisition of property, capital outlays, per diem and mileage and inspection of records.

NMSA 1978 § 21-28-7(A) (emphasis added). Conversely, according to the same act, a research park corporation “*shall* be deemed an agency or other political subdivision of the state for purposes of applying statutes and laws relating to the furnishing of goods and services to the university that operates it and the risk management fund.” NMSA 1978 § 21-28-7(B) (emphasis added). Moreover, the Act specifies that research park corporations, as well as their officers, directors and employees, enjoy immunity from tort liability pursuant to the Tort Claims Act. NMSA 1978 § 21-28-7(C). Further, the Act provides that losses suffered by a

research park corporation “may be included among losses covered by the risk management fund of New Mexico.” N.M.S.A. 1978 § 21-28-7(C).

Conceding that research park corporations may be considered agencies of the state for “*limited* purposes,” Quest Defendants maintain that STC’s separate corporate existence under New Mexico law nevertheless weighs against a finding of Eleventh Amendment immunity. *Doc.* 63 at 17-19. They argue that “[c]ourts have recognized that nonprofit corporations generally do not qualify for immunity as an arm of the state.” *Id.* at 17 (citing *Ormsby v. C.O.F. Training Servs., Inc.*, 194 F. Supp. 2d 1177, 1185 (D. Kan. 2002)). They note that, by virtue of STC’s classification as a corporation, it enjoys the power to sue and be sued in its corporate name, to make contracts, to incur liabilities and borrow money, and to enter into license agreements involving intellectual property. *Id.* at 18 (citing N.M.S.A. 1978 § 21-28-6).

But the Tenth Circuit’s rationale in *Sturdevant v. Paulsen*, 218 F.3d 1160 (2000) suggests that the corporate structure of an agency does not resolve the issue of whether it constitutes an arm of the state. There, the entity at issue, the Colorado State Board for Community Colleges and Occupational Education, was described as a “‘body corporate’ with the power to hold ‘money, lands, or other property’” and, yet, the court found that the entity’s corporate status did not preclude its characterization as an arm of the state. *Id.* at 1163. The court acknowledged that the corporate structure may be used “for the purpose of providing a convenient means for allowing [the university] to pursue the ends of higher education.” *Id.* at 1167.

Here, STC's corporate structure does not weigh in favor of, nor against, a finding of Eleventh Amendment immunity. See *id.* at 1167; see also *Hamilton Mfg. Co. v. Trs. of State Colls. in Colo.*, 356 F.2d 599, 601 (10th Cir. 1966) (holding that the Board of Trustees of the State Colleges in Colorado were entitled to Eleventh Amendment immunity despite designation as a "body corporate"); *U.S. ex rel. Adrian v. Regents of the Univ. of Cal.*, 363 F.3d 398, 401 (5th Cir. 2004) (holding that the Regents of the University of California were an arm of the state even though they managed the laboratory at issue through a corporate structure); *Donald v. Univ. of Cal. Bd. of Regents*, 329 F.3d 1040, 1044 (9th Cir. 2003) (holding that the Regents of the University of California, as manager of a university hospital, qualified as an arm of the state despite their corporate organization).

Consequently, the Court is left with competing legislative descriptions of a research park corporation under URPEDA as the primary indication of the State's characterization of STC. Although the Act suggests that STC is not a state agent for certain purposes, the Court concludes that the New Mexico Legislature's articulation favors a finding that a research park corporation *is* an arm of the state for Eleventh Amendment immunity purposes. In contrast to the language that the Legislature has sometimes used to specify that entities are separate and apart from the state, URPEDA expressly anticipates that STC will be treated as a state agency for certain purposes. *Contra Lucero v. N.M. Lottery Auth.*, No. 07cv0499 JCH/RLP, 2008 WL 7467977, at \*2 (D.N.M. July 7, 2008) (noting both § 6-24-2(C)'s description of the New Mexico Lottery Authority as "a business enterprise

separate from state government” and § 6-24-5’s description of the Authority as a “public body, politic and corporate, separate and apart from the state”); *Jornigan v. N.M. Mut. Cas. Co.*, No. CIV 03cv0813 JB/ACT, 2004 WL 3426120, at \*7 (D.N.M. July 14, 2004) (noting N.M.S.A. 1978 § 52-9-4’s description of New Mexico Mutual Casualty Company, as one created by the state as a “nonprofit, independent, public corporation”).

Ultimately, that STC is deemed by the Legislature to be an agency of the State for certain significant purposes, such as for laws relating to the provision of goods and services to UNM, for participation in the risk management fund, and for tort liability under the Tort Claims Act, weighs in favor of granting STC Eleventh Amendment immunity.

## **2. Guidance and Control Exercised by the State**

According to STC, URPEDA itself contemplates considerable control by the State over STC’s management and operations. *Doc. 10* at 9. For example, STC notes that the Act requires it to perform annual independent audits and to provide copies of those audits to the UNM Board of Regents and the New Mexico Secretary of State. *Id.* (citing N.M.S.A. 1978, § 21-28-17). Moreover, the UNM Board of Regents is charged by statute with appointing STC’s board of directors. *Id.* (citing N.M.S.A. 1978, § 21-28-4(B)).

STC insists the powers it has been granted as a research park corporation are “subordinate to the broad powers given to [UNM] Board of Regents to ‘operate,’ ‘finance’ and otherwise establish guidelines controlling [STC].” *Doc. 10* at 9. Section 21-28-6, which outlines the “Powers of research park corporations,”

gives STC the power to, among other things, approve or disapprove proposals; sue and be sued; purchase, own, and dispose of property, including intellectual property; sell or otherwise dispose of assets and property; make contracts and borrow money; receive and administer grants; and invest funds. NMSA § 21-8-6. By contrast, Section 21-28-5 outlines the “[p]owers of [the] university as related to research parks,” giving the UNM Board of Regents the power to, among other things, establish and operate research parks; form research park corporations; lease and sell personal and real property to research parks on terms and conditions established by the regents; construct or acquire buildings and improvements, including research and service facilities; allow a lessee or purchaser of university land to acquire or construct suitable buildings, facilities and improvements upon the land; finance the costs of the research park; conduct, sponsor, finance and contract in connection with technological innovations of all kinds; and “anything else that the regents deem appropriate to further the purposes of the University Research Park and Economic Development Act either directly or indirectly.” § 21-28-5(A). Furthermore, the statute provides that the “specification of powers [of the Board of Regents as related to research parks] is not exclusive and shall not be construed to impair or negate any other power or authority enjoyed by the regents under the constitution or laws of this state.” § 21-28-5(B). Having considered the respective powers granted by statute to STC and UNM Board of Regents, the Court agrees that those granted to the Regents are far broader and superior to those granted

to STC and that the disproportionate powers support a finding of significant state control.

Further, pursuant to its Articles of Incorporation, STC is to be “operated, exclusively for the benefit of, to perform the functions of, or carry out the purposes of, the University of New Mexico” and, further, “shall be operated, supervised, or controlled by the University of New Mexico.” *Doc. 11-2, Ex. A, at 9-10* (Article III(b) and (c)). The Articles provide that UNM Board of Regents is the sole corporate member and that upon dissolution of STC, all “assets shall be distributed” to the Regents. *Id. at 10* (Article V-VI).

Similarly, STC’s By-laws reiterate that STC is organized exclusively for the benefit of UNM and that the UNM Board of Regents is the only corporate member. *Doc. 11-2, Ex. B, at 2* (Articles I and III). They also provide that any member of the UNM Board of Regents may call a special meeting. *Id. at 3* (Article III). Pursuant to the By-laws, the number of directors on the Board who are UNM employees may not exceed 40 percent. Yet, in addition to STC’s President and CEO, the Board must include UNM’s President, Provost and Executive Vice President for Academic Affairs, Vice President for Research, the Executive Vice President for Administration, Executive Vice President for Health Science, a UNM academic dean, two members of the UNM faculty, and one member of the UNM Board of Regents. *Id. at 3* (Article IV, § 1). STC suggests that requiring UNM officials to serve on STC’s Board allows the State to exert significant control over STC.

Quest Defendants note that only 40 percent of the total number of directors are permitted to be UNM employees. See *Doc. 63* at 21 (citing *Doc. 11-2*, Ex. A to Kuuttila Decl., at 3). According to Quest Defendants, requiring 60 percent of the board members to be employed outside UNM significantly limits UNM's control over STC. *Id.* Still, nominations to the board must be presented to the UNM Board of Regents for "approval or disapproval," and the UNM President is charged with appointing the UNM academic dean and members of UNM faculty. *Doc. 11-2*, Ex. B, at 3 (Article IV, § 2). Directors may be removed by UNM Board of Regents for cause. *Id.* at 4 (Article IV, § 7). That there is some limitation on the number of state employees serving on the Board does not diminish the significant control by UNM through the UNM Regents' selection and retention of board members.<sup>3</sup> See *Watson*, 75 F.3d at 576 (board members appointed by the university president with the approval of the institutional council); *Colby*, 849 F.3d at 1277 (commissioners appointed and removed by the governor); *Sturdevant*, 218 F.3d at 1169 (board predominantly made up of state executive appointees).

Even so, Quest Defendants submit that STC's independence from UNM is its "hallmark" and its primary purpose, as the research park corporation was a created to "bridge" relationships between UNM and the business community. *Doc. 63* at 19 (citing Kuuttila Dep. at 193:16-21). They note that according to the

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<sup>3</sup> Indeed, STC's CEO reports that in 2004 the UNM Board of Regents became dissatisfied with the composition of the board and refused to confirm the appointments of three or four board members, choosing instead to select and appoint different board members and requiring amendment to the governing documents to allow UNM greater control over the board. *Doc. 63-1* at 47, Kuuttila Dep. at 183:22-184:5.

Revised Memorandum under which STC operates, STC has the power to organize itself and employ staff as it sees fit in fulfilling its responsibilities to UNM. See *id.* at 20 (citing Ex. 4 to Kuuttila Decl., at 2, ¶ 1.3 and Kuuttila Dep. at 97:7-22). Further, STC pays its own employee salaries and provides employee benefits. *Doc. 63*, at 20 (citing Kuuttila Dep. at 32:21-33:10; 33:23-34:20).

STC, however, maintains that it is not the day-to-day operations of a given entity which drive the arm-of-the-state analysis. *Doc. 67* at 13-14. The Court's rationale in *Watson* supports such a notion.

In *Watson*, the Tenth Circuit described the university medical center as “clearly . . . not autonomous from the University or the state” despite the center's operation of its own patient care programs “virtually . . . in the public sector, competing with other private nonprofit entities” and its ability to increase its own revenues through control over patient billing. See *Watson*, 75 F.3d at 576. The *Watson* court emphasized that the university, through its president, was responsible for appointing members of the medical center's board of directors with approval by the institutional council. *Id.* Further, the university president retained authority to “grant final approval for the long range plan of the Medical Center, the annual budget and appropriations request, major construction, capital financing, fund raising programs, and University policies, procedures, rules, and regulations ‘relating to or affecting’ the Medical Center.” *Id.* The medical center's by-laws described it as a “component organization” of the university, and the chief operating officer of the medical center reported directly to the university vice president for health sciences. *Id.* Although the court characterized it as a “close

case” given the medical center’s limited state funding, the state’s control through appointing board members, approving its budget, and engaging in long-range planning weighed in favor of Eleventh Amendment immunity. *See id.* at 576-77.

Where UNM exerts a similar degree of control over STC here, appointing its board of directors, reviewing its annual audits, and “operat[ing],” “supervis[ing],” and “control[ing]” its functions, this factor weighs strongly in favor of a finding that STC is indeed an arm of the state.

### **3. Funding Received from the State**

The Act expressly grants the UNM Board of Regents the power “to finance all or part of the cost of [a] research park,” including the purchase, construction, remodeling, and maintenance of buildings and equipment. N.M.S.A. 1978, § 21-28-5(A)(8). According to the testimony of STC’s CEO, “between 80 and 90 percent of STC’s budget comes from direct cash funding or indirect funding via commercialization of UNM intellectual property.” *Doc. 63-1* at 48-49, Kuuttilla Dep. at 189:22-190:3. STC’s licensing income is derived entirely from UNM’s assignment of its intellectual property to the research park corporation. *Id.* at 190:7-11. Indeed, STC’s CEO testified that STC’s salaries, benefits, retirement funds, private insurance, and legal representation come from UNM or the income derived from UNM’s intellectual property. *Id.* at 191:12-192:1. Further, STC’s budget is approved by the University and its financial audits are reviewed by UNM Board of Regents and approved annually. *Id.* at 181:2-21.

Conceding that UNM “retains some budget oversight,” Quest Defendants emphasize that UNM “does not control how every dollar is spent at STC.”

*Doc. 63* at 21. In the Court's view, however, STC's financial dependence on UNM is quite substantial, far more substantial than it was in *Watson* and *Colby*, where the subject entities received less than ten percent of their revenue from state appropriations. See *Watson*, 75 F.3d at 576; *Colby*, 849 F.3d at 1277 n.2. As such, this factor weighs heavily in favor of Eleventh Amendment immunity.

#### **4. Ability to Issue Bonds and Levy Taxes**

The Act grants research park corporations, like STC, the authority to issue bonds and other obligations, which are "deemed issued on behalf of the university." See NMSA 1978, § 21-28-9. By statute, any income from bonds issued by a research park corporation are free from taxation. See NMSA 1978, § 21-28-16. Quest Defendants reference testimony by STC's CEO, however, that it has never issued a bond in her 15-year tenure with STC. *Doc. 63* at 22 (citing Kuuttilla Dep. at 176:6-25; 177:1-10).

Although the parties agree that STC does not, in fact, issue bonds or levy taxes, (see *Docs. 63* at 23; *67* at 13), the parties interpret the significance of this fact differently. Quest Defendants maintain that when an entity, like STC, uses methods other than bonds and taxes to raise money, it behaves like a nonprofit, rather than a division of the State, which suggests that it is not an arm of the state for Eleventh Amendment immunity purposes. STC maintains otherwise.

The Tenth Circuit's opinions in *Colby* and *Sturdevant* lend credence to STC's interpretation. In *Colby*, the court explained that the power of the subject entity to issue bonds "cut *against* Eleventh Amendment immunity." *Colby*, 849 F.3d at 1277 (emphasis added). The court offered more explanation in

*Sturdevant*, explaining that bond-issuing and tax-levying authority are considerations in the arm-of-the-state analysis, not because they distinguish an arm of the state from a non-profit, but because they are “characteristic attribute[s] of a political subdivision,” which is not entitled to Eleventh Amendment immunity. See *Sturdevant*, 218 F.3d at 1170. Applying the logic of *Colby* and *Sturdevant* to this case, STC’s statutory power to issue bonds weighs *against* Eleventh Amendment immunity, though the weight may be somewhat diminished by the fact that STC has never actually exercised that authority. As for the authority to levy taxes, STC lacks such authority (see *Docs.* 63 at 23; 57 at 13), which weighs *in favor* of Eleventh Amendment immunity. See *Sturdevant*, 218 F.3d at 1170.

Ultimately, where STC admittedly lacks taxing authority and has never exercised its statutory bond-issuing authority, the Court considers this factor weighing more heavily toward a finding of Eleventh Amendment immunity.

### **5. Liability to Pay Judgments**

The final factor, which courts have regarded as the most significant one, has at times been problematic in its application. In *Sturdevant*, for example, the Tenth Circuit described the factor as a “particularly important” one but ultimately declined to resolve it. *Sturdevant*, 218 F.3d at 1164-66. The court explained that there was a “lack of clarity” as to the operation of Colorado’s risk management fund with respect to the defendant board and the state’s legal liability for a potential judgment against it. *Id.* at 1166.

Here, the New Mexico Legislature has explicitly addressed participation by research park corporations in the State's risk management fund.<sup>4</sup> New Mexico Statute Annotated § 21-21-7 provides that a research park corporation is deemed to be an "agency or other political subdivision of the state for purposes of . . . the risk management fund." § 21-28-7(B). Further, STC's enabling statute contemplates that its losses "may be included among losses covered by the risk management fund of New Mexico." § 21-28-7(C).

In addition to these applicable statutes, the Risk Management Division offered its own understanding of STC's coverage by the fund in a 1994 letter from the Deputy Director of New Mexico's Risk Management Division to UNM counsel. There, the division expressly confirmed that "since [STC] is established by [UNM]," the Risk Management Division considers it, its officers, directors, and employees to be covered "the same as [UNM] under the public liability fund." *Doc. 12-3, Ex. C, at 2*. Likewise, the Risk Management Division issued an Evidence of Coverage on July 1, 2017, naming both STC and the "State of New Mexico" as insureds and outlining the insurance coverage available. *Doc. 11-4, Ex. D, at 2*.

Quest Defendants point out that the 1994 letter from the Risk Management Division goes on to address STC's access to other coverages under the risk management fund, however. *Doc. 63 at 23* (citing *Doc. 11-3, Ex. C, at 2-3*). Indeed, the letter explained that it was the Risk Management

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<sup>4</sup> Generally speaking, the Risk Management Fund covers state governmental entities for risks for which sovereign immunity has been waived under the Tort Claims Act. See N.M.S.A. 1978, § 41-4-20, *et seq.*

Division's "initial conclusion" that coverages for "public property, surety bond, worker's compensation, and unemployment compensation" were not available to STC, because it is a non-profit corporation. *Doc. 11-3*, Ex. C, at 2-3. Quest Defendants maintain that "the record is clear that STC purchases and pays for insurance from the private sector for coverage such as public property, surety bond, worker's compensation, unemployment compensation, medical malpractice, boiler and machinery, fine arts, et cetera." *Doc. 63* at 24 (citing *Doc. 11-4*, Ex. D; Kuutila Dep. at 56:20-23, 57:17-21, 61:10-16, 161:14-25, 165:19-23, 166:17-25, 167:1-20). Accordingly, they suggest that there are many causes of action for which STC does not enjoy coverage under the risk management fund. *Id.* at 24. STC counters, referring the Court to its 2018 "Evidence of Coverage," which shows that it has each type of coverage listed by Quest Defendants in conjunction with the State and UNM. *Doc. 67* at 13 (citing *Doc. 63-1*, at 132).

The Court agrees with STC that its more recent Evidence of Coverage trumps any "initial conclusion" articulated in the Risk Management Division's 1994 letter. Furthermore, in *Sturdevant*, the Tenth Circuit rejected a similar argument to the one advanced by Quest Defendants here, dismissing as unsupported the plaintiff's position that the "details of a risk management fund" rendered an entity ineligible for characterization as an arm of the state for certain types of claims. See *Sturdevant*, 218 F.3d at 1165. The court "decline[d] to answer the state law question of the precise application of the risk management statute to particular claims." *Id.*

Perhaps more importantly, the Tenth Circuit cautioned against delving into the details of a risk management fund's operation to the extent that it might "eclipse a fundamental distinction . . . between alter egos or instrumentalities of the state on the one hand, and political subdivisions such as cities and counties on the other." *Id.* at 1170. Explaining that Eleventh Amendment immunity does not extend to "counties and similar municipal corporations," the Tenth Circuit distilled the arm-of-the-state analysis down to one primary inquiry: whether the entity is "more like a county or city than . . . like an arm of the state?" *Id.* at 1163-64. The court explained that "political control by some community other than the state as a whole" is a "fundamental characteristic of a political subdivision." *Id.* at 1170. Further, it noted that the Tenth Circuit has "consistently held that state colleges and universities are arms of the state, whereas local school boards are political subdivisions." *Id.*

Where NMSA § 21-28-7 and STC's Evidence of Coverage confirm that STC participates in the risk management fund in the same manner as UNM, the Court cannot say that STC's purchase of private insurance for some types of coverage somehow precludes Eleventh Amendment immunity. Rather, STC's participation in the State's risk management fund suggests that judgments against it would expose the State to liability. The State's liability for STC's judgments, in turn, weighs in favor of arm-of-the-state status. *See Colby*, 849 F.3d at 1277 (explaining that the entity's participation in Colorado's risk management fund "supports consideration . . . as an arm of the state"); *see also Watson*, 75 F.3d at 576-78 (reasoning that although the medical center was

practically self-funded, there was evidence that “the bulk of any judgment would be paid from the state Risk Management Fund,” which supported a determination that the medical center was an arm of the state).

Returning to the fundamental distinction between counties and cities and arms of the state, which the Tenth Circuit has implored courts to consider over and above the details of a risk management fund’s operation, the Court is satisfied that STC’s primary function is to benefit UNM, a state university, as well as the State of New Mexico as a whole. See *Doc. 63-1* at 21, Kuuttila Dep. at 79:9-80:6 (explaining that STC was formed to benefit UNM and the State of New Mexico through technology transfer and economic development); see also *Doc. 11-2*, Ex. B, at 2 (By-laws); *Doc. 11-2*, Ex. A, at 9-10 (Articles of Incorporation); *Doc. 63-1*, Ex. 4, at 142 (Revised Memorandum of Agreement Between the Regents of UNM and STC) (UNM “desires to enhance the economic well-being of the State of New Mexico [and] through the operations of STC, which brings special expertise to the commercialization of University-owned intellectual property, new business ventures and new jobs will be created and existing New Mexico business will be helped”). As such, STC is more akin to an arm of the state than a county or city.

Considering the application of the relevant factors, the Court finds that they largely mirror the Court’s application of these same factors in *United States ex rel. Burlbaw v. Regents of New Mexico State University*, 324 F. Supp. 2d 1209, 1213 (D.N.M. 2004). In *Burlbaw*, Judge Bruce Black held that a university-operated entity, the Physical Science Laboratory (“PSL”), was an arm of the state

entitled to Eleventh Amendment immunity. *Id.* at 1214-15. Judge Black explained that although PSL enjoyed some degree of independence in contracting and was largely self-funded, its budget, property, director, and contracting activities were subject to the control of the university. *See id.* So too STC maintains autonomy in certain areas, including the ability to make contracts, to sue and be sued, and to organize itself and employ staff; nevertheless, UNM and its Board of Regents exert significant control over STC in nearly every relevant way. On balance, the Court finds that application of the relevant factors supports a finding that STC *is* an arm of the state protected by Eleventh Amendment immunity and that the Court lacks diversity jurisdiction over the claims at issue.

Relatedly, there is no indication that STC has waived its immunity. Typically, a waiver of Eleventh Amendment immunity exists when the State “makes a clear declaration that it intends to waive immunity, such as by statute . . . or when the [S]tate voluntarily invokes federal jurisdiction.” *Tegic Commc’n Corp. v. Bd. of Regents of Univ. of Tex. Sys.*, 458 F.3d 1335, 1340 (Fed. Cir. 2006). Neither a statute waiving immunity nor a voluntary invocation of federal jurisdiction exists here. As explained above, STC’s Complaint asserts state contract claims arising under the parties’ License Agreement and does not assert claims arising under federal law.

For all of these reasons, the undersigned recommends that presiding District Judge Martha Vazquez find that federal court lacks diversity jurisdiction, just as it lacks other varieties of subject matter jurisdiction, and remand this case to state court.

#### **D. Attorney's Fees**

Finally, STC requests an award of attorney fees it incurred as a result of Quest Defendants' improper removal of this case to federal court. The language of 28 U.S.C. § 1447(c) directs that the award of attorney's fees rests squarely within the discretion of the district court when a remand is ordered. See § 1447(c) ("An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."). As the Tenth Circuit has recognized, "[i]n deciding whether to award costs under § 1447(c), the key factor is the propriety of the defendant's removal. The district court does not have to find that the state court action has been removed in bad faith as a prerequisite to awarding attorney fees and costs under § 1447(c)." *Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 322 (10th Cir. 1997). On the other hand, attorney's fees may be denied where the defendant "had a fair basis for removing the case." *Daleske v. Fairfield Cmtys., Inc.*, 17 F.3d 321, 324 (10th Cir. 1994). The proper inquiry is whether the defendant had objectively reasonable grounds to believe the removal was legally proper. *Martin*, 393 F.3d at 1147.

Here, the Court recommends that the presiding judge decline to award STC attorney's fees. Even though the Court recommends a finding against Quest Defendants on the merits of removal, it finds that such removal was premised upon a reasonable belief that subject matter jurisdiction existed under federal question, federal patent, patent counterclaim, or diversity jurisdiction.

Wherefore,

**IT IS HEREBY RECOMMENDED** that STC.UNM's Motion to Remand (*Doc. 12*) be granted;

**IT IS FURTHER RECOMMENDED** that STC.UNM's Motion to Dismiss Defendants' Counterclaims (*Doc. 10*) be denied as moot;

**IT IS FINALLY RECOMMENDED** that this matter be remanded to the Second Judicial District Court, County of Bernalillo, State of New Mexico.

**THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 14 DAYS OF SERVICE** of a copy of these Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1). **A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.**

  
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

STC.UNM,

Plaintiff,

v.

CIV 17-1123 MV/KBM

QUEST DIAGNOSTICS INCORPORATED  
and QUEST DIAGNOSTICS CLINICAL  
LABORATORIES, INC.,

Defendants.

**ORDER ADOPTING MAGISTRATE JUDGE'S  
PROPOSED FINDINGS AND RECOMMENDED DISPOSITION**

Magistrate Judge Karen B. Molzen filed her Proposed Findings and Conclusions of Law on March 8, 2019, (*Doc. 72*) in which she recommended that STC.UNM's Motion to Remand (*Doc. 12*) be granted and STC.UNM's Motion to Dismiss Defendants' Counterclaims (*Doc. 10*) be denied as moot. The proposed findings notify the parties of their ability to file objections and that failure to do so waives appellate review. As of today, no objections have been filed, and there is nothing in the record indicating that the proposed findings were not delivered.

Wherefore,

**IT IS HEREBY ORDERED AS FOLLOWS:**

1. The Magistrate Judge's Proposed Findings and Conclusions of Law (*Doc. 72*) is **ADOPTED**;
2. STC.UNM's Motion to Remand (*Doc. 12*) is **GRANTED**;

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3. STC.UNM's Motion to Dismiss Defendants' Counterclaims (*Doc. 10*) is **DENIED AS MOOT**;
4. This matter is remanded to the Second Judicial District Court, County of Bernalillo, State of New Mexico.

  
UNITED STATES DISTRICT JUDGE

## SANDOVAL COUNTY HEALTH FACILITIES AGREEMENT

THIS HEALTH FACILITIES AGREEMENT (this “**Agreement**”), is made by and between the COUNTY OF SANDOVAL, a political subdivision of the State of New Mexico (the “**County**”), and UNM SANDOVAL REGIONAL MEDICAL CENTER, INC., a New Mexico non-profit and University Research Park and Economic Development Act corporation (“**UNMSRMC**”), each a Party (“Party”) and collectively the Parties (“Parties”).

### **RECITALS:**

**WHEREAS**, UNMSRMC owns and operates a 60-bed community-based, general teaching hospital (the “**Hospital**”) located on the campus of the University of New Mexico Health Sciences Center in Rio Rancho, Sandoval County, New Mexico (“HSC Rio Rancho”), which provides health care services to all residents of Sandoval County, New Mexico, as contemplated in N.M. STAT. ANN. §§ 4-48B-1 *et seq* (1978) (the “**Hospital Funding Act**”);

**WHEREAS**, pursuant to Section 4-48B-12 of the Hospital Funding Act, the County levied a Mill Levy to pay to UNMSRMC in accordance with a health care facilities contract defined in Section 4-48B-3(G) of the Hospital Funding Act (the “**Mill Levy**”) as described in the Ballot Question attached to this Agreement as Exhibit A (the “**Ballot Question**”) and, consistent with the requirements of Section 4-48B-15 of the Hospital Funding Act, the voters of Sandoval County voted to approve the Mill Levy in an election held on November 6, 2018;

**WHEREAS**, subject to and on the terms and conditions set forth in this Agreement, the County and UNMSRMC desire to enter into to a health care facilities contract as contemplated in Section 4-48B-3(G) of the Hospital Funding Act and to set forth the terms and conditions for distribution of the proceeds of the Mill Levy (the “**Mill Levy Proceeds**”) to UNMSRMC pursuant to this Agreement;

**NOW, THEREFORE**, for and in consideration of the premises and the mutual covenants and agreements set forth herein, the Parties hereto agree as follows:

1. **Purpose.** UNMSRMC will operate the Hospital to include medical services typically offered in community hospitals including medical, surgical, behavioral health and emergency services including, without limitation, and those services identified in Section 4-48B-3(G) of the Hospital Funding Act.

2. **Availability and Development of Services.**

(a) The Hospital will undertake to ensure that Hospital services are provided to all residents of the County, and such other persons as may require them without regard to race, sex, religion, color, national origin, ancestry, sexual orientation, gender identity, physical or mental handicap or ability to pay for such services.

(b) The Hospital shall at all times maintain a program to provide free care, discounted care, or other financial assistance program for medically necessary services to persons who qualify for the same whose income is up to two hundred fifty percent (250%) of the Federal Poverty Guidelines for the 48 Contiguous States and the District of Columbia for the then current calendar year (as published from time to time by the Secretary of the U.S. Department of Health & Human Services) and based on such other financial criteria as may be approved by UNMSRMC.

(c) Consistent with the Ballot Question, UNMSRMC shall use the Mill Levy Proceeds to provide operating revenues for medical services including new substance abuse treatment and trauma care, and a return of behavioral health services in Sandoval County. UNMSRMC and the County shall cooperate to consider, plan, and prioritize services and programs for use of Mill Levy Proceeds, and shall agree upon how the Mill Levy Proceeds will be utilized and spent by UNMSRMC as described in Exhibit B attached to this Agreement. Exhibit B shall be updated by mutual agreement of the Parties, as necessary and at least annually.

3. **Medical Staff.** Membership on the Hospital's medical staff shall be open to all physicians who meet Hospital's credentialing and privileging requirements, without regard to the physician's employment or other affiliations. Hospital shall use its best efforts to collaborate with other hospitals and physicians in the County to provide call coverage, including shared call, across specialty shortage areas.

4. **Term.** Subject to the provisions on termination in Section 11 set forth herein, the effective date of this Agreement shall be as of July 1, 2019, and shall continue for a period of eight (8) years until June 30, 2027 (the "**Term**").

5. **Operations of the Hospital.** UNMSRMC will operate the Hospital in such a manner as to meet or exceed the standards of The Joint Commission ("**TJC**") and the Council on Medical Education of the American Medical Association ("**AMA**") or other approved accreditation entity of the AMA as long as resources are reasonably available so as to make it reasonably possible to comply with such standards. UNMSRMC has the exclusive responsibility, jurisdiction and authority to control and manage the Hospital all in accordance with the terms and conditions of this Agreement. UNMSRMC will operate the Hospital in compliance with all applicable laws, rules and regulations of the federal and state governmental authorities having jurisdiction with respect to the Hospital.

6. **County Covenant to Provide Revenues and Obligations of the Parties.**

(a) *Imposition of Mill Levy; Segregation of Tax Proceeds.* During the Term of this Agreement, and to the extent of its authority, the County will take the steps necessary and required under the Hospital Funding Act, or any successor statute thereto, to continue to impose the Mill Levy, segregate all taxes collected thereunder together with all sums received by it as required by the Hospital Funding Act during the Term set forth in Section 4 herein and thereafter as required by Section 11 herein.

(b) *Distribution of Proceeds.* Subject to provisions of the Hospital Funding Act, during the Term of this Agreement through and including the termination of the Mill Levy, the proceeds of the Mill

Levy collected by the County shall be distributed to UNMSRMC on an “as collected” basis, i.e., the proceeds of the Mill Levy collected in each month shall be distributed by the 22<sup>nd</sup> day of the following month.

The funds shall be sent to:

UNM Sandoval Regional Medical Center, Finance Department  
ATTN: SRMC Controller  
P.O. Box 80600  
Albuquerque, NM 87198

(c) *UNMSRMC & Hospital Obligations.* UNMSRMC shall spend and allot the Mill Levy Proceeds as outlined in EXHIBIT B to this Agreement.

**7. Accounting Records; Audits.** UNMSRMC will keep records of the Hospital’s financial direct, indirect and management fee costs in accordance with principles of accounting generally accepted by the hospital industry and in accordance with applicable laws or regulations, including, without limitation, UNMSRMC’s obligations under that certain Regulatory Agreement dated December 10, 2010, by and between UNMSRMC and the United States Department of Housing and Urban Development, in respect of the \$143,425,000 UNMSRMC Taxable Revenue Build America Bonds and Recovery Zone Bonds Series 2010A and 2010B. UNMSRMC will have the financial affairs of the Hospital audited at least once each year. Copies of annual audits will be furnished to the County as soon as practicable after they become final and available and will always be made available on UNMSRMC’s website for review by the public.

**8. Review of UNMSRMC Obligations and Inspection of Hospital.** Subject to applicable federal and state laws, rules, and regulations governing privacy, security and confidentiality of patient health information (including, without limitation, the Health Insurance Portability and Accountability Act of 1996 (“**HIPAA**”) and the Privacy Rule Regulation promulgated thereunder, 42 CFR Part 2: Confidentiality of Substance Use Disorder Patient Records, the New Mexico Mental Health Code, the New Mexico Mental Health Treatment Decisions Act, the New Mexico Children’s Code, and the New Mexico Children’s Mental Health Treatment Decisions Act), authorized representatives of County shall have the right to inspect the Hospital to verify the Hospital’s performance of its obligation to provide the services described

in Section 4-48B-3.G of the Hospital Funding Act at times mutually agreed upon by County and UNMSRMC, but not to the extent or frequency of any unreasonable interference with UNMSRMC's operation or obligations. The County shall promptly provide UNMSRMC with copies of all reports produced as a result of such inspections, unless any such reports are confidential and/or privileged as a result of pending or threatened litigation. UNMSRMC shall present and provide a written report quarterly to the County Commission, and shall include in such report other information as requested by the County, regarding UNMSRMC's use of Mill Levy funds to perform its obligations under the Agreement; audited financial statements of UNMSRMC shall be made available for inspection by the County at the time such reports are published.

**9. Liability; Insurance.** UNMSRMC will be responsible for legal liabilities incurred in connection with the operations of the Hospital. In this connection, UNMSRMC will carry professional and general liability coverage, property or other coverage as set forth in the New Mexico Tort Claims Act, N.M. STAT. ANN. § 41-4-1 *et seq.* (1978) and the University Research Park and Economic Development Act, N.M. STAT. ANN. § 21-28-1 *et seq.* (1978). The County understands and agrees that UNMSRMC is funding certain amounts of money to support the provision of behavioral health for detainees at the Sandoval County Detention Center and further acknowledges that UNMSRMC is not directing or managing the actual provision of behavioral health services at the Sandoval County Detention Center. As such, the County will cause any contracted provider of behavioral health services at the Sandoval County Detention Center to amend its liability coverages and endorsements for all such contracts as currently set forth in Subparts B, D, E, and F of Section 40 of that certain Sandoval County "Jail Health Services" Agreement, Contract #FY18-SCDC-01, to include UNM Sandoval Regional Medical Center, Inc. as an additional insured on the same terms and subject to the same conditions as that enjoyed by the County with respect to substance abuse and behavioral health services for detainees at the Sandoval County Detention Center.

**10. Participation in Government Programs, Certification and Accreditation.** The Hospital shall at all times participate in Medicare and Medicaid and other government programs that expand the availability of healthcare. The Hospital shall at all times maintain its certification to participate in such programs as well as accreditation by TJC or other hospital accrediting organization approved by the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services.

**11. Termination of Agreement.**

(a) This Agreement may be terminated by mutual agreement, which must be evidenced by a written agreement executed by all of the Parties to this Agreement.

(b) In the event either Party materially defaults in the performance of its obligations under this Agreement, and fails to cure such default within 90 days after written notice thereof from the other Party (or if the default is such that it cannot be cured within 90 days, has failed to take substantial steps to effect such cure), the non-defaulting Party may terminate this Agreement by providing a final notice of termination at least 30 days prior to the date of termination.

(c) Notwithstanding Section 11(b), failure of the County to provide and pay over to UNMSRMC the required Mill Levy Proceeds distribution described in Paragraph 6(b) above, shall result in the automatic termination of this Agreement. In this connection, UNMSRMC shall provide the County with thirty (30) days' prior written notice via certified U.S. mail, return receipt requested, thereof to the County and stating the date of termination to the County.

(d) If this Agreement is terminated or terminates as provided in Sections 11(a)-(c) of this Agreement, UNMSRMC will be relieved of its obligations as described in this Agreement as of the date of termination. Following any termination, any Mill Levy Proceeds owed to UNMSRMC shall be imposed and collected as provided herein and paid to UNMSRMC for the time during which this Agreement remained in effect. The County's obligations under this Section 11(d) survive the termination of this Agreement.

**12. Board Position.** The County shall have the right to nominate to the Regents of the University of New Mexico (the “**Regents**”) an individual to serve as a voting Director on the UNMSRMC Board of Directors. The County understands, acknowledges, and agrees that because UNMSRMC is a corporation organized under and pursuant to the University Research Park and Economic Development Act, only the Regents may act to appoint Directors of UNMSRMC. In this connection, the County agrees that in nominating such an individual to serve as a Director of UNMSRMC, the County will follow the processes for such nomination as set forth in the Bylaws of UNMSRMC.

**13. Miscellaneous.**

(a) *No Discrimination.* The Hospital shall not discriminate in employment, granting of medical staff privileges, or availability of Hospital facilities on account of race, age, sex, religion, color, national origin, ancestry, sexual orientation, gender identity, physical or mental handicap, serious medical condition or spousal affiliation.

(b) *Hospital Operation.* UNMSRMC takes and assumes all financial and other responsibility for the operating costs of the Hospital. UNMSRMC shall be responsible for all losses arising out of the operation of the Hospital and shall receive all excess revenues of the Hospital.

(c) *Entire Agreement.* This Agreement represents the entire understanding between the Parties with respect to the subject matter hereof, and supersedes any prior agreements or understandings with respect to the subject matter of this Agreement. No changes, amendments or alterations to this Agreement will be effective unless in writing and signed by duly authorized representatives of the Parties to this Agreement. Notwithstanding the foregoing, no change in the provisions of Section 6 above shall be effective unless agreed to in writing by the County and UNMSRMC.

(d) *Governing Law.* This Agreement will be construed, interpreted, governed and enforced in accordance with the statutes, judicial decisions, and other laws of the State of New Mexico.

(e) *Third Parties.* Except as specifically set forth herein, nothing in this Agreement, express or implied, is intended to confer any rights, remedies, claims, or interests upon a person not a party

to this Agreement.

(f) *Exclusion from Participation in Government Programs.* Each Party represents that neither it, nor any of its management or any other employees or independent contractors who will have any involvement in the services or products supplied under this Agreement, have been excluded from participation in any government healthcare program, debarred from or under any other federal program (including but not limited to debarment under the Generic Drug Enforcement Act), or convicted of any offense defined in 42 U.S.C. § 1320a-7, and that it; and its employees, and independent contractors who will have any involvement with in the services provided under this Agreement are not otherwise ineligible for participation in federal healthcare programs. Further, each Party represents that it is not aware of any such pending action(s) (including criminal actions) against it or its employees or independent contractors who will have any involvement with in the services provided under this Agreement. Each Party will notify the other Party immediately upon becoming aware of any pending or final action in any of these areas.

(g) *Notices.* Any notice required to be given pursuant to the terms and provisions of this Agreement will be in writing and will be sent by certified mail, return receipt requested, postage prepaid, as follows:

To UNMSRMC:	UNM Sandoval Regional Medical Center, Inc. 3001 Broadmoor Blvd., N.E. Rio Rancho, NM 87144 Attn: President and Chief Executive Officer
With a Copy to:	Deputy University Counsel for Health Sciences Office of University Counsel 1 University of New Mexico MSC 09 5300 Albuquerque, New Mexico 87131-0001 (which shall not constitute notice)
To County:	Sandoval County Commission c/o Sandoval County Manager 1500 Idalia Road Building D P.O. Box 40

(h) *Binding Effect.* This Agreement is binding upon, and inures to the benefit of, the Parties to this Agreement and their respective successors and assigns.

(i) *Severability.* Except as set forth in such provision, each provision of this Agreement is intended to be severable. If any term or provision of this Agreement will be determined by a court of competent jurisdiction to be illegal, invalid, or unenforceable for any reason whatsoever, such provision will be severed from this Agreement and will not affect the validity of the remainder of this Agreement.

(j) *Counterparts.* This Agreement may be executed in one or more exact counterparts, and when so executed by the Parties, will be effective in accordance with the terms hereof.

(k) *Remedies; No Waiver.* All rights, powers, and remedies granted to either Party by any particular term of this Agreement are in addition to, and not in limitation of, any rights, powers, or remedies which it has under any other term of this Agreement, at common law, in equity, by statute, or otherwise. All such rights, powers and remedies may be exercised separately or concurrently, in such order and as often as may be deemed expedient by either Party. No delay or omission by either Party to exercise any right, power, or remedy will impair such right, power, or remedy or be construed to be a waiver of or an acquiescence to any breach or default. A waiver by either Party of any breach or default hereunder will not constitute a waiver of any subsequent breach or default.

(l) *Assignment.* This Agreement will not be assigned by either Party, nor will the duties imposed upon either Party by this Agreement be delegated, subcontracted, or transferred by either Party, in whole or in part, without the prior written consent of the other Party, which consent may not be unreasonably withheld, delayed or conditioned. Notwithstanding the foregoing, UN-MSRMC may perform its obligations under this Agreement, including but not limited to those listed in **Section 2 Availability and Development of Services** and in **Exhibit B**, in any manner it

deems necessary, including through agreements with third parties for provision of services, in the sole discretion of UNMSRMC. UNMSRMC shall notify the County of the purpose for procuring services and any planned use of a third party in advance of procuring such services, shall give the County an opportunity to comment on the selection of the third party, and shall give priority consideration to qualified providers or subcontractors whose primary business location is in Sandoval County.

(m) *Force Majeure.* The Parties shall be excused for failures and delays in the performance of their respective obligations, excluding payment obligations, under this Agreement due to any cause beyond the control and without the fault of such Party, including without limitation, any act of God, war, terrorism, riot or insurrection, law or regulation, strike, flood, fire, pandemic health event, public health emergency contemplated under the New Mexico Public Health Emergency Response Act, N.M. STAT. ANN. § 12-10A-1 *et seq.* (1978), explosion or inability due to any of the aforementioned causes to obtain necessary labor, materials or facilities. Upon claiming any such excuse or delay for non-performance, such Party shall give prompt written notice thereof to the other Party, provided that failure to give such notice shall not in any way limit the operation of this provision.

(n) *County Acknowledgement.* The County understands, acknowledges, and agrees that the obligations of UNMSRMC under this Agreement are obligations of UNMSRMC and not of the Regents and the County agrees that in no event shall the Regents have any financial responsibility for or obligation to perform or otherwise undertake to do or carry out any of the obligations of UNMSRMC under this Agreement.

**IN WITNESS WHEREOF**, the Parties hereto have executed this Agreement as of the date first written above.

County:

**BOARD OF COUNTY COMMISSIONERS  
OF SANDOVAL COUNTY**

**ATTEST:**

\_\_\_\_\_  
David J. Heil, Chairman

\_\_\_\_\_  
Jay C. Block Vice Chairman

\_\_\_\_\_  
Eileen Garbagni, County Clerk

\_\_\_\_\_  
Katherine Bruch, Member

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Kenneth Eichwald, Member

\_\_\_\_\_  
Robin S. Hammer,  
Sandoval County Attorney

\_\_\_\_\_  
Michael Meek, Member

Date: \_\_\_\_\_

**UNMSRMC:**

UNM SANDOVAL COUNTY REGIONAL MEDICAL CENTER, INC., a New Mexico non-profit and University Research Park and Economic Development Act corporation,

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Jamie Silva-Steele, RN  
President and Chief Executive Officer

Approved as to Form:

By: \_\_\_\_\_  
Scot Sauder, Esq., Deputy University  
Counsel for Health Sciences

**EXHIBIT A**

**MILL LEVY BALLOT QUESTION**

HOSPITAL TAX QUESTION: “For the purpose of providing operating revenues for medical services including new substance abuse treatment and trauma care, and a return of behavioral health services, shall Sandoval County, New Mexico impose a mill levy of one and ninety hundredths (1.90) mills each year for eight (8) years on each dollar of net taxable value of property in Sandoval County, to pay to Sandoval Regional Medical Center in accordance with a health care facilities contract with Sandoval County

## EXHIBIT B

### **For the Mill Levy of 1.9 Mills per assessed value during each tax collection year<sup>1</sup>:**

UNMSRMC and County agree to work together to develop and maintain trauma, substance abuse treatment, and behavioral health services which meet the needs of UNMSRMC and Sandoval County residents. During the term of the Mill Levy, the Mill Levy Proceeds will be distributed to UNMSRMC on an “as collected” basis as described in the Agreement. The funds shall be expended by UNMSRMC in the following order with the spending in paragraph one taking priority over spending in paragraph two and both of these items taking priority over paragraph three of each fiscal year.

During FY 20, (July 1, 2019 – June 30, 2020), UNMSRMC shall use the Mill Levy Proceeds as follows:

1. UNMSRMC shall allot \$375,000 of the Mill Levy Proceeds for provision of behavioral health and substance abuse services inside the Sandoval County Detention Center; then
2. UNMSRMC shall allot the greater of \$5,131,431 or 76% of the remainder of the Mill Levy Proceeds for trauma care services; then
3. UNMSRMC shall allot the remainder of the Mill Levy Proceeds for new substance abuse treatment and a return of behavioral health services.

During FY 21 (July 1, 2020 – June 30, 2021), UNMSRMC shall use the Mill Levy Proceeds as follows:

1. UNMSRMC shall allot \$765,000 of the Mill Levy Proceeds for provision of behavioral health and substance abuse services inside the Sandoval County Detention Center; then
2. UNMSRMC shall allot the greater of \$5,408,515 or 77% of the remainder of the Mill Levy Proceeds for trauma care services; then
3. UNMSRMC shall allot the remainder of the Mill Levy Proceeds for new substance abuse treatment and a return of behavioral health services.

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<sup>1</sup> The County’s tax collection year runs from November 1 through October 31. The initial tax collection year for the Mill Levy is November 1, 2019, through October 31, 2020 (“Tax Collection Year 20”). In each Fiscal Year of the Agreement, UNMSRMC will allocate proceeds for the corresponding Tax Collection Year.

During FY 22 (July 1, 2021 – June 30, 2022), UNMSRMC shall use the Mill Levy Proceeds as follows:

1. UNMSRMC shall allot \$780,300 of the Mill Levy Proceeds for provision of behavioral health and substance abuse services inside the Sandoval County Detention Center; then
2. UNMSRMC shall allot the greater of \$ 5,697,412 or 78% of the remainder of the Mill Levy Proceeds for trauma care services; then
3. UNMSRMC shall allot the remainder of the Mill Levy Proceeds for new substance abuse treatment and a return of behavioral health services.

During FY 23 (July 1, 2022 – June 30, 2023), UNMSRMC shall use the Mill Levy Proceeds as follows:

1. UNMSRMC shall allot \$795,900 of the Mill Levy Proceeds for provision of behavioral health and substance abuse services inside the Sandoval County Detention Center; then
2. UNMSRMC shall allot the greater of \$ 5,868,334 or 78% of the remainder of the Mill Levy Proceeds for trauma care services; then
3. UNMSRMC shall allot the remainder of the Mill Levy Proceeds for new substance abuse treatment and a return of behavioral health services.

During FY 24 (July 1, 2023 – June 30, 2024), UNMSRMC use the Mill Levy Proceeds as follows:

1. UNMSRMC shall allot \$ 811,824 of the Mill Levy Proceeds for provision of behavioral health and substance abuse services inside the Sandoval County Detention Center; then
2. UNMSRMC shall allot the greater of \$ 6,121,877 or 79% of the remainder of the Mill Levy Proceeds for trauma care services; then
3. UNMSRMC shall allot the remainder of the Mill Levy Proceeds for new substance abuse treatment and a return of behavioral health services.

During FY 25 (July 1, 2024 – June 30, 2025), UNMSRMC shall use the Mill Levy Proceeds as follows:

1. UNMSRMC shall allot \$ 828,061 of the Mill Levy Proceeds for provision of behavioral health and substance abuse services inside the Sandoval County Detention Center; then

2. UNMSRMC shall allot the greater of \$ 6,305,533 or 79% of the remainder of the Mill Levy Proceeds for trauma care services; then
3. UNMSRMC shall allot the remainder of the Mill Levy Proceeds for new substance abuse treatment and a return of behavioral health services.

During FY 26 (July 1, 2025 – June 30, 2026), UNMSRMC shall use the Mill Levy Proceeds as follows:

1. UNMSRMC shall allot \$ 844,622 of the Mill Levy Proceeds for provision of behavioral health and substance abuse services inside the Sandoval County Detention Center; then
2. UNMSRMC shall allot the greater of \$ 6,494,699 or 79% of the remainder of the Mill Levy Proceeds for trauma care services; then
3. UNMSRMC shall allot the remainder of the Mill Levy Proceeds for new substance abuse treatment and a return of behavioral health services.

During FY 27 (July 1, 2026 – June 30, 2027), UNMSRMC shall use the Mill Levy Proceeds as follows:

1. UNMSRMC shall allot \$ 861,514 of the Mill Levy Proceeds for provision of behavioral health and substance abuse services inside the Sandoval County Detention Center; then
2. UNMSRMC shall allot the greater of \$6,689,536 or 79% of the remainder of the Mill Levy Proceeds for trauma care services; then
3. UNMSRMC shall allot the remainder of the Mill Levy Proceeds for new substance abuse treatment and a return of behavioral health services.

For any Mill Levy Proceeds collected after FY 27, distributions shall be made in the following percentages:

1. UNMSRMC shall allot 10% of the Mill Levy Proceeds for provision of behavioral health and substance abuse services inside the Sandoval County Detention Center; then
2. UNMSRMC shall allot 79% of the remainder of the Mill Levy Proceeds for trauma care services; then
3. UNMSRMC shall allot the remainder of the Mill Levy Proceeds for new substance abuse treatment and a return of behavioral health services.

**STATE OF NEW MEXICO  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

**MICHELLE LUJAN GRISHAM**  
Governor

**Marianne Bowers**, Chair  
**Mark Myers**, Vice-Chair  
**Nan Nash**, Member

2929 Coors Blvd. N.W. Suite 303  
Albuquerque, NM 87120  
(505) 831-5422  
(505) 831-8820 (Fax)

**THOMAS J. GRIEGO**  
Executive Director

September 10, 2021

Youtz & Valdez, P.C.  
900 Gold Avenue S.W.  
Albuquerque, NM 87102  
Attn: Shane Youtz

Rodey, Dickason, Sloan, Akin & Robb, P.A.  
Post Office Box 1888  
Albuquerque, New Mexico 87102  
Attn: Thomas L. Stahl  
Jeffrey L. Lowry

Re: ***UHPNM – AFT and UNM - Sandoval Reg. Med. Center; PELRB 306-21***

Dear Counsel:

The following constitutes my Letter Decision on the UNM Sandoval Regional Medical Center, Inc.'s Motion to Dismiss.

**PROCEDURAL BACKGROUND**

On August 19, 2021, UNM Sandoval Regional Medical Center, Inc., (“SRMC”) moved to dismiss a Petition filed by United Health Professionals of New Mexico, AFT, AFL-CIO’s Petition for Certification on August 13, 2021, because SRMC is not a “public employer” within the meaning of the New Mexico Public Employees Bargaining Act (“PEBA”). If it is not a “public employer” as that term is defined in Section 10-7E-4(Q) NMSA 1978, then this Board lacks jurisdiction over SRMC and the Petition herein.

The Petitioner filed its Response to the Motion on September 2, 2021 and oral argument on the Motion and Response was heard on September 7, 2021. This decision followed.

**STANDARD OF REVIEW**

This Board has a long-established practice of following the New Mexico Rules of Civil Procedure when it comes to deciding a Motion to Dismiss. Accordingly, this Board follows those cases applying SCRA Rule 1-012(B)(6). The purpose of a motion to dismiss is to test the legal sufficiency of the claim, not the facts that support it. *McCasland v. Prather*, 1978-NMCA-098, ¶ 5, 92 N.M. 192, 585 P.2d 336. “The pleadings must tell a story from which the essential elements prerequisite to the granting of the relief sought can be found or reasonably inferred.” *Derringer v. State*, 2003-NMCA-073, ¶ 5, 133 N.M. 721, 68 P.3d 961 (internal quotation marks, citation and ellipses omitted).

**Exhibit 4**

Dismissal under Rule 1-012(B)(6) is appropriate only where the non-moving party is “not entitled to recover under any theory of the facts alleged in their complaint.” *Id.* ¶ 12 (internal quotation marks and citation omitted). The New Mexico Court of Appeals has noted that “granting a motion to dismiss is an extreme remedy that is infrequently used.” *Town of Mesilla v. City of Las Cruces*, 1995-NMCA-058, ¶ 4, 120 N.M. 69, 898 P.2d 121.

## **ANALYSIS AND CONCLUSIONS**

- A. THE NEW MEXICO UNIVERSITY RESEARCH PARK AND ECONOMIC DEVELOPMENT ACT, NMSA 1978, §§ 21-28-1 TO 25 (“URPEDA”) UNDER WHICH THE UNM SANDOVAL REGIONAL MEDICAL CENTER, INC., (“SRMC”) WAS FORMED, DOES NOT CONTROL THE QUESTION OF WHETHER SMRC IS A “PUBLIC EMPLOYER” (AND CONSEQUENTLY WHETHER ITS EMPLOYEES ARE “PUBLIC EMPLOYEES”) UNDER THE PUBLIC EMPLOYEE BARGAINING ACT.**
- 1. SMRC is a Public Employer Other Than the State for Collective Bargaining Purposes Within the Meaning of NMSA 1978 § 10-7E-4(R) (2020) and any of its Regular Non-Probationary Employees are Public Employees as Defined by § 10-7E-4(Q) of the Public Employee Bargaining Act With the Result That This Board has Jurisdiction over it With Respect to the Petition Herein and all Other Collective Bargaining and Labor Relations Matters.**

Because SRMC is a nonprofit “research park corporation” created pursuant to the New Mexico URPEDA and the URPEDA expressly provides that for personnel matters, research park corporations shall not be deemed a public employer, SRMC argues that it does not fall within the scope of PEBA and the PELRB does not have jurisdiction over it with respect to the Petition herein or other collective-bargaining and labor relations matters.

URPEDA provides in relevant part as follows:

“A. A research park corporation shall not be deemed an agency, public body or other political subdivision of New Mexico, including for purposes of applying statutes and laws relating to personnel, procurement of goods and services, meetings of the board of directors, gross receipts tax, disposition or acquisition of property, capital outlays, per diem and mileage and inspection of records.

B. A research park corporation shall be deemed an agency or other political subdivision of the state for purposes of applying statutes and laws relating to the furnishing of goods and services to the university that operates it and the risk management fund.”

NMSA 1978, § 21-28-7.

This Board is charged with the duty and the authority to enforce provisions of the Public Employee Bargaining Act, which is primarily concerned with guaranteeing public employees the right to organize and bargain collectively with their employers. See, NMSA 1978 §§ 10-7E-9 and 10-7E-2 (2020). When the PEBA describes those who may collectively bargain as employees, it refers to all public employees, except those confidential, managerial, and supervisory employees expressly excluded from bargaining under § 10-7E-5 or § 10-7E-13 of the Act. *Cf. Regents of Univ. of New Mexico v. New Mexico Fed'n of Teachers*, 1998-NMSC-020, ¶ 43, 125 N.M. 401, 962 P.2d 1236. Therefore, I liberally construe the definition of “public employer” under the Act to include SRMC and that of “public employees” subject to the Act to include its regular non-probationary employees. I do so based on the following:

1. The Articles of Incorporation for SRMC, Exhibit A to its Motion to Dismiss indicates at Article III that it is incorporated as an instrumentality of the Regents of the University of New Mexico and is specifically organized for the development, construction, and operation of a licensed general, community teaching hospital in support of and under the operating aegis of the Health Sciences Center of the University of New Mexico and, in connection therewith to facilitate and develop the clinical and medical practices of the faculty of the University of New Mexico School of Medicine. By its own terms the Article of Incorporation support a conclusion that SRMC is a “public employer” as defined by § 10-7E-4(R) of the Act:

“‘public employer’ means the state or a political subdivision thereof, including a municipality that has adopted a home rule charter, and does not include a government of an Indian nation, tribe or pueblo, provided that state educational institutions as provided in Article 12, Section 11 of the constitution of New Mexico shall be considered public employers other than the state for collective bargaining purposes only;”

2. The exclusion of governments of Indian nations, tribes or pueblos from coverage of the Act by definition, and the exclusion of certain management, confidential and supervisory public employees under the PEBA §§ 10-7E-5 and 13, do not include employees of a nonprofit research park corporation created pursuant to the New Mexico URPEDA. There are no further exclusions from coverage of the Act within the Act itself that would exclude employees of a nonprofit research park corporation created pursuant to the New Mexico URPEDA. The PEBA’s express exclusion of certain pre-existing legislation demonstrates that our legislature could have included URPEDA among those exclusions had it wanted to do so. As a matter of statutory construction, I will not add an exclusion to PEBA coverage that the legislature could have but did not include.

3. As SRMC points out, URPEDA at Section 21-28-7 provides:

“A. A research park corporation shall not be deemed an agency, public body or other political subdivision of New Mexico, including for purposes of applying statutes and laws relating to personnel, procurement of goods and services, meetings of the board of directors, gross receipts tax, disposition or

acquisition of property, capital outlays, per diem and mileage and inspection of records.

B. A research park corporation shall be deemed an agency or other political subdivision of the state for purposes of applying statutes and laws relating to the furnishing of goods and services to the university that operates it and the risk management fund.”

The URPEDA was enacted prior to the PEBA authorizing state-wide public employee collective bargaining and its provisions at 21-28-7(A) that a research park corporation shall not be deemed an agency, public body or other political subdivision of New Mexico, presents a classic conflict question in consideration of NMSA 1978 §§ 10-7E-2; 10-7E-5; 10-7E-9 and 10-7E-13 (2020). Our legislature has provided for the eventuality of such conflicts by § 10-7E-3:

“In the event of conflict with other laws, the provisions of the Public Employee Bargaining Act shall supersede other previously enacted legislation and rules; provided that the Public Employee Bargaining Act shall not supersede the provisions of the Bateman Act [6-6-11 NMSA 1978], the Personnel Act [Chapter 10, Article 9 NMSA 1978], the Group Benefits Act [Chapter 10, Article 7B NMSA 1978], the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978], the Retiree Health Care Act [10-7C-1 to 10-7C-16 NMSA 1978], public employee retirement laws or the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978].”

Conspicuously absent from the listed “previously enacted legislation” unaffected by the passage of the Public Employee Bargaining Act is the URPEDA NMSA 1978 §§ 21-28-1 to 25, inclusive.

Therefore, I conclude that URPEDA, to the extent it would exclude SMRC as a Public Employer other than the state for collective bargaining purposes, has been superseded by the PEBA NMSA §§ 10-7E-1, *et seq.* enacted in 2003 and amended in 2020.

My conclusion that both SRMC and its regular non-probationary employees are covered by the New Mexico Public Employee Bargaining Act is supported by PELRB precedent that the definition of “public employer” must be read in conjunction with the description of “appropriate governing body” in NMSA 1978, § 10-7E-7 (2003). See *USWA & Gila Regional Medical Ctr.*, 1-PELRB-14 (Nov. 17, 1995), Recommended Decision, at 22. Here, either the UNM Board of Regents or the UNM Health Sciences Center Board of Directors, both of which are public employers under the Act as political subdivisions of the state would be the “appropriate governing body” of SRMC pursuant to NMSA 1978, § 10-7E-7 (2003).

As the Union argued in its Response to the Motion to Dismiss New Mexico jurisprudence requires that an “entanglement” between UNM and SRMC would render SRMC a “public” body subject to

UHPNM, AFT & SRMC  
Letter Decision re: Motion to Dismiss, Page 5  
September 10, 2021

state law such as the PEBA, Citing *Memorial Med. Ctr. v. Tasch Constr., Inc.*, 2000-NMSC-030, 129 N.M. 677, 12 P.3d 431. (New Mexico Supreme Court determined the standards for evaluating whether an otherwise private corporation would be subject to the Public Works Minimum Wage Act or the State Procurement Code, noting that, in general “a private organization, despite its name or legal status, may have so many public attributes it can no longer be considered private” and that “a private entity may be controlled, organized, and conducted in such a manner that it becomes an arm of a public entity.” Id. ¶ 34.

For the foregoing reasons, I find and conclude: (1) that SMRC is a public employer other than the state for collective bargaining purposes within the meaning of NMSA 1978 § 10-7E-4(R) (2020); and, (2) any of its regular non-probationary employees are public employees as defined by § 10-7E-4(Q) of the Public Employee Bargaining Act; and, (3) URPEDA has been superseded by PEBA with respect to its coverage and this Board’s jurisdiction; and (4) this Board has both subject matter and personal jurisdiction over the instant Petition and all other collective bargaining and labor relations matters among the parties

WHEREFORE, Respondent’s Motion to Dismiss is hereby **DENIED** and the matter shall proceed in accordance with this Board’s Rules concerning Representation Petitions.

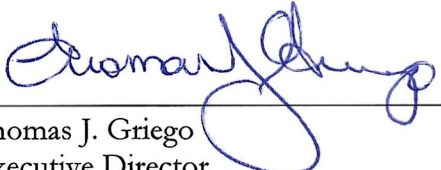
As this is a matter of first impression for the Board and given the fundamental importance of the jurisdictional issues involved, I am certifying this decision for an interlocutory appeal to the Board, pursuant to NMAC 11.21.1.27. Review by the board shall be based on the evidence presented or offered at the earlier stages of the proceeding and shall not be de novo. Additionally, it is appropriate to toll the deadline for Respondent to file its contemplated Motion to Quash a subpoena issued by the Executive Director for a list of the employees who would be eligible to vote if the petitioned-for unit were found to be appropriate, based on the payroll period that ended immediately preceding the filing of the petition in the above-captioned action, until after the Board has heard any appeal of this decision. A deadline for filing any such Motion to Quash will be set at or after the Board’s Order following the interlocutory appeal.

Finally, the caption herein shall be amended to reflect the name of the Respondent as it appear on its Articles of Incorporation, Exhibit A to Respondent’s Motion to Dismiss:

“UNM Sandoval Regional Medical Center, Inc.”.

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

  
\_\_\_\_\_  
Thomas J. Griego  
Executive Director

STATE OF NEW MEXICO  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

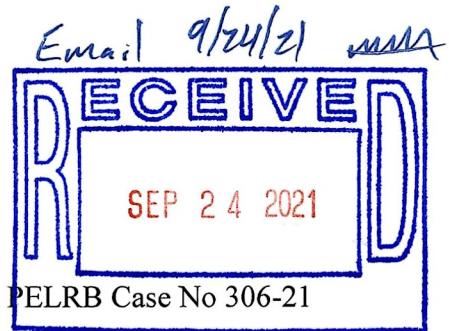
UNITED HEALTH PROFESSIONALS  
OF NEW MEXICO, AFT, AFL-CIO,

Petitioner,

and

UNM Sandoval Regional Medical Center, Inc.

Respondent.



09-24-21 13:09 FILE

**RESPONDENT'S REQUEST FOR REVIEW**

Pursuant to NMAC 11.21.1.27 and 11.21.2.22(A), Respondent UNM Sandoval Regional Medical Center, Inc., ("SRMC"), identified in the original petition as "University of New Mexico Sandoval Regional Medical Center," submits this Request for the Public Employee Labor Relations ("PELRB" or "Board") Review of the PELRB Executive Director's Letter Decision of September 10, 2021, denying SRMC's Motion to Dismiss Petition for Certification ("Director's Decision").

**Introduction and Background**

SRMC, a community teaching hospital in Rio Rancho, New Mexico, is a nonprofit "research park corporation" created pursuant to the New Mexico University Research Park and Economic Development Act, NMSA 1978, § 21-28-1 to -25 ("URPEDA"). *See* SRMC Articles of Incorporation, relevant portions attached to SRMC's Mot. to Dismiss, as Ex. A, at 1. On August 13, 2021, the United Health Professionals of New Mexico, AFT, AFL-CIO ("Union") filed a Petition for Certification with the PELRB seeking to represent nurses and other employees at SRMC as the exclusive representative for collective bargaining. On August 19,

**Exhibit 5**

2021, SRMC filed its Motion to Dismiss Petition for Certification on the basis that SRMC is not a “public employer” within the meaning of the New Mexico Public Employees Bargaining Act (“PEBA”) and therefore the PELRB lacks jurisdiction over SRMC and the Union’s Petition. In its Motion to Dismiss, SRMC made clear that it will not contest the jurisdiction of the National Labor Relations Board (“NLRB”) to adjudicate a petition for representation if the Union files one with that agency.

The Union filed its response to the Motion to Dismiss on September 2, and the parties presented oral argument to the Director on September 7. The parties received the Director’s Decision on September 10, making this Request for Review timely under NMAC 11.21.2.22(A).

#### **Basic Argument and Statutory Authority in Support of SRMC’s Motion to Dismiss**

The PELRB has jurisdiction over SRMC and its employees only if SRMC’s employees are “public employees” under PEBA. NMSA 1978, § 10-7E-2. PEBA defines a “public employee” as “a regular nonprobationary employee of a public employer.” NMSA 1978, § 10-7E-4(Q). In turn, a “public employer” under PEBA “means the state or a political subdivision thereof, including a municipality that has adopted a home rule charter ... provided that [constitutionally-created state educational institutions] shall be considered public employers other than the state for collective bargaining purposes only.” *Id.* § 10-7E-4(R). The fundamental jurisdictional question in this case, then, is whether the PELRB may deem SRMC a “state or political subdivision thereof.” The law specifically prohibits it from doing so.

As noted above, SRMC was formed pursuant to a statute, URPEDA, which provides as follows:

- A. A research park corporation **shall not be deemed an agency, public body or other political subdivision of New Mexico**, including for purposes of applying statutes and laws relating to personnel, procurement of goods and services, meetings of the board of directors, gross receipts tax, disposition or

acquisition of property, capital outlays, per diem and mileage and inspection of records.

B. A research park corporation shall be deemed an agency or other political subdivision of the state for purposes of applying statutes and laws relating to the furnishing of goods and services to the university that operates it and the risk management fund.

NMSA 1978, § 21-28-7 (emphasis added). Put simply, the New Mexico legislature made clear that research park corporations like SRMC are not and *shall not be deemed* a public subdivision of the state except for very limited purposes not applicable here. The Director's conclusion to the contrary is in direct violation of New Mexico law and a fundamental legal error requiring reversal. SRMC addresses the specific errors in the Director's analysis and conclusions below.

### **Errors in the Director's Decision**

Pursuant to NMAC 11.21.2.22(A), SRMC identifies the following portions of the Director's Decision to which SRMC takes specific exception and requests that the Board address and reverse:

1. The Director's application of Rule 1-012(B)(6) of the New Mexico Rules of Civil Procedure, and the accompanying Rule 1-012(B)(6) standard as developed in New Mexico case law, to SRMC's Motion to Dismiss. Director's Decision at 1-2;
2. The Director's finding and conclusion "that SRMC is a public employer other than the state for collective bargaining purposes within the meaning of NMSA 1978 § 10-7E-4(R) (2020)." Director's Decision at 5; *see also* 3-4 (setting forth analysis leading to that conclusion);
3. The Director's finding and conclusion that "URPEDA has been superseded by PEBA with respect to its coverage and this Board's jurisdiction." Director's Decision at 5; *see also* 3-5 (setting forth analysis leading to that conclusion); and
4. the Director's finding and conclusion that "this Board has both subject matter and personal jurisdiction over the instant Petition and all other collective bargaining and labor relations matters among the parties[.]" Director's Decision at 5.

SRMC will address each error in turn.

## Standard of Review

Statutory construction is a pure question of law subject to de novo review. *See Truong v. Allstate Ins. Co.*, 2010-NMSC-009, P. 22, 147 N.M. 583. The goal of the court is to give primary effect to the intent of the Legislature. *Id.* Our appellate courts have repeatedly stated that the guiding principle in statutory construction requires that the court look to the wording of the statute and attempt to apply “the plain meaning rule, recognizing that when a statute contains language which is clear and unambiguous, it must give effect to that language and refrain from further statutory interpretation. *Id.* at ¶ 37 (internal quotation marks and citation omitted). The Legislature itself has codified the plain meaning rule in the Uniform Statute and Rule Construction Act: “The text of a statute or rule is the primary, essential source of its meaning.” NMSA 1978, § 12-2A-19 (2011).

## Bases for Reversing the Director’s Errors

1. **The Director’s application of Rule 1-012(B)(6) of the New Mexico Rules of Civil Procedure, and the accompanying Rule 1-012(B)(6) standard as developed in New Mexico case law, to SRMC’s Motion to Dismiss.**

As all parties and the Director recognize, the basis for SRMC’s motion to dismiss is that the PELRB lacks jurisdiction. *See* Motion to Dismiss at 1 (“the Public Employee Labor Relations Board (‘PELRB’) lacks jurisdiction over SRMC”); *see also* Director’s Decision at 1. SRMC agrees with the Director that the Board looks to and follows the New Mexico Rules of Civil Procedure when deciding motions to dismiss, but SRMC disagrees that Rule 1-012(B)(6) NMRA, which applies to motions to dismiss for failure to state a claim, is the appropriate or applicable rule of procedure. *See* Director’s Decision at 1. Motions to dismiss for lack of jurisdiction fall under different subsections of Rule 1-012(B) – in particular, Rule 1-012(B)(1) (“lack of jurisdiction over the subject matter”), and Rule 1-012(B)(2) (“lack of jurisdiction over the person”). Because the PELRB is not a court of general jurisdiction but a government agency

with limited, statutory powers, the jurisdictional issues here implicate both subject matter and personal jurisdiction: If SRMC is not a “public employer,” the PELRB has no jurisdiction over SRMC or any petition filed to represent SRMC’s employees in collective bargaining.

The Director’s failure to apply the correct legal standard is critical here. The case law cited and relied upon in the Decision provides that Rule 1-012(B)(6) motions to dismiss should be granted “only where the non-moving party is ‘not entitled to recover under any theory of the facts alleged in their complaint’” and that granting a motion to dismiss under Rule 1-012(B)(6) “is an extreme remedy that is infrequently used.” Director’s Decision at 2 (citations omitted). Motions to dismiss based on lack of jurisdiction are not subject to the same standard as Rule 1-012(B)(6) motions and, instead, are subject to a much more exacting standard. Unlike Rule 1-012(b)(6) motions to dismiss which merely test the sufficiency of the complaint, the issue in a Rule 1-012(B)(1) motion “is the trial court’s jurisdiction - its very power to hear the case.” *Valenzuela v. Singleton*, 1982-NMCA-138, ¶ 30, 100 N.M. 84, 666 P.2d 225. In jurisdictional motions to dismiss, unlike in Rule 1-012(B)(6) motions, “no presumptive truthfulness attaches to plaintiff’s allegations,” and the burden of establishing jurisdiction – not just making jurisdictional allegations but in “proving jurisdictional facts” – is on the plaintiff, not the defendant. *Id.* ¶¶ 30-31. By citing to and applying the wrong rule and incorrect “extreme remedy” standard, the Director committed reversible error which the Board must correct.

**2. The Director’s finding and conclusion “that SRMC is a public employer other than the state for collective bargaining purposes within the meaning of NMSA 1978 § 10-7E-4(R) (2020).”**

The Director concluded that SRMC is a “public employer,” and its employees “public employees,” based on (1) SRMC’s Articles of Incorporation; and (2) PEBA’s specific exclusion of certain governments and employees but not research park corporations or its employees. Director’s Decision at 3. Neither basis is supported and, more fundamentally, cannot overcome

the express legislative pronouncement that research park corporations “shall not be deemed an agency, public body or other political subdivision of New Mexico.” NMSA 1978, § 21-28-7(A).

**A. SRMC’s Articles of Incorporation do not make it a public employer.**

The Director’s Decision cites to SRMC’s “Articles of Incorporation,” which SRMC attached to its Motion to Dismiss, and asserts that “[b]y its own terms [they] support a conclusion that SRMC is a ‘public employer’ as defined by § 10-7E-4(R) of [PEBA].” The Director does not explain that conclusion, but the Decision refers to the fact that, under the Articles of Incorporation, SRMC “is incorporated as an instrumentality of the Regents of the University of New Mexico and is specifically organized for the development, construction, and operation of a licensed general, community teaching hospital in support of and under the operating aegis of the Health Sciences Center of the University of New Mexico.” Director’s Decision at 3. The implication is that these facts about SRMC’s incorporation, purpose, and activities necessarily establish SRMC as a public employer. That conclusion, however, is unwarranted and erroneous given the specific provisions of URPEDA.

The only legal basis for SRMC to incorporate – that is, to file valid Articles of Incorporation – as a non-profit research park corporation was pursuant to URPEDA. Under URPEDA, *only* a university may establish a research park corporation (“separate and apart from the state and the university”). NMSA 1978, § 21-28-4(A). The purposes for establishing research park corporations, according to the New Mexico legislature, are “to promote, develop and administer research parks or technological innovations for scientific, educational and economic development opportunities in accordance with bylaws adopted by the research park corporation or economic development initiatives that support the teaching, research or service mission of the university.” *Id.*

The Director's Decision merely restates that SRMC, in drafting and filing its articles of incorporation as a non-profit research park corporation, complied with the statutory requirements for the creation, governance structure, and purposes of research park corporations. Compliance with the law, however, does not make an employer a public subdivision of the state. That is especially true given that the same statute specifically and emphatically makes clear that that research park corporations "shall not be deemed an agency, public body or other political subdivision of New Mexico." NMSA 1978, § 21-28-7(A). The Director's conclusion that SRMC's filing articles of incorporation in compliance with URPEDA somehow renders irrelevant or ineffectual the other part of URPEDA that specifically prohibits deeming research park corporations public bodies or political subdivisions of the state (§ 21-28-7(A)) is erroneous. Under a "well-established rule of statutory construction," courts (and other interpreters of state statutory law) are required "to give effect to all the language enacted by the Legislature." *Garcia-Montoya v. Public Employees Retirement Bd.*, 2006-NMCA-094, ¶ 10, 140 N.M. 175, 140 P.3d 1124. "[T]he legislature is presumed to have used no surplus words, and that a statute must be construed so that no word and no part of the statute is rendered surplusage"), *Vaughn v. State Taxation & Revenue Dep't*, 1982-NMCA-112, 98 N.M. 362, 365-66, 648 P.2d 820, 823-24 (Ct. App. 1982). The Board must give effect not only to URPEDA's requirements for establishing research park corporations but also to the legislature's stated intention in the same act that such corporations *shall not be deemed public bodies or political subdivisions of the state*. NMSA 1978, § 21-28-7(A). By focusing on and applying only one portion of URPEDA and ignoring and rendering meaningless another (more relevant) portion of URPEDA, without a legal basis for doing so, is error and must be reversed.

**B. PEBA’s exclusion of certain governments and employees from coverage does not make SRMC a public employer.**

The second basis in the Director’s Decision for concluding that SRMC is a public employer under PEBA is because PEBA exempts some governments (“Indian nations, tribes or pueblos”) and employees (“management, confidential and supervisory public employees”) from coverage but not SRMC. Director’s Decision at 3. According to the Director, the Board “will not add an exclusion to PEBA coverage that the legislature could have but did not exclude.” *Id.* This analysis, however, is the opposite of the proper approach to statutory interpretation – in particular, whether later-enacted statute that does not mention an earlier statute at all implicitly repeals the earlier statute.

Before turning to the case law, it is important to recognize that (1) PEBA, originally enacted in 1992, became law after URPEDA was enacted in 1989, and (2) PEBA does not mention URPEDA or research park corporations anywhere in the statute. Nor was there a reason to since URPEDA contains unequivocal language that research park corporations are not public entities. Moreover, there is no section in PEBA, whether as originally enacted or as re-enacted and amended, providing that research park corporations formed under URPEDA shall be considered “public employers” subject to the jurisdiction of the PELRB. Nor does anything in PEBA define “public employees” to include the employees of research park corporations or entities formed under URPEDA. Instead, the Director assumes that PEBA’s general jurisdiction provision, without mentioning URPEDA or research corporations at all, implicitly applies to research corporations because they are not *explicitly* excluded, notwithstanding URPEDA’s command that research park corporations shall not be deemed public bodies or political subdivisions of the state. Such an approach, however, is inconsistent with New Mexico law.

For well over one hundred years, New Mexico courts have held that repeals by implication are disfavored and that, in the absence of a repealing clause, courts must interpret two statutes so that they both remain in effect:

It is a well established rule of statutory construction that in the absence of a repealing clause expressly designating the prior enactment intended to be abrogated no new statute will be allowed to sweep away existing legislation unless its terms are such that the new and the old can not consistently stand together. Repeals by implication are not favored;

*Wilburn v. Territory*, 1900-NMSC-028, ¶ 7, 10 N.M. 402 62 P.2d; *State v. Moore*, 1936-NMSC-044, ¶ 11, 40 N.M. 344, 59 P.2d 902 (“Where there is an apparent conflict between the two acts, without any repeal, the two will be reconciled.”) The Supreme Court reiterated this rule in 1985, when it held that the court presumes that the legislature is “fully aware of existing law” when enacting new legislation and that the legislature “did not intend to enact a provision inconsistent with any existing law.” *Clothier v. Lopez*, 1985-NMSC-088, ¶ 11, 103 N.M. 593, 711 P.2d 870.

The New Mexico legislature codified this rule of statutory construction in 1997, when it enacted the Uniform Statute and Rule Construction Act, NMSA 1978, §§ 12-2A-1 et seq. The relevant portion of that act provides as follows:

A. If statutes appear to conflict, they must be construed, if possible, to give effect to each. If the conflict is irreconcilable, the later-enacted statute governs. However, an earlier-enacted specific, special or local statute prevails over a later-enacted general statute unless the context of the later-enacted statute indicates otherwise.

*Id.* § 12-2A-10(A).

As explained below, there is no actual conflict between URPEDA and PEBA. PEBA does not address research park corporations or define them as political subdivisions of the state (and therefore “public employers” under PEBA). By properly interpreting SRMC and other research park corporations as non-profit corporations that are not political subdivisions of the state (as URPEDA specifically provides), URPEDA and PEBA are easily “reconciled” and can

exist in harmony. That is what the law requires. Moreover, URPEDA is the more specific law with respect to whether research park corporations are political subdivisions of the state or not, whereas PEBA does not define political subdivisions of the state even generally, much less address whether research park corporations should be deemed political subdivisions of the state. As quoted above, New Mexico law provides that “an earlier enacted specific ... statute prevails over a later-enacted general statute unless the context of the later-enacted statute indicates otherwise.” *Id.* § 12-2A-10(A).

In contravention of long-standing cannons of common law and New Mexico’s Uniform Statute and Rule Construction Act, the Director finds that SMRC is a “public employer,” which requires the predicate finding that SRMC is a “political subdivision” of the state under § 10-7E-4(R) of PEBA. Director’s Decision at 3. That improper and unnecessary finding creates a conflict between URPEDA and PEBA where none would otherwise exist. The fact that PEBA does not specifically identify URPEDA research corporations as excluded along with “Indian nations, tribes, or pueblos,” does not mean that the legislature intended to define research park corporations as public employers. PEBA also does not specifically exclude other non-profit corporations like United Way of Central New Mexico or the Boys Club of Northern New Mexico. Nobody can seriously contend, however, that the legislature intended those non-profit corporations to be subject to the PELRB’s jurisdiction. Silence about URPEDA and research park corporations in PEBA, a later-enacted general statute, cannot be used a justification for implicitly repealing a key section of the earlier-enacted statute, URPEDA, which specifically addresses whether research corporations may be deemed political subdivisions of the state. By introducing an unnecessary conflict between PEBA and URPEDA, which then forms the basis for assuming that PEBA implicitly repealed of a portion of URPEDA, the Director’s Decision

violates both long-standing common law and NMSA 1978, §§ 12-2A-10(A). Such a conclusion is error that the PELRB must correct.

**3. The Director’s finding and conclusion that “URPEDA has been superseded by PEBA with respect to its coverage and this Board’s jurisdiction.”**

The Director’s finding and conclusion that PEBA “superseded” URPEDA “with respect to its coverage and this Board’s jurisdiction,” Director’s Decision at 5, suffers from the same flaws identified above. The Director’s Decision identifies no language in PEBA that purports to “supersede” any part of URPEDA or even addresses URPEDA or research park corporations at all. As explained above, the Director assumes that the New Mexico legislature *implicitly* meant to repeal (supersede) URPEDA to the extent URPEDA defined research park corporations as not being political subdivisions of the state. *See* Director’s Decision at 4. Repeals of statutes by implication are not favored, and when two statutes cover in whole or in part the whole matter and are not “irreconcilable,” the courts should give effect to both statutes. *Waltom v. City of Portales*, 1938-NMSC-022, ¶¶ 11-12, 42 N.M. 433, 81 P.2d 58; *see also* NMSA 1978, §§ 12-2A-1-10(A). There is nothing “irreconcilable” between URPEDA and PEBA, and the fact that PEBA does not specifically address the language in URPEDA that the Director assumes the legislature meant to change (“supersede”) is fatal to that conclusion. *Clothier v. Lopez*, 1985-NMSC-088, ¶ 11, 103 N.M. 593, 711 P.2d 870; *Friedrich v. City of Chicago*, 888 F.2d 511, 516 (7th Cir. 1989) (“[It] can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change.”).

The Director’s Decision quotes the “conflict” provisions of PEBA, NMSA 1978, § 21-28-7(B), to support his conclusion that PEBA supersedes URPEDA: “In the event of a conflict with other laws, the provisions of the Public Employee Bargaining Act shall supersede other previously enacted legislation and rules [with identified exceptions].” Director’s Decision at 4.

This, however, simply assumes away the key point: there is *no conflict* between PEBA and URPEDA. Once again, PEBA does not define URPEDA research park corporations as political subdivisions of the state; it does not define political subdivisions of the state at all. PEBA also does not address URPEDA or research corporations in any respect. Nothing in PEBA prohibits giving effect to URPEDA's command that research park corporation "shall not be deemed" political subdivisions of the state. The PELRB can respect and give effect to § 21-28-7(A) of URPEDA without rewriting or offending any part PEBA. Both statutory and common law require that the Board do so. The Executive Director's unnecessary and unsupported finding of a "conflict" between URPEDA and PEBA and inappropriate conclusion that PEBA implicitly "supersedes" URPEDA with respect to URPEDA's specific injunction not to deem research park corporations political subdivisions of the state is error that the PELRB must correct.<sup>1</sup>

**4. The Director's finding and conclusion that "this Board has both subject matter and personal jurisdiction over the instant Petition and all other collective bargaining and labor relations matters among the parties[.]"**

The Director's finding and conclusion that the PELRB has subject matter and personal jurisdiction over the Union's Petition and SRMC and its employees flows from his application of the wrong legal standard (Rule 1-012(b)(6) instead of Rules 1-012(B)(1) and (2)) and incorrect analysis of New Mexico statutes and common law, all of which are set forth above. By applying the correct standard and properly reconciling and giving effect to both URPEDA and PEBA, it is clear that SRMC is not a political subdivision of the state and is therefore not a "public employer" under PEBA. The PELRB therefore lacks jurisdiction over SRMC, its employees, and

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<sup>1</sup> The Director's Decision cites *USWA & Gila Regional Medical Ctr.*, 1-PELRB-14 (Nov. 17, 1995) and *Memorial Med. Ctr. v. Tasch Constr., Inc.*, 2000-NMSC-030, 129 N.M. 677, 12 P.3d 431, in support of his conclusions. See Director's Decision at 5. Neither case is relevant, much less controlling, as neither deals with a statute like URPEDA that expressly provides that the entity at issue is not a public employer.

the Union's Petition. The PELRB should reverse the Director's Decision and grant SRMC's Motion to Dismiss.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By /s/ Jeffrey L. Lowry

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*Attorneys for Respondent*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on September 24, 2021, a copy of the forgoing was served by electronic means as follows:

Shane Youtz  
shane@youtzvaldez.com

Stephen Curtice  
Stephen@youtzvaldez.com

James Montalbano  
james@youtzvaldez.com

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By /s/ Jeffrey L. Lowry

Jeffrey L. Lowry

**STATE OF NEW MEXICO  
PUBLIC EMPLOYEES LABOR RELATIONS BOARD**

**In re:**

**UNITED HEALTH PROFESSIONALS  
OF NEW MEXICO, AFT, AFL-CIO**

**Petitioner,**

**And**

**PELRB Case No. 306-21**

**UNIVERSITY OF NEW MEXICO  
SANDOVAL REGIONAL MEDICAL  
CENTER,**

**Respondent.**

**PETITIONER’S RESPONSE TO REQUEST FOR REVIEW**

COMES NOW Petitioner, United Health Professionals of New Mexico, AFT, AFL-CIO (“AFT”), by and through its counsel of record, Youtz & Valdez, P.C. (Shane Youtz, Stephen Curtice, James Montalbano), and files this Response to Respondent’s Request for Review. For the following reasons, that request for interlocutory review should be denied.

**Summary of Petitioner’s Legal Argument**

Respondent UNM (SRMC) seeks, by its motion, to erase the New Mexico Legislature’s guarantee of rights extended to its employees, “to guarantee public employees the right to organize and bargain collectively.” NMSA 1978, § 10-7E-2 (2003). Respondent’s legal argument directing the Board to erase this statutory guarantee is predicated on the illogical conclusion that the Legislature somehow intended its 1989 law (URPEDA) to deny a guarantee of rights (in PEBA) which did not exist when URPEDA was enacted.

Since the rights guaranteed in PEBA did not exist in 1989 when the Legislature enacted URPEDA, PEBA is not just a “later enacted statute” for purposes of traditional legal conflicts

**Exhibit 6**

analysis; it is the primary statutory source for determining the answer to the question raised by Respondent, stated as follows:

Did the legislature intend to extend guaranteed bargaining rights to employees of an Employer which is, by its own description in its most recent audited Financial Statement, a **“component unit” and “subsidiary of University of New Mexico”**?

As explained below, UNM defines UNM (SRMC)’s “component unit” status to mean that “the University appoints a voting majority of SRMC’s board **and is able to impose its will on SRMC.**” As also detailed below, another UNM URPEDA entity has recently argued in Federal Court that UNM’s URPEDA entities are **“an agency of the State of New Mexico . . . an arm of the state.”** *STC.UNM v. Qwest Diagnostics Inc.*, Case No. 1:17-cv-01123 MCA-KBM (filed Mar. 3, 2019).

Respondent *cannot* argue that the legislature intended, in 1989’s URPEDA, to waive rights which did not yet exist. URPEDA can only be read to waive employment rights which existed in 1989 – which notably did not include a statutorily guaranteed right to organize and bargain. When PEBA was enacted (initially in 1992, *see* 1992 N.M. Laws Ch. 9), the legislature made clear that any entity which described itself as, “an agency of the State of New Mexico” would be included within PEBA’s coverage. These legislative facts dictate a much more strait forward and logical legal analysis than that suggested by UNM, as follows:

Does PEBA guarantee bargaining rights for employees employed by an “agency of the State of New Mexico?

The answer to this question is manifest; PEBA covers these employees. Section 4 defines “public employers” to include the state or a political subdivision and expressly includes “state educational institutions.” The only question remaining in the legal analysis is this:

Does URPEDA (enacted before the existence of rights announced in PEBA) supersede the express coverage of PEBA for subsidiaries of the University of New Mexico?

That question was contemplated and answered by the Legislature in section 3 of PEBA: **“PEBA shall supersede other previously enacted legislation.”** NMSA 1978, § 10-7E-3 (2020). Respondent’s legal analysis ignores this legislative fact and takes us down the rabbit hole of legal authority analyzing statutes with no “repealing clause,” cases where courts had to divine the legislature’s intent regarding the interplay between two laws. (e.g., the 120 year-old, *Wilburn v. Territory*, 1900-NMSC-028.). In Respondent’s rabbit hole, we find ourselves wallowing in unhelpful analysis such as whether the specific prevails over the general. This analysis serves primarily to cloud the the issues before the Board; the questions to be answered here do not require application of Respondent’s conflict analysis because the legislature included an explicit conflicts provision in PEBA – a repealer provision: **“In the event of conflict with other laws, the provisions of the Public Employee Bargaining Act shall supersede other previously enacted legislation.”** NMSA 1978, § 10-7E-3 (2020). Since URPEDA is not one of the six laws identified in Section 3 as superseding PEBA, the law effectively reads as follows: “PEBA shall supersede URPEDA.” PEBA’s conflicts provision is the lead to this story; for obvious reasons, Respondent has buried the lead, and only addresses the repealer language in a single paragraph beginning at page 11. Ultimately this Board should avail itself of plain statutory language which reads (in effect): The provisions of the PEBA shall supersede URPEDA.

**I. Respondent’s appeal for reversal arising out of the standard of review identified in the Letter Decision is not relevant to the outcome of the appeal. UNM (SRMC) is a public employer under either standard of review.**

Respondent contends on appeal that the legal questions analyzed in the Letter Decision should have been reviewed under Rule 12(B)(1), rather than Rule 12(B)(6).<sup>1</sup> In fact, under either

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<sup>1</sup> It is worth noting that Respondent did not file its Motion to Dismiss on a stated Rule 12(B)(1) basis, nor did it specifically request relief or mention Rule 12(B)(1) as the basis for its motion. Respondent’s first written request that the legal claims be evaluated under Rule 12(B)(1) is made, for the first time, on appeal.

standard, Respondent's motion should be dismissed. Under a Rule 12(B)(6) review, the Letter Decision correctly referenced UNM (SRMC)'s Articles of Incorporation, attached by Respondent to its motion. As the Articles of Incorporation indicate, Respondent was formed "as an instrumentality of the Regents of the University of New Mexico." By its own terms, UNM (SRMC) is a public employer, as identified by the Act: It is a "subdivision" of a "state educational institution." So, in fact, review under Rule 12(B)(6), yields the appropriate conclusion.

If this Board were to review this decision under Rule 12(B)(1), and adds the requirement that Petitioner must "prove jurisdictional facts," the Articles of Incorporation introduced by Respondent yield the same results; UNM (SRMC) is subject to PEBA. But, under Rule 12(B)(1), the Board may also take into account all of the other evidence submitted by Petitioner, which wholly supports the conclusion that UNM (SRMC) is a public employer. For instance, the most recent audited Financial Statement of Respondent (excerpts of which are attached as Ex. 1 to Petitioner's original opposition) describes it thus in the "Overview of Entity" Section:

The Regents of the University of New Mexico (UNM) approved the formation of the Medical Center, a New Mexico non-profit corporation under and pursuant to the New Mexico University Research Park and Economic Development Act. The corporation is formed *as an instrumentality of the Regents of UNM*, to promote the social welfare of New Mexico through the advancement of healthcare. The corporation is organized for the development, construction and operation of a licensed general, community teaching hospital located in Sandoval County, New Mexico in support of *and under the operating aegis* of the Health Sciences Center of the University of New Mexico (UNM HSC) and, in connection therewith, to facilitate and develop the clinical and medical practices of the faculty of the University of New Mexico School of Medicine (UNM SOM). *The Medical Center is a component unit of UNM.*

Ex. 1 to Response, at 3 (emphasis added).

That document also notes that Respondent:

is a corporation organized by the Regents of the University of New Mexico (UNM) and exists *as a New Mexico government nonprofit* and University Research Park and Economic Development Act (URPEDA) corporation. [SRMC] is governed by its Board

of Directors (the Board), which is empowered to do all things necessary for the proper operation of the [SRMC]. UNM, by and through its Board of Regents, is the sole member of the Medical Center.

*Id.* at 21 (emphasis added). It also describes SRMC as a “URPEDA subsidiary[y]” of UNM. *Id.*

Elsewhere, that document notes that SRMC:

is a separately incorporated but UNM-affiliated entity, which is the basis for intercompany or related-party transactions between SRMC and any UNM or UNM-affiliated entity. The clinical elements of UNM HSC are a *fully integrated*, academic health center and healthcare delivery system, and are *collectively administered* as the UNM Health System. The UNM Health System consists of SRMC, UNM Hospitals, UNM Behavioral Health Operations, UNM Cancer Center, and UNM Medical Group, Inc. (UNMMG).

*Id.* at 38 (emphasis added).

The University of New Mexico’s own 2020 audited financial statement (excerpts of which are attached as Ex. 2 to Petitioner’s original opposition) reports on the “Blended Component Units” of the University of New Mexico. It defines that term thus:

Component units that are blended generally include those in which 1) the component unit provides services entirely, or almost entirely, to the University or otherwise exclusively, or almost exclusively, benefits the University, 2) the component unit’s governing body is substantively the same as the governing body of the University and there is either a financial benefit or burden relationship between the University and the component unit or management of the University has operational responsibility for the component unit, or 3) the University is the sole corporate member of the component unit.

*Id.* at 34.

Respondent is considered to meet that definition:

Sandoval Regional Medical Center (SRMC) is a teaching hospital located in Sandoval County that was formed by the UNM Regents in August 2009 and is a New Mexico nonprofit corporation organized under and pursuant to the New Mexico University Research Park and Economic Development Act. ***SRMC was determined to be a component unit, because the University appoints a voting majority of SRMC’s board and is able to impose its will on SRMC.***

*Id.* at 35 (emphasis added).

Another of the “component units” of UNM is STC.UNM, also formed by UNM pursuant to URPEDA. *Id.* (describing STC.UNM). That UNM URPEDA entity argued in federal court that it was “an agency of the State of New Mexico, and is therefore entitled to sovereign immunity.” *See* Motion to Dismiss Counterclaims, *STC.UNM v. Qwest Diagnostics Inc.*, Case No. 1:17-cv-01123 MCA-KBM (filed Dec. 7, 2017), attached to original opposition as Exhibit 3, at 8; *see also id.*, at 2 (“STC.UNM is owned and controlled by The Regents of the University of New Mexico as an arm of the state. STC.UNM is a sovereign entity and not subject to suits to which it has not consented or waived its immunity.”). This argument was successful. *See* Proposed Findings of Fact and Recommended Disposition, *STC.UNM v. Qwest Diagnostics Inc.*, Case No. 1:17-cv-01123 MCA-KBM (filed Mar. 3, 2019) and Order Adopting the same (filed Mar. 27, 2019), collectively attached as Exhibit 4 to petitioner’s original opposition.

Because it is an “arm of the state” and a “New Mexico government nonprofit,” Respondent is able to, and does, receive public money in the form of property taxation. In 2018, the voters of Sandoval County approved the following Mill Levy Ballot Question:

For the purpose of providing operating revenues for medical services including new substance abuse treatment and trauma care, and a return of behavioral health services, shall Sandoval County, New Mexico impose a mill levy of one and ninety hundredths (1.90) mills each year for eight (8) years on each dollar of net taxable value of property in Sandoval County, to pay to Sandoval Regional Medical Center in accordance with a health care facilities contract with Sandoval County.”

*See* Sandoval County Health Facilities Agreement, attached as Exhibit 5, at Ex. A in Petitioner’s original opposition.

Under either standard UNM (SRMC) is, without question, a public employer, as defined by PEBA.

**II. The Letter Decision’s conclusion that UNM (SRMC) is a public employer under PEBA is unwaveringly consistent with the law and the facts before this Board.**

Ultimately, the question whether this Board has jurisdiction to process the Petition is a question of statutory interpretation. There is no question that this Board has jurisdiction over “public employer[s].” Nor is there any question that the UNM Board of Regents is such a public employer; indeed, it is specifically called out as such in the definition of public employer in PEBA: NMSA 1978, § 10-7E-4(R) (2020) (providing that “state educational institutions as provided in Article 12, Section 11 of the constitution of New Mexico shall be considered public employers other than the state for collective bargaining purposes only”).

Respondent takes issue with the Letter Decision’s supplemental findings that further analysis of PEBA expresses relevant legislative intent regarding the scope of coverage of the guarantee provided to public employees. In fact, this analysis further supports a traditional conflicts scenario. The legislature certainly knew how to exclude some otherwise public entities from the definition of “public employer.” Indeed, the definition expressly provides that it “does not include a government of an Indian nation, tribe or pueblo.” Having identified this one exclusion, it can be presumed that the Legislature did not intend to exclude other public entities. “The doctrine of *expressio unius est exclusio alterius* [means that] the expression or inclusion of one thing indicates exclusion of the other....” *Vives v. Verzino*, 2009-NMCA-083, ¶ 17, 146 N.M. 673, 213 P.3d 823. The Letter Decision also appropriately notes that URPEDA employees are not excluded among the public employees not covered by the Legislature’s guarantee (“management, confidential and supervisory public employees”).

It should also be noted that a subsection of URPEDA not cited by Respondent provides that a “research park corporation, its officers, directors *and employees* shall be granted immunity from liability for any tort as provided in the Tort Claims Act.” Section 21-28-7(C) (emphasis

added). That is significant; the Tort Claims Act reinstated New Mexico’s sovereign immunity for a “governmental entity and *any public employee* while acting within the scope of duty.” NMSA 1978, § 41-4-4(A) (2001) (emphasis added). Thus, the very statute cited by Respondent to argue it should not be deemed a “public employer” under PEBA, provides that it is to be considered a “governmental entity” under the Tort Claims Act, and that its employees are “public employees” under that Act.

**III. The Letter Decision’s conclusion that “URPEDA is superseded by PEBA” relies explicitly and directly upon the statutory language of PEBA and constitutes the appropriate legal conclusion.**

Respondent relies solely upon a statutory provision (URPEDA) which, it claims, exempts it from PEBA. That statutory exemption, however, is subordinate to PEBA (Section 3): “In the event of conflict with other laws, the provisions of PEBA shall supersede other previously enacted legislation.” PEBA’s Section 3 does identify six statutes which do supersede PEBA; the statute identified by Respondent is conspicuously absent from this list.<sup>2</sup>

Respondent is considered a “public employer” under PEBA. It is an arm of the state, entitled to sovereign immunity. It receives public taxation money in the form of the County Mill Levy. It was created by a public employer to be its “instrumentality.” It is a “component unit” of that public employer which is its “sole member.” The public employer appoints a voting majority of its board, and is able to “impose its will” on it. The public employer operates the “UNM Health System” (including Respondent) as a “fully integrated, academic health center and healthcare

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<sup>2</sup> Respondent criticizes references to two cases in the Letter Decision, (*USWA & Gila Regional Medical Ctr.* 1-PELRB-14, and *Memorial Med. Ctr. v. Tasch Constr.*, 2000-NMSC-030) claiming that, “neither case is relevant, much less controlling.” (Appeal, at p. 12.). The *USWA* decision provides relevant PELRB precedent, making clear that “public employer” must be read in conjunction with the description of “appropriate governing body.” Under that precedent, either UNM Board of Regents or UNM Health Sciences Center Board of Directors would be the “appropriate governing body.” Since either “appropriate governing body” is a public employer, the legal conclusion should be drawn that Respondent is a public employer. That conclusion is relevant and possibly controlling. *Memorial*, is appropriately cited for the background legal proposition that, in New Mexico, even private corporations may be subject to employment laws affecting only the public sector.

delivery system.” That system is “collectively administered” along with other public entities such as UNM Hospital under the “operating aegis” of the public employer. These facts create a simple conflict of laws; the resolution of that conflict was contemplated by the legislature and can be found in Section 3 of PEBA.

Because there is a conflict between PEBA and URPEDA, this question of statutory interpretation is governed by NMSA 1978, § 10-7E-3 (2020). That section, originally enacted in 2003 well after the URPEDA, and as amended in 2020, provides:

In the event of conflict with other laws, the provisions of the Public Employee Bargaining Act ***shall supersede other previously enacted legislation and rules***; provided that the Public Employee Bargaining Act shall not supersede the provisions of the Bateman Act [6-6-11 NMSA 1978], the Personnel Act [Chapter 10, Article 9 NMSA 1978], the Group Benefits Act [Chapter 10, Article 7B NMSA 1978], the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978], the Retiree Health Care Act [10-7C-1 to 10-7C-16 NMSA 1978], public employee retirement laws or the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978].

(Emphasis added). URPEDA is not one of the enumerated prior enactments that survives the conflict with PEBA. Thus, because PEBA would consider Respondent a public employer, it “supersede[s]” a contrary (and earlier) declaration in URPEDA. Respondent characterizes this provision as an “implicit” repeal; indeed it must because its analysis could not survive otherwise. But in fact, there is nothing “implicit” about the statutes which became subordinate — Section 3 explicitly subordinates ALL previously enacted legislation, except for the six statutes identified.

Section 3 is an explicit, and stronger, articulation of the general notion that “when two statutes conflict, the most recent expression of legislative intent will control over an earlier statute to the extent of any inconsistency.” *Martin v. Middle Rio Grande Conservancy Dist.*, 2008-NMCA-151, ¶ 12, 145 N.M. 151, 194 P.3d 766 (quotation marks and quoted authority omitted). This rule, in turn, is based on the notion that “[t]he legislature is presumed to know existing law and judicial pronouncements.” *State v. Alderette*, 1990-NMCA-132, ¶ 8, 111 N.M.

297, 804 P.2d 1116. Thus, knowing that it had previously made the general pronouncement that URPEDA corporations are not subject to “personnel” laws, the Legislature enacted PEBA which, as it relates specifically to collective bargaining, imposed on all “public employers” the obligation to bargain with unions and granted this Board jurisdiction to handle petitions such as this one.

### **Conclusion**

WHEREFORE, for the foregoing reasons, Petitioner respectfully requests that this Board conclude: (1) that Respondent is a “public employer,” (2) that to the extent that URPEDA provides otherwise, that declaration has been “superseded” by PEBA pursuant to Section 10-7E-3, and (3) that this Board has jurisdiction over Respondent and the Petition. The Letter Decision correctly analyzed the facts and ordered the appropriate remedy. It should be affirmed.

Dated: September 29, 2021

Respectfully submitted,

**YOUTZ & VALDEZ, P.C.**

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I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was served on all parties to this action pursuant to 11.21.2.9 NMAC this 29<sup>th</sup> day of September, 2021.

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**STATE OF NEW MEXICO  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

In re:

**UNITED HEALTH PROFESSIONALS  
OF NEW MEXICO, AFT, AFL-CIO,  
Petitioner**

-and-

**PELRB No. 306-21**

**UNIVERSITY OF NEW MEXICO  
SANDOVAL REGIONAL MEDICAL,  
Respondent**

**ORDER**

**THIS MATTER** comes before the Public Employee Labor Relations Board (“Board”) on Respondent’s request for Board review of Executive Director Thomas J. Griego’s denial of Respondent’s Motion to Dismiss the Petition for Certification filed by the American Federation of State, County, and Municipal Employees (“AFSCME”). The Board, after reviewing the pleadings, hearing oral argument and being sufficiently advised, voted 3-0 to affirm Executive Director Thomas J. Griego’s decision dated September 10, 2021 with the addendum that this appeal is interlocutory and this Order is an interim order not subject to appeal under Rule 1-074 NMRA.

**THEREFORE THE BOARD** adopts the Executive Director’s Decision as its own and the Respondent’s Motion to Dismiss the Petition is **DENIED** and the case is remanded to the Executive Director for further proceedings consistent with this Order.

**PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

10/13/2021  
DATE

Mark Myers  
MARK MYERS, BOARD CHAIR

STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO ex rel.  
UNM SANDOVAL REGIONAL MEDICAL  
CENTER, INC.,

Petitioner,

v.

No. \_\_\_\_\_

NEW MEXICO PUBLIC EMPLOYEE  
LABOR RELATIONS BOARD,

Respondent,

and

UNITED HEALTH PROFESSIONALS  
OF NEW MEXICO, AFT, AFL-CIO,

Real Party in Interest.

**ALTERNATIVE WRIT OF MANDAMUS**

This Alternative Writ of Mandamus is hereby issued to Respondent New Mexico Public Employee Labor Relations Board.

The Court has jurisdiction over this matter under NMSA 1978, § 44-2-3 (1884). Venue is proper under NMSA 1978, § 38-3-1(A) (1988).

Petitioner UNM Sandoval Regional Medical Center, Inc. (“SRMC”) has come before the Court and submitted the verified petition attached hereto as Exhibit 1, setting forth grounds sufficient for issuance of this alternative writ.

Respondent is a statutorily-created state government board that has jurisdiction over collective bargaining and labor relations of “public employees” in New Mexico. NMSA 1978, § 10-7E-8(A) (2003) (creating PELRB); § 10-7E-2. Petitioner SRMC is a nonprofit “research

park corporation” created pursuant to the New Mexico University Research Park and Economic Development Act, NMSA 1978, §§ 21-28-1 to -25 (2007) (“URPEDA”) and the Nonprofit Corporation Act<sup>1</sup>, NMSA 1978, §§ 53-8-1 to -99 that owns a community teaching hospital in Rio Rancho, New Mexico. Real Party in Interest United Health Professionals of New Mexico, AFT, AFL-CIO (“Union”) filed a Petition for Certification with the PELRB on August 13, 2021, seeking to represent nurses and other employees of SRMC as the exclusive representative for collective bargaining.

As demonstrated in the verified petition attached hereto, the PELRB has unlawfully asserted jurisdiction over SRMC and its employees, thereby refusing to comply with URPEDA’s command that research park corporations “shall not be deemed” political subdivisions of the state. The PELRB’s refusal to give effect to both URPEDA and the PEBA, the PELRB has violated both New Mexico statute, NMSA 1978, § 12-2A-10(A), and long-standing New Mexico common law, *see, e.g., Wilburn v. Territory*, 1900-NMSC-028, ¶ 7, 10 N.M. 402 62 P.2d; *State v. Moore*, 1936-NMSC-044, ¶ 11, 40 N.M. 344, 59 P.2d 902 (“Where there is an apparent conflict between the two acts, without any repeal, the two will be reconciled”); *Clothier v. Lopez*, 1985-NMSC-088, ¶ 11, 103 N.M. 593, 711 P.2d 870 (the presumption should be that the legislature “did not intend to enact a provision inconsistent with any existing law.”).

Based on the showing made in the verified petition, Respondent’s refusal to comply with New Mexico law and respect its jurisdictional limits will cause SRMC and its employees to lose

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<sup>1</sup> “Any university may form, pursuant to the provisions of the Nonprofit Corporation Act or the Business Corporation Act, one or more research park corporations, separate and apart from the state and the university, to promote, develop and administer research parks or technological innovations for scientific, educational and economic development opportunities in accordance with bylaws adopted by the research park corporation or economic development initiatives that support the teaching, research or service mission of the university.” NMSA 1978, § 21-28-4(A).

fundamental rights guaranteed by federal law. This Writ of Mandamus is therefore warranted and shall issue.

It is therefore ORDERED that Respondent shall file a pleading responsive to the attached petition within thirty (30) days after being served with this alternative writ, or at the time of the hearing described below, whichever is sooner, and shall also either:

- A. Cease all proceedings related to the Petition for Certification filed by the United Health Professionals of New Mexico, AFT, AFL-CIO; *and*
- B. dismiss the Petition for Certification for lack of jurisdiction; or
- C. show cause why it should not be compelled to comply with (A) and (B) above.

It is further ORDERED that if Respondent chooses to show cause rather than comply with the commands of Sections A and B, above, Respondent shall do so at a hearing to be held on \_\_\_\_\_, 2021, at \_\_\_\_\_ .m., at the Bernalillo County Courthouse, Albuquerque, New Mexico. Respondent is directed to notify the Court at once if Respondent takes action sufficient under the terms of this alternative writ to render the hearing unnecessary.

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DISTRICT COURT CLERK

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DISTRICT COURT JUDGE

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