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VIA U.S. MAIL AND E-MAIL

Ms. Angela Gladwell
P.O. Box 1329
Santa Fe, New Mexico 87504

Email: Fema-hermits-peak@fema.dhs.gov

Re: Hermit's Peak/Calf Canyon Fire Assistance Act

Dear Ms. Gladwell,

Our law firm represents approximately one thousand victims of the Hermit's Peak and Calf Canyon Fires. I write to express serious concerns regarding FEMA's handling of our clients' claims through the Hermit's Peak/Calf Canyon Claims Office.

We began submitting Notices of Loss on behalf of our clients in January 2023, and submitting Proof of Loss forms in August 2023 (after FEMA made the form available in May). Since then, we have regularly corresponded with FEMA and Claims Office representatives to discuss a wide range of issues, which have still not been resolved.

- 1. There is an irreconcilable conflict between the Claims Office's oral representations and the express language of the Partial Payment Waiver form with respect to interim payments and supplemental claims.**

Claims Office representatives have repeatedly stated that fire victims may be asked to accept interim (or partial) payments without prejudicing their right to a full recovery and that they will be permitted to submit supplemental claims when necessary.

The problem is that FEMA requires a Partial Payment Waiver form before a claimant can receive a partial payment. And that waiver form is extremely broad. In fact, it states that "a claimant waives all past, present, and future claims" related to the losses or damages "identified on the attached Proof of Loss."

Without further, written guidance from FEMA, it is impossible to reconcile this language with the FEMA employees' oral representations that claimants will be permitted to file supplemental claims. Thus, while the Partial Payment Waiver completely waives the claimant's legal right to recover additional damages for that area of loss, FEMA employees are telling claimants the exact opposite.

Simply put, the non-lawyer FEMA employees are giving claimants – including our clients – inaccurate legal advice. Not to put too fine a point on it, but not only are the FEMA employees practicing law without a license, they are committing legal malpractice.

This is not a hypothetical problem. As you know, FEMA recently partnered with the National Resources Conservation Service to offer fire victims a free conservation report regarding their property damage. The Claims Office has informed us that if a claimant submits one of these reports along with his or her Proof of Loss, FEMA will immediately issue payment on the portion of the claim identified in the Conservation Report.

The Claims Office also advised us, however, that these reports do *not* include estimates for replacing lost trees or otherwise reforesting a claimant's property.

And again, a claimant who wishes to get paid on a submitted NRCS report will have to execute a Partial Payment Waiver, which – according to its plain terms – would preclude the claimant from seeking compensation for any other claims related to his or her property damage. Simply put, a claimant who submits an NRCS report to receive a prompt, partial payment could be precluded from recovering the full value of his or her damages. This places all the fire victims who wish to take advantage of the NRCS program in an untenable position.

2. FEMA's refusal to compensate fire victims for non-economic damages is based on an erroneous reading of the Fire Assistance Act and conflicts with controlling New Mexico law.

As you are aware, FEMA's interpretation of the Fire Assistance Act is that it precludes recovery for non-economic damages such as emotional distress and nuisance. FEMA has informed us that this interpretation is based on the phrase "actual compensatory damages," and its reading of *FAA v. Cooper*,¹ a U.S. Supreme Court case from 2012.

We have provided you with a detailed brief setting forth why this interpretation is facially erroneous, contrary to controlling New Mexico law, and grossly unfair to the victims of the fire.

In the first place, the Supreme Court's holding in *Cooper* is limited to the phrase "actual damages" in the context of the federal Privacy Act of 1974.² In fact, the opinion specifically states that "the precise meaning of the term changes with the specific statute in which it is found" and that "[t]he term is sometimes understood to include nonpecuniary harm."³ There is simply nothing about the phrase "actual compensatory damages" to suggest that non-economic damages are not recoverable in the context of the Fire Assistance Act.

Further, FEMA's interpretation is wholly inconsistent with the stated goal of the Act, which is to compensate victims as they would be compensated under the laws of New Mexico, which provide for the recovery of non-economic damages in this context.

¹ 566 U.S. 284 (2012).

² 5 U.S.C. § 552(a).

³ 566 U.S. at 292 (citations and quotations omitted).

As you know, we have submitted a brief to FEMA on this issue, requesting that the Agency revise its stance in the final regulations. While FEMA has promised to provide a response setting forth the legal basis for its position, that never occurred and, just today, final regulations were released that excluded non-economic damages.

This issue is critically important to our clients and to all claimants. There is no justification for FEMA to deny these victims the full damages they are legally entitled to recover.

3. There has been a protracted delay in enrolling fire victims in the National Flood Insurance Plan.

The Claims Office has urged eligible claimants to enroll in the National Flood Insurance Plan as soon as possible, and we concur. The fire has left most of its victims particularly vulnerable to floods; our clients are extremely anxious about this ongoing threat and eager to enroll in this program.

To that end, we have prioritized enrolling all our eligible clients. The Claims Office informed us, however, that each claimant would need to submit a set of 10-15 “informational data points” before he or she could be enrolled in the plan, while failing to identify what those data points are. We did not receive the data points until July 20 and, despite sending a follow up email immediately seeking clarification on several issues – which we have followed up on several times – we have yet to receive a response. We are concerned not only about our clients, but all victims who have not received the necessary flood insurance promised under the Act. According to the presentation given by Ms. Gladwell last week, only 62 policies have been issued through FEMA to date.

4. FEMA's insistence on making direct payments to represented claimants is contrary to the standard procedure for payments to represented parties and poses a threat to the attorney-client relationship.

FEMA representatives have informed us that when the Agency issues payments, it will make them *directly* to the claimant, even if the claimant is represented by counsel. Of course, the standard procedure for payments to represented parties is for payments to be made to the party's attorney, where it will be held in a trust account until the attorney distributes the proceeds consistent with the client's fee agreement. This process ensures proper accounting and transparency for everyone involved.

FEMA's position is that the Agency is unable to make payments to a represented party's attorney because such a payment would constitute an “assignment,” which is not permitted under the current regulations. This reading of the “no assignments” clause in the interim regulations is, at best, ambitious. A payment to an attorney and held in trust for proper accounting is obviously not an “assignment.”

5. The Claims Office continues to directly contact represented claimants to persuade them that they do not need counsel.

Representatives of the Claims Office regularly lobby represented claimants to fire their lawyers. We receive reports on an almost daily basis of Claims Office representatives contacting our clients specifically to persuade them that they do not need an attorney to go through the claims process.

The same representatives are also consistently hostile toward counsel in other respects. For example, lawyers from Singleton Schreiber have been asked to leave public meetings of the Claims Office, the stated basis for exclusion being that they are lawyers. Further, a Claims Office representative informed us that the Office's acceptance of our clients' Notices of Loss forms was delayed simply because they were represented parties.

I am once again requesting that you respect the constitutional rights of those victims who have elected to hire attorneys and work with us to get the best results for them.

6. The claims process is taking far too long.

Last week, you gave a power-point presentation that included FEMA's projection that it will distribute \$1 billion to victims by January 2025. This projection is disturbing because the Act earmarked \$3.95 billion for victims in 2022. It should not take almost three years to distribute only 25% of those funds.

By way of comparison, the Fire Victims' Trust (administering payments to victims of California's North Bay Fires) began accepting claims in July 2020 and had paid \$1 billion to victims by October 2021, \$2 billion by February 2022, \$3 billion by March 2022, and \$4 billion by June 2022.

The Hermit's Peak and Calf Canyon fires occurred in April 2022. It should not take this long to compensate the victims, many of whom lost their homes and are desperate to be made whole.

7. Requiring wet signatures is unnecessary and contrary to Federal and State law.

E-Signatures were approved by the federal government in 2000 when congress passed the ESIGN Act. Furthermore, **The Uniform Electronic Transactions Act, Sections 14-16-1 through 14-16-20, NMSA 1978**, states that "if a law requires a signature, an electronic signature satisfies the law" and that a record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

As stated above, our firm has been filing Notice of Losses since January and Proof of Losses since August 7. The majority of these have been filed with electronic signatures, which are acceptable forms of signature on legal documents under New Mexico law.

However, just this week, our office was informed that electronic signatures are not being accepted. When we pushed back, the Claims Office told us that "FEMA upper management has decided to accept a digital signature on Proof of Losses from an applicant who is being

represented by an attorney because in dealing with law firms, the chances for identity fraud would be minimal if non-existent.” However, less than 36 hours later, this statement was retracted, and we were once again instructed that wet signatures were required.

To deny victims the right to use electronic signatures directly contradicts well-established federal and state law and regulations. This is just one more example of FEMA frustrating the process and making victims jump through an additional – and unnecessary – step before they can receive the funds that they are rightly due.

8. The claims process has been plagued by a panoply of miscellaneous, administrative issues.

We have also encountered several other issues, including:

- The Claims Office apparently has no formal, internal process for handling claims submitted by represented claimants and frequently assigns related claims to different representatives;
- We have submitted large volumes of documents via cloud-based, document-sharing programs (e.g., fileshare), only to find out after following up weeks later that the Office was unable (or unwilling) to download the share-link file;
- We have observed that some FEMA navigators disseminate inaccurate information regarding claims deadlines, specifically that victims can continue to file claims through 2025 and 2026, when the regulations state that the deadline is November 14, 2024; and
- We regularly reach out to FEMA representatives (typically by phone or email) regarding these issues and rarely receive a response.

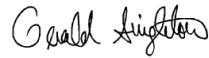
Again, however, by far the most frustrating part about this is that while the Congress and the President went above and beyond to get this money for the victims, your office is failing to hire and train sufficient staff to review these claims and to set up a system that will efficiently evaluate claims and make payments to victims.

As a result, a program that was intended to – and should – have had an incredibly positive impact on this community has engendered frustration in the community toward both FEMA and this process.

Conclusion

Unfortunately, the Claims Office (at least in its present form) is deficient in its staffing, training, and overall administration. A qualified administrator with the relevant experience and expertise is needed to oversee this operation, ideally in conjunction with a senior-level attorney or other appropriately qualified individual. Until changes are made, we will continue to experience these recurring issues, which will perpetuate delayed payments to fire victims desperate for relief.

Sincerely,



Gerald Singleton, Esq.

Cc: Hon. Martin Heinrich, United States Senator
Hon. Ben Ray Lujan, United States Senator
Hon. Teresa Leger Fernandez, United States Congresswoman (CD-3)
Hon. Melanie Stansbury, United States Congresswoman (CD-1)
Hon. Gabe Vasquez, United States Congressman (CD-2)