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6 NETWORK

7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
8 **COUNTY OF SAN DIEGO - NORTH COUNTY DIVISION**

10	BONSALL UNIFIED SCHOOL DISTRICT,)	CASE #: 37-2015-00012596-CU-MC-NC
11	Plaintiff,)	VERIFIED ANSWER TO COMPLAINT
12	v.)	FOR VALIDATION
13	ALL PERSONS INTERESTED IN THE)	Judge: Hon. Timothy M. Casserly
14	MATTER OF THE PROCEEDINGS FOR)	Dept.: N-31
15	RESOLUTION NO. 15-02-02-1(a) APPROVING)	Complaint Filed: April 15, 2015
16	SITE LEASE, SUBLEASE, AND)	Trial Date: Not Set
17	CONSTRUCTION SERVICES AGREEMENT)	IMAGED FILE
18	BETWEEN BONSALL UNIFIED SCHOOL)	[Jury Trial Demanded]
19	DISTRICT AND ERICKSON-HALL)	
	CONSTRUCTION CO. FOR THE BONSALL)	
	HIGH SCHOOL NEW CLASSROOM)	
	BUILDING(S) PROJECT, PHASE II,)	
	Defendants.)	

20 Comes now Defendant CALIFORNIA TAXPAYERS ACTION NETWORK, a non-profit
21 corporation, (hereinafter "Defendant" or "TAXPAYER") for itself, the taxpayers in the BONSALL
22 UNIFIED SCHOOL DISTRICT (hereinafter "Plaintiff" or "DISTRICT") and others similarly situated
23 and/or interested in this matter and responds to the DISTRICT's Complaint in this action as follows:

- 24 1. In response to Paragraph 1 of the Complaint, Defendant admits these allegations.
- 25 2. In response to Paragraph 2 of the Complaint, Defendant asserts Education Code 17406
26 speaks for itself and is to be interpreted and taken in context with other related statutes and applicable
27 California law.

1 3. In response to Paragraph 3 of the Complaint, Defendant admits these allegations.
2 4. In response to Paragraph 4 of the Complaint, Defendant admits these allegations.
3 5. In response to Paragraph 5 of the Complaint, Defendant admits these allegations.
4 6. In response to Paragraph 6 of the Complaint, Defendant admits these allegations.
5 7. In response to Paragraph 7 of the Complaint, Defendant admits these allegations.
6 8. In response to Paragraph 8 of the Complaint, Defendant admits the DISTRICT owns
7 the site. As to the statutes referenced in this Paragraph, they speak for themselves and are to be to be
8 interpreted and taken in context with other related statutes and applicable California law.
9 9. In response to Paragraph 9 of the Complaint, Defendant admits the Project is being
10 solely financed by grant funds and other DISTRICT funds. Defendant denies it was necessary or in
11 the best interest for the District to perform the Project pursuant to the Lease Leaseback delivery
12 method authorized by Education Code 17400 et seq.
13 10. In response to Paragraph 10 of the Complaint, Defendant lacks sufficient information
14 or belief to answer the factual allegations contained in this Paragraph, and basing its denial on this
15 ground, denies each and every factual allegation contained therein.
16 11. In response to Paragraph 11 of the Complaint, Defendant admits these allegations.
17 12. In response to Paragraph 12 of the Complaint, Defendant admits these allegations.
18 13. In response to Paragraph 13 of the Complaint, Defendant admits these allegations.
19 14. In response to Paragraph 14 of the Complaint, Defendant denies these allegations.
20 15. In response to Paragraph 15 of the Complaint, Defendant admits these allegations.
21 16. In response to Paragraph 16 of the Complaint, Defendant realleges and incorporates
22 by reference the allegations contained in Paragraphs 1 through 15 as though fully set forth herein.
23 17. In response to Paragraph 17 of the Complaint, Defendant admits these allegations.
24 18. In response to Paragraph 18 of the Complaint, Defendant admits these allegations.
25 19. In response to Paragraph 19 of the Complaint, Defendant admits title to the Project and
26 Site vest in the DISTRICT upon the expiration of the Site Lease but deny the District is entitled to use
27 the Site and Project during the term of the Site Lease and any other factual allegations in this
28 Paragraph on information and belief..

1 in this action that the DISTRICT contracts which are the subject to this validation action are ultra
2 vires, illegal, void and/or unenforceable under the California Supreme Court's statement of well
3 settled California law that "the trial court must be free to search out illegality lying behind the forms
4 in which the parties have cast the transaction to conceal such illegality." Lewis and Queen v. N.M.
5 Ball Sons (1957) 48 Cal.2d 141, 147-148. Thus, under long standing California law, regardless of the
6 state of the pleadings, when the evidence shows a party in substance seeks to enforce an illegal
7 contract or recover compensation for an illegal act, the court has both the power and duty to ascertain
8 the true facts in order that it may not unwittingly lend its assistance to the consummation or
9 encouragement of what public policy forbids. Lewis and Queen v. N.M. Ball Sons (1957) 48 Cal.2d
10 141, 147-148; See also Wells v. Comstock (1956) 46 Cal.2d 528, 532; Franklin v. Nat C. Goldstone
11 Agency (1949) 33 Cal.2d 628, 629; Fewel & Dawes, Inc. v. Pratt (1941) 17 Cal.2d 85, 92; Endicott
12 v. Rosenthal (1932) 216 Cal. 721, 728; Tevis v. Blanchard (1954) 122 Cal.App.2d 731, 732-734;
13 Owens v. Haslett (1950) 98 Cal.App.2d 829, 835-836. California courts have held it is immaterial that
14 the parties, whether by inadvertence or consent, even at the trial do not raise the issue. The court may
15 do so of its own motion when the testimony produces evidence of illegality. Norwood v. Judd (1949)
16 93 Cal.App.2d 276, 277-278, 282. The California Supreme Court has held it is not too late to raise the
17 issue on motion for new trial, Pacific Wharf & Storage Co. v. Standard American Dredging Co. (1920)
18 184 Cal. 21, 23-24; in a proceeding to enforce an arbitration award, Franklin v. Nat C. Goldstone
19 Agency (1949) 33 Cal.2d 628, 629 or even on appeal, Morey v. Paladini (1922) 187 Cal. 727,
20 733-734.

21 **FIRST AFFIRMATIVE DEFENSE**

22 **(Failure to Comply with Education Code § 17400 et seq. by Failing to Have Genuine Leases)**

23 36. As and for a first affirmative defense to the Complaint on file herein, and each claim
24 therein, TAXPAYER alleges, on information and belief subject to proof at trial after sufficient
25 discovery, the Lease-Leaseback Contracts which are the subject of this validation action are ultra
26 vires, illegal void and unenforceable because Education Code §§ 17400-17429 only authorize genuine
27 lease-leaseback agreements to provide for financing of a school facility project over time, while the
28 Lease-Leaseback Contracts at issue in this action sham leases entered into as a subterfuge to avoid the

1 competitive bidding requirements of Public Contract Code § 20110 et seq., which exist to obtain the
2 goals and public benefits outlined by the Legislature in Public Contract Code §100.

3 37. Education Code §§17400-17429 authorize California public school districts to enter
4 into lease leaseback arrangements to provide for the construction of school facilities only in the
5 manner prescribed therein. The procedures defined in Education Code §§17400-17429 may only be
6 used as an alternative to the procedures for school facility construction prescribed in Public Contract
7 Code §§20110-20118.4 if a school district enters into a genuine lease and leaseback arrangement with
8 its selected contractor. Conversely, the procedures for school facility construction prescribed in Public
9 Contract Code §§20110-20118.4 apply to traditional purchase type construction contracts between
10 school districts and contractors where, as here, the school district has retained its own separate
11 architect relative to the project. Under a traditional purchase type construction contract a school
12 district presently has all of the money necessary to pay the cost of construction and pays it to their
13 contractor by way of periodic payments during construction pro rated based upon CONTRACTOR's
14 percentage of completion (i.e. progress payments). Shortly after the end of construction the contractor
15 is paid in full for the agreed upon cost of construction.

16 38. To fit within the alternative procedures for school facility construction prescribed by
17 Education Code §§17400-17429 a genuine lease and leaseback arrangement must exist whereby the
18 right of use and beneficial occupancy of the subject property is transferred to the contractor by way
19 of a site lease and the district regains the right to use and occupy the property through a leaseback
20 agreement by which fixed rental payments are paid by the district to the contractor over a sufficient
21 period of time after substantial completion of the facilities constructed by contractor so that district
22 can have beneficial use and occupancy of the improvements for their intended purposes.

23 39. TAXPAYER alleges, on information and belief subject to proof at trial after sufficient
24 discovery, the actual contractual arrangement between DISTRICT and CONTRACTOR relative to
25 Lease-Leaseback Contracts at issue in this action is NOT the type of arrangement authorized by
26 Education Code §§17400-17429. Under California law the trier of fact is required to disregard the self
27 serving titles, stipulations and definitions contained in the challenged Lease-Leaseback Contracts
28 between DISTRICT and CONTRACTOR relative to the Project and evaluate the true nature,

1 arrangement and purpose of these agreements in light of the subject to which they relate, the end for
2 which they were created and the means by which they accomplish their end.

3 40. TAXPAYER alleges, on information and belief subject to proof at trial after sufficient
4 discovery, the challenged Lease-Leaseback Contracts between DISTRICT and CONTRACTOR
5 relative to the Project are not the type of agreements authorized by Education Code §§17400-17429.
6 Instead, they are merely a sham and subterfuge to avoid the requirements of Public Contract Code
7 §§20110-20118.4 and circumvent the goals and public benefits outlined by the Legislature in Public
8 Contract Code §100 because, inter alia, the required “Sublease” payments are not real lease payments
9 because they, inter alia,: (1) last only as long as the duration of construction; (2) are variable based
10 upon the value of construction work performed by CONTRACTOR prior to the date of payment; (3)
11 do not provide for any financing of the work by CONTRACTOR (because its obligation to pay others
12 who are actually providing the labor, equipment, materials and services for the construction of the
13 Project is contingent upon it first receiving payment for same from the DISTRICT); (4) the lease
14 payments end concurrently with the completion of construction of the Project by CONTRACTOR;
15 (5) the Project is being performed and administered in a manner consistent with Public Contract Code
16 §§20110-20118.4 rather than with Education Code §§17400-17429; (6) the DISTRICT is withholding
17 retention from its payments to CONTRACTOR and requiring CONTRACTOR to provide payment
18 and performance bonds; (7) the DISTRICT does not have the right or practical ability to have
19 beneficial occupancy of the demised premises during the term of the Sublease to use them for their
20 intended purposes.

21 41. Because the contractual arrangement between DISTRICT and CONTRACTOR relative
22 to the construction of the subject Project is not the type of arrangement authorized by Education Code
23 §§17400-17429, DISTRICT was required to comply with the requirements of Public Contract Code
24 §§20110-20118.4 relative to the Project.

25 42. TAXPAYER alleges, on information and belief subject to proof at trial after sufficient
26 discovery, DISTRICT did not comply with the requirements of Public Contract Code
27 §§20110-20118.4 relative to the Project, i.e. publication of notice inviting sealed bids from all
28 interested bidders and award, if at all, only to the lowest responsive and responsible bidder.

1 Accordingly, the Lease-Leaseback Contracts are ultra vires, illegal void and unenforceable

2 **SECOND AFFIRMATIVE DEFENSE**

3 **(Failure to Comply with Education Code § 17400 et seq.**

4 **by Failing to Have Sufficient Contractor Financing)**

5 43. As and for a second affirmative defense to the Complaint on file herein, and each claim
6 therein, TAXPAYER alleges, on information and belief subject to proof at trial after sufficient
7 discovery, the DISTRICT's Lease Leaseback Contracts are ultra vires, illegal, void, and unenforceable
8 because the lease-leaseback construction project delivery method authorized by Education Code §§
9 17400-17429 is only available for use by school districts in California as a means to finance the cost
10 of construction over time when they do not have sufficient immediate funds available to them to cover
11 the cost of construction. Education Code §§ 17400 et seq., requires the cost of construction be
12 advanced and carried over a period of many years by the party to whom the lease leaseback contracts
13 are awarded.

14 44. The lease-leaseback arrangement authorized under Education Code §§ 17400-17429
15 must constitute a genuine “financing” because revisions made to the Education Code which enacted
16 these provisions were established as a mechanism to finance school facilities. See *Morgan Hill*
17 *Unified School Dist. v. Amoroso* (1988) 204 Cal.App.3d 1083, 1086 and 62 Ops.Cal.Atty.Gen. 209,
18 210 (1979) which state the lease-leaseback provisions of Education Code §§39300–39325 (currently
19 (§§17400-17429) are a method for financing school construction.

20 45. Here, TAXPAYER alleges, on information and belief subject to proof at trial after
21 sufficient discovery, because of proceeds derived from voter approved bond sales and state grants,
22 DISTRICT has sufficient funds available to it to cover the immediate costs of construction of the
23 Project as they are incurred and therefore is not permitted to use the lease-leaseback construction
24 project delivery method authorized by Education Code §§ 17400-17429 because there is no need for
25 the project financing contemplated thereunder. Because DISTRICT is not using the lease-leaseback
26 construction project delivery method authorized by Education Code §§ 17400-17429 as a means to
27 finance the cost of construction of the Project over time when they do not have sufficient immediate
28 funds available to them to cover the cost of construction the foregoing contracts were not made in

1 strict conformity with all applicable legal requirements such that they are ultra vires, illegal, void, and
2 unenforceable and all monies paid by the DISTRICT thereunder to CONTRACTOR must be paid back
3 by CONTRACTOR.

4 **THIRD AFFIRMATIVE DEFENSE**

5 **(CONTRACTOR's Conflict of Interest)**

6 46. As and for a third affirmative defense to the Complaint on file herein, and each claim
7 therein, TAXPAYER alleges, on information and belief subject to proof at trial after sufficient
8 discovery, the Lease Leaseback Contracts are ultra vires, illegal void and unenforceable because
9 CONTRACTOR is legally precluded from being awarded the Lease-Leaseback Contracts due to a
10 conflict of interest that arises from its prior professional consulting services for the DISTRICT which
11 involved the Project.

12 47. Based upon common law conflict of interest principles and/or Government Code §
13 1090 et seq., CONTRACTOR is legally precluded from being awarded the Lease-Leaseback
14 Contracts from DISTRICT relative to the construction of the Project because TAXPAYER alleges,
15 on information and belief subject to proof at trial after sufficient discovery, CONTRACTOR
16 previously acted as a professional consultant to DISTRICT relative to the Project and had a hand in
17 designing and developing the plans and specifications by which the Project is being constructed and
18 upon which CONTRACTOR is being paid from DISTRICT.

19 48. TAXPAYER alleges, on information and belief subject to proof at trial after sufficient
20 discovery, CONTRACTOR provided to DISTRICT professional pre-construction services relative to
21 the Project such that CONTRACTOR had a conflict of interest vis a vis the Project and therefore the
22 Lease-Leaseback Contracts between the DISTRICT and CONTRACTOR are ultra vires, void and
23 unenforceable.

24 **FOURTH AFFIRMATIVE DEFENSE**

25 **(Failure to Have DSA Approved Plans & Specs Prior to Contract Award)**

26 49. As and for a fifth affirmative defense to the Complaint on file herein, and each claim
27 therein, TAXPAYER hereby incorporates by reference each and every allegation contained in
28 paragraphs 15 through 53 above as though set forth fully herein.

1 50. Education Code §17402 provides in relevant part "Before the governing board of a
2 school district enters into a lease or agreement pursuant to this article...it shall have prepared and shall
3 have adopted plans and specifications for the building that have been approved pursuant to Sections
4 17280 to 17316..."

5 51. TAXPAYER alleges that the proposed Site Lease and Sublease and Construction
6 Services Agreements specified therein are illegal, void and/or unenforceable because, on information
7 and belief subject to proof at trial following adequate and sufficient discovery, the DISTRICT's plans
8 and specifications for the Project had not been completely and finally approved by the California
9 Department of General Services' Division of the State Architect ("DSA") and thereafter adopted by
10 DISTRICT prior to the DISTRICT's award of the foregoing contracts as required by Education Code
11 § 17402, § 17297 and/or § 17307.

12 **PRAYER FOR RELIEF**

13 WHEREFORE, Defendant prays judgment as follows:

- 14 1. That the proposed Site Lease, Sublease Agreement and/or Construction Services
15 Agreement referenced in Plaintiff's Complaint are ultra vires, illegal, void and/or
16 unenforceable;
- 17 2. For attorney's fees as provided by Code of Civil Procedure §1021.5;
- 18 3. For costs of suit incurred herein;
- 19 4. For such other and further relief as the Court deems just and proper.

20 Dated: 6/8/2015

CARLIN LAW GROUP, APC

21
22 By: *William Hendricks*
23 Kevin R. Carlin
24 William A. Hendricks, Attorneys for
25 Defendants CALIFORNIA TAXPAYERS
26 ACTION NETWORK

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VERIFICATION

STATE OF CALIFORNIA, COUNTY OF San Diego

I have read the foregoing Answer to Complaint for Validation

and know its contents.

CHECK APPLICABLE PARAGRAPH

I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I am an Officer a partner a of California Taxpayers

Action Network

a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I am one of the attorneys for a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on June 4, 20 15, at San Diego, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Cory J. Briggs

Type or Print Name

Signature

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF

I am employed in the county of, State of California.

I am over the age of 18 and not a party to the within action; my business address is,

On, 20, I served the foregoing document described as

by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list; by placing the original a true copy thereof enclosed in sealed envelopes addressed as follows:

BY MAIL I deposited such envelope in the mail at, California. The envelope was mailed with postage thereon fully prepaid.

As follows I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on, 20, at, California. (BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.

Executed on, 20, at, California.

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct. I (Federal) declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Type or Print Name

Signature

(By MAIL SIGNATURE MUST BE OF PERSON DEPOSITING ENVELOPE IN MAIL SLOT, BOX, OR BAG)

(FOR PERSONAL SERVICE SIGNATURE MUST BE THAT OF MESSENGER)