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SUPERIOR COURT OF THE STATE OF ARIZONA

IN THE ARIZONA TAX COURT

STATE OF ARIZONA *ex rel.* MARK BRNOVICH, Attorney General Plaintiff, v. ARIZONA BOARD OF REGENTS; JOHN P. CREER, Assistant Vice President for University Real Estate Development at ASU, Defendants, PAUL D. PETERSEN, in his official capacity as MARICOPA COUNTY ASSESSOR; and ROYCE T. FLORA, in his official capacity as MARICOPA COUNTY TREASURER Relief-Defendants.	Case No: TX2019-000011 **STATE'S RESPONSE TO MOTION TO DISMISS NUMBER 5** (Assigned to the Hon. Christopher Whitten)

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff State of Arizona, *ex rel.* Mark Brnovich, Attorney General (the "State") respectfully opposes Motion to Dismiss Number 5 ("MTD 5") filed by Defendant Arizona Board of Regents ("ABOR").

Count IV of the State's First Amended Complaint ("FAC") contains a well-pled claim that the option contract and amendments thereto between ABOR and Omni (the "Omni Deal") involves illegal payments of public monies under A.R.S. § 35-212. This is because the tens of millions of dollars to be paid by ABOR to Omni will provide an illegal subsidy in violation of article IX, section 7 of the Arizona Constitution ("Gift Clause"). Not only is ABOR agreeing to pay the full cost—up to $19.5 million—for a private conference center that it has the right to use for free ***only seven days per year***, but ABOR is also agreeing to construct a $30 million parking structure, $8.5 million of which is for parking spaces for Omni's exclusive use. ABOR's agents also violated ABOR's own policies (and acted contrary to their prior representations to ABOR) by selling the land on which the hotel and conference center will be built for a fraction of market value. Until the FAC was filed, ASU's high-level executives never disclosed to the public, the Regents in a public meeting, or the Legislature that ASU would only have seven-days-per-year of free use of the private conference center it was paying the full cost to construct or that the land was being sold for a fraction of market value. Instead, this deal was publicly sold as an ASU conference center that ASU "will own" and "will be a university asset." FAC ¶111.

The only real questions at this point are who knew what, when it was known, and whether ASU Vice President John Creer alone contractually obligated ABOR to make what will be illegal payments of public monies and sell ABOR land at a fraction of market value or whether he acted at others' direction. These questions can be answered only through discovery, which ABOR is desperately trying to avoid (including by making frivolous arguments about an inapplicable statute of limitations and flooding the Court with dismissal motions).

Unlike its challenge to FAC Counts I-III in its prior motions to dismiss, ABOR does not dispute that the Attorney General has statutory power to bring § 35-212 claims to prevent the

illegal payment of public monies or that the $19.5 million payment by ABOR to Omni, among other things, is a "payment" for purposes of § 35-212. Instead, ABOR offers three different defenses—1) that the claim is barred by an inapplicable statute of limitations; 2) that Count IV fails to state a claim upon which relief can be granted; and 3) that Tempe is a necessary party that cannot feasibly be joined (again, based on an inapplicable statute of limitations).

ABOR's arguments fall flat and call into question its candor to the Court given that it failed to even identify the applicable statute of limitations, A.R.S. § 35-212(E), much less contend with it in its first and third arguments. Furthermore, for its second argument, ABOR fails to establish that the State's illegal payment of public monies allegations do not state a claim upon which relief can be granted. The MTD's arguments that Count IV fails to state a claim are advocate afterthoughts that appear to be an effort to obfuscate the increasingly apparent conclusion that (i) the details of the Omni Deal were never fully disclosed to ABOR, the public, or the Legislature; (ii) ABOR never authorized the terms as ASU VP Creer entered into them; and (iii) there is no economic rationale for the deal that would prevent it from being a Gift Clause violation. Contrary to what university officials stated publicly at the time of the deal, ABOR now relies exclusively on the *ex post* rationale that this deal was all about the "additional rent" payments ABOR hopes to recoup decades into the future by redirecting property tax payments that otherwise would be paid for K-12 schools, community colleges, and counties into payments to ABOR in lieu of taxes. But this cannot support Rule 12 dismissal because the FAC alleges that these payments "simply represent converting payments that would otherwise be made as ad valorem taxes into in lieu payments" and "[s]imply redirecting which government entity receives tax payments is not a public benefit as a matter of law or fact." FAC ¶168. Moreover, the relief ABOR seeks—dismissal without any fact-finding—is inappropriate because "intuitions as to proportionality, however strong, cannot substitute for specific findings of fact." *Turken v. Gordon*, 223 Ariz. 342, 351 ¶43 (2010).

Finally, as set forth below, the City of Tempe is not a required party under Rule 19 and even it if were, it could feasibly be joined under the applicable statute of limitations, § 35-212(E). Accordingly, as with the other *four* MTDs, the Court should deny ABOR's MTD 5.

LEGAL STANDARD[1]

To survive a motion to dismiss, a complaint need only comply with Rule 8's requirement to plead a "short and plain statement of the claim showing that the pleader is entitled to relief." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 ¶6 (2008). Under that well-established principle, Arizona follows a liberal notice pleading standard, which requires only that allegations "give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved." *Id.* In reviewing motions to dismiss, "[c]ourts must also assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom." *Id.* at ¶7. Exhibits to a complaint are part of the well-pled facts. *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶9 (2012). And a motion to dismiss must be denied if *any interpretation* of the alleged facts would establish entitlement to relief. *Id.* at ¶8 (quoting *Fid. Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, 224 ¶4 (1998)). In addition, Courts must interpret the complaint in a light most favorable to the plaintiff and indulge any theory of law sufficient to constitute a valid claim. *Savard v. Selby*, 19 Ariz. App. 514, 515 (1973); *see also Guerrero v. Copper Queen Hosp.*, 112 Ariz. 104, 106 (1975) ("In testing a complaint for a failure to state a claim, the question is whether enough is stated which would entitle the plaintiff to relief upon some theory to be developed at trial.").

ARGUMENT

I. The Statute Of Limitations Established By A.R.S. § 35-212(E) Controls And, In Any Event, The State's Claim Under § 35-212 Did Not Accrue Until Only A Few Weeks Before The FAC Was Filed

A. A.R.S. § 35-212(E) Provides The Applicable Statute Of Limitations Here

The applicable statute of limitations for the State's Count IV is the more specific and more recent A.R.S. § 35-212(E)—a provision ABOR failed to acknowledge—and not A.R.S. § 12-821, which ABOR asserts. Under, A.R.S. § 35-212(E) actions brought by the Attorney General to enjoin or recover the illegal payment of public monies (the claim at issue here) "must be brought within five years after the date an illegal payment was ordered." It is

[1] The factual background of the Omni Deal is set forth in detail in the FAC (*see, e.g.*, ¶¶69-118), is incorporated as if set forth fully herein, and will not be reproduced here.

axiomatic that a later, more specific statute prevails over an earlier, more general one. *State v. Jones*, 235 Ariz. 501, 503 ¶8 (2014) ("When 'two conflicting statutes cannot operate contemporaneously, the more recent, specific statute governs over an older, more general statute.'"). And in the specific context of statutes of limitations, when one of two statutes might apply, the more specific and longer statute controls. *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 590 (1995); *La Canada Hills Ltd. P'ship v. Kite*, 217 Ariz. 126, 129 ¶9 (App. 2007). By its plain language, A.R.S. § 35-212(E) is both more specific and longer. Section 35-212(E) is also more recent; paragraph E was added to the statute in 2018. 2018 Ariz. Sess. Laws Ch. 253, § 3 (2d Reg. Sess.) In contrast, the current version of A.R.S. § 12-821 was enacted in 1994. 1994 Ariz. Sess. Laws Ch. 162, § 1 (2d Reg. Sess.). Accordingly, the State has five years to bring this suit, not one, and ABOR does not claim, nor could it, that Count IV accrued more than five years before the FAC was filed. Worse, ABOR never even cites A.R.S. § 35-212(E), much less explains how it does not control.[2]

In addition, even if the State's cause of action accrued before the amendment adding § 35-212(E) took effect—something that would not excuse failing to cite § 35-212(E)—A.R.S. § 12-505 specifically addresses the effect of a change in the applicable statute of limitations. Section 12-505(B) provides, "[i]f an action is not barred by pre-existing law, the time fixed in an amendment of such law shall govern the limitation of the action." *See also City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 554 ¶42 (2005). Therefore, since the 2018 amendment to § 35-212 took effect less than a year after February 28, 2018 (the date the option was entered into between ABOR and Omni), the time fixed in the amendment (five years under § 35-212(E)) governs the limitation of the action pursuant to § 12-505(B).

[2] Furthermore, A.R.S. § 35-212(E) states that A.R.S. § 12-821.01, which requires a notice of claim to be filed with a public entity before the public entity can be sued under A.R.S. Title 12, Chapter 7, Article 2, "does not apply to the action [brought by the attorney general]." This further demonstrates that in amending A.R.S. § 35-212 in 2018, the Legislature considered Title 12, Chapter 7, Article 2 (which includes A.R.S. § 12-821), was aware of the general statute of limitations therein, and specifically intended to expand the time available to the Attorney General to bring a claim under § 35-212. *See also* Chaptered House Bill Summary, S.B. 1274, 53rd Leg., 2d Reg. Sess. (April 23, 2018) (Provisions 5 and 6).

B. Even If A.R.S. § 12-821 Applied, Count IV Would Not Be Time-Barred

Even if A.R.S. § 12-821 governed over A.R.S. § 35-212(E) (which it does not), the State's claim under A.R.S. § 35-212 via the Gift Clause still is timely both because the claim accrued only weeks before it was filed and because it relates back to the original Complaint. Arizona law regarding claim accrual for statute of limitations purposes makes plain that the claim here could not have accrued until the State possessed sufficient knowledge of the facts to make the allegations supporting the claim. *See e.g., Walk v. Ring,* 202 Ariz. 310, 315-16 ¶¶18-23 (2002). This principle is further codified in A.R.S. § 12-821.01 (which must apply for determining accrual if § 35-212(E) does not), which states that "a cause of action accrues when the damaged party *realizes* he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition that caused or contributed to the damage." A.R.S. § 12-821.01(B) (emphasis added); *see also Power Rd.-Williams Field LLC v. Gilbert*, 14 F. Supp. 3d 1304, 1310 (D. Ariz. 2014); *Rogers v. Bd. Of Regents of Univ. of Ariz*, 233 Ariz. 262, 265 ¶7 (App. 2013); *Long v. City of Glendale*, 208 Ariz. 319, 325 ¶¶9-14, 18-20 (App. 2004) (denying defendant City's statute of limitations argument in spite of claim being filed more than a year after the public meeting that gave rise to the substance of the claim because plaintiff did not *realize* he had a cause of action at that time). Here, the State did not realize there was an illegal payment of public monies until the State saw the option and lease agreement between ABOR and Omni, which did not occur until March 2019.

Power Rd.-Williams Field dealt with a situation in which the dispositive fact was when the plaintiff became aware of the factors giving rise to the claim. There, the plaintiff sued Mesa and Gilbert on May 15, 2013. *Power Rd.-Williams Field LLC*, 14 F. Supp. 3d at 1310. The suit arose from an intergovernmental agreement recorded on May 10, 2012—over a year before the suit was commenced. *Id.* Although the cities asserted that the cause of action accrued when the agreement was recorded, the court instead concluded that the cause of action accrued on May 16, 2012, the date the plaintiff's attorneys' actually received a copy of the agreement, because it was only then that plaintiffs *realized* they had a claim. *Id.*

Here, as with the plaintiff in *Power Rd.-Williams Field*, it was impossible for the State to realize there may have been an illegal expenditure of public funds under § 35-212 without knowing the terms of the agreement between ABOR and Omni, and it was only after litigation ensued that the State obtained a copy of the agreement and analyzed its terms. ABOR claims that the cause of action accrued on February 28, 2018, the date the agreement was signed, but ABOR makes no effort to explain how the State was aware of when a non-public agreement was signed, let alone the agreement's contents. The agreement, which was not public before this litigation, is the only instrument that explains what ABOR receives in exchange for its gift to Omni. The Attorney General's Office obtained a copy of the Omni lease on March 9, 2019; that date is when the cause of action accrued, which was mere weeks before the amended complaint was filed on April 3, 2019. The State clearly did not sleep on its rights; instead, once the State saw how the agreement violated the Gift Clause, the complaint was nearly immediately amended to add Count IV.

Finally, even if Count IV would somehow be barred if it were brought in a new complaint (it wouldn't), Count IV still relates back to the filing of the original complaint, which was within one year of when ABOR and Omni entered into the Omni Deal. Count IV meets all of the factors necessary to comport with Rule 15(c). *See Flynn v. Campbell*, 243 Ariz. 76, 81 ¶11 (2017). Rather than cite Rule 15(c) directly, ABOR relies on two cases, both over 40 years old, to dodge that rule's obvious application here. Therefore, irrespective of which statute of limitations applies, the State's Count IV was asserted well within the applicable timeframe.

II. The State Has Well-Pled Ample Facts To Establish A Section 35-212 Claim Based On Payment Of Tens Of Millions Of Dollars In Public Monies To A Private Entity In Violation Of The Gift Clause

Accepting the FAC's well-pled allegations as true and taking all inferences in the light most favorable to plaintiff, *see* page 3, *supra*, the State's claim under A.R.S. § 35-212 more than comports with Arizona's notice pleading standard and states a claim upon which relief can be granted. The Gift Clause establishes that the State shall not "make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation[.]" Ariz. Const. art. IX, § 7. It was included in the Arizona Constitution to prevent the government from giving special

advantages to favored interests that would result in an uneven playing field for economic actors, and from engaging in non-public enterprises. *See Wistuber v. Paradise Valley Unified Sch. Dist*., 141 Ariz. 346, 349 (1984); John D. Leshy, *The Making of the Arizona Constitution*, 20 Ariz. St. L.J. 1, 96 (1988).

The FAC plainly alleges that the Omni Deal will result in payments of tens of millions of state dollars to a private company in violation of the Gift Clause, therefore constituting an illegal payment of public monies under A.R.S. § 35-212. *See, e.g.*, FAC at ¶¶1, 6, 162-170. Under the Arizona Supreme Court's Gift Clause analysis, a transaction ***both*** must have a public purpose and the consideration received by the government must not be grossly disproportionate to what the government paid such that the contract amounts to a subsidy to the private entity. *Turken*, 223 Ariz. at 345 ¶7. When asserting a claim under § 35-212, the Attorney General "may use 'any ethically permissible argument' to prevent the illegal payment of public monies." *State ex rel. Woods v. Block*, 189 Ariz. 269, 273 (1997). Therefore, the Attorney General may point to all of the illegal aspects of the transaction, not just the payment itself, to establish and enjoin an illegal payment of public monies. *See id.* at 274 (permitting assertion of § 35-212 claim on theory that because underlying state agency, the Constitutional Defense Council, was unlawfully constituted, any payments of public monies by it were illegal).

A. The Contractual Mandate For ABOR To Pay Tens of Millions Of Dollars To Omni Is Not For A Public Purpose

Based on the allegations in the FAC, ABOR's contract with Omni is not for a public purpose for multiple reasons. First, a government officer or entity acting outside of its powers cannot be acting for a public purpose. *See Graham Cty. v. Dowell*, 50 Ariz. 221, 225-28 (1937) (relying on the Gift Clause to disallow the state from spending money to improve a road because the road had not met the statutory definition of a public road). And when reviewing public purpose, courts should look at factors including the private interests served by the contract and the degree of public control over the object of the contract. *See Kromko v. Arizona Bd. of Regents*, 149 Ariz. 319, 321 (1986) (upholding the public purpose of ABOR's lease of a University of Arizona Hospital to a non-profit); *Town of Gila Bend v. Walled Lake Door Co.*,

107 Ariz. 545, 549 (1971) (upholding the public purpose of a town's provision of a water line to a private manufacturing plant partly because ownership and control of the water line remained with the town).

Here, the FAC's allegations and the inferences from those allegations validly support a claim that ABOR *never* authorized the particular deal entered into on its behalf. Specifically, ABOR's approval at its November 2016 meeting was based on the land being sold for fair market value and on there being a conference center that ASU would own and use. *See, e.g.*, FAC ¶110-111; FAC App'x 28-30, 254. The FAC alleges that it was never disclosed to the Regents (the actual decision-makers) that the land would be sold for a fraction of its market value, specifically in violation of ABOR policy, and that the conference center for which ABOR is reimbursing the ***full cost to construct*** only would be available for ASU's free use a ***mere seven days out of the year***.

The below-market sale and minimal ASU free use of the conference center materially change the public vs. private purpose of the transaction. A below-market land sale is itself a substantial subsidy to the private entity purchasing land at that artificial price. And there is a very material difference in the public vs. private purpose of a government payment for a conference center depending on whether the government entity has the right to use it to the extent of its needs (and those needs make up a substantial portion of the conference center's use) or instead the government's right to use is so substantially limited that it receives that right only 7 days out of 365 (**2%**), with the remaining **98%** going to the private entity's benefit. Therefore, while courts ordinarily give deference to a public body as to its finding of a public purpose, *see Cheatham v. DiCiccio*, 240 Ariz. 314, 320 ¶21 (2016), based on the allegations in the FAC, there is in fact no finding by ABOR for the Court to defer to concerning whether the ***actual*** deal serves a public purpose. Accepting the FAC's allegations as true and taking all inferences in the light most favorable to plaintiff, this Court must allow these theories to be "developed at trial." *See Guerrero*, 112 Ariz. at 106.

In addition, the Omni Deal as actually entered into by Mr. Creer is not for a public purpose because it unduly promotes a private interest (*i.e.* the development of a private hotel and

conference center) and because ABOR lacks any meaningful control over the conference center. A government contract that unduly promotes private interests is at the core of what the Gift Clause exists to prevent. *See Turken*, 223 Ariz. at 347-48 ¶¶19-20. Several factors are important in determining whether a contract is for a public purpose, including the private interests served by the contract and the degree of public control over the object of the contract. *See Kromko*, 149 Ariz. at 321 (upholding the public purpose of ABOR's lease of a University of Arizona Hospital to a non-profit); *Town of Gila Bend*, 107 Ariz. at 549.[3]

Here, this hotel and conference center is for Omni, not ASU, and ABOR relinquishes all control over the project. Apart from the seven days a year ASU receives free use, the hotel and conference center is open only to Omni's paying customers (which may, or may not, include ABOR and ASU). FAC ¶¶99-101. Only Omni can claim depreciation of the hotel and conference center assets and only Omni benefits from any profits made, including from the 275 parking spaces gifted by ABOR to Omni. FAC ¶¶94-98. For all of these reasons, Count IV sufficiently alleges that ABOR's contract with Omni lacks a public purpose.

B. ABOR's Payments To Omni Are Grossly Disproportionate To The Objective Fair Market Value Of The Consideration Being Provided By Omni In Return

In addition to the lack of public purpose, the FAC also alleges that ABOR's deal with Omni will result in a grossly disproportionate public subsidy to Omni compared to the value of consideration being provided by Omni in return. The FAC thus is not subject to dismissal for two independent reasons: 1) resolving the proportionality allegations is inappropriate at the Rule 12 stage, and 2) since the "additional rent" payments represent only redirected *ad valorem*

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[3] The *Turken* court noted this principle was applied in *Kromko v. Arizona Bd. of Regents*. *See Turken*, 223 Ariz. at 347-48 ¶¶19-20. A careful reading of *Kromko* reveals that that court applied this principle as part of its public purpose analysis. *See Kromko*, 149 Ariz. at 321. In the *Kromko* case, the Arizona Supreme Court relied on several factors, absent here, to find a public purpose in ABOR's lease of a University of Arizona Hospital to a non-profit: ABOR would appoint the board of the private entity; ABOR had the authority to approve of any business transactions; the non-profit had to periodically report to ABOR, including its financial position; the revenues of the non-profit would not inure to the benefit of private individuals other than reasonable compensation to staff; ABOR would regain possession of the hospital at the end of the lease; and the private entity was to maintain the hospital as a teaching hospital in furtherance of ABOR's educational mission. *Kromko*, 149 Ariz. at 321.

taxes that would have to be paid but for ABOR agreeing to take bare legal title to the newly constructed private improvements, they are not valid consideration or, alternatively, have a fair market value to the State of Arizona of $0.

First, this Court need not even get into the weeds now on proportionality because the Arizona Supreme Court has stated that "intuitions as to proportionality, however strong, cannot substitute for specific findings of fact." *Turken*, 223 Ariz. at 351 ¶43. It therefore would be particularly inappropriate to grant a Rule 12 dismissal when the FAC alleges that payments were grossly disproportionate as a matter of fact, *see, e.g.*, FAC ¶168; such claims must be permitted to be tried and result in findings of fact. *See Guerrero*, 112 Ariz. at 106. ABOR's advocates have pointed to the "additional rent" payments in lieu of taxes as providing the vast bulk of Omni's consideration to ABOR, and they further contend that the presence of these payments in the Omni Deal requires dismissal. But, as *Turken* established, the relevant inquiry is calculating those payments' "objective fair market value." *See Turken*, 223 Ariz. at 350 ¶33. Determining the fair market value of payments that span out 60+ years into the future likely requires expert testimony opining on the present value of those future payments. *See Felder v. Physiotherapy Assocs.*, 215 Ariz. 154, 165 ¶51 (App. 2007) ("The function of an expert is to provide testimony on subjects that are beyond the common sense, experience and education of the average juror.") (cleaned up); *see also Stiglitz v. Bank*, No. CV 05-1826 (RJL), 2011 WL 13254022, at *1 (D.D.C. June 14, 2011) (recognizing "concepts such as net present value and discount rates" require expert testimony). A ruling by this Court prior to any factual development is therefore inappropriate.

Separately, under *Turken*, the Omni Deal provides nowhere near proportional consideration from Omni back to the State of Arizona for the massive amounts of state money and other subsidies that ABOR is contractually required to provide to Omni. *Turken* affirmed the principle that otherwise payable tax obligations may not be counted in the proportionality analysis under the Gift Clause. 223 Ariz. at 350 ¶¶33, 38-39. Therefore, in *Turken* the City of Phoenix was not permitted to count projected sales tax revenue as consideration in return for the $97.4 million Phoenix was to pay for the non-exclusive use of 2,980 parking spaces. *Id.*

That the instant case is controlled by *Turken* is illustrated by a simple hypothetical: assume ABOR did the Omni Deal and provided the same subsidies to Omni, but did not step in as the holder of bare legal title to the private hotel and conference center after Omni built it. In this hypothetical, Omni would be required to pay property taxes on the improvements because they would be private improvements on government land (IPRs). *See, e.g.*, FAC ¶96 (citing A.R.S. § 42-19003). This hypothetical deal clearly violates the Gift Clause as having grossly disproportionate consideration under *Turken*. ABOR would be providing over $28 million in subsidies (plus the below-market value of the land). In return, Omni would be promising only seven days per year of conference center use (plus the other incidental promises such as posting ASU's branding on the private hotel) while paying ~$1-2 million of property taxes under A.R.S. § 42-19003, which under *Turken* would not be valid consideration for Gift Clause purposes. *See Turken*, 223 Ariz. at 250 ¶¶33, 38.

The actual Omni Deal is the same as the above hypothetical, except instead of Omni paying property taxes, Omni pays the same (or a smaller) amount of money to ABOR as "additional rent" in lieu of property taxes. *See, e.g.*, FAC ¶83. This change in the deal does not change the result under the Gift Clause. Courts must not be overly technical in Gift Clause analysis and must take a "panoptic view" of the transaction, considering all the pertinent circumstances. *Wistuber*, 141 Ariz. at 349 (1984). Omni's agreement as to the manner in which it would pay otherwise-due money (*i.e.*, as a payment in lieu of taxes to ABOR instead of as property taxes) "does not obligate [Omni] to produce a penny of tax revenue for the [State]." *See Turken*, 223 Ariz. at 25 ¶38. Omni and ABOR are simply shifting around a pre-existing legal obligation to pay taxes. Under the required panoptic view of the transaction, the redirection of payments among State agencies and political subdivisions is not valid consideration for Gift Clause purposes.

Moreover, even if redirecting tax payments is technically consideration, the Gift Clause analysis does not end because the objective fair market value of Omni redirecting payments to ABOR instead of paying those monies as property taxes is $0 for Gift Clause purposes. *See* FAC ¶168. Under *Turken*, the court must look at the "objective fair market value of what the

private party has promised to provide in return for the public entity's payment." *Turken*, 223 Ariz. at 350 ¶33. The fair market value analysis for purposes of the Gift Clause must be from the perspective of the entire state, not just one agency of the state. This is because the Gift Clause's plain language itself references "the state" and because ABOR is paying state monies to Omni and is expressly claiming it is "the state" for purposes of conferring the property tax exemption in the first place. *See* Ariz. Const. art. 9 §§ 2(1) (listing exemption), 7 (gift clause). From the State of Arizona's perspective, redirecting payments of the same amounts of money from one set of political subdivisions (K-12 schools, community colleges, and counties) to a different state agency (ABOR) does not create any new objective value for the state—the State would receive those monies anyway.[4] Given that the "additional rent" payments—whether technically consideration or not—do not have an objective fair market value greater than $0 to the State of Arizona, the Omni Deal is controlled by *Turken* and fails under the Gift Clause.

In sum, the State has well-pled its claim under A.R.S. § 35-212 and outlined, both herein and in the FAC, how ABOR's deal with Omni will violate the Gift Clause and result in illegal payments of public money under A.R.S. § 35-212.

III. Rule 19 Does Not Bar Count IV

A. The City of Tempe Is Not A Necessary Party

ABOR's conclusory statement that Tempe is a necessary party simply because the FAC mentioned Tempe's separate tax incentives for Omni is insufficient to support that Tempe is a necessary party that must be joined under Rule 19. The rule proscribes that a party must be joined when either of the following factors are met: (A) a court cannot accord complete relief in the party's absence; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter

[4] That the money paid by Omni is simply fungible and there is no objective fair market value to the State from contractually shifting its recipient is further shown by the fact the Legislature could accomplish the same task without taking in *any* new state revenue. It could take the monies that were paid in property taxes by Omni and appropriate them for ABOR as it did with the athletic facilities district, *see* FAC ¶41 (citing A,R,S, § 48-4202(C)), or it could pass a law that sweeps the "additional rent" payments to ABOR and return them to the local K-12 schools, community colleges, and county. Therefore, this shifting around cannot be used as justification under the Gift Clause for *paying* tens of millions of public dollars to a private entity.

impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest. Ariz. R. Civ. P. 19(a)(1).

Under the factors identified in Rule 19(a)(1), joinder of Tempe is not required. First, Tempe's absence does not affect this Court's ability to fashion complete relief. Count IV concerns whether ABOR's arrangement with Omni should be enjoined under A.R.S. § 35-212 because it violates the Gift Clause—not Tempe's separate arrangement, which concerns rebating an ***entirely separate*** type of taxes that will be paid by Omni to Tempe if the project is in fact built. Tempe's entirely separate agreement with Omni ultimately has no bearing on the relief sought against ABOR because Tempe's inclusion in the action would not affect the Court's ability to determine whether ***ABOR*** violated the Gift Clause and, if so, to enjoin the illegal payment of public monies. The FAC mentions Tempe in six paragraphs that present a more complete picture regarding what Omni stands to gain by contracting to build the hotel and convention center. FAC ¶¶72, 74-76, 79-80. At no point does the FAC suggest that Tempe is complicit in ABOR's illegal actions or that a separate cause of action may exist against Tempe.

Second, awarding the State relief concerning ABOR would not impede Tempe's interests or subject ABOR to conflicting legal obligations. Again, Tempe's agreement with Omni is entirely separate. That agreement involves rebate incentives on transaction privilege and transient lodging taxes to be provided if the proposed hotel and convention center is built. It has nothing to do with property taxes or the payment of public monies by ABOR to Omni. And Tempe's agreement explicitly provides that it "shall terminate if . . . the Hotel Lease [between ABOR and Omni] is terminated for any reason prior to the Completion Date." FAC App'x 261. Tempe's interest is therefore conditional on ABOR and Omni executing the lease agreement and building the project. Tempe will suffer no damages if the project is not completed—it simply will maintain the status quo.

Finally, there is no argument that Tempe's absence from this suit leaves it subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations. If the Omni Hotel is built, then Tempe is obligated to provide incentives in accordance with its

development agreement with Omni. If the hotel is not built, then there simply are no sales or bed taxes to abate. The separate agreement between Tempe and Omni accounts for this, and there can be no argument that the FAC ties this wholly separate agreement to ABOR's violations of the law.

B. Even If Tempe Were Required To Be Joined, It Can Be Joined Under The Applicable Five-Year Statute Of Limitations, A.R.S. § 35-212(E)

Even if Tempe were required to be joined (which it is not), the appropriate relief is to order that Tempe be made a party under Rule 19(a)(2), not dismissal. ABOR's entire argument that Tempe cannot be made a party is a house of cards that crumbles under its failure to cite to this Court the applicable statute of limitations—A.R.S. § 35-212(E). *See* Part I(A), *supra*. In failing to do so, ABOR doubles down on its incorrect argument that the one-year statute of limitations in A.R.S. § 12-821 applies, and it further fails in its duty of candor to this Court to identify A.R.S. § 35-212(E). Because a five-year statute of limitations applies, there is no argument that Tempe cannot be feasibly joined if ordered by this Court. And even if the one-year statute of limitations applied, this action was filed within one year of when the State realized it had a claim for the reasons set forth in Part I(B), *supra*.

Alternatively, even a conclusion that Tempe is indispensable and joinder is not feasible does not mandate dismissal here. Rule 19(b) requires an analysis of whether an action can continue in a necessary party's absence which includes considering at least four factors: (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by protective provisions, shaping the relief, or other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. Ariz. R. Civ. P. 19(b). These factors analyzed in context here plainly support that this action can continue in Tempe's absence. As previously discussed, a judgment on whether ABOR violated the Gift Clause would not prejudice Tempe because the relief narrowly focuses on ABOR's actions and Tempe's absence does not alter the adequacy of this relief. Further, the State would not have an adequate remedy

if the action were dismissed for nonjoinder of Tempe because none of the relief sought relates to Tempe. Thus, the factors support that the action can be maintained in Tempe's absence. Accordingly, Rule 19 does not require dismissal of the State's Gift Clause claim.

CONCLUSION

ABOR's MTD 5 should be denied.

RESPECTFULLY SUBMITTED: May 13, 2019

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