Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
James Manley (031820)
Veronica Thorson (030292)
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org
Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

RICHARD RODGERS; SHELBY MAGNUSON-HAWKINS; and DAVID PRESTON,

Plaintiffs,

vs.

CHARLES H. HUCKELBERRY, in his official capacity as County Administrator of Pima County; SHARON BRONSON, RAY CARROLL, RICHARD ELIAS, ALLYSON MILLER, and RAMÓN VALADEZ, in their official capacities as members of the Pima County Board of Supervisors; PIMA COUNTY, a political subdivision of the State of Arizona,

Defendants.

Case No.: C20161761

(Assigned to the Honorable Catherine Woods)

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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Introduction and Factual Background

This is not a case that requires any grand statements about the legality of corporate subsidies in general; rather, this is a case about a single deal, done in secret and in defiance of what the Arizona Supreme Court has said about the Gift Clause and what the Legislature has said about the limits of county authority. Defendants' attempt to evade judicial scrutiny of their subsidies to World View Enterprises through their Motion to Dismiss likewise neglects the relevant legal principles. The Motion also neglects Plaintiffs' factual allegations, assumed true at this stage. The Motion should be denied.

The Arizona Constitution's Gift Clause was intended to prevent precisely what Defendants sought to accomplish here: public aid for private profit. Defendants' subsidy of World View's space balloon business involves a partially subsidized Headquarters Lease and a fully subsidized Balloon Pad.

The Headquarters subsidy starts with Certificates of Participation (COPs), which mortgaged County-owned buildings to fund the construction of the $15 million Headquarters. Compl. ¶ 17–24. The County leased the Headquarters to World View at sharply discounted rates—so low World View will still owe taxpayers nearly $5 million after the County pays off the COPs with general tax revenue. Compl. ¶ 30–31; Mot., Exhibit E at 5. In year 19—just as rent rises closer to market rates and the County is recovering the subsidy—World View has the right to buy the property for $10. Compl. ¶ 28.

Defendants obfuscate the loan and subsidy they are providing by focusing on the total amount World View will pay the County under the Lease, but the reality is simple: World View gets the benefit of the Headquarters now, but does not pay the full cost until much later, if ever. Moreover, the risk of default is entirely with the County; World View made no security deposit, gave the County no rights to attach its property, and gave taxpayers no assurances of its ability to pay any rent owed.

The Balloon Pad Operating Agreement gives World View exclusive use of a $1.5 million Balloon Pad, including exclusive rights to determine whether any of World View's competitors can use the pad and how much World View will charge for the privilege. Compl. ¶¶ 42–45; Mot., Ex. B. World View pays nothing in exchange for its exclusive control of the Balloon Pad.

Even if these subsidies did not violate the Gift Clause, the Headquarters Lease and the design

and construction contracts for the Headquarters and Balloon Pad still violate statutory limits on Defendants' authority. To prevent favoritism, fraud, and public waste, the Legislature has for decades required an appraisal, a public auction, and a minimum price when a county leases property. A.R.S. § 11-256. Defendants ignored those requirements. Compl. ¶¶ 66–81. Defendants also bypassed competitive bidding requirements for the design and construction contracts because, Defendants assert, it would have inconvenienced World View. *Id.* ¶¶ 82–98. Even overlooking that Defendants had at least six months to bid these projects, competitive bidding requirements would be eviscerated if government could waive them at the whim of private companies.

Counsel for Plaintiffs addressed the illegality of the Headquarters Lease and Balloon Pad Operating Agreement in a letter to Defendants on March 28, 2016. Defendants responded defiantly on April 5, 2016, and this action was filed on April 15, 2016. Defendants moved to dismiss pursuant to Ariz. R. Civ. P. 12(b)(6) on May 4, 2016.

Argument

I. STANDARD OF REVIEW.

On a 12(b)(6) motion this Court must "assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts, but mere conclusory statements are insufficient." *Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 9 (2012). "Dismissal is appropriate under Rule 12(b)(6) only if as a matter of law plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof." *Id.* ¶ 8 (quotation omitted). Assuming the truth of all factual allegations in the Complaint and indulging all reasonable inferences, Plaintiffs have alleged claims for relief.

II. THE WORLD VIEW AGREEMENTS VIOLATE THE GIFT CLAUSE.

The Gift Clause forbids the County from "ever giv[ing] or loan[ing] its credit in the aid of, or mak[ing] any donation or grant, by subsidy or otherwise, to any individual, association, or corporation . . . ." ARIZ. CONST. art. 9, § 7. As the Arizona Supreme Court recently explained, the Gift Clause "was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to quasi public purposes, but actually engaged in private business." *Turken v.*

Gordon, 223 Ariz. 342, 346 ¶ 10 (2010) (citations omitted). Specifically, the "the evil to be avoided was the depletion of the public treasury or inflation of public debt by engagement in non-public enterprises." *State v. Nw. Mut. Ins. Co.*, 86 Ariz. 50, 53 (1959); *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984) (same). That describes precisely what is happening here.

A public expenditure must satisfy two tests to survive a Gift Clause challenge: it must reflect adequate consideration and it must serve a public purpose. The World View agreements fail both tests.

A. World View's Payments to the County are Grossly Disproportionate to What is Received in Return.

As the Supreme Court explained in *Turken*, "the most objective and reliable way to determine whether the private party has received a forbidden subsidy is to compare the public expenditure to what the *government receives* under the contract." 223 Ariz. at 348, ¶ 22 (emphasis added). Indirect benefits do not count in the consideration inquiry; the "analysis of adequacy of consideration for Gift Clause purposes focuses instead on the *objective fair market value* of what the private party has promised to provide in return for the public entity's payment." *Id*. at 350, ¶ 33 (emphasis added).

"The potential for a subsidy is heightened when, as occurred here, a public entity enters into the contract without the benefit of competitive proposals." *Id.* ¶ 32. Defendants' avowed aim was to "retain World View's operations in Pima County" and so *by design* the consideration was *not* proportional; the intent was to give World View something for nothing.[1] Mot. at 4. The only thing the "the government receives under the contract," *Turken*, 223 Ariz. at 348 ¶ 22, are lease payments that are "substantially below market rates." Compl. ¶ 30. In exchange for these below market lease payments, World View gets a $14.5 million Headquarters. World View pays nothing for exclusive use of a $1.5 million Balloon Pad. Compl. ¶ 45. At the motion to dismiss stage, the factual inquiry into the adequacy of consideration is easily and conclusively resolved in favor of Plaintiffs, because these factual allegations are taken as true. *Coleman*, 230 Ariz. at 356, ¶ 9. Nothing more needs to be said to defeat Defendants' Motion. It is,

[1]Although, this deal did not achieve that purpose. Approximately one year before the County offered its largess, the Arizona Commerce Authority had already contractually obligated World View to stay in Arizona, locate its headquarters here, and build its manufacturing facility here. Compl. ¶ 5.

however, instructive to elaborate on the particular loans and subsidies contained in the Balloon Pad and Headquarters agreements.

1. World View Gets Exclusive Access to the Balloon Pad for "Nothing."

Defendants admit the disproportionality of the Balloon Pad subsidy: "World View pays the County nothing to use the Launch Pad." Mot. at 8. Defendants' effort to minimize this fact ignores the extent of World View's authority over the Balloon Pad and focuses on extraneous details about the limits of the County's fee-setting authority.

The critical problem with the Balloon Pad Operating Agreement is not that the County is charging World View too little to *use* the pad, it is that the County charged World View nothing for the exclusive right to *control* it. Only "high-altitude balloons and associated payloads" may be launched from the Balloon Pad. Mot., Ex. B at § 4.1. In exchange for nothing, the County gave World View "sole but commercially reasonable discretion" to decide which of its competitors can use the Balloon Pad, and on what terms. *Id*. This discretion need only be "commercially reasonable," not reasonable from the perspective of a neutral governmental entity controlling access to a public facility. *Id*. This means World View can require its competitors to enter into "use, license, waiver, indemnification, non-disclosure and similar agreements with World View" as a condition of using the Balloon Pad. *Id*. World View can also limit the time and manner of use or close the Balloon Pad completely if—in World View's sole judgment—it is "commercially reasonable" to do so. *Id*. The County gave World View the right to "prohibit users who do not meet such criteria or who do not agree to enter into such agreements" from using the Balloon Pad. World View gets total control over which of its competitors can use this supposedly "public transportation facility" and World View pays nothing for what amounts to the exclusive right to use the balloon pad.[2]

Defendants ignore World View's sole control over the Balloon Pad and focus instead on the amount the County would have charged the public to use the Balloon Pad if it had not given a private

[2] World View can also charge fees to cover its "maintenance and repair expenses, insurance expenses, utility expenses and casualty costs." *Id*. § 4.2.

company authority over this public asset. Mot. at 8. This misses the fact that the County has gifted World View control over a $1.5 million public asset, but it also highlights how this shift in authority undermines the very statute on which the County relies.

Assuming A.R.S § 11-251.08 applies here, the County is correct that the statute limits fees to the "actual cost of the product or service." A.R.S § 11-251.08(A)–(B). But the County ignores that the statute requires those fees to be set only *after* "a public hearing on the issue with at least fifteen days' published notice." A.R.S § 11-251.08(C). World View is not so constrained in setting whatever rates it likes, so long as payments it receives contribute to its "maintenance and repair expenses, insurance expenses, utility expenses and casualty costs." Mot., Ex. B § 4.2. This highlights the central problem with the Balloon Pad gift: the County gave away its authority and thereby deprived the public of the safeguards that come from public ownership and control. Defendants gave World View exclusive use of the Pad, including the power to control which of its competitors can use the Balloon Pad and on what terms. The County received nothing in exchange for granting this shift in power. There is no clearer gift than getting something for nothing.

2. The Headquarters Lease Rates are Substantially Below Market Rates.

The County does not dispute that World View pays below market lease rates and, for purposes of the Motion to Dismiss, this Court must accept as true the allegation that those rates are "substantially below market rates." Compl. ¶ 30; *Coleman*, 230 Ariz. at 356, ¶ 9. The Agreement increases World View's lease rates over the course of the lease in five-year increments, from $5/sq. ft., to $8, to $10, and finally to $12. Mot., Ex. A § 6.1. Assuming for the sake of illustration that the final lease rate is a market rate, if the County had required $12/sq. ft. over the life of the lease, World View would have paid an additional $8.7 million to the County. The exact disparity between the subsidized rates and the actual market rates can only be determined after discovery, which will allow for an appraisal of the property and the planned building, as well as evidence of other similar lease agreements; for now it is presumed that the disparity is "substantial." Compl. ¶ 30.

The smallest possible subsidy World View receives under the Headquarters Lease is illuminated

very simply by one number: $4,711,747. That is the amount World View is subsidized by the County even *after* making 15 years of below-market lease payments. Mot., Ex. E at 5. After 15 years, the County will have paid off the COPs that financed the building, but only because the County has contributed $4.7 million from taxpayers, over and above what World View has paid. *Id*. At best, this constitutes a public loan to World View, because it will receive the benefit of the Headquarters but will be allowed to delay full payment for that benefit by approximately five years.

If World View had obtained private financing at market rates, it would have paid at least $4.7 million more to finance the same amount of debt. This is not speculation. We know it because the County had to pay $4.7 million more than World View paid over 15 years in order to finance the construction of the Headquarters. That $4.7 million is the County's loan and gift to World View, in the form of rent payments so low, they do not even begin to cover the cost of the County's principal and interest until after the debt is already paid off. In other words, Defendants gave World View financing at least $4.7 million more generous than World View could have obtained in an "objective fair market" transaction. *Turken*, 223 Ariz. at 350 ¶ 33.

The discount World View receives on the Headquarters Lease payments is just the start. World View benefits from the County-subsidized loan for the first 18 years of the 20-year lease. *See* Mot., Ex. E at 5. It is not until the end of year 18 that the County emerges from under these subsidies, but that emergence is destined to be snuffed out as it begins, because World View can buy the building just as its debt to the County is being repaid. After 19 years and 6 months, World View will have contributed just $528,252.42 more than the County, but it will have the right to buy the $14.5 million Headquarters for just $10.[3] Mot., Ex. A at Lease-Purchase Agreement, Ex. C. That represents a 0.13% yearly return on the County's $20 million investment.[4] Defendants have not, and cannot, introduce evidence at this stage

[3]At 19 years and 6 months, World View will have contributed $21,195,000, and the County $20,236,747, for a difference of $958,253. *See* Mot., Ex. E at 5. However, the County is also contributing the land, valued at $430,000 as of January 2016, which, subtracted from $958,252, brings the difference down to $528,252. *See id*. Ex. A § 1.2.

[4] World View's $528,252, divided over 19.5 years, is 0.13% of the County's $20,236,747 investment.

to establish that 0.13% is "a reasonable return on [the County's] investment overall," but it certainly appears unfair to the taxpayer Plaintiffs. Mot. at 6.

While the full extent of the Headquarters subsidy will require factual development as described above, it is clear from the face of the agreement that the County gave World View incredibly generous terms that do not reflect an "objective fair market" transaction. *Turken*, 223 Ariz. at 350 ¶ 33. At the very least, these allegations state a claim and the Motion to Dismiss should be denied.

3. The Employment Targets are Not Consideration for Gift Clause Purposes.

The Headquarters Lease includes employment targets for World View's on-site employees. Mot., Ex. A § 4.1. Defendants only mention this in passing, but they assert without support that these employment targets are consideration for the Headquarters Lease. Mot. at 7. But *Turken* clarified two aspects of the consideration test that show the employment targets cannot be consideration: only "obligations" under the contract count, and "indirect benefits" do not.

Only what a party "*obligates* itself to do (or to forebear from doing) in return for the promise of the other contracting party" counts as consideration. *Turken*, 223 Ariz. at 349 ¶ 31 (emphasis added). World View has only an illusory obligation to meet the employment targets. The County's only recourse if World View does not meet the employment targets is to cancel the Headquarters Lease. Compl. ¶ 38. But doing so relieves World View of its obligations under the lease, including the obligation to pay rent and meet the employment targets. In other words, if World View fails to meet its obligations under the employment targets, the only consequence is that it has no obligations under the lease. If the County cancels the lease during the first 18 years, World View will capture as much as $4.7 million in accrued subsidies. Mot., Ex. E at 5. That sort of illusory promise where World View can choose to perform the employment targets or not, and end up in the same position or a better position, is not consideration. *See* 3 Williston on Contracts § 7:7 (4th ed.) ("[I]n any case where a promise in terms or in effect provides that the promisor has a right to choose one of two alternatives, and by choosing one will escape without suffering a detriment or giving the other party a benefit, the promise is not consideration.").

Even if the employment targets created a non-illusory obligation, they would still not be Gift

Clause consideration because they are not something "the government receives under the contract." *Turken,* 223 Ariz. at 348 ¶ 22. If third-party consideration counted, as Defendants contend, then World View could have, for example, bought Defendant Huckelberry a Ferrari (or Ferraris for a few taxpayers) and that would be Gift Clause consideration. That is an absurd result, but it follows from Defendants' theory, because the lucky drivers and local auto mechanics would benefit from the high-maintenance exotic cars. Such a gratuity would obviously fail the Gift Clause analysis, however, because the County would not receive a benefit under the contract, thereby "deplet[ing] [] the public treasury or inflat[ing] [] public debt." *Nw. Mut. Ins. Co.,* 86 Ariz. at 53. That is why Gift Clause consideration must flow to the government, not to a subset of private individuals. *Turken*, 223 Ariz. at 350 ¶ 33 (sales tax revenues *received by the City* could be consideration). The employment targets are not something "the government receives under the contract," *id*. at 348 ¶ 22, and are therefore not Gift Clause consideration.

B. Subsidizing World View's Business is Not a Public Purpose Under the Gift Clause.

In order to survive Gift Clause scrutiny, the World View agreements also must serve a public purpose. It is "a core Gift Clause principle" that "[p]ublic funds are to be expended only for 'public purposes' and cannot be used to foster or promote the purely private or personal interests of any individual." *Turken*, 223 Ariz. at 347–48 ¶¶ 19–20 (citing *Kromko v. Arizona Bd. of Regents*, 149 Ariz. 319, 321 (1986)). The Gift Clause "may be violated by a transaction even though th[e] transaction has *surface indicia* of public purpose. The reality of the transaction both in terms of purpose and consideration must be considered." *Wistuber,* 141 Ariz. at 349 (emphasis added). Despite "significant deference to the judgments of elected officials," "determining whether governmental expenditures serve a public purpose is ultimately the province of the judiciary." *Turken*, 223 Ariz. at 346 ¶ 14.

1. Government Ownership and Control are Essential to the Public Purpose Prong of the Gift Clause.

Both the Headquarters subsidy and the Balloon Pad subsidy fail the public purpose test because the County relinquishes control of the assets it has pledged to the benefit of World View. In the case of the Headquarters, the County also relinquishes ownership. Government ownership and control have

been the essential test of public purpose under Arizona's and other state's Gift Clauses for over 100 years. *See McRae v. County of Cochise*, 5 Ariz. 26, 33 (1896); David E. Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. Pa. L. Rev. 265, 284–89 (1963). The public must maintain control over public funds in order for an expenditure to serve a public purpose under the Gift Clause. *See Valley Bank & Trust Co. v. Proctor*, 47 Ariz. 77 (1936) (governor's personal expenditures—including travel expenses for third parties—were for private rather than public purposes); *McRae*, 5 Ariz. at 33 (reward for digging a flowing well did not serve a public purpose when it "remains the private property of the person who obtains it, in which the public has no property interest"). *Kromko* reiterated that a government expenditure does not advance a public purpose if it is used "to foster or promote the purely private or personal interests of any individual." 149 Ariz. at 321 (citation omitted). In this case, public control is simply absent.

In *Kromko*, the Court carefully examined a lease between the Arizona Board of Regents and a nonprofit corporation under the public purpose test. The Court's public purpose analysis relied heavily on the level of control the Regents exercised over the nonprofit hospital at issue. But *all* of the factors that led the Court to uphold the lease in *Kromko* are absent in this case. In *Kromko,* the private nonprofit's "internal organization" was subject to the Regents' approval; the Regents appointed the nonprofit's board of directors; the Regents retained the right of approval before the nonprofit engaged in any financial transactions that could adversely affect the interests of the state, or before its bylaws or articles could be amended; the nonprofit was required to provide annual progress reports and audited financial statements; and all of its assets upon dissolution would revert to the Regents. *Id.* In essence, the nonprofit was the alter ego of the Board of Regents. As the Supreme Court summarized, the nonprofit's activities are "subject to the control and supervision of public officials. Hence, we believe the fear of private gain or exploitation of public funds envisioned by the drafters of our constitution is absent under both A.R.S. § 15-1637 and the lease." *Id.*

The World View agreements are 180 degrees opposite. The County exercises no control over World View's operations, and, for the nominal amount of $10, World View retains the Headquarters at

the end of the lease. Although the County retains ownership of the Balloon Pad, World View has sole discretion about which of its competitors can use the Balloon Pad and on what terms. The fear of private gain or exploitation of public funds is very much alive here.

In one of the first cases applying a Gift Clause, the Colorado Supreme Court struck down a lease-purchase agreement very similar to the Headquarters lease under that state's analogue to our Clause, because the property would not be owned and controlled by the government. *Lord v. City & Cty. of Denver*, 143 P. 284, 287 (Colo. 1914). Like the Headquarters Lease, Denver financed a railroad tunnel, held title to the property, and leased it to the railroad. *Id*. The railroad allowed other carriers to use the tunnel, and title passed to the railroad at the end of the lease. *Id*. The court held that the public interest in ensuring that other railroads could use the tunnel was inadequately protected because Denver relinquished control, and eventually ownership, of the tunnel to the railroad.[5] *Id*.

The County's lack of control over the public assets it has pledged to World View, and its decision to relinquish ownership of the Headquarters, mirrors the situation in *Lord* and distinguishes this case from Arizona cases that have approved economic development, in which the government retained ownership or control of the assets that benefited the private parties. *See, e.g., City of Tombstone v. Macia*, 30 Ariz. 218, 220 (1926) ("electric light, power, and ice plant for said municipality"); *Humphrey v. City of Phoenix*, 55 Ariz. 374, 379 (1940) (public housing); *Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545, 550 (1971) (public water line); *Industrial Dev. Auth. of Pinal Cnty. v. Nelson*, 109 Ariz. 368, 374 (1973) (pollution control equipment); *Turken*, 223 Ariz. at 351 ¶ 42 (exclusive City use of 200 parking spaces.). The County controls nothing here. It retains ownership of the Headquarters only temporarily at the pleasure of World View. This lack of direct public oversight deprives the project of a public purpose and, by itself, causes the agreements to run afoul of the Gift Clause.

[5] The court reiterated that government control was essential when it later approved a different lease of the same tunnel—one that required the government to retain ownership and control. *Milheim v. Moffat Tunnel Improvement Dist.*, 211 P. 649, 661 (Colo. 1922) ("There is and will be neither a joint ownership of the tunnel by the district and some private person or corporation, nor an ownership now or hereafter by any private person or corporation.").

2. Economic Subsidy for the Sake of Economic Subsidy is Not a Public Purpose.

The other distinguishing factor between this case and others that arguably serve a public purpose is that here the County is not aiding World View in order to provide a traditional governmental service. This is economic subsidy for the sake of economic subsidy. The Gift Clause prevents exactly this type of subsidy, by limiting public funds to work that is "essentially public, and for the general good of all the inhabitants of the city. It must not be undertaken merely for gain or for private objects. Gain or loss may incidentally follow, but the purpose must be primarily to satisfy the need, or contribute to the convenience, of the people of the city at large." *Macia*, 30 Ariz. at 224 (quotation omitted). In *Macia*, the court approved an "electric light, power, and ice plant" to provide potable water because "[i]t is clearly within the limits of a governmental or public purpose to protect the public health, and one of the agencies most conducive to a high standard of public health is a pure and abundant water supply." *Id.* at 223. In cases dealing with economic development projects, a private entity may incidentally benefit from public improvements, but the purpose is providing a traditional governmental service.[6]

The World View agreements are the reverse. The purpose of the expenditures is to subsidize World View's business, not to serve a traditional governmental function. Any public benefit is incidental to the success of World View's business; in *Macia* and every case discussed in footnote 6, the public purpose was primary and the private benefit incidental. This is exactly the "giving [of] advantages to special interests or [] engaging in non-public enterprises" the Gift Clause was intended to prevent. *Wistuber*, 141 Ariz. at 349 (citations omitted). The World View agreements do not serve a public purpose, and the subsidies therefore violate the Gift Clause.

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[6]Similarly, the court approved slum clearance as a "means adopted by society for self-protection against crime and disease." *Humphrey*, 55 Ariz. at 387. Likewise, in *Walled Lake Door Co.*, 107 Ariz. at 550, a public water line serving a single factory was approved because "supplying of water for purposes of preserving and protecting lives and property is a 'public purpose' and one which will provide a direct benefit to the public at large." Again, in *Nelson*, 109 Ariz. at 374, pollution control equipment served "[t]he obvious public purpose [of] . . . the protection of the health of the citizens of this state by preventing or limiting air, water, and other forms of pollution." And finally, in *Turken*, 223 Ariz. at 348 ¶ 23, there was no dispute "that providing parking is a legitimate public purpose . . . ."

III. DEFENDANTS' JUSTIFICATION FOR NOT FOLLOWING A.R.S. § 11-256 GETS STATUTORY INTERPRETATION EXACTLY BACKWARD.

Defendants admit that they did not follow the appraisal, auction, and minimum price requirements of A.R.S. § 11-256, imposed by the Legislature "to prevent favoritism, fraud, and public waste." *Johnson v. Mohave Cnty.*, 206 Ariz. 330, 333, ¶ 12 (App. 2003) (quotation omitted); Mot. at 9. Defendants' excuse is that A.R.S. § 11-254.04 allows them to spend public monies for economic development activities. *Id.* This ignores the rules of statutory construction.

First, seemingly conflicting statutes must be interpreted to harmonize the inconsistencies, giving effect to both statutes. *Steer v. Eggleston*, 202 Ariz. 523, 527, ¶ 16 (App. 2002). Second, courts should review the history of the various sections in order to understand legislative intent and construe the statutes to further that intent. *State v. Thomason*, 162 Ariz. 363, 366 (App. 1989).

The competitive safeguards of section 11-256 are easily reconciled with the economic development authority in section 11-254.04: the former creates basic safeguards for county leases, the latter gives counties the authority to lease property for economic development consistent with those safeguards. This reading harmonizes both statutes and is consistent with the history of the two sections.

Section 11-256 was enacted in 1939, alongside a single exception to its requirements for public park leases. *Johnson*, 206 Ariz. at 333, ¶ 12. "Section 11-256 *governed all leases of land* not involving parks until 1981, when the legislature added A.R.S. § 11-256.01 (2001), obviating the need for a public auction for land leased to another governmental entity for a non-park purpose." *Id.* at ¶ 13 (emphasis added). The newly added exception for non-park leases, like the park exception before it, excluded section 11-256 explicitly, by prefacing the new leasing authority with a "[n]otwithstanding § 11-256" clause. A.R.S. § 11–256.01(A). Each of the four times that the Legislature has sought to exclude county leases from section 11-256, it has done so explicitly through a similar "notwithstanding" clause.[7] But

[7] *See* A.R.S. § 11-256.01(A) ("Notwithstanding § 11-256"); A.R.S. § 11-256.02 ("Notwithstanding any other statute"); A.R.S. §11-251.10(A) (County may "provide affordable housing *without holding a public auction* and for less than the fair market value *as required by § 11-256.*"); A.R.S. § 11-1435(B) (Community Health Systems agreements "*are exempt from . . . § 11-256* . . . .") (all emphasis added).

Defendants rely on section 11-254.04, which has no similar exception.

In 1994, the Legislature expanded counties' economic development authority by enacting section 11-254.04. In 1989, counties had been granted only the authority to appropriate $1.5 million per year to governmental agencies or nonprofits for economic development. A.R.S. § 11-254. The 1994 expansion lifted those constraints and added explicit authority, for the first time, for the "acquisition, improvement, leasing or conveyance of real or personal property or other activity" for economic development, but that expansion of authority came without any exception for section 11-256. A.R.S. § 11-254.04(C). If the Legislature wanted to exclude economic development leases from the safeguards of section 11-256, it knew how to do so. *See* A.R.S. §§ 11-256.01(A); 11-256.02; 11-251.10(A); 11-1435(B).

Applying the section 11-256 safeguards is perfectly compatible with economic development leases; Pima County recognized the need to comply with section 11-256 in past economic development leases. *See* Bidders' Package at 14, https://goo.gl/9DkXR7. Section 11-256 allows counties to set other lease terms, so they are free to accomplish their economic development goals. A.R.S. § 11-256(C) ("Such land or building shall be leased . . . subject to such other terms and conditions as the board may prescribe."). As Defendants point out, section 11-256 makes it harder for counties to play favorites; but that is a feature, not a failing. *Johnson*, 206 Ariz. at 333 ¶ 12; Mot. at 10. And while the Gift Clause must be obeyed separately, "[t]he potential for a subsidy is heightened when, as occurred here, a public entity enters into the contract without the benefit of competitive proposals." *Turken*, 223 Ariz. at 350 ¶ 32. Indeed, had Defendants followed section 11-256, this lawsuit would likely have never been filed.

IV. THE COUNTY CANNOT VOLUNTEER TO IGNORE COMPETITIVE BIDDING LAWS IN ORDER TO SUIT THE PREFERENCES OF A PRIVATE COMPANY.

A. Competitive Bidding Requirements Would be Eviscerated if Governments Could Waive Them at the Whim of Private Companies.

Defendants admit the requirements of Title 34 and Pima County Code § 11.16.010(A) apply to the design and construction contracts at issue here, Mot. at 10–11, but argue that A.R.S. § 34-606 exempts Defendants because competitive bidding would have inconvenienced World View. Mot. at 13.

Defendants' claim that they are not subject to competitive bidding when they manufacture situations where compliance would be inconvenient violates both the plain language and the spirit of Title 34.

Defendants' argument that no "traditional" emergency need exist to comply with A.R.S. § 34-606 is unavailing. Mot. at 13. The Attorney General has construed language identical to A.R.S. § 34-606 in Arizona's Procurement Code, A.R.S. § 41-2537, to excuse competitive bidding "only under *emergency conditions that involve a sudden, unexpected, and unforeseen event* that jeopardizes the public's health, welfare, or safety *and* under circumstances that make the formal procurement process impracticable, unnecessary, or contrary to the public interest." Ariz. Op. Atty. Gen. No. I96-007 (June 6, 1996) (emphasis added). That reading is also appropriate here.

Defendants fail to read A.R.S. § 34-606 as a whole, which states that "emergency procurements" can only be made "if there exists a threat to public health, welfare or safety or if a situation exists which makes compliance with [this title] impracticable, unnecessary or contrary to the public interest . . . except that such emergency procurements shall be made with such competition as is practicable under the circumstances." The statute makes clear these are all "emergency procurements"—hence, procurements necessitated by an emergency—and such procurements must still be made with competition as is practicable, meaning "reasonably capable of being accomplished; feasible in a particular situation." PRACTICABLE, Black's Law Dictionary (10th ed. 2014).[8]

Defendant Huckelberry relied upon Swaim and Barker Morrissey as unpaid consultants and negotiated with them to obtain their services for at least 6 months, Compl. ¶86, and chose those contractors "under the guise of an 'emergency' or 'impracticability' that was caused solely by the County's choosing of an accelerated schedule." Compl. ¶ 88. Even if this Court accepts Defendants' argument that they can waive their duty to obey the competitive bidding statutes in the absence of an

[8]Defendants rely upon *Imburgia v. City of New Rochelle*, 223 A.D.2d 44, 47 (N.Y. App. Div. 1996), to argue that no emergency is necessary for competition to be "impossible or impracticable." But in *Imburgia*, the term "emergency" was not in the law and the court rejected the invitation to import the term. *Id*. Unlike the law in *Imburgia*, only "emergency procurements" are exempt from Title 34.

emergency, Defendants must still demonstrate they procured services "with such competition as is practicable under the circumstances." A.R.S. § 34-606. As such, a record is necessary to determine what competition was practicable. For now, the allegations are enough; the Motion should be denied.

B. Plaintiffs Have Standing and Their Claims are Not Time-Barred.

Defendants also argue that taxpayers are precluded from seeking injunctive relief under Title 34 and its Pima County analogue, and that taxpayer Plaintiffs waited too long to sue. Mot. at 10; 14–15.

Defendants cite the cases that defeat their arguments. Mot. at 12 n.4. In *Achen-Gardner, Inc. v. Superior Court In & For Cnty. of Maricopa*, 173 Ariz. 48, 55 (1992), the Arizona Supreme Court granted relief in a special action to enjoin construction contracts that had been awarded in violation of Title 34 several months prior. ("The court of appeals' opinion is vacated *except for its conclusion granting the injunctive relief requested by Achen-Gardner . . . .*") (emphasis added). Defendants also cite *Secrist v. Diedrich*, 6 Ariz. App. 102, 104 (1967), which established that in a Title 34 action—even after the work has been completed—"a taxpayer has sufficient standing to question in an appropriate action illegal expenditures made or threatened by a public agency." *See also Smith v. Graham Cnty. Cmty. Coll. Dist.*, 123 Ariz. 431, 433 (App. 1979).

Defendants' reliance on *Valley Drive-In Theatre Corp. v. Superior Court In & For Pima Cnty.*, 79 Ariz. 396 (1955), is misplaced. Mot. at 11–12. *Valley Drive-In* overturned an injunction in a replevin action that "substituted an equitable remedy for the statutory method whereby a defendant may regain the possession of the property." 79 Ariz. at 399. But equitable relief is available unless the Legislature intended to preclude that remedy or that remedy would prejudice statutory rights. *Weitz Co. v. Heth*, 235 Ariz. 405, 410 ¶ 17 (2014). Unlike *Valley Drive-In*, the relief under ARS § 34-613 is neither complete nor in conflict with the relief that addresses Plaintiffs' injuries—stopping expenditure of taxpayer funds in violation of ARS § 34-604 and Pima County Code § 11.16.010. That is why Arizona courts have awarded injunctive relief to taxpayers in Title 34 cases, and injunctive relief is proper here.

For the foregoing reasons, Defendants' Motion to Dismiss should be denied.

DATED: May 23, 2016

Respectfully submitted,

/s/ James Manley
James Manley (031820)
Veronica Thorson (030292)
Attorneys for Plaintiffs

E-FILED this 23rd day of May, 2016 with:

Pima County Clerk of the Superior Court
110 W. Congress St.
Tucson, AZ 85701

COPY E-SERVED this 23rd day of May, 2016 to:

Regina L. Nassen
Andrew Flagg
Pima County Attorney's Office
32 North Stone Avenue, 21st Floor
Tucson, Arizona 85701
Regina.nassen@pcao.pima.gov
Andrew.Flagg@pcao.pima.gov
Attorneys for Defendants

/s/ Kris Schlott
Kris Schlott