Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Veronica Thorson (030292)
Christina Sandefur (027983)
James M. Manley (031820)
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 MARICOPA

DARCIE SCHIRES; ANDREW AKERS; and GARY WHITMAN,

Plaintiffs,

vs.

CATHY CARLAT, in her official capacity as Mayor of the City of Peoria; VICKI HUNT, in her official capacity as City of Peoria Councilmember for the Acacia District; CARLO LEONE, in his official capacity as City of Peoria Councilmember for the Pine District; MICHAEL FINN, in his official capacity as Councilmember for the City of Peoria for the Palo Verde District; JON EDWARDS, in his official capacity as Councilmember for the City of Peoria for the Willow District; BRIDGET BINSBACHER, in her official capacity as Councilmember for the City of Peoria for the Mesquite District; and BILL PATENA, in his official capacity as Councilmember for the City of Peoria for the Ironwood District; CITY OF PEORIA, a municipal corporation of the State of Arizona,

Defendants.

Case No. CV 2016-013699

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(The Honorable Sherry K. Stephens)

Pursuant to Ariz. R. Civ. P. 56, Plaintiffs move for summary judgment on their Complaint alleging that the City of Peoria violated article IX, section 7, of the Arizona Constitution (the "Gift Clause") when it executed Economic Development Agreements ("EDAs") with Huntington University ("Huntington") and Arrowhead Equities LLC ("Arrowhead"). Summary judgment is appropriate if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309 (1990). This Motion is supported by the accompanying Statement of Facts ("PSOF") and the Memorandum of Points and Authorities set forth below.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The City of Peoria has promised to give nearly $2.6 million to two private businesses for the establishment of a specialized Christian university in Peoria. Whether this is legal is the question at issue today. The answer, a hearty and emphatic "no," was provided by the Arizona Constitution over a 100 years ago: "Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever…make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." Ariz. Const. art. IX, § 7. The framers of Arizona's constitution—drafted and ratified at the height of the Progressive Era, when voters persistently decried the abuses of corporate subsidies—sought to curb government power in aid of private enterprise, in part due to a "long history of direct involvement by officials of the territorial government of Arizona in mining, railroad, canal, and other private ventures." John D. Leshy, *The Making of the Arizona Constitution*, 20 Ariz. St. L. J. 1, 13 (1988).[1] The people were so disturbed by government support of private enterprise that the framers "sought to ensure, by a variety of individual measures, that the players in the economy were on a level field, and that government would not unfairly favor particular enterprises." *Id.* at 96.[2] Thus, the framers

[1] *See also* Nicholas J. Wallwork & Alice S. Wallwork, *Protecting Public Funds: A History of Enforcement of the Arizona Constitution's Prohibition Against Improper Private Benefit from Public Funds*, 25 Ariz. St. L. J. 349, 349–360 (1993) for a general overview of Arizona's unique history with such abuses (and noting that "Arizona's pre-constitution courts recognized that the protection of the public fisc requires constant judicial vigilance." *Id.* at 354).

[2] These measures, in addition to the Gift Clause, included limiting taxation for "public purposes only," Ariz. Const. art. IX, § 1; barring "privileges or immunities" for "any citizen, class of citizens, or corporation other than municipal" that do "not equally belong to all citizens or corporations," *id.* at art.

of the constitution changed the "thrust of taxation" away "from a tool of capital enhancement and attraction." Leshy at 79 (internal citation and quotations omitted). In February of 1911, the voters of the Arizona Territory expressed their approval of these limitations on government by ratifying the charter that would become their official state constitution a year later. *Id.* at 56–57.

The new limitations "were designed to prevent the economic losses of the 19th century suffered by municipal corporations which gave money, credit or other valuable advantages to railroads, canal companies, etc.," *Industrial Dev. Auth. of Pinal Cnty. v. Nelson*, 109 Ariz. 368, 372 (1973), and did so by barring municipalities from giving away money in the first place. Thus, it did not matter historically, nor should it matter today, whether a city believed a company's presence would develop the economy, and the outcome of the subsidy was not dispositive of its illegality. Because even though the Gift Clause has been recognized repeatedly as the "the reaction of public opinion to the orgies of extravagant dissipation of public funds by counties, townships, cities, and towns in aid of the construction of railways, canals, and other like undertakings during the half century preceding 1880," *Day v. Buckeye Water Conservation & Drainage Dist.*, 28 Ariz. 466, 473 (1925), the framers of Arizona's Constitution did not limit the prohibition to unprofitable subsidies only or to subsidies for railroads and the like. The Gift Clause categorically prohibits "donations or grants, by subsidy or otherwise," to any association or corporation because "it 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." *Id*.

The historical backdrop contextualizes the subsidies at issue in this case. A century ago, municipalities believed transportation projects would benefit their locales, so they enticed chosen corporations to develop their projects in the area with public money. The improvement of transportation was just as critical to the economy and necessary to the public as education is today, but the framers of our constitution outlawed public subsidies to quasi-public railroads, canals, and roads that were privately owned and thus engaged in private business. The public subsidies at issue in this case are likewise given

---

II, § 13; and forbidding "special laws" granting "any corporation, association, or individual, any special or exclusive privileges, immunities, or franchises," *id.* at art. IV, pt. 2, § 19(13). Leshy, *supra* at 96.

in aid of enterprises devoted to quasi-public purposes but privately owned and thus engaged in private business. And even though the motivation behind these subsidies may be rimmed with good intentions, and though the subsidies may spur the indirect benefits the City hopes for, they are nevertheless illegal. The subsidies violate the spirit and letter of the Gift Clause, its potent elixir having been distilled over the last 100 years by Arizona courts into the following two-part test: An expenditure of taxpayer money violates the Gift Clause if (1) it fails to serve a public purpose or (2) the consideration the government receives in exchange for the expenditure is inadequate. *Turken v. Gordon*, 223 Ariz. 342, 345 ¶ 7 (2010).

II. ARGUMENT

A. The City's Expenditure of Taxpayer Money Under its EDA with Huntington University Does Not Serve a Public Purpose and Lacks Adequate Return Consideration.

Under its EDA with Huntington, the City will pay up to $1.875 million in three installments for Huntington's completion of three "performance thresholds," which include appointing campus leadership, offering coursework, enrolling students, and other activities Huntington must perform anyway in its ordinary course of business. PSOF ¶¶ 30–32. Although the EDA is structured such that each of the three payments directly corresponds to a set of performance criteria, the City contends the entire subsidy is an exchange for Huntington's promise to operate its business in Peoria. PSOF ¶¶ 49–51. Regardless of how the exchange of promises is structured, however, expending public funds to entice a private business to locate within City boundaries does not serve a public purpose, and nothing in the EDA suggests the City receives adequate direct consideration for its $1.875 million subsidy.

1. The Huntington EDA Does Not Serve a Public Purpose.

An expenditure of public money serves a public purpose if it primarily, tangibly, and directly satisfies the need or contributes to the convenience of the people of the city at large and involves a traditional government function. *City of Tombstone v. Macia*, 30 Ariz. 218, 222–224 (1926).[3] As

[3] Courts have noted that "'[p]ublic purpose is a phrase perhaps incapable of definition, and better elucidated by examples.'" *Turken*, 223 Ariz. at 346 ¶ 12 (quoting *Tombstone*, 30 Ariz. at 222). Nevertheless the Arizona Supreme Court *has* provided a definition *and* examples:

> 'The true test is that which requires that the work should be *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*.

evidenced by the history of the Gift Clause, enacted in part to level the uneven playing field resulting from public subsidies to specially favored private transportation projects, the City's expenditure to entice a chosen private university to operate within Peoria is not a traditional government function.

Likewise, Huntington's presence in Peoria does not primarily, tangibly, and directly satisfy the need or contribute to the convenience of the people of the city at large. Unlike a public park or library or even public parking (at issue in *Turken*), all of which involve traditional government functions, there is nothing in the EDA that authorizes public use of the Huntington campus by the people of the City at large. PSOF ¶ 12. *See Turken*, 223 Ariz. at 348, ¶ 20, 224 P.3d at 164 ("In concluding that the transfer of the university hospital from the Board of Regents to a nonprofit corporation served a public purpose, we focused on the existence of public benefits, such as the *corporation's promise* to continue to operate the facility as a nonprofit hospital *open to the public*.") (emphasis added). Unlike a hospital, which must admit anyone by emergency regardless of ability to pay and which *will* admit anyone under non-emergency circumstances if they are able to pay, Huntington is not generally open to everyone in the City. PSOF ¶ 12. If Peoria residents wish to use the campus, they must apply, be accepted, enroll, and pay tuition like everyone else in Arizona; pay Huntington to lease space; or request Huntington's permission to otherwise use the property. PSOF ¶ 13. But even under those circumstances, there is no guarantee Huntington will admit them, lease space to them, or otherwise give them access. PSOF ¶ 13. And unlike a city service that requires payment from the public (e.g., municipal water service or trash collection) or a public university or community college, the money Peoria residents pay to attend or lease space at Huntington goes entirely into Huntington's coffers, not the City's. PSOF ¶ 14.

Also unlike a public university or community college, Huntington only caters to students who

---

Tombstone, 30 Ariz. at 224 (citation omitted; emphasis added). Examples include "maintenance of an adequate police department," "opening, maintaining, and paving a system of public streets," and "providing a system for the disposal of sewage," all of which are traditional government functions and primarily, tangibly, and directly satisfy the need or contribute to the convenience of the people at large. *Id.* at 222. Examples of private purpose include "land purchased to aid a private enterprise in holding annual fairs" and "assisting a company to embark in the manufacture of linen fabrics." *Id.* at 222–23. Even examples that do not "fall…clearly in one or the other of these categories" involve traditional government functions that primarily, tangibly, and directly benefit the public (e.g., "the proper lighting of public highways and streets"). *Id.*at 223

are interested in one particular field (Digital Media Arts) taught through one particular worldview (Christianity). PSOF ¶¶ 15–16, 19–23. The narrow educational focus makes it more likely the school will enroll a majority of its students from outside of Peoria rather than from within. PSOF ¶ 18. Regardless of where the students come from, however, they must be seeking "an environment where classes are taught and curriculum has that lens of the Christian worldview," including "integration of faith into the subjects that students would take" and "a professor praying before class starts." PSOF ¶ 23. Moreover, to work at Huntington, one is required to sign a statement of faith, so Huntington jobs are not available to Peoria residents who are unable to sign such a statement (e.g., Agnostics and Atheists or adherents of Buddhism, Hinduism, Islam, Jainism, Judaism, etc.). PSOF ¶¶ 24–26.

Huntington is also unlike a public university in that government officials exercise no control over its operations. PSOF ¶ 11. In fact, Huntington bylaws require two-thirds of its 32 board members to be affiliated with the Church of the United Brethren in Christ. PSOF ¶ 27. The church directly elects nine of those members, and the Bishop of the Church of the United Brethren serves on the Board of Trustees, which makes decisions for the Peoria campus. PSOF ¶¶ 28–29. Huntington University is a private business (PSOF ¶ 10) and is free to conduct its affairs as it pleases, but the lack of nonsectarian, public control eliminates any chance the university might serve a public purpose. *See Turken*, 223 Ariz. at 348 ¶ 20 (transfer of university hospital from Board of Regents to a nonprofit corporation served a public purpose, in part, because Board retained extensive control over the corporation, and the hospital reverted to the Board upon corporate dissolution). *See also Lord v. City & Cnty. of Denver*, 143 P. 284, 287 (Colo. 1914) (unconstitutional subsidy resulted when city relinquished control, and eventually ownership, of a railroad tunnel).

By its very nature, the university cannot satisfy the need of the people at large or contribute to their convenience, and enticing it to locate within the City is not a traditional government function. Thus, the City's expenditure in aid of Huntington's establishment does not serve a public purpose.

2. The City Does Not Receive Adequate Consideration Under the Huntington EDA.

Although the Huntington EDA does not serve a public purpose and fails the Gift Clause test on that ground alone, the City also fails to receive adequate return consideration under the EDA, rendering

it unconstitutional on that ground as well. "Gift Clause jurisprudence quite appropriately focuses on adequacy of consideration because paying far too much for something effectively creates a subsidy." *Turken*, 223 Ariz. at 350 ¶ 32. And because anticipated "indirect benefits, such as projected sales tax revenue" are "not consideration under contract law…or the *Wistuber* test" when not bargained for as promised performance, "adequacy of consideration…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 (citation omitted). "When a public entity purchases something from a private entity, 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*. When government payment is grossly disproportionate to what is received in return, the payment violates the Gift Clause." *Id.* at 348 ¶ 22 (emphasis added).

The Huntington EDA fails the consideration prong of the Gift Clause test spectacularly. Per the face of the EDA, which states that the "financial incentive package is directly tied to performance thresholds" (PSOF ¶ 49), the City receives nothing of any quantifiable or market value in exchange for its three payments to Huntington for completing three performance thresholds. PSOF ¶ 46. This is true even when taking a "panoptic view" of the contract and examining Huntington's other promises under the EDA. *Cheatham v. DiCiccio*, 240 Ariz. 314, 321 ¶ 30 (2016) (Courts adopt a "panoptic view" of the transaction when analyzing adequacy of consideration.).

Plaintiffs were barred from asking anyone from the City other than its expert witness about the monetary value of the promises. PSOF ¶ 62. But the City's expert did not analyze the monetary value of the individual promises under the EDA and testified that he did not believe he "or any economist or business valuation analyst" could do so, that he doesn't "think there's a way to realistically do that," and that he "do[es]n't know how that would be done." PSOF ¶¶ 63–65. Nevertheless, Plaintiffs' expert witness concluded that the value the City receives under the EDA is "zero." PSOF ¶ 66. And taking each promise in turn, the lack of consideration becomes clear:

a. The Performance Thresholds.

Under the three performance thresholds, Huntington has promised to do many things. PSOF ¶

30. All of these things, however, are functionally necessary for Huntington to operate its business anyway, so they are not consideration. *See, e.g., Travelers Ins. Co. v. Breese*, 138 Ariz. 508, 511 (App. 1983) (pre-existing duty cannot be consideration); *In re Mariotte's Estat*e, 127 Ariz. 291, 292 (App. 1980) (paying someone to do what they are already doing anyway is not consideration). Additionally, none of the promises under the performance thresholds have a quantifiable value, nearly half of them are not received by the City, and the ones that are received by the City have zero market value. PSOF ¶¶ 46–48.

In exchange for $900,000 of taxpayer money, the first "performance threshold" requires Huntington to (1) appoint leadership at the Peoria campus; (2) receive approval for degree programs in Broadcast Fusion Media, Film Production, Graphic Design, Digital Animation, and Web Development; (3) receive federal approval to offer financial aid; (4) submit to the City a Huntington-approved marketing and enrollment plan with five-year tuition and enrollment projections; (5) submit to the City a list of undergraduate programs it will offer; (6) purchase property or enter a seven-year lease for property in Peoria with a minimum square footage of 15,0000 and submit documentation of this to the City; (7) submit to the City a Huntington-approved and funded faculty and staff plan with five-year enrollment estimates; (8) submit to the City executed articulation agreements between Huntington and the Maricopa County Community College District for majors that Huntington offers; (9) accept students for the 2016–2017 academic year, to commence actual coursework in the fall for one of three Digital Media Arts ("DMA") majors; and (10) submit to the City a detailed accounting of reimbursable expenses and a summary report of its expenditures. PSOF ¶ 33.

Although six of the ten items—numbered 4, 5, 6, 7, 8, and 10—require Huntington to submit documentation to the City, the documentation itself has no quantifiable or market value. PSOF ¶¶ 34–35. The City's expert did not analyze the monetary value of the individual promises and stated it may not be possible to do so. PSOF ¶¶ 64–65. Plaintiffs' expert concluded the value received by the City under the Huntington EDA is "zero." PSOF ¶ 66. No evidence supports the notion that the documentation is worth $900,000. It appears merely to function as evidence of what Huntington has done to establish and operate its campus. The other items—numbered 1, 2, 3, 6, and 9—are not received by the City (PSOF ¶ 36) and therefore have no value to the City. *Turken*, 223 Ariz. at 348 ¶ 22 (to

determine whether private party has received a forbidden subsidy, compare public expenditure to what *government receives under the contract*). Item 6, for example, requires Huntington to lease property *in* Peoria but not *from* Peoria (PSOF ¶ 37), which means the direct benefit of that promise goes to Huntington's landlord, Arrowhead Equities, not to the City.

In exchange for another $550,000 of taxpayer money, the second threshold requires Huntington to (1) offer coursework to 100 students (post-high school, seated, enrolled, in pursuit of a degree, and completing part of their coursework) for the 2017–2018 academic year and (2) submit to the City a detailed accounting of reimbursable expenses and a summary report of its expenditures. PSOF ¶ 38. Only the second item is received by the City, but it has no quantifiable or market value. PSOF ¶¶ 39–40. The City's expert did not analyze the monetary value of the individual promises and stated it may not be possible to do so. PSOF ¶¶ 64–65. Plaintiffs' expert concluded the value received by the City under the Huntington EDA is "zero." PSOF ¶ 66. No evidence supports the notion that the documentation is worth $550,000. The first item is not received by the City and therefore has no value to the City. *Turken*, 223 Ariz. at 348 ¶ 22 (compare expenditure to what *government receives under the contract*).

Finally, in exchange for yet another $425,000 of taxpayer money, the third threshold requires Huntington to (1) offer coursework to 150 students (post-high school, seated, enrolled, in pursuit of a degree, and completing part of their coursework) for the 2018–2019 academic year and (2) submit to the City a detailed accounting of reimbursable expenses and a summary report of its expenditures. PSOF ¶ 42. Only the second item is received by the City, but it, too, has no quantifiable or market value. PSOF ¶¶ 43–44. The City's expert did not analyze the monetary value of the individual promises and stated it may not be possible to do so. PSOF ¶¶ 64–65. Plaintiffs' expert concluded the value received by the City under the Huntington EDA is "zero." PSOF ¶ 66. No evidence supports the notion that the documentation is worth $425,000. The first item is simply not received by the City and therefore has no value to the City. *Turken*, 223 Ariz. at 348 ¶ 22 (compare expenditure to what *government receives under the contract*).

b. The Other Promises.

Even though the face of the EDA plainly establishes that each of the three payments totaling $1.875 million are exchanged for Huntington's completion of the three performance thresholds (PSOF ¶

49), taking a generous and panoptic view of the contract, there are only three other promises that warrant an analysis of value: (1) Huntington's "participat[ion] in economic development activities with the City for the attraction of City Targeted Industries[4] for high-wage and technically-skilled jobs, including the development of customized work force development plans and programs for targeted industries sought by the City as part of its business attraction efforts. Such activities will include participation in meetings with business prospects, the creation of custom training programs to meet workforce development needs, and marketing activities" (PSOF ¶ 59); (2) Huntington's "invest[ment of] 2.5 million dollars ($2,500,000) for the development of the HU Peoria Campus during years 1–3. This investment by HU is to be program specific to the digital media arts undergraduate programs offered at the HU Peoria Campus" (easy since Huntington only offers DMA programs) (PSOF ¶ 68–69); and (3) Huntington's decision to locate its campus in Peoria (PSOF ¶ 51).

Could Huntington's participation in nebulous "economic development activities with the City" be worth $1.875 million? Per the face of the EDA, there is no set duration for the "economic development activities," so there is no ongoing requirement for Huntington to participate in the activities. PSOF ¶ 60. The contract also fails to mention how many times Huntington must perform the activities. PSOF ¶ 61. How many plans and programs must it develop? How many meetings must it attend? How many training programs must it create? What exactly do the marketing activities entail? Because the requirement to "participate in economic development activities with the City" is so vague on the face of the contract, Plaintiffs agree with Defendants' expert that assigning a value here may not be possible. PSOF ¶ 65. Nevertheless, Plaintiffs' expert has concluded that the value the City receives under the Huntington EDA is "zero." PSOF ¶ 66. That is the only number on record describing the value the City receives from Huntington's participation in "economic development activities." PSOF ¶ 67.

Next, there is the matter of Huntington's investment of $2.5 million into its own campus in Peoria. Huntington's investment into its own campus and operations is not received by the City and

[4] The City has adopted policies and guidelines "for evaluating City financial incentives and investment towards…attraction and expansion of targeted industries," PSOF ¶ 55, "and attraction of certain new businesses within the City." PSOF ¶ 56. This includes other incentives not generally available to all others, such as fast-track permitting for chosen businesses. PSOF ¶ 54.

therefore has no value in terms of consideration received by the City (not to mention that the City's reimbursement of $1,875,000 means that Huntington is required to invest only $625,000 after all is said and done). PSOF ¶¶ 70–73. *Turken*, 223 Ariz. at 348 ¶ 22 (compare expenditure to what *government receives under the contract*). In fact, the City admitted that Huntington's $2.5 million investment into its own campus will not go into the City coffers. PSOF ¶ 70. The City further admitted that nothing in that section of the EDA even "requires Huntington to purchase items from within Peoria." PSOF ¶ 71.

Finally, only one more matter remains regarding any possible value the City receives under the EDA: the value of Huntington's operation in Peoria. The City contends that Huntington's operation in Peoria is consideration for the $1.875 million and that the performance thresholds exist to secure and ensure Huntington's operation. PSOF ¶ 51. The City also believes Huntington's operation in Peoria provides various other direct benefits to the City (PSOF ¶ 57), but Plaintiffs were barred from asking the City about the monetary value of these so-called direct benefits. PSOF ¶ 62. And since the value of those benefits cannot be ascertained from the face of the EDA (PSOF ¶ 58), only the expert witnesses in this case could value the benefits. PSOF ¶ 62. The City's expert could not assign a value. PSOF ¶¶ 64–65. However, Plaintiffs' expert concluded that the value the City receives under the Huntington EDA is "zero." PSOF ¶ 66.

Zero is grossly disproportionate to $1.875 million. *See Turken*, 223 Ariz. at 351 ¶¶ 42–43 (difficult for court to believe public's exclusive use of 3,180 parking spots for 45 years has a value anywhere near $97.4 million, so contract quite likely violates Gift Clause). *Compare with Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346 (1984) (school district's payment of $19,200 salary to union president released from teaching duties to pursue a number of activities and undertake duties that inured to the district not so disproportionate as to invoke the constitutional prohibition) and *Burke v. Arizona State Ret. Sys.*, 152 Ariz. 323, 326 (App. 1986) (public service of 22 years sufficient consideration for $45,525 pension).

The only value the City might possibly receive by enticing Huntington to operate its campus in the City (not the actual value but the *potential* value) is $206,630 in estimated tax revenues over five years. PSOF ¶¶ 77–78. This number comes from an analysis the City commissioned from Elliott D. Pollack and Company (the "Pollack report") prior to entering the EDA. *Id.* Although it estimates the tax

revenue the City might receive from the Huntington project, this number is not a direct benefit because it is not promised under the EDA (PSOF ¶ 79) and therefore does not qualify as consideration received by the City under the EDA. *See Turken*, 223 Ariz. at 350 ¶ 33 (Anticipated "indirect benefits, such as projected sales tax revenue," are not consideration when not bargained for as promised performance.). It merely serves to establish the possible monetary value of Huntington's decision to locate in Peoria for the purpose of proving disproportionality of consideration.

Assuming the $206,630 in estimated tax revenues was consideration that could be weighed against the City's $1.875 million subsidy, that estimate was unreasonable at the time the EDA was signed and has become more unreasonable with the passage of time. To calculate the potential tax revenue the City might receive from the Huntington project, the Pollack report "relied upon the estimates of operating revenues outlined in [its] study," Huntington's "ongoing operations including direct expenditures by the university on salaries and operating supplies along with spending by faculty, staff and students." PSOF ¶ 82. The estimates are based on "assumptions" supplied by Huntington and the City. PSOF ¶ 83. But those "assumptions" do not correlate with what Huntington has promised under the EDA: the assumptions are much higher. PSOF ¶ 84.

The assumptions project the following anticipated enrollment figures for seated students: 0 students in the first year; 100 in the second; 210 in the third; 320 in the fourth; and 440 in the fifth. PSOF ¶ 85. But the EDA only promises that 100 students will be enrolled in the second year and 150 each year after that. PSOF ¶ 86. The difference between projected students and promised students results in a difference of 60 students in the third year, 170 in the fourth, and 290 in the fifth—for a total of 520. PSOF ¶ 86. The assumptions for faculty and support staff are necessarily based on the projected number of enrolled students—"because you're not going to hire staff if you don't have the students"—and therefore any projections regarding the *wages* of faculty and support staff are also based on the projected number of enrolled students. PSOF ¶¶ 88–89.

Huntington projected it would need to hire 34 faculty, support staff, and office executives with total wages of $295,000 if it enrolls 100 seated students in the second year; 69 with wages of $599,000 if it enrolls 210 in the third; 93 with wages of $883,000 if it enrolls 320 in the fourth; and 106 with wages of $1.165 million if it enrolls 440 in the fifth. PSOF ¶ 90. But the EDA only requires 150 students

in each of the third, fourth, and fifth years, which translates to somewhere between 34 and 69 faculty, support staff, and office executives. PSOF ¶ 91. The assumptions on which the Pollack report relied—and the resulting analysis—simply do not reflect the reality of what is actually promised under the EDA. PSOF ¶ 92. This is significant because it means that Pollack's estimated fiscal impact of $206,630, which is based on Huntington's assumptions, is much higher than it would be if it relied on the numbers in the EDA.[5] *Id*. So the one number that might possibly show what the City, as an indirect result of the EDA, *could* receive in its coffers—the projected tax revenue of $206,630—is higher than it would be if based on the actual promises in the EDA. But even $206,630 is grossly disproportionate to $1.87 million.[6] *See Turken*, 223 Ariz. at 351 ¶¶ 42-43; *Wistuber*, 141 Ariz. 346; and *Burke*, 152 Ariz. at 326.

Because the City's expenditure of taxpayer money in aid of Huntington's establishment in Peoria does not serve a public purpose, and the City receives nothing with any quantifiable or market value from Huntington under the EDA, it is unconstitutional under the Gift Clause.

B. The City's Expenditure of Taxpayer Money Under its EDA with Arrowhead Equities LLC Does Not Serve a Public Purpose and Lacks Adequate Return Consideration.

Under the City's EDA with Arrowhead, the City has promised to pay $737,596 in public money for the renovation of a privately owned building for lease by a private business. The beneficiaries of this expenditure are Arrowhead—a single-purpose entity created for the acquisition of the building in order

[5] And, in fact, the reality is even much bleaker. Huntington Director of Arizona Operations Jeffrey Berggren reports there were only 55 registered students as of August 23, 2017. PSOF ¶ 95. The semester began on August 28. PSOF ¶ 96. This means the assumptions on which the Pollack report relied were much too ambitious, so any tax revenue that the City might receive from Huntington's operation in Peoria is negligible at best. This is relevant to Plaintiffs' burden of proving disproportionality of consideration. *Cheatham*, 240 Ariz. at 322 ¶ 35 ("Taxpayers have the burden of proving gross disproportionality of consideration.").

[6] The City's expert, in response to criticism of the Pollack report by Plaintiffs' expert, performed a subsequent analysis (the "Cook report"), but that analysis was based on the very same assumptions the Pollack report used and did not estimate the value of projected tax revenue. PSOF ¶¶ 97–98. Using the inflated numbers listed in the assumptions, the Cook report estimated the Huntington project would create an economic impact of $11.3 million. PSOF ¶ 100. However, there is no promise or guarantee in the EDA that the City will receive an economic impact of $11.3 million, so it is not consideration under the Gift Clause. *See Turken*, 223 Ariz. at 350 ¶ 33 (anticipated "indirect benefits" not consideration when not bargained for as promised performance). In fact, the City's expert admitted that no analyst, including himself, could guarantee a specific economic impact. PSOF ¶ 115.

to "make money" for its private investors (PSOF ¶¶ 116–122, 133–136)—and Huntington, which will use the building as its campus. An expenditure of taxpayer money violates the Gift Clause if (1) it fails to serve a public purpose or (2) the consideration the government receives for the expenditure is inadequate. *See Turken*, 223 Ariz. 342, 345 ¶ 7. Subsidizing a private real-estate investment does not serve a public purpose, and the City receives nothing at all in exchange for its payment.

1. The Arrowhead EDA Does Not Serve a Public Purpose.

Peoria's payment of $737,596 to Arrowhead does not serve a public purpose because Arrowhead's renovation of its own property does not primarily, tangibly, and directly satisfy the need or contribute to the convenience of the people of Peoria at large, and an expenditure for this purpose is not a traditional function of government. *See Graham Cnty. v. Dowell*, 50 Ariz. 221, 226 (1937) ("It is hardly necessary to state that," under the Gift Clause, government may not "expend money upon what, as a matter of law, is merely a private right of way and not a public highway."); *Tombstone*, 30 Ariz. at 222. As discussed in Part II(A) *supra*, the Huntington campus (Arrowhead's property) is not generally open to the public at large, so Arrowhead's promise to renovate the campus does not satisfy the need or contribute to the convenience of the people of Peoria at large. PSOF ¶ 121.

Under the EDA, Arrowhead has also promised to provide an accounting of its renovation expenses to the City; to lease its property to Huntington; and to comply with applicable laws, its EDA with the City, and its lease with Huntington. PSOF ¶¶ 123–125. Additionally, Arrowhead has represented that Huntington and Arrowhead will together provide $6.7 million in capital investment for the project. PSOF ¶ 128. Not one of these additional promises primarily, tangibly, and directly satisfies the need or contributes to the convenience of the people of Peoria at large, nor do they serve a traditional government function, for all the same reasons discussed in Part II(A) *supra*, which are incorporated here.

Moreover, the people at large do not need an accounting of Arrowhead's renovation expenses, and an accounting of expenses does not contribute to their convenience or serve a traditional government function. Arrowhead's lease to Huntington does not satisfy a need or contribute to the convenience of Peoria residents because it does not provide them with access to the building, nor does it serve a government function since the lease is between two private parties. Arrowhead's promises to

comply with applicable laws, its EDA with the City, and its lease with Huntington do not primarily, tangibly, or directly benefit the public, and Arrowhead's promises are not government functions.

Finally, Arrowhead and Huntington's $6.7 million capital investment into the campus also fails the test because the campus is not a public building and involves no government function. For all these reasons, the City's EDA with Arrowhead does not serve a public purpose and therefore violates the Gift Clause.

2. The City Does Not Receive Adequate Consideration Under the Arrowhead EDA.

Although the City's payment to Arrowhead does not serve a public purpose and fails the Gift Clause test on that ground alone, the City also fails to receive adequate consideration under the EDA, so the expenditure is unconstitutional on that ground as well. "When a public entity purchases something from a private entity, 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*. When government payment is grossly disproportionate to what is received in return, the payment violates the Gift Clause." *Turken*, 223 Ariz. at 348 ¶ 22 (emphasis added).

Under its EDA with Arrowhead Equities LLC (Huntington's landlord), the City has promised to pay Arrowhead $737,596 (through reimbursement of Arrowhead's expenses) in exchange for Arrowhead's completion of (A) Tenant Improvements, (B) Program Criteria, and (C) Performance Criteria. PSOF ¶ 122. To fulfill (A), Arrowhead was required to renovate its own property by October 15, 2016, so that Huntington could open for business by that date. PSOF ¶ 123. The renovations are not received by the City and therefore have no value to the City. *Turken*, 223 Ariz. at 348 ¶ 22.

The Program Criteria under (B) required the following: (1) City approval of architectural expenses for which Arrowhead sought reimbursement; (2) consistency of Arrowhead's reimbursement requests with City-approved budget; (3) Arrowhead's submission to the City of satisfactory evidence of prior payment of items for which it sought reimbursement; (4) Arrowhead's completion of tenant improvements per approved plans and specifications; (5) the premises will have passed all fire and building inspections; and (6) Arrowhead's completion of the improvements by October 15, 2016. PSOF ¶ 124. Under the first item, the City receives nothing. The second item is not something that can be received by the City. Under the third item, the City receives evidence that Arrowhead paid for things.

Finally, the City receives nothing under the fourth, fifth, and sixth items. Only the third item, evidence of payments, is received by the City. PSOF ¶¶ 130–135. The City's expert did not analyze the monetary value of the individual promises and stated it may not be possible to do so. PSOF ¶¶ 64–65. Plaintiffs' expert concluded the value received by the City under the Huntington EDA is "zero." PSOF ¶ 66. No evidence supports the notion that evidence of Arrowhead's payments for things is worth $737,596.

The Performance Criteria under (C) continues[7] to require the following: (1) Huntington is open for business without interruption since its opening; (2) Arrowhead is in material compliance with all applicable laws; (3) the premises is in material compliance with all applicable building, fire, and safety requirements and passes corresponding inspections; (4) Arrowhead complies with its lease to Huntington; and (5) Arrowhead is not in default or breach of the EDA and its representations and warranties remain true and correct. PSOF ¶ 125. The only item received by the City under (C) is Arrowhead's compliance with its own promises under the EDA, which is a pre-existing duty and is therefore not consideration. *See Travelers*, 138 Ariz. at 511 (pre-existing duty not consideration).

Taking a generous and panoptic view of the EDA, Plaintiffs note Arrowhead's representation under section 1(E) of the EDA that "the preliminary capital investment from Arrowhead and [Huntington] will be in excess of $6,700,000.00" (though it is not clear how Arrowhead is authorized to make this representation on behalf of Huntington). PSOF ¶ 128. Arrowhead and Huntington's investments into their own private projects are not received by the City and are therefore not consideration under the Gift Clause. *Turken*, 223 Ariz. at 348 ¶ 22. In fact, not one of Arrowhead's promises to the City under the EDA constitute valuable and proportionate consideration to the City for all the same reasons discussed in Part II(A) *supra*, which are incorporated here, including the fact that the City does not own the Huntington campus and therefore receives no value from improvements to the campus by Arrowhead. PSOF ¶¶ 130–31. Whatever indirect benefits that may be spurred by the overall private investment of private money into a private business are irrelevant to analysis of consideration

[7] Under § 3(A), Arrowhead received an initial disbursement of $221,280 for completing the Program Criteria described in (B) *supra*. For continuing to comply with the Performance Criteria described in (C) *supra*, Arrowhead will receive seven additional disbursements of $73,760 each beginning on the fourth anniversary of the initial disbursement date and annually thereafter, until the City has disbursed the full amount to Arrowhead. PSOF ¶¶ 126–27.

under the Gift Clause because they are not promised to the City and taxpayers under the EDA. *Turken*, 223 Ariz at 350 ¶ 33 (anticipated indirect benefits not consideration when not bargained for). Instead, the City's payment of $737,596 in taxpayer money to Arrowhead directly benefits Arrowhead and Huntington, each of which profit from the tenant improvements. PSOF ¶¶ 132–33. In Arrowhead's case, it will receive more money under its lease with Huntington than it would have if half its costs were not reimbursed by the City; in Huntington's case, it is able to lease a building that is customized to its use. PSOF ¶¶ 134–35.

Because the City's expenditure of taxpayer money under the Arrowhead EDA does not serve a public purpose and lacks adequate return consideration, it is unconstitutional under the Gift Clause.

III. CONCLUSION

The framers of the Arizona Constitution "sought to ensure, by a variety of individual measures, that the players in the economy were on a level field, and that government would not unfairly favor particular enterprises." Leshy, *supra* at 96. The City has admitted that it does not offer incentives or other valuable advantages to all businesses, only to "targeted" companies like Huntington. PSOF ¶¶ 52–55. So in the name of economic development, the City is using Plaintiffs' money to make the playing field uneven and unfair. But the Gift Clause was enacted for just this kind of situation, and it (1) forbids City expenditures that do not serve a public purpose and (2) requires the City to receive fair consideration for the taxpayer money it spends, eliminating the possibility that particular enterprises will be unfairly favored. The Huntington and Arrowhead deals do not serve a public purpose, and the City receives nothing in exchange for millions of dollars. That is an unconstitutional gift and must be enjoined. Plaintiffs respectfully request that summary judgment be entered in their favor.

RESPECTFULLY SUBMITTED this 18th day of December 2017 by:

/s/ Veronica Thorson
Veronica Thorson (030292)
Christina Sandefur (027983)
James M. Manley (031820)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

ORIGINAL E-FILED this 18th day of December 2017 with a copy delivered via the ECF system to:

Mary O'Grady
Shane M. Ham
OSBORN MALEDON, PA
2929 N. Central Ave., 21st Floor
Phoenix AZ 85012-2973
mogrady@omlaw.com
sham@omlaw.com

Stephen J. Burg, City Attorney
Office of the City Attorney
City of Peoria
Melinda A. Bird, Assist. City Attorney
PO Box 4038
Peoria AZ 85380
caofiling@peoriaaz.com
Attorneys for Defendants

/s/ Kris Schlott