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Jonathan Riches (025712)
Timothy Sandefur (033670)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, Arizona 85004
(602) 462-5000
litigation@goldwaterinstitute.org

Attorneys for Plaintiff

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

BRAMLEY PAULIN; AUSTIN SHEA [ARIZONA] – 7TH STREET AND VAN BUREN LLC; AND CULVER PARK – 1129 NORTH FIRST STREET, LLC; MAT ENGLEHORN; HOPELESSLY URBAN, LLC, Plaintiffs, vs. CITY OF PHOENIX, a municipal corporation of the State of Arizona; JEFF BARTON, in his official capacity as City Manager of the City of Phoenix, Defendants, and 6TH & GARFIELD OWNER, LLC, a limited liability company, Intervenor-Defendant.	Case No. CV2022-005658 **PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT** (Assigned to The Honorable Dewain D. Fox)

INTRODUCTION

In the heart of downtown Phoenix, in one of the most desirable real estate markets in the state, the City of Phoenix ("City") has agreed to an elaborate contract ("the Agreement") with a private real estate developer, 6th and Garfield, LLC ("Hubbard" or "Developer"). That Agreement enables Hubbard to avoid paying nearly $7.9 million in property taxes that it would otherwise owe. The City is giving Hubbard this benefit even though Hubbard does not give the City anything in return that is proportional to the subsidy the City is giving it—and even though other similarly-situated properties do not receive this special financial benefit.

The City signed the Agreement giving Hubbard a Government Property Lease Excise Tax ("GPLET") abatement, even after this Court had already declared a nearly identical arrangement (which also provided an eight-year GPLET tax abatement to the developer of a high-rise luxury apartment building) unconstitutional under the Gift Clause. *Englehorn v. Stanton*, No. CV 2017-001742, 2020 WL 7487658 (Ariz. Super. June 19, 2020).

Just as in *Englehorn*, the GPLET subsidy here violates the Constitution's Gift Clause (Art. IX, Sec. 7), which bars the City from giving public resources to private parties unless: (1) the benefit is for a public purpose; and (2) the government receives in return direct, measurable consideration that is proportionate to the value of that benefit. *Schires v. Carlat*, 250 Ariz. 371, 374–75 ¶ 7 (2021); *Turken v. Gordon*, 223 Ariz. 342, 345 ¶ 7, 348 ¶ 22 (2010).

In this case, the City is giving Hubbard a tax benefit worth $7.9 million. It gets back $525,000 in rent payments and payments of $32,000 to two local school districts. That is grossly disproportionate by any measure. It equates to a $7.3 million subsidy—which violates the Gift Clause.

The City tries to distinguish this case from the GPLET subsidy this Court declared unconstitutional in *Englehorn* by pointing to the Agreement's Minimum Direct Benefit ("MDB") provision. At first glance the MDB might seem to guarantee that the City will

receive $9 million in direct benefits in exchange for the GPLET subsidy. But that provision is an illusion. As a legal matter, the payment of taxes that make up $8.5 million of the MDB do not count as consideration under the Gift Clause at all. *Schires*, 250 Ariz. at 377 ¶ 18; *Turken*, 223 Ariz. at 350 ¶ 38. The MDB does not and cannot change the payment of taxes into consideration under the Gift Clause. As a factual matter, the MDB also provides no meaningful "guarantee" of anything, because it does not obligate Hubbard to provide anything other than the payment of taxes it would already owe or anything else of objective fair market value to the City. Therefore, this Court can and should determine *as a matter of law* that the MDB is not sufficient direct consideration, and grant summary judgment for Taxpayers.

STANDARD OF REVIEW

Summary judgment is appropriate "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56. Summary judgment should be entered when "there is no material fact for a reasonable trier of fact to find," *National Bank of Arizona v. Thruston*, 218 Ariz. 112, 115 ¶ 15 (App. 2008), and when "reasonable jurors applying the law to the facts could reach but one conclusion." *Hill-Shafer P'ship v. Chilson Family Trust*, 165 Ariz. 469, 472 (1990).

Summary judgment is appropriate here. After extensive briefing and initial discovery, including expert affidavits and rebuttal affidavits, it is clear that the primary disputes in this case are *legal*, not *factual*. What factual disputes exist are not *material*. Taxpayers agree with the City that this is "straightforward litigation, in which almost all key facts are undisputed." City's Resp. to Appl. For TRO and Prelim. Inj. ("City's Resp. to PI") at 1.

PROCEDURAL HISTORY

Taxpayers filed the Complaint in this case along with an Application for a Temporary Restraining Order and a Motion for a Preliminary Injunction ("PI Motion") on May 4, 2022.

After the City moved for a change of judge, the Court set the matter for a hearing on Taxpayers' PI Motion. 05/24/22 M.E. Order. The Court also set deadlines for limited discovery, including requests for admission, requests for production, interrogatories, and expert affidavits. 06/03/2022 M.E. Order

The parties then exchanged discovery, including comprehensive expert affidavits from both parties.

After Taxpayers filed their PI Motion and discovery was taken, the City stipulated that it would not take title to the Hubbard Project until this Court has ruled on Taxpayers' PI Motion and the Defendants' Motions to Dismiss. 08/11/22 M.E. Order at 2. That stipulation satisfied Taxpayers' request for preliminary relief to the extent that the unlawful allocation of taxpayer resources was no longer imminent.

The City and Hubbard also moved to dismiss, and this Court ordered that Hubbard's Motion to Dismiss "be treat[ed] as a motion for summary judgment," *id.* at 3, setting the matter for a hearing on October 21, 2022. The Court also indicated that it would only consider matters raised in Intervenor's Motion to Dismiss (which is being treated as a summary judgment motion). *Id.* In that motion, Intervenors contend that the affirmative defenses of statute of limitations and laches apply, and that Taxpayers' Gift Clause and Evasion Clause claims fail on the merits.

As the extensive briefing that has already occurred shows, the central disputes between the parties are *legal* not *factual*. Thus, Taxpayers cross-move for summary judgment.

FACTS

Hubbard currently pays *ad valorem* property taxes on vacant parcels of land it owns at the southeast corner of Sixth and Garfield Streets in downtown Phoenix. Pls.' Statement of Facts ("PSOF") ¶ 2. But it will no longer be required to do so after it builds a 26-story high rise luxury apartment building called the Hubbard Project. PSOF ¶ 6. The cost of constructing the Hubbard Project is estimated at $86,900,000. PSOF ¶ 4. Hubbard expects at least a 5.56% return on its investment in the Project, but the City has agreed to

increase Hubbard's profits to 6.51% through the taxpayer-financed abatement and reduction of the property taxes Hubbard would otherwise have to pay. PSOF ¶ 39.

Hubbard sought this subsidy in a response to a Request for Proposals that the City issued. PSOF ¶¶ 3–4. On October 7, 2020, the City Council approved Ordinance S-46966, which authorized the City Manager or his designee to enter into a development agreement with Hubbard. PSOF ¶ 5. Hubbard and the City then engaged in several months of negotiations over the terms of the Agreement. Then, on May 14, 2021, Hubbard and the City finalized the Agreement and it became effective. PSOF ¶ 6.

Under the Agreement, Hubbard will convey its property title to the City after it finishes construction of the Hubbard Project, PSOF ¶ 7, and the City will immediately lease the Project back to Hubbard for eight years. PSOF ¶ 8. The transfer of title to the City will mean that the Project is subject to the GPLET instead of the *ad valorem* property taxes that would normally apply. But the Agreement further provides that during the eight-year period, the City *abates* all GPLET taxes on the Project, so Hubbard pays no property taxes on the property at *all*. *Id.*

During the lease period, Hubbard fully controls, operates, and manages the Hubbard Project, with no oversight or control by the City. *Id.* PSOF ¶ 10. Also, despite being putatively "government-owned," the City cannot transfer title or any interest whatsoever in the Hubbard Project to any other party. *See* PSOF ¶ 12. Additionally, Hubbard may terminate the lease and acquire the property *at any time and for any reason* for a $100,000 payment. PSOF ¶ 15. At the end of the eight years, the City conveys the Hubbard Project back to Hubbard. PSOF ¶ 16.

The City entered the Agreement to relieve Hubbard, and only Hubbard, of its *ad valorem* property tax burden for eight years. Hubbard and the City estimate that the value of the tax abatement over the eight years is $6,608,800. PSOF ¶ 22. Taxpayers estimate

that the value of the tax abatement is $7,891,324. *See* PSOF ¶ 21.[1] Either way, it is an immense financial benefit to Hubbard.

In exchange for that $6.6 million or $7.9 million tax abatement, Hubbard agrees to give the City $525,000 in rent payments, *see* PSOF ¶ 24, and to give $32,000 to two school districts that will be deprived of tax revenue during those eight years due to the tax abatement. PSOF 25. The Agreement also requires Hubbard to make available 10% of the residential units for "Workforce Housing"—to any person who meets eligible income requirements—during (and only during) the lease period. PSOF ¶ 27. Hubbard provides no other direct benefits to the City in the Agreement.

There's also the MDB provision. It purports to guarantee that the City will receive from Hubbard a minimum of $9 million in construction taxes, tenant taxes, lease payments, and property taxes after the lease term, or that Hubbard will make up any shortfall. PSOF ¶¶ 28–33. But $8.5 million of the taxes that Hubbard "actual[ly] pay[s]," are *credited against* this amount. PSOF ¶ 35. That means that nearly all of the MDB amount Hubbard promises the City will be satisfied through the payment of taxes that it *already* owes and would *already* pay. And if the GPLET Lease is terminated early—which Hubbard can unilaterally do at any time—the MTD is prorated. This ensures that the MTD will always be *fully satisfied* through the payment of taxes that Hubbard *already owes* or would *already* have to pay, and that Hubbard will never, in fact, have to make up any difference. Thus the MDB is an illusory promise to do something Hubbard is already legally required to do—and, as such, cannot qualify as consideration under the Gift Clause. *Schires*, 250 Ariz. at 377 ¶ 18; *Turken*, 223 Ariz. at 350 ¶ 38.

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[1] The difference between the two estimates is that the City anticipates no growth in the property value of the Hubbard Project, whereas Taxpayers estimate a modest growth in property value (and therefore higher property taxes). PSOF ¶ 23.

I. The $7.3 million GPLET subsidy to Hubbard violates the Gift Clause.

A. The City's GPLET subsidy to Hubbard is grossly disproportionate to any benefit the City receives from Hubbard.

The Gift Clause forbids the City from "mak[ing] any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." Ariz. Const. art. IX, § 7. The purposes of this Clause are twofold: (1) to prevent the "depletion of the public treasury or inflation of public debt by [public entities] engag[ing] in non-public enterprise," *Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545, 549 (1971) (citation omitted), and (2) to prevent government entities from "giving advantages to special interests," *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984).

The Clause applies not only to direct expenditures of funds, but also to tax exemptions or rebates. This Court has already said so. *Englehorn v. Stanton*, No. CV 2017-001742, 2018 WL 11252676, at *4 (Ariz. Super. May 10, 2018), and appellate courts have held for a century that the Clause applies not just to expenditures, but to subsidies and special advantages of all kinds, including the elimination of debts a private party would otherwise owe. *See Ariz. Ctr. for Law in Pub. Interest v. Hassell*, 172 Ariz. 356, 369 (App. 1991) (sale of state lands at below market rates was unconstitutional subsidy); *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 320 (1986) (lease of public property at below market rates was subsidy); *City of Tempe v. Pilot Props., Inc.*, 22 Ariz. App. 356, 362 (1974) (lease of land for below market rate was unconstitutional subsidy); *Puterbaugh v. Gila Cnty.,* 45 Ariz. 557, 564 (1935) (elimination of debt was "clearly a donation" in violation of the Gift Clause); *Rowlands v. State Loan Bd. of Ariz.*, 24 Ariz. 116, 121 (1922) (eliminating debt is an unconstitutional subsidy). Elimination of taxes due has also been expressly held to be subject to Gift Clause scrutiny. *Maricopa Cnty. v. State*, 187 Ariz. 275 (App. 1996); *Pimalco, Inc. v. Maricopa Cnty.*, 188 Ariz. 550 (App. 1997). The Gift Clause applies to the Agreement.

To survive a Gift Clause challenge, a transfer of public funds or the grant of a tax exemption to a private entity must (1) serve a public purpose and (2) be in exchange for

adequate consideration tendered by the recipient. *Schires*, 250 Ariz. at 374–75 ¶ 7; *Turken*, 223 Ariz. at 345 ¶ 7, 348 ¶ 22. These are conjunctive requirements, so a failure of either requirement violates the Gift Clause. *Id.*

The Agreement fails this test—and is therefore unconstitutional—because the City receives $557,000 for the $7.9 million tax abatement it is giving to Hubbard, resulting in a $7.3 million subsidy. This case can be decided based on this inadequacy of consideration factor alone. But the GPLET arrangement also fails the public purpose element because the City approved this subsidy to increase the profits of a private company and the City fails to exercise sufficient control over Hubbard's operations to ensure that a public purpose is accomplished.

1. The GPLET subsidy fails the consideration prong of the Gift Clause test because the City is not receiving direct benefits that are proportional to the amount of the subsidy.

The simplest way to resolve the Gift Clause claim—and this case—is by conducting an analysis of the adequacy of consideration in the Agreement. Because the consideration Hubbard gives the City in exchange for the GPLET subsidy is grossly disproportionate, the Agreement violates the Gift Clause.

To survive Gift Clause scrutiny, the allocation of public resources must be supported by *adequate* consideration. That means the recipient of public resources must make a contractual promise to give the public a measurable return value that is proportionate to what it receives. Simply put, the Court "focuses on what the public is giving and getting from an arrangement and then asks whether the 'give' so far exceeds the 'get' that the government is subsidizing a private venture." *Schires*, 376 Ariz. at 376 ¶ 14. And when it does this, the Court *"should not give deference* to the [City's] assessment of value but should instead identify the fair market value of the benefit provided to the entity and then determine proportionality." *Id.* at 378 ¶ 23 (emphasis added). Not only is the comparison based on objective fair-market values, but "anticipated indirect benefits," such as economic improvement that the government may

hope will result from a development project, cannot be included in this analysis. *Id.* at 377 ¶ 16. Nor can pre-existing legal duties such as the payment of taxes. *Id.* ¶ 18.

The question the Court must answer is therefore a simple one**: What is the Agreement costing the City and its taxpayers, and what is the City *directly* receiving in return, based on the *objective fair market value* of both sides of the transaction?** If the latter is grossly disproportionate to the former, then the arrangement is unlawful because it would amount to a gift, akin to spending $100 to buy a hammer worth only $10. *See Turken*, 223 Ariz. at 347 ¶ 16.

According to the City's economic analysis, if the Hubbard Project were completed *without* the GPLET subsidy, Hubbard would pay $6,608,800 in property taxes over the eight-year term of the lease. *See*PSOF ¶ 22. Hubbard's estimate agrees with this. *See id.*. Taxpayers' estimate is higher: their expert estimates that, absent the GPLET exemption, Hubbard would be liable for $7,891,324 in *ad valorem* property taxes over those eight years.[2] PSOF ¶21. But for purposes of the Gift Clause, and for purposes of this motion, this difference is not material, because **whether the subsidy is $6.6 million or $7.8 million, the values here are grossly disproportionate.**

The parties differ over what the City is promised in return for this benefit, but those disagreements *are questions of law, not fact*, and in any event, are not material for Gift Clause purposes. Instead, the primary legal disagreement comes down to whether the $9 million MDB counts as direct consideration under the Gift Clause. For the reasons stated below, it does not. Instead, there are only two direct payments Hubbard promises in the Agreement to make to the City that can count as consideration for the $7.9 million tax benefit it receives. These are: $525,000 in "rent" payments and $32,000 in payments to Phoenix Elementary School District and Phoenix Union High School District.[3] PSOF ¶¶

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[2] The estimates differ because of anticipated growth rates in the value of the completed Hubbard Project through the duration of the lease. The City thinks the Hubbard Project will not grow in value at all. PSOF ¶ 23. Taxpayers estimate a modest growth in property value.

[3] Although the school districts and not the City are receiving these payments, this Court in *Englehorn* found that the districts in that case were "intended, third party beneficiar[ies],"

24–26 . Based on these payments, **in exchange for the $6.6 or $7.9 million GPLET subsidy, the City is receiving $557,000 in direct benefits from Hubbard.** That is "grossly disproportionate" and unconstitutional. *Turken,* 223 Ariz. at 348 ¶ 22.

The Defendants make other assumptions regarding consideration, but none are material. And even if the Court accepts *all* the Defendants' assumptions regarding consideration, the benefits the City gives Hubbard in the Agreement are *still* grossly disproportionate to the benefits Hubbard gives back in return.[4] By *any* measure, the two values are grossly disproportionate—which means this is an unconstitutional subsidy. *Turken*, 223 Ariz. at 350 ¶ 35.

2. The MDB is not direct consideration under the Gift Clause.

The Defendants attempt to distinguish this Agreement from the one that was struck down in *Englehorn* by including the $9 million MDB in the comparison of values. Although the MDB might seem at first glance to ensure the City will receive $9 million in constitutionally adequate consideration in exchange for the GPLET subsidy, the "realit[y] of the transaction" is that it does nothing of the sort. *Turken,* 223 Ariz. at 345 ¶ 8.

The MDB says that Hubbard will pay the City $9 million in construction taxes, tenant taxes, lease payments,[5] and property taxes by the end of the eight-year lease, or—purportedly—it will make up the difference. PSOF ¶¶ 28–34. Under the MDB provision, **$8.5 million** of the taxes Hubbard already owes and "actual[ly] pay[s]" will be credited against this amount. PSOF ¶ 36. That means $8.5 million of the $9 million is satisfied exclusively through the payment of taxes that Hubbard *already* owes and would otherwise pay. Since "[a] business's obligation to pay taxes is *independent* of an economic

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and therefore payments to school districts that are bargained for were included as consideration in that case. 2020 WL 7487658, at *3 ¶ 37 (Ariz. Super. June 19, 2020).

[4] Adding the $100,000 donation to the "Affordable Housing Trust Fund" to the $557,000 would bring the total amount provided by Hubbard to the City up to only $657,000, which is still grossly disproportionate to either a $6.6 million or $7.9 million outlay. And even if the Court also adds in the $1.15 million in "Workforce Housing," that would *still* bring the total up to only $1,807,000 provided by Hubbard to the City, which *is still* grossly disproportionate to even the City's low figure of $6.6 million in benefits to Hubbard, let alone to the $7.9 million that Taxpayers estimate.

[5] Taxpayers do not dispute that the $525,000 in lease payments for the GPLET lease are direct consideration.

development agreement," and *not* consideration under the Gift Clause, *Schires,* 250 Ariz. at 377 ¶ 18, this provision of the Agreement does nothing more than reiterate Hubbard's promise to do what it is already legally obligated to do—and that is never consideration for a contract. *J. D. Halstead Lumber Co. v. Hartford Accident & Indem. Co.,* 38 Ariz. 228, 235 (1931) ("A promise to do something which a party is already legally obliged to do is no consideration.").

Hubbard argues that the MDB is different than the tax payments in *Schires* because "there is an actual guaranteed payment." Mot. to Dismiss at 17. In other words, Hubbard contends that its "promise" to make up the shortfall for any taxes that are not generated by the Hubbard Project is itself worth $9 million. That is nonsense, and incorrect for three separate reasons.

First**,** Hubbard is "guaranteeing" to do what it is already obligated to do: pay its taxes.[6] Payment of taxes is *not* consideration under the Gift Clause. *Schires,* 250 Ariz. at 377 ¶ 18. And a "guarantee" to do what one already has an obligation to do is an illusory promise—which is not consideration. *Shattuck v. Precision-Toyota, Inc*., 115 Ariz. 586, 588 (1977). Thus, the entirety of the $8.5 million of the MDB that is satisfied through the payment of taxes does not count as consideration. This is true regardless of the labels the Defendants have affixed to these *tax* payments.

Second**,** under the terms of the GPLET Lease, Hubbard will *never* actually be obligated to "fund any shortfall," City Resp. to TRO at 10, through anything other than paying taxes it already owes. *See* Pls. Reply to City's Resp. to Appl. For TRO at 5-6. That is because of how the MDB provision is structured. Under the GPLET Lease, the City's tax abatement subsidy will be provided once the Hubbard Project is completed and will last for eight consecutive years. According to the City's own calculations:

- $3.6 million of the MDB will be satisfied in **pre-construction taxes**. PSOF ¶ 30.

[6] The tax payments in question are also calculated based on projections of Hubbard's future economic success. That means they are also *indirect* under *Turken*, 223 Ariz. at 350, ¶ 33, and *Schires*, 250 Ariz. at 377 ¶ 18—and thus, again, not consideration at all.

- Another $2.5 million of the MDB is satisfied through the payment of **transaction privilege taxes, use taxes,** and lease rent during the eight-year GPLET Lease. PSOF ¶ 31—32. That amounts to $312,500 per year of the eight-year lease.
- The remaining $2.9 million of the MDB is satisfied **through the payment of *ad valorem* property taxes after the lease expires**. Hubbard has eight years to make these post-lease property tax payments. According to the City's *own* calculations, Hubbard will be obligated to pay $826,100 in property taxes in the last year of the GPLET Lease.[7] PSOF ¶ 33.

What this means is:

A) If the GPLET Lease is satisfied as the Defendants anticipate it will be, Hubbard will have fulfilled the entirety of its $9 million MDB in three and a half years[8] after the expiration of the GPLET Lease, well ahead of the *eight* years it has to do so. It will have done so by paying $8.5 million in taxes it was already required to pay, and which cannot count as consideration. ***None*** of that $8.5 million counts as consideration under the Gift Clause. *Schires,* 250 Ariz. at 377 ¶ 18.[9]

B) If the GPLET Lease is terminated before the eight years is up, Hubbard is only obligated to pay "a prorated [MDB] Amount." PSOF ¶ 37. This prorated amount is "based on a fraction with the numerator being the actual number of days the Lease was in effect during the Lease Term and the denominator being the total number of days of the Lease Term." *Id.* Thus, according to the City, "if the Lease is terminated after [e.g.,] one year, the [MDB] amount would be one-eighth of the remaining unpaid [MDB] Amount balance, *which [Hubbard] would guarantee to pay in property taxes over the next eight years following termination*." PSOF ¶ 38 (emphasis added).

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[8] According to Mr. McCarthy's calculations, the MDB will be fully satisfied in just over two and half years after the GPLET Lease. PSOF ¶ 35.

[9] *Schires* makes clear that it does not count as consideration for two reasons: first, because of the pre-existing duty rule. Second, because the taxes in question are calculated based on the anticipated economic success of the Hubbard Project—but anticipations of that sort are too contingent; they depend on the actions of third parties and cannot be bargained for in a contract. They are therefore "indirect." 250 Ariz. at 377 ¶ 18.

So, if the lease were terminated after one year, the new "prorated" MDB would only be $635,937.50.[10] Hubbard would then have *eight years* to pay this $635,937.50. Since the City calculates that Hubbard will pay $826,100 in property taxes in the last year of the GPLET Lease, the entire prorated MDB would be satisfied within one year. In other words, in the event of Lease termination, the MDB is also satisfied *through the payment of property taxes* that Hubbard is *already* legally obligated to pay. The same is true if Hubbard terminates the Lease at any point in time. Thus, Hubbard is promising to do what it's already legally required to do, and further promising that if it fails to do so, it promises again to do nothing that it is not already legally obligated to do. Regardless of when the GPLET Lease is terminated, Hubbard will always be able to satisfy the prorated lease amount *through the payment of taxes*, and well ahead of schedule—and will consequently *never* be required "to fund any shortfall." City Resp. to TRO at 10.

C) If Hubbard transfers its rights under the Agreement to another private party (which it can do in its discretion), Hubbard will be released from *all* of its obligations under the Agreement, and the new "tenant's" tax payments will all *count toward the MDB*. PSOF ¶ 40. That means that Hubbard will *never* be required "to fund any shortfall" in the MDB; it can sell out to someone else and not have to make good on the alleged guarantee.

Put simply, the MDB is a chimera and an illusory promise. All the MDB does, under any scenario, is relabel Hubbard's obligation to pay taxes it already owes and that are not consideration under the Gift Clause. It guarantees nothing and obligates Hubbard to nothing.

Third, even if the MDB did have some mythical value to the City, consideration must be calculated based on its "objective fair market value." *Schires,* 250 Ariz. at 376 ¶ 14. But Hubbard's purported "guarantee" to pay $9 million is not worth *anything near* $9 million. As with all guarantees or insurance policies, the present value is the dollar

[10] This calculation is made by subtracting $3.6 million in pre-lease construction tax and $312,500 in transaction privilege taxes, use taxes, and lease rent from year one from the $9 million MTD (equal to $5,087,500) and multiplying that figure by one-eighth.

amount *multiplied by the risk of having to pay*—i.e., the "actuarial value." *See Price v. Marshall Erdman & Assocs., Inc.*, 966 F.2d 320, 327 (7th Cir. 1992). Because the risk of having to pay is **zero** as setout above, the value of the MDB is zero. The Defendants' fallacious argument regarding the MDB ignores this reality. It says the MDB is worth $9 million—which is tantamount to saying that a $1 million life insurance policy for a healthy 25-year-old has an objective fair market value of $1 million, ignoring the fact that the policyholder is unlikely to ever make a claim on the policy.[11] Their argument is actually even worse than this because, unlike an insurance policy, there is no risk to the "insurer" because Hubbard will never have to fund the MDB with anything other than tax payments.

What's more, the City admits that neither it nor Hubbard has ever even *tried* to determine the objective fair market value of Hubbard's purported "guarantee." PSOF ¶ 41. Instead, $8.5 million in tax payments toward the MDB are a preexisting legal duty and therefore not consideration, and the "objective fair market value" of the promise to make up the difference in the (nonexistent) event of a shortfall is also zero. Thus, the MDB "is valueless under the Gift Clause." PSOF ¶ 42.

The Gift Clause requires the Court to look beyond labels and base its ruling on "[t]he reality of the transaction both in terms of purpose and consideration." *Hassell*, 172 Ariz. at 368. The reality of this transaction is that the City is giving Hubbard a $7.3 million subsidy for which it is receiving an illusory and valueless "benefit" in return. That is unconstitutional.

B. The GPLET subsidy fails the public purpose prong of the Gift Clause test because the tax benefit was provided to increase the profits of a private company and the City does not exercise control over the Hubbard Project.

The fact that the City does not receive adequate consideration in exchange for its GPLET subsidy to Hubbard is sufficient reason to find the Agreement unconstitutional.

[11] The actual value of such a policy would be the $1 million *multiplied by the chances of a claim being made*, which is some fraction of 1. Were it otherwise, nobody would sell insurance.

But the subsidy is also so clearly earmarked for Hubbard's self-interested benefit that it also fails to achieve a public purpose. This is true for two reasons.

First, the *expressly stated* purpose of the GPLET subsidy is to increase Hubbard's profits from 5.56% to 6.51%. *See* PSOF ¶¶ 43–44. Utilizing taxpayer resources "to foster or promote the purely private or personal interests of any individual," is precisely what the Gift Clause is designed to forbid. *Walled Lake Door Co.*, 107 Ariz. at 549.

Second, the City exercises insufficient "control and supervision" over the Hubbard Project. *Kromko,* 149 Ariz. at 321. *Kromko* makes clear that the government can make payments to a private entity to engage in certain services, as long as the government supervises and controls the recipient to ensure that it performs those public services. But here, Hubbard fully controls, operates, manages, and profits from the property entirely on its own terms. PSOF ¶ 10. Additionally, even though labelled a "lease," Hubbard is always the constructive owner of the Project, because it can terminate the "lease" and acquire the property back **at any time for any reason**. PSOF ¶ 15. In short, the Project represents a completely private endeavor, and it is "government property" in name only. The GPLET subsidy is therefore not for a public purpose, but for a private one—which is unconstitutional. *Kromko*, 149 Ariz. at 321.

II. The Hubbard Agreement violates the Evasion Clause.

In addition to the Gift Clause violation, the Agreement also violates the Evasion Clause because the *only* reason the Project is conveyed to the City is so Hubbard can avoid paying *ad valorem* property taxes. Under the Constitution, "[n]o property shall be exempt which has been conveyed to evade taxation." Art. IX, § 2(12). Here, the GPLET conveyance has no indicia of actual property ownership, such as the ability to control, alter, transfer, or encumber the property. PSOF ¶¶ 10–15. As a result, the conveyance is illusory, and done for the sole purpose of evading tax liabilities.

Hubbard contends that Taxpayers' Evasion Clause claim is "foreclosed" by *State v. Ariz. Bd. of Regents*, 507 P.3d 500, 502–03 ¶ 2 (Ariz. 2022). But that case supports Taxpayers, not the City. There, the property was *owned* by the government to begin with,

so there was no tax to evade. Here, the property is owned by Hubbard, which currently pays taxes on it, and there *is* a tax to evade.

In *Arizona Board of Regents*, the court found that the Board of Regents ("ABOR") did not violate the Evasion Clause when it leased "land owned by ABOR" to Omni hotels. *Id.* Because the land was *owned* by ABOR, it was already tax-exempt, so there was "no tax to enforce." *Id.* at 504 ¶ 10. And ABOR never transferred title to the private entity. Here, Hubbard owns the land, not the government. PSOF ¶ 1. Hubbard is currently paying *ad valorem* property taxes on it. PSOF ¶ 2. Hubbard will *convey* title to the City so that the Hubbard Site becomes "government-owned" property, so that Hubbard will no longer be subject to *ad valorem* property taxes. PSOF ¶ 7. So there *is* an existing "tax to evade," 507 P.3d at 504 ¶ 10, and the entire Agreement is designed with the *express purpose* of evading it. To the extent it applies at all, *Arizona Board of Regents* supports Taxpayers' Evasion Clause claim.

The plain language of that Clause, and its history and purpose, show it was enacted to prevent conveyances that occur for the sole purpose of evading taxes that would otherwise be due. The Agreement says: the "City acknowledges and agrees that the intention of the Parties is for the Project and all eligible improvements … [is] to be subject to the GPLET (and not to *ad valorem* taxation) … and for the GPLET to be abated for a period of eight (8) years." PSOF ¶ 52.

In other words, the whole purpose of this Agreement is for Hubbard to evade property taxes. That would not run afoul of the constitution if Hubbard *actually* conveyed the property to the City and the City actually exercised property ownership over it. But here, the City's "ownership" of the project is in name only, and the property will be put to an exclusively *private* use. During the eight years, Hubbard alone controls, operates, and manages the Project, with no oversight or control by the City. PSOF ¶¶ 10–15. Also, despite being a putatively "government-owned" building, the City cannot sell it or transfer title or any interest in it to anyone else. PSOF ¶¶ 12–13. And Hubbard may unilaterally

terminate the lease and reacquire title *at any time and for any reason* for a nominal payment. PSOF ¶ 15.

Because the property is being conveyed *solely* to qualify for a municipal-property tax exemption, and because the conveyance is illusory—in that Hubbard gives up no real property rights to the Project and the City exercises no ownership rights over it—the Agreement violates Ariz. Const. art. IX, § 2(12).

RESPECTFULLY SUBMITTED this 12th day of September, 2022.

GOLDWATER INSTITUTE

/s/ Jonathan Riches
Jonathan Riches (025712)
Timothy Sandefur (033670)
Scharf-Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, Arizona 85004
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

ORIGINAL E-FILED this 12th day of September, 2022, with a copy delivered via the ECF system to:

Thomas G. Stack
Daniel J. Inglese
OFFICE OF THE CITY ATTORNEY
CRIS MEYER, City Attorney
200 West Washington, Suite 1300
Phoenix, Arizona 85003-1611
Thomas.stack@phoenix.gov
Daniel.inglese@phoenix.gov
Counsel for City of Phoenix & Jeff Barton

Brett W. Johnson
Tracy A. Olson
Ian R. Joyce
SNELL & WILMER
One Arizona Center
400 E. Van Buren, Ste. 1900
Phoenix, Arizona 85004-2202
bwjohnson@swlaw.com
tolson@swlaw.com
ijoyce@swlaw.com
Counsel for Proposed Intervenor
6th & Garfield Owner, LLC

/s/ *Kris Schlott*
Kris Schlott, Paralegal