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8 **SUPERIOR COURT OF CALIFORNIA**

9 **COUNTY OF LOS ANGELES, SOUTH DISTRICT**

10 JAMES D. McGEE, an individual and)
11 taxpayer on behalf of himself and the)
12 taxpayers of the TORRANCE UNIFIED)
SCHOOL DISTRICT)

13 Plaintiffs,)

14 v.)

15 TORRANCE UNIFIED SCHOOL)
DISTRICT, a California public entity;)
16 BARNHART-BALFOUR BEATTY, INC.,)
dba BALFOUR BEATTY)
CONSTRUCTION; a California corporation;)
17 ALL PERSONS INTERESTED IN THE)
MATTER OF Torrance Unified School)
18 District's approval and execution of a (1) Site)
Lease, Sublease, and Construction Services)
19 Agreement and Other Acts Relating to the)
Construction of the Hickory Elementary)
20 School Modernization Project per Resolution)
#AS-03-12/13; (2) Site Lease, Sublease, and)
21 Construction Services Agreement and Other)
Acts Relating to the Construction of the)
22 Madrona Middle School Modernization)
Project per Resolution #AS-04-12/13; and (3))
23 Site Lease, Sublease, and Construction)
Services Agreement and Other Acts Relating)
24 to the Construction of the North High School)
Modernization Project per Resolution)
25 #AS-05-12/13 all with Barnhart-Balfour)
Beatty, Inc., dba Balfour Beatty Construction;)
26 and DOES 1 through 100, inclusive)

27 Defendants.)
28

CASE NUMBER: YC068686

(Consolidated With Case Nos. YC069859 & YC070614)

PLAINTIFFS' TRIAL BRIEF

Judge: Hon. Michael P. Vicencia
Dept.: S26
Complaint Filed: February 19, 2013
Trial Date: January 14, 2019

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

page(s)

- I. INTRODUCTION. 2**
 - A. Plaintiffs’ Complaints Are Not Moot Because The Contracts at Issue Are Not the Kind Which Are Subject to Validation 2**
 - B. Plaintiffs’ Complaints Are Not Moot Because Conflict of Interest Claims Are Not Subject to the Validation Statutes 2**
 - C. Plaintiffs’ Complaints Are Not Moot Since the Court Can Grant Plaintiffs ‘Effectual Relief’ Notwithstanding the Challenged Contracts Are Fully Performed 2**
- II. SUMMARY OF FACTS & PROCEDURE 3**
 - A. Summary of Plaintiffs’ Complaints and Cases 3**
 - B. Summary of Facts Giving Rise to BBC’s Conflict of Interest. 4**
 - 1. Initial Use of The Construction Manager Multiple Prime Delivery Method. 5**
 - 2. The Transition from Construction Manager Multiple Prime Delivery Method to the Lease-Leaseback Delivery Method. 8**
 - C. Facts Relating to BBC’s Government Code § 1092.5 Affirmative Defense. . . . 11**
- III. SUMMARY OF LAW 14**
 - A. BBC Is Automatically Liable For 100% Disgorgement Without Any Offset. . 19**
- IV. SPECIFIC ISSUES FOR TRIAL 21**
 - A. Plaintiffs’ Complaints Are Not Moot Because The Contracts at Issue Are Not the Kind Which Are Subject to Validation 21**
 - B. Plaintiffs’ Complaints Are Not Moot Because Conflict of Interest Claims Are Not Subject to the Validation Statutes 23**
 - C. Plaintiffs’ Complaints Are Not Moot Since the Court Can Grant Plaintiffs ‘Effectual Relief’ Notwithstanding the Challenged Contracts Are Fully Performed 24**
 - D. BBC Should Not Be Allowed to Introduce Evidence of the Benefits of TUSD’s Lease Leaseback Arrangement or the Detriments of TUSD’s Prior CM Multiple Prime Arrangement. 27**
 - E. Government Code §1092.5 Does Not Apply to Balfour Beatty Because They Were A Direct Party to the Conflicted Contracts. 28**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

F. BBC Cannot Meet All Three Requirements for Their Government Code §1092.5 Affirmative Defense: They Were Not a “Good Faith Lessee” Under the Challenged Contracts 32

G. BBC Cannot Meet All Three Requirements for Their Government Code §1092.5 Affirmative Defense: BBC Did Not Fully and Timely “Paid Value” as Required by Section 1092.5.. . . . 35

H. Government Code §1092.5 Does Not Eliminate Plaintiff’s Common Law Conflict of Interest Basis of Disgorgement 35

1 **TABLE OF AUTHORITIES**

2 *page(s)*

3 **CASES**

4 Adams v. Commission on Judicial Performance (1994) 8 Cal.4th 630, 650. 31

5 California-American Water Co. v. Marina Coast Water Dist. (2016) 2 Cal.App.5th 748. 23

6 California Commerce Casino, Inc. v. Schwarzenegger (2007) 146 Cal.App.4th 1406 22

7 California Taxpayers Action Network v. Taber Construction, Inc. (2017) 12 Cal.App.5th 115. . 14, 19

8 Carson Redevelopment Agency v. Padilla (2006) 140 Cal.App.4th 1323 20

9 City of Desert Hot Springs v. County of Riverside (1979) 91 Cal.App.3d 441, 449 33, 34

10 City of Oakland v. California Const. Co. (1940)15 Cal.2d 573, 576. 13

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23 National City v. Fritz (1949) 33 Cal.2d 635, 636 32

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25 1000, 1008. 31

26 People v. Arias (2008) 45 Cal.4th 169 30

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28 People v. Vallerga (1977) 67 Cal.App.3d 847, 867 18

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7 Terry v. Bender (1956) 143 Cal.App.2d 198 15

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10 Wilson & Wilson v. City Council of Redwood City (2011) 191 Cal.App.4th 1559 24-27

11 Wisconsin Public Intervenor v. Mortier (1991) 501 U.S. 597, 610, fn. 4. 30

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13 **STATUTES**

14 California Code of Civil Procedure 526a 3, 5

15 California Education Code 17281, Article 3 5

16 California Education Code 17281, Article 65

17 California Education Code 17281, Article 75

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19 California Government Code § 1092 3, 5, 11, 12, 28, 30-35

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22 California Public Contract Code 22002(c)7

23 **OTHER**

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1 Plaintiffs JAMES D. MCGEE (“MCGEE”) and CALIFORNIA TAXPAYERS ACTION
2 NETWORK (“CALTAN”) (MCGEE and CALTAN are collectively hereinafter “Plaintiffs” or
3 “Taxpayers”) respectfully submit the following Trial Brief in advance of the trial scheduled for January
4 14, 2019 in the above consolidated cases (collectively hereinafter the “Action”).

5 I. INTRODUCTION

6 Based on the operative complaints in this Action Plaintiffs seek the relief requested therein
7 including a judicial determination that the individual Construction Services Agreements and Sublease
8 Agreements between TORRANCE UNIFIED SCHOOL DISTRICT (“District” or “TUSD”) and
9 BALFOUR BEATTY CONSTRUCTION, LLC fka Barnhart-Balfour Beatty, Inc. dba Balfour Beatty
10 Construction (“Balfour Beatty” or “BBC”) are void ab initio because they violate California’s
11 statutory and common law government consultant conflict of interest prohibitions. Because each of
12 the Construction Services Agreements and Sublease Agreements are void Plaintiffs are entitled under
13 well settled California law to a judgment directing BBC to pay back to TUSD every single dollar BBC
14 received from TUSD under those contracts, plus interest, without any offset.¹ Plaintiffs cannot and
15 do not seek to recover a single penny for themselves except for recoverable costs of litigation and
16 attorneys fees under Code of Civil Procedure § 1021.5 and/or other equitable grounds.

17 As discussed starting on page 21 in preparation for the mootness phase of this trial, the fact that
18 Plaintiffs made reference to the validation statutes as one of the many grounds by which they have
19 standing to bring this Action and the fact that the subject construction projects are complete does not
20 render Plaintiffs’ conflict of interest action moot for the following reasons:

- 21 **A. Plaintiffs’ Complaints Are Not Moot Because The Contracts at Issue Are Not the**
22 **Kind Which Are Subject to Validation**
- 23 **B. Plaintiffs’ Complaints Are Not Moot Because Conflict of Interest Claims Are Not**
24 **Subject to the Validation Statutes**
- 25 **C. Plaintiffs’ Complaints Are Not Moot Since the Court Can Grant Plaintiffs**
26 **‘Effectual Relief’ Notwithstanding the Challenged Contracts Are Fully Performed**

27 ¹ Plaintiffs do not seek to recover to Balfour Beatty the \$1 Balfour Beatty paid to TUSD
28 under each of the Site Leases referenced in Plaintiffs’ complaints because TUSD is
legally entitled to keep all consideration received under the contracts that are void for
conflict of interest. San Diegans for Open Government v. HAR Construction, Inc. (2015)
240 Cal.App.4th 611, 616.

1 Moreover, the statute of limitation on Government Code § 1092(b) is 4 years after a plaintiff has
2 discovered, or in the exercise of reasonable care should have discovered, a violation of Government
3 Code § 1090. Plaintiffs filed their actions within 60 days of each of the contracts being awarded. This
4 Court can still grant Plaintiffs effectual relief i.e. enter judgment directing BBC to pay back to TUSD
5 all monies received under the challenged contracts regardless of whether the subject projects are
6 complete or not. As discussed herein below, 100% disgorgement is the automatic remedy required
7 by California law for a conflicted contract even if it has been fully executed and performed.

8 II. SUMMARY OF FACTS & PROCEDURE

9 Pursuant to the First Stipulated Set of Facts for Trial filed with the Court on December 27,
10 2018 Plaintiffs, BBC and TUSD stipulated to the following facts:

11	1. James D. McGee was a resident, voter and payer of taxes in TUSD at all times relevant to
12	this litigation.
13	2. G. Rick Marshall was a resident, voter and payer of taxes in TUSD at all times relevant to
14	this litigation.
15	3. G. Rick Marshall is a member and officer of California Taxpayers Action Network.
16	4. California Taxpayers Action Network was incorporated in California on April 8, 2014.
17	5. At all times relevant to this litigation California Taxpayers Action Network has been in
18	good standing as a corporation for purposes of maintaining this litigation.

19 A. Summary of Plaintiffs' Complaints and Cases

20 On February 19, 2013 MCGEE filed his "COMPLAINT TO RECOVER PUBLIC FUNDS
21 ILLEGALLY EXPENDED ON ACCOUNT OF: ...[inter alia]... (4) CONFLICT OF INTEREST"
22 (Case #YC06868) seeking to recover from BBC² all monies paid them by TUSD under 3 separate
23 Construction Services Agreements (Trial Exhibits 300, 303, 306) and Sublease Agreements (Trial
24 Exhibits 302, 305, 308) whereby BBC was to construct and lease back to TUSD building

25 ² All of Plaintiffs' operative complaints assert, and Plaintiffs will prove at trial, BBC is
26 and was formerly known as Barnhart, Inc., and Barnhart-Balfour Beatty, Inc., dba
27 Balfour Beatty Construction in prior dealings with TUSD and that BBC is one and the
28 same with said entities by merger, acquisition or otherwise such that any separateness of
said entities no longer exists such that all such entities are the alter egos of one another
and should be treated as one legally and equitably for purposes of the relief requested by
Plaintiffs.

1 improvements on TUSD's Hickory Elementary, Madrona Middle and North High School campuses.
2 MCGEE's operative complaint in Case #YC06868 is now his Third Amended Complaint ("TAC").

3 On May 15, 2014 Plaintiffs filed their "COMPLAINT TO RECOVER PUBLIC FUNDS
4 ILLEGALLY EXPENDED ON ACCOUNT OF: ...[inter alia]... (4) CONFLICT OF INTEREST"
5 (Case #YC069859) seeking to recover from BBC all monies paid them by TUSD under 2 separate
6 Construction Services Agreements (Trial Exhibits 309, 312) and Sublease Agreements (Trial Exhibits
7 311, 314) between TUSD and BBC whereby BBC was to construct and lease back to TUSD building
8 improvements on TUSD's Riviera Elementary and Towers Elementary School campuses. Plaintiffs'
9 operative complaint in Case #YC069859 is this Complaint ("Complaint").

10 On May 29, 2015 Plaintiffs filed their "COMPLAINT TO RECOVER PUBLIC FUNDS ON
11 VOID CONTRACTS DUE TO CONFLICTS OF INTEREST" (Case #YC070614) seeking to recover
12 from BBC all monies paid them by TUSD under 5 separate Construction Services Agreements and
13 Sublease Agreements between TUSD and BBC whereby BBC was to construct and lease back to
14 TUSD building improvements on TUSD's Edison Elementary, Yukon Elementary and Torrance High
15 School campuses. (Trial Exhibits 315 & 317). Within a few weeks TUSD and BBC rescinded their
16 Construction Services Agreements and Sublease Agreements relative to the 4 Edison Elementary and
17 Yukon Elementary school construction projects and a number of others Plaintiffs had not yet filed suit
18 on (Trial Exhibit 321 & 355) because of the June 1, 2015 Fifth District Court of Appeal decision in
19 Davis v. Fresno Unified School Dist. (2015) 237 Cal.App.4th 261 discussed below and the fact that
20 these projects had not yet started construction. TUSD and BBC proceeded with their Construction
21 Services Agreement and Sublease Agreement relative to the Torrance High School project because
22 it had already started construction. Plaintiffs' operative complaint in Case #YC070614 is their Second
23 Amended Complaint ("SAC").

24 **B. Summary of Facts Giving Rise to BBC's Conflict of Interest**

25 All of Plaintiffs' operative complaints assert, and Plaintiffs will prove at trial, the individual
26 Construction Services Agreements and Sublease Agreements referenced therein are void ab initio
27 because they violate California's statutory and common law government consultant conflict of
28 interest prohibitions. Because the Construction Services Agreements and Sublease Agreements

1 referenced in Plaintiffs complaints are void, Plaintiffs, as taxpayers, have standing and are entitled to
2 a judgment under Code of Civil Procedure 526a, Government Code § 1092 and common law directing
3 BBC to pay back to TUSD every single dollar BBC received from TUSD under those contracts, plus
4 interest, without any offset.

5 Like the medical malpractice plaintiff who was under anesthesia at the time of injury, Plaintiffs
6 have no direct personal knowledge of any of the facts which support their case because they were not
7 present nor privy to any of the conduct between TUSD and BBC. All of the evidence Plaintiffs have
8 to offer comes from TUSD and BBC or those working with them relative to their relationship and
9 actions between 2008 and present. That evidence establishes a prohibited conflict of interest under
10 California law that requires disgorgement of all monies TUSD paid to BBC under the challenged
11 Sublease Agreements and Construction Services Agreements based on, inter alia, the following facts
12 that will be proven at trial:

13 **1. Initial Use of The Construction Manager Multiple Prime Delivery Method**

14 Prior to August 15, 2008 TUSD issued a “Request for Proposals-Construction Management
15 Services-Multiple Prime” (“RFP”) (Trial Exhibit 178) seeking proposals from construction
16 management service firms to help TUSD use the Construction Manager Multi-Prime (“CMMP”)
17 delivery method to complete modernization of its existing school buildings, new construction projects,
18 special classroom projects, and athletic field improvements all funded from the proceeds of general
19 obligation bond measures Y & Z on the November 4, 2008 ballot. Under the CMMP delivery method
20 TUSD contracts directly with multiple different trade contractors to provide the labor, materials and
21 equipment necessary to complete specific scopes of work defined in “Bid Packages” to complete a
22 particularly defined school facility construction project whose plans and specification are first
23 reviewed and approved by the California Division of State Architect as required by the California Field
24 Act.³

25
26 ³ Pursuant to Education Code 17281, Article 3 (17280-17316) together with Article 6
27 (commencing with Section 17365), and Article 7 (commencing with Section 81130) of
28 Chapter 1 of Part 49, shall be known and may be cited as the “Field Act.” The Field Act
was one of the first pieces of legislation that mandated earthquake resistant construction
(specifically for schools in California) in the United States. The Field Act had its genesis
in the 6.3 magnitude 1933 Long Beach earthquake which occurred on March 10 of that

1 On August 15, 2008 BBC (under the name of Barnhart Inc.) submitted a Construction
2 Management Services Proposal (Trial Exhibit 179) in response to TUSD’s RFP outlining all of BBC’s
3 professional qualifications and describing the services it would provide TUSD if selected. In its
4 proposal BBC outlined how it was most qualified and would perform for TUSD the preliminary
5 discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and
6 solicitation for bids relative to TUSD’s projects to be constructed with TUSD’s Measure Y & Z bond
7 funds.

8 On August 26, 2008 BBC gave a power point presentation to TUSD where is noted it was the
9 6th largest education builder in the nation; was one of the top 30 largest Construction Managers in the
10 nation; and had “worked on over 200 school projects within the last 5 years utilizing the CM delivery
11 method.” BBC also asserted it had “Hundreds of Projects Completed Under DSA Jurisdiction [with]
12 First-hand Knowledge of Approval Process [and] Ability to Assist Architect with Approvals.” (Trial
13 Exhibit 147).

14 On September 2, 2008 TUSD and BBC (under the name of Barnhart, Inc.) entered into an
15 “Agreement...For Construction Management Services for Measures Y & Z Bond Construction
16 Program” (“Construction Management Services Agreement”) (Trial Exhibit 104) whereby TUSD hired
17 BBC to “perform Construction Management Services necessary for the New Construction and
18 Modernizations projects ("Projects") on the sites of the existing Schools ("Project Sites") depicted and
19 described on Exhibit ‘A’ on a multiple prime contract basis.” The Construction Management Services
20 Agreement reiterated in Paragraph 2.1.1 “The Projects shall be accomplished by means of multiple
21 prime contracts (“Trade Contracts”), utilizing multiple component contractors (“Trade Contractors”)”
22 and further stated in Paragraph 1.E of Exhibit C Scope of Services: “The Construction Manager shall
23 not be a bidder on any Trade Contract within the Project.” BBC’s Construction Management Services
24 Agreement with TUSD has been renewed annually from 2010 to present. (Trial Exhibit 293) and BBC

25
26
27 year and destroyed or rendered unsafe 230 school buildings in Southern California.
28 https://en.wikipedia.org/wiki/Field_Act. As of 2010, the Field Act currently applies to
the design, construction and renovation of all K–12 school buildings and community
college buildings in California. The DSA remains the primary enforcement body. *Id.*

1 has continuously performed and been paid for these construction management services under this
2 contract at all times relevant to this litigation and up through today. (Trial Exhibit 33 & 34).

3 Under the Construction Manager Multiple Prime delivery method TUSD contracts directly with
4 individual Trade Contractors in compliance with the requirements of Public Contract Code §§ 20110-
5 20118.5 to complete specifically defined Bid Packages of work based on the DSA approved plans and
6 specifications for a particularly defined construction project. Pursuant to Public Contract Code §
7 20112 TUSD is required to publish a public notice inviting bids on its Bid Packages as follows:

8 For the purpose of securing bids the governing board of a school district shall publish
9 at least once a week for two weeks in some newspaper of general circulation published
10 in the district, or if there is no such paper, then in some newspaper of general
11 circulation, circulated in the county, and may post on the district's Web site or through
12 an electronic portal, a notice calling for bids, stating the work to be done or materials
or supplies to be furnished and the time when and the place and the Web site where
bids will be opened. Whether or not bids are opened exactly at the time fixed in the
public notice for opening bids, a bid shall not be received after that time. The
governing board of the district may accept a bid that was submitted either electronically
or on paper.

13 Pursuant to Public Contract Code §§ 20111(b)(1) TUSD is only allowed to award contracts for its Bid
14 Packages to the lowest responsible bidder or else reject all bids and start the notice and sealed bidding
15 process all over again:

16 The governing board shall let any contract for a public project, as defined in
17 subdivision (c) of Section 22002⁴, involving an expenditure of fifteen thousand dollars
18 (\$15,000) or more, to the lowest responsible bidder who shall give security as the board
requires, or else reject all bids. All bids for construction work shall be presented under
19 sealed cover, and shall be accompanied by one of the following forms of bidder's
security:

- 20 (A) Cash.
21 (B) A cashier's check made payable to the school district.
22 (C) A certified check made payable to the school district.
23 (D) A bidder's bond executed by an admitted surety insurer, made payable to the school
district.

24 (2) Upon award to the lowest bidder, the security of an unsuccessful bidder shall be
25 returned in a reasonable period of time, but in no event shall that security be held by
26 the school district beyond 60 days from the time the award is made.

27 To facilitate the preparation of plans and specification and the solicitation of bids for each of
28 TUSD's projects BBC issued individual Preconstruction Service Proposals for BBC to provide on a

⁴ Public Contract Code 22002(c) defines project as:
(1) Construction, reconstruction, erection, alteration, renovation, improvement,
demolition, and repair work involving any publicly owned, leased, or operated facility.
(2) Painting or repainting of any publicly owned, leased, or operated facility.

1 project by project basis the preconstruction services specified therein in addition to the services already
2 required by its Construction Management Services Agreement. Each of BBC's Preconstruction
3 Service Proposals promised TUSD:

4 Working together as a team, we are confident your projects will receive the highest
5 quality management, coordination, oversight and technical construction expertise.

6 Thank you for the opportunity to present our proposal and we look forward to
7 continuing our successful and effective partnership.

8 BBC provided preconstruction proposals and services for TUSD's projects which are not the subject
9 of this litigation (Trial Exhibits 519 & 520) as well as for the projects which are the subject of this
10 litigation (Trial Exhibits 521 & 522) for which BBC was paid by TUSD. (Trial Exhibits 130, 132,
11 134, 136, 138, 164).

12 **2. The Transition from Construction Manager Multiple Prime Delivery Method to
13 the Lease-Leaseback Delivery Method**

14 The Minutes for TUSD's February 7, 2011 Board of Education meeting (Trial Exhibit 210)
15 state under the "STAFF PRESENTATIONS AND INFORMATION" section on page 2 that:

16 Gil Fullen and John Bemardy from Barnhart, Balfour Beatty presented information to
17 the Board on Lease-Leaseback projects. District council [sic], Lindsey Thorson, Esq.
18 of AALRR answered questions from the Board on the process.

19 At this February 7, 2011 meeting BBC in its Staff capacity to TUSD presented a "Lease-Leaseback"
20 power point presentation that informed the TUSD Board of Education about the Lease-Leaseback
21 ("LLB") delivery method and said "Provides Owner with a number of benefits not possible within
22 other alternate delivery options" and "Award of subcontractors is not based on low price only." (Trial
23 Exhibit 209).

24 On February 22, 2011, following the foregoing "STAFF PRESENTATIONS AND
25 INFORMATION" about the Lease-Leaseback delivery method by BBC and TUSD's attorneys in this
26 matter Atkinson, Andelson, Loya, Ruud & Romo, TUSD's Superintendent and Deputy Superintendent
27 for Administrative Services submitted information and recommendation to the TUSD Board of
28 Education (Trial Exhibit 212) as follows:

Board of Education authorization is requested to approve the use of the Lease-Lease
Back (LLB) construction project methodology with Barnhart Balfour Beatty for
specific modernization/construction projects for Measure Y and Measure Z.

1 LLB is a construction methodology that allows the District to enter into a contract for
2 construction services that provides for a Guaranteed Maximum Price (GMP). This
3 GMP significantly reduces change orders and allows the general contractor (Barnhart)
4 to be more selective in the assignment of subcontractors used for the project.

5 Specific contracts utilizing LLB will be brought to the Board on an individual basis for
6 approval and will be funded through Torrance Unified School District General
7 Obligation Bond Measure Y and Measure Z.

8 The Minutes of TUSD's February 22, 2011 Board of Education meeting evidence the following result:

9 Motion was made by Mr. Steffen, seconded by Mr. Wermers, that authorization be
10 given to approve the utilization of a Lease-Lease Back construction methodology with
11 Barnhart Balfour Beatty for specific Measure Y and Measure Z modernization/
12 construction projects funded through Torrance Unified School District General
13 Obligation Bond Measure Y and Measure Z. Motion unanimously carried.

14 The foregoing approval of using the LLB delivery method was limited to specific Measure Y
15 and Measure Z modernization/construction projects to be determined on a case by case basis going
16 forward since TUSD continued to use the CMMP delivery method after February 2011. (Trial
17 Exhibits 346, 454).

18 The first 3 LLB delivery method Construction Service Agreements and Sublease Agreements
19 which are the subject of this Action ⁵ were awarded by TUSD on December 19, 2012. (Trial Exhibit
20 219). They are the subject of TUSD Resolutions dated the same day (Trial Exhibits 222-224) which
21 state in relevant part:

22 WHEREAS, the Torrance Unified School District ("District") desires to construct
23 improvements on the Madrona Middle School campns, as more particularly described
24 in Exhibit "A" attached hereto and incorporated herein by this reference (the "Site"),
25 as a lease-leaseback project whereby the District will lease the Site which the District
26 owns to Balfour Beatty Construction ("Builder") who will construct the Project thereon
27 and lease the Project and underlying Site back to the District;

28 ...

Section 2. Site Lease and Sublease. The form of agreements entitled "Site Lease,"
"Sublease" and "Construction Services Agreement," each presented to this meeting and
each to be entered into by and between the District and Builder which together provide
generally for (i) the lease by the District of the Site to Builder, (ii) the sublease of the
Site and the lease of the Project by Builder to the District, and (iii) the payment of
certain lease payments by the District under the Sublease in an amount equal to the
aggregate construction costs for the Project as set forth in the Construction Services

⁵ The remaining Construction Service Agreements and Sublease Agreements and related
resolutions which are the subject of this Action are essentially identical and are omitted
from Plaintiffs' Trial Brief for space and efficiency but will be admitted as exhibits at
trial.

1 Agreement (“Lease Payments”) are hereby approved subject to any revisions which are
 2 acceptable to both District's Superintendent (“Superintendent”) and District’s legal
 3 counsel. The Superintendent or their designee is hereby authorized and directed, for
 and in the name and on behalf of the District, to execute and deliver to Builder such
 agreements, once finalized, pursuant to the delegation of authority provided for hereby.

4 The following is a summary of the TUSD Resolutions authorizing the use of the LLB delivery
 5 method on the particular projects and awarding of the Construction Service Agreements and Sublease
 6 Agreements at issue in this Action to BBC with corresponding case numbers:

Case	Project Name	Award Date	Resolution #	Trial Ex #
YC068686	Hickory Elementary School Modernization	12/19/2012	AS-03-12/13	223
YC068686	Madrona Middle School Modernization	12/19/2012	AS-04-12/13	224
YC068686	North High School Modernization	12/19/2012	AS-05-12/13	222
YC069859	Riviera Elementary School Modernization	3/17/2014	AS-09-13/14	225
YC069859	Towers Elementary School Modernization	3/17/2014	AS-10-13/14	226
YC070614	Torrance High School Modernization	3/31/2015	AS-16-14/15	227
YC070614	Edison Elementary School Modernization	5/18/2015	AS-18-14/15	410
YC070614	Yukon Elementary School Modernization	5/18/2015	AS-19-14/15	411
YC070614	Edison Elementary School Infrastructure	5/18/2015	AS-20-14/15	412
YC070614	Yukon Elementary School Infrastructure	5/18/2015	AS-21-14/15	413

15 As each of the foregoing LLB delivery method projects were completed TUSD would record
 16 Notices of Completion with the Los Angeles County Recorder stating the date that the particular
 17 project was substantially complete:

Court Case#	Project Name	TUSD Resolution #	Completion Date per NOC	Evidence
YC068686	Hickory Elementary School Modernization	AS-03-12/13	2/14/2014	392
YC068686	Madrona Middle School Modernization	AS-04-12/13	4/25/2014	393
YC068686	North High School Modernization	AS-05-12/13	3/31/2015	397
YC069859	Riviera Elementary School Modernization	AS-09-13/14	3/31/2015	394
YC069859	Towers Elementary School Modernization	AS-10-13/14	3/31/2015	395
YC070614	Torrance High School Modernization	AS-16-14/15	10/7/2017	396
YC070614	Edison Elementary School Modernization	AS-18-14/15	Rescinded	355
YC070614	Yukon Elementary School Modernization	AS-19-14/15	Rescinded	355
YC070614	Edison Elementary School Infrastructure	AS-20-14/15	Rescinded	355
YC070614	Yukon Elementary School Infrastructure	AS-21-14/15	Rescinded	355

1 **C. Facts Relating to BBC's Government Code § 1092.5 Affirmative Defense**

2 First, BBC was not factually a "Lessee"⁶ under the Sublease Agreements and Construction
3 Services Agreements that Plaintiffs seek disgorgement of all monies paid by TUSD to BBC under.
4 Instead, BBC was the "Lessor" and "Contractor" under the at issue Sublease Agreements and
5 Construction Services Agreements respectively. In contrast, BBC was only a "Lessee" under the Site
6 Leases such that Plaintiffs' operative complaints do not seek disgorgement thereunder because
7 Plaintiffs do not seek that BBC receive a return of the \$1 it "paid" to TUSD under each Site Lease.
8 (Trial Exhibit 301, 304, 307, 310, 313 & 316).

9 Moreover, BBC did not factually 'pay value'⁷ to TUSD under the foregoing 3 Site Leases
10 where it was a lessee because those Site Leases had already terminated prior to BBC's payment
11 thereon based on BBC's completion of the corresponding projects and TUSD's payment of the last
12 Sublease Agreement payments and corresponding Construction Services Agreement payments thereon
13 years prior.

14 Specifically, Each Section 3 of the Site Leases at issue states:

15 The term of this Site Lease shall terminate as of the last day of the Sublease, unless
16 sooner terminated as provided thereby.....Without limiting any other term or provision
17 of the Sublease Agreement or Construction Services Agreement between the parties,
18 at the termination of this Site Lease, natural or otherwise, title to the Site, and any
19 improvements constructed thereon by the Lessee, shall vest in the District in
20 accordance with Education Code section 17406.

21 Each Section 3 of the Sublease Agreements at issue states:

22 The term of the Sublease shall terminate upon the completion of the Project and
23 payment of the last Sublease Payment, unless sooner terminated as hereinafter
24 provided.

25 That BBC did not pay its required \$1 Site Lease payments on the following projects before the
26 projects were completed and TUSD had made its final payment to BBC under the Construction
27 Services Agreements and Sublease Agreements relative to those projects is evidenced by the
28 following:

6 First factual predicate of the Government Code 1092.5 defense asserted by BBC.

7 Another factual predicate of the Government Code 1092.5 defense asserted by BBC.

Project Name	BBC Site Pymnt to TUSD	Evidence	TUSD Final Pymnt to BBC	Evidence
Hickory Elementary School Modernization	9/20/2017	500	7/10/2014	445 p. 8804
Madrona Middle School Modernization	9/20/2017	501	11/10/2014	446 p 9092
North High School Modernization	9/20/2017	502	2/17/2016	447 p 10284

Finally BBC was factually not “without actual knowledge of a violation of any of the provisions of Section 1090”⁸ In the weeks prior to the December 19, 2012 award of the first 3 Construction Services Agreements and Sublease Agreements challenged by MCGEE in Case # YCO68686, BBC was provided an “Opposition to Barhart-Balfour Beatty, Inc., dba Balfour Beatty Construction's Special Motion to Strike Stewart Payne's Cross-Complaint Pursuant to Code of Civil Procedure Section 425.16” in San Diego Superior Court Case # 37-2012-00076752 (the “Sweetwater Case”) (Trial Exhibit 6) where it was advised of California’s consultant conflict of interest laws and prohibitions that applied to them relative to TUSD in the following passage from the Sweetwater Case Opposition:

1. Barnhart is Legally Precluded from an Award of the Lease Leaseback Contracts Because it Was Previously a Professional Consultant to the District Relative to the Development of Its Scope of Work Under the Challenged Contracts

- a. Policy and Application of California’s Conflict of Interest Laws

In *Schaefer v. Berinstein*, the California Appellate Court held,

“Officers of a municipal corporation, ..., are agents of the corporate body and may not use their official position for their own benefit, or for the benefit of anyone except the municipality itself....Such contracts are held void as against public policy, both on the ground that the interest of the officer interferes with the unbiased discharge of his duty to the public and also that a contract in violation of an express statutory provision is void.” (1956) 140 Cal.App.2d 278, 290.

The *Schaefer* court further held that a person merely in an advisory position to a public entity was subject to the conflict of interest rules.

Id. at 291. Such contracts are held void as against public policy, both on the ground that the interest of the officer interferes with the unbiased discharge of his duty to the public and also that a contract in violation

⁸ Final factual predicate of the Government Code 1092.5 defense asserted by BBC.

1 of an express statutory provision is void. City of Oakland v. California
2 Const. Co. (1940) 15 Cal.2d 573, 576. FN6

3 FN 6 The United States Supreme Court has summarized rational
4 behind the conflict of interest doctrine that precludes those who are
5 charged with serving a public entity from having an interest in the
6 public entity's contracts as follows: "The moral principle upon which
7 [public entity conflict of interest laws are based] has its foundation in
8 the Biblical admonition that no man may serve two masters, Matt. 6:24,
9 a maxim which is especially pertinent if one of the masters happens to
10 be economic self-interest. . . . The statute is thus directed not only at
11 dishonor, but also at conduct that tempts dishonor. This broad
12 proscription embodies a recognition of the fact that an impairment of
13 impartial judgment can occur in even the most well-meaning men when
14 their personal economic interests are affected by the business they
15 transact on behalf of the Government. To this extent, therefore, the
16 statute is more concerned with what might have happened in a given
17 situation than with what actually happened. It attempts to prevent
18 honest government agents from succumbing to temptation by making
19 it illegal for them to enter into relationships which are fraught with
20 temptation." *United States v. Mississippi Valley Generating Co.*,
21 (1961) 364 U.S. 520, 549-550 cited with approval in *Stigall v. City of*
22 *Taft* (1962) 58 Cal.2d 565 California Supreme Court invalidated
23 contract to construction company whose principal had a hand in
24 planning of the project and development of plans & specifications for
25 the city. *Id* at 571.

26 Further BBC was expressly informed by the Sweetwater Case Opposition:

27 Under California law persons in an advisory position to public entities fall within the
28 scope of the conflict of interest laws. In particular, independent contractors whose
official capacities carry the potential to exert influence over the contracting decisions
of a public agency may not have personal interests in that agency's contracts. *California*
Housing Finance Agency v. Hanover/California Management & Accounting Center,
Inc. (2007) 148 Cal.App.4th 682, 693; *Hub City Solid Waste Services, Inc. v. City of*
Compton (2010) 186 Cal. App.4th 1114, 1124-1125.

Based on the foregoing, BBC had actual knowledge as of November 2012 (prior to TUSD's
December 19, 2012 award of the first 3 challenged Construction Services and Sublease Agreements)
that Government Code § 1090 applied to it as a government consultant to TUSD and that it would be
violating the provisions of Government Code § 1090 if it were to receive an award of the challenged
Sublease Agreements and Construction Services Agreements that are the subject of MCGEE's
complaint in Case YC068686.

Further, BBC was factually not "without actual knowledge of a violation of any of the
provisions of Section 1090" when it received the second award of Construction Services Agreements
and Sublease Agreements from TUSD on March 17, 2014 which are the subject of Plaintiffs'

1 complaint in Case #YC069859 because that award was after the Sweetwater Opposition discussed
2 above and BBC was having internal discussions about passing on construction contracts where they
3 or one of their sister Balfour entities were involved in the design or management. (Exhibits 194, 195).

4 Finally, BBC was factually not “without actual knowledge of a violation of any of the
5 provisions of Section 1090” when it received the third award of Construction Services Agreements
6 and Sublease Agreements from TUSD on March and May 2015 which are the subject of Plaintiffs’
7 complaint in Case #YC070614 because that award was after the Sweetwater Opposition discussed
8 above and BBC was having internal discussions about passing on construction contracts where they
9 or one of their sister Balfour entities were involved in the design or management. (Exhibits 194, 195)
10 and after BBC had further internal discussions and emails about such conflicts of interest. (Exhibits
11 196, 197 & 198) and it is after the briefing and January 23, 2015 Second District Court of Appeal
12 decision McGee v. Torrance Unified School District (Cal. Ct. App., Jan. 23, 2015, No. B252570) 2015
13 WL 301918 in Case # YC068686 (Trial Exhibits 421, 422 & 423).

14 **III. SUMMARY OF LAW**

15 During the course of this litigation counsel for Plaintiffs obtained the following Appellate
16 Court decisions, discussed in more detail below, which are controlling in this matter:⁹

- 17 1. McGee v. Torrance Unified School District (Cal. Ct. App., Jan. 23, 2015, No.
18 B252570) 2015 WL 301918 (“McGee I”).
- 19 2. Davis v. Fresno Unified School Dist. (2015) 237 Cal.App.4th 261, as modified June
20 19, 2015. Review Denied August 26, 2015 (“Davis”).
- 21 3. San Diegans for Open Government v. HAR Construction, Inc. (2015) 240 Cal.App.4th
22 611 (“SANDOG”).
- 23 4. McGee v. Balfour Beatty Construction, LLC (2016) 247 Cal.App.4th 235 (“McGee
24 II”).
- 25 5. California Taxpayers Action Network v. Taber Construction, Inc. (2017) 12
26 Cal.App.5th 115 (“Taber”).

27
28 ⁹ One or more counsel for Defendants were representing a defendant in each of the appeals
as well.

1 Moreover, in a separate and subsequent government consultant conflict of interest decision
2 People v. Superior Court (Sahlolbei) (2017) 3 Cal.5th 230 the California Supreme Court summarizes
3 at pages 236-241 the history and public policies behind California’s government consultant conflict
4 law applicable in this case:

5 In the ordinary case, a contractor who has been retained or appointed by a public entity
6 and whose actual duties include engaging in or advising on public contracting is
7 charged with acting on the government's behalf. Such a person would therefore be
8 expected to subordinate his or her personal financial interests to those of the public in
9 the same manner as a permanent officer or common law employee tasked with the
10 same duties. (See 46 Ops.Cal.Atty.Gen., supra, at p. 79 [“[Section 1090] require[s] of
11 those who serve the public temporarily the same fealty expected from permanent
12 officers and employees.”].)...

13 ...

14 “...we and other courts have repeatedly held that conflicts statutes look past “[l]abels
15 and titles and fictional divides... What mattered was that he or she was in a position to
16 influence how a public entity spends the public's money.” Id. at 240-241.

17 In Sahlolbei, the Supreme Court explained that California’s Government Consultant Conflict
18 Laws trace their origins back to Schaefer v. Berinstein (1956) 140 Cal.2d 278 (“Schaefer”) and Terry
19 v. Bender (1956) 143 Cal.App.2d 198 (“Terry”). Id. 236. “Schaefer said that “[s]tatutes prohibiting
20 personal interests of public officers in public contracts are strictly enforced” and that what mattered
21 was that the [consultant] was hired to advise on city contracting. (Schaefer, at p. 291, 295 P.2d 113
22 [“A person merely in an advisory position to a city is affected by the conflicts ... rule.”].)” Sahlolbei,
23 supra, 3 Cal. 5th at 240-241.

24 Sahlolbei noted the “Legislature endorsed Schaefer's holding and reasoning when it amended
25 section 1090 in 1963 to include ‘employees.’” Id. In discussing the legislative history of the 1963
26 amendment of Section 1090, Sahlolbei said:

27 In an appendix to its report on the 1963 amendments, the Assembly Interim Committee
28 on Government Organization cited Schaefer for its view that “[s]tatutes prohibiting
personal interest of public officers in public contracts are strictly enforced. (Schaefer
v. Berinstein (1956) 140 Cal.App.2d 278, 291 [295 P.2d 113].)” (Assem. Interim Com.
on Government Organization, Rep. on Conflict of Interest (Jan. 1963) p. 32 (Assembly
Report).) Then, in a subsection titled Advisory Position, the committee repeated
verbatim Schaefer's holding that “[a] contract may be contrary to public policy where
an official in a position to advise or influence officials making the contract has a
personal interest in the contract. A person in an advisory position to a city is affected
by the conflicts of interest rule.... (Special Counsel) Schaefer v. Berinstein, [at p.] 291
[295 P.2d 113].” (Assem. Rep., at p. 37, italics added.)

 In light of this history, we conclude that the Legislature understood section 1090's
reference to “officers” to apply to outside advisors with responsibilities for public

1 contracting similar to those belonging to formal officers, notwithstanding Spreckels's
2 definition of “public officer” for other statutes. It stands to reason that when the
3 Legislature added the term “employees” to section 1090, it similarly intended to
4 include outside advisors with responsibilities for public contracting similar to those
5 belonging to formal employees, notwithstanding the common law distinction between
6 employees and independent contractors. (See Assem. Rep., supra, at p. 32 [recognizing
7 that the “tendency of the law is to widen rather than circumscribe the scope of ‘conflict
8 of interest’ statutes such as Section 1090”].) At the very least, it does not seem
9 plausible to believe that the Legislature, in “widen[ing]” section 1090 to include
10 “employees,” meant in the same breath to also “circumscribe” section 1090 by
11 categorically excluding outside advisors previously understood to be within the
12 statute's scope. (Assem. Rep., supra, at p. 32.)

13 This understanding of the 1963 amendments to section 1090 is almost as old as the
14 amendments themselves. Writing two years after the amendments, the Attorney
15 General observed that Schaefer and Terry had applied “the policy, if not the letter, of
16 section 1090” to include outside advisors. (46 Ops.Cal.Atty.Gen. 74, 79 (1965).) The
17 Attorney General concluded that “the Legislature in ... amending section 1090 to
18 include ‘employees’ intended to apply the policy of the conflicts of interest law, as set
19 out in the Schaefer and Terry cases, to independent contractors who perform a public
20 function and to require of those who serve the public temporarily the same fealty
21 expected from permanent officers and employees.” (Ibid.) The Attorney General
22 reasoned that “a statute ... is presumed to have been enacted or amended in the light of
23 such existing judicial decisions as have a direct bearing upon it.” (Ibid.)

24 The Courts of Appeal have generally agreed with the Attorney General. (See
25 Campagna v. City of Sanger (1996) 42 Cal.App.4th 533, 541–542, 49 Cal.Rptr.2d 676
26 (Campagna) [outside attorney was covered by section 1090]; People v. Gnass (2002)
27 101 Cal.App.4th 1271, 1287, fn. 3, 1302, fn. 10, 125 Cal.Rptr.2d 225 (Gnass)
28 [accepting that an outside attorney could be covered by section 1090, though the parties
did not litigate the question]; California Housing Finance Agency v.
Hanover/California Management and Accounting Center, Inc. (2007) 148 Cal.App.4th
682, 693, 56 Cal.Rptr.3d 92 (California Housing) [outside attorney, though an
independent contractor, was covered by section 1090]; Hub City Solid Waste Services,
Inc. v. City of Compton (2010) 186 Cal.App.4th 1114, 1125, 112 Cal.Rptr.3d 647 (Hub
City) [independent contractor who provided waste management services came within
section 1090]; Davis v. Fresno Unified School District (2015) 237 Cal.App.4th 261,
300, 187 Cal.Rptr.3d 798 [extending section 1090 to corporate consultants].) Only the
courts in Christiansen and in this case have found that section 1090 categorically
excludes independent contractors. We find that Campagna, California Housing, Hub
City, Davis, and the Attorney General's opinion more accurately reflect the
Legislature's intent than does Christiansen, which did not consider the legislative
history or the purposes of section 1090.

29 Sahlolbei, supra, 3 Cal. 5th at 237-238. Sahlolbei concluded that independent contractors like BBC
30 who act as consultants to public entities such as TUSD are subject to Section 1090's prohibitions:

31 ...We conclude that the Legislature did not intend to exclude from the scope of section
32 1090 outside advisors to public entities solely because they are independent contractors
33 at common law.

34 This conclusion is consistent with, and helps give effect to, the purposes of section
35 1090. Section 1090 “codifies the long-standing common law rule that barred public
36 officials from being personally financially interested in the contracts they formed in
37 their official capacities.” (Lexin, supra, 47 Cal.4th at p. 1072, 103 Cal.Rptr.3d 767, 222

1 P.3d 214; accord, Stockton Plumbing & Supply Co. v. Wheeler (1924) 68 Cal.App.
2 592, 597, 229 P. 1020.) The common law rule, like section 1090, protects the actual
3 and perceived integrity of the public fisc. As a result, liability—even criminal
4 liability—can accrue without “actual fraud, dishonesty, unfairness or loss to the
5 governmental entity.” (Honig, supra, 48 Cal.App.4th at p. 314,...)

6 ...
7 Recognizing the prophylactic purposes of conflicts statutes, the case law makes clear
8 that section 1090 should be construed broadly to ensure that the public has the official's
9 “absolute loyalty and undivided allegiance.” (Stigall v. City of Taft (1962) 58 Cal.2d
10 565, 569, 25 Cal.Rptr. 441, 375 P.2d 289 (Stigall).) The focus is on the substance, not
11 the form, of the challenged transaction, “disregard[ing] the technical relationships of
12 the parties and look[ing] behind the veil which enshrouds their activities.” (People v.
13 Watson (1971) 15 Cal.App.3d 28, 37, 92 Cal.Rptr. 860.) To that end, we have held that
14 the “making” of a contract for the purposes of section 1090 includes “planning,
15 preliminary discussions, compromises, drawing of plans and specifications and
16 solicitation of bids,” and not just the moment of signing.

17 Sahlolbei, supra, 3 Cal. 5th at 239.

18 Under California Government Code § 1090 and common law government consultant conflict
19 of interest prohibitions a school district lease leaseback construction contract is void if the lease
20 leaseback construction contractor provided preconstruction services (i.e. engaging in the preliminary
21 discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and
22 solicitation for bids relative to the project to be constructed) for the school district relative to the lease
23 leaseback project. Specifically Davis stated:

24 Courts evaluating a conflict of interest claim under Government Code section 1090
25 must consider “(1) whether the defendant government officials or employees
26 participated in the making of a contract in their official capacities, (2) whether the
27 defendants had a cognizable financial interest in that contract,... Id. at 298.

28 ...[W]e conclude the allegations that Contractor served as a professional consultant to
Fresno Unified and had a hand in designing and developing the plans and
specifications for the project are sufficient to state that Contractor (1) was an
“employee” for purposes of Government Code section 1090 and (2) participated in
making the Lease–leaseback Contracts. Id. at 301.

[T]he FAC alleged that Fresno Unified and Contractor entered into the
Lease–leaseback Contracts pursuant to which Contractor agreed to build the project for
a guaranteed maximum price of \$36.7 million. These allegations are sufficient to state
that Contractor was “financially interested in” the Lease–leaseback Contracts for
purposes of Government Code section 1090, subdivision (a). Id.

Thus, under California law, if a construction contractor engaged as a professional consultant
provides preconstruction services to a school district relative to a lease leaseback construction project
they are deemed to have participated in the “making” of the contract for that construction project and

1 therefore are prohibited by Government Code 1090 and common law from being awarded a contract
2 to construct the project. In explaining its analysis and conclusion the Davis Court stated at pages 298:

3 The breadth of what it means to participate in the making of a contract is illustrated by
4 Stigall. In that case, a taxpayer filed an action seeking to have a contract for plumbing
5 work related to construction of a civic center declared invalid. (Stigall, supra, 58 Cal.2d
6 at p. 566, 25 Cal.Rptr. 441, 375 P.2d 289.) The trial court sustained a demurrer to the
7 complaint, concluding the taxpayer failed to allege facts showing a prohibited conflict
8 of interest. The Supreme Court reversed and directed the demurrer to be overruled. (Id.
9 at p. 571, 25 Cal.Rptr. 441, 375 P.2d 289.)

10 In Stigall, the complaint alleged the member of the city council in charge of the
11 council's building committee owned more than 3 percent of the stock of a plumbing
12 company and the building committee supervised the drawing of plans and
13 specifications for a civic center. (Stigall, supra, 58 Cal.2d at pp. 566–567, 25 Cal.Rptr.
14 441, 375 P.2d 289.) When the bids for the construction work were received and
15 opened, the council member's plumbing company was the low bidder for the plumbing
16 work. (Id. at p. 567, 25 Cal.Rptr. 441, 375 P.2d 289.) After objections were made to
17 awarding the contract to the council member's plumbing company, the council rejected
18 all bids and advertised for a new round of bidding. (Ibid.) Subsequently, the council
19 member resigned and the council awarded the construction contract to a general
20 contractor that had included a sub-bid for the plumbing work from the former council
21 member's plumbing company. (Ibid.)

22 The Supreme Court addressed the timing of the council member's resignation and
23 whether he “made” the contract entered into by the plumbing company. (Stigall, supra,
24 58 Cal.2d at pp. 568–569, 25 Cal.Rptr. 441, 375 P.2d 289.) The court determined the
25 use of technical terms and rules governing the making of contracts was not appropriate
26 and construed the word “made” broadly in light of the statutory objective to “limit the
27 possibility of any personal influence, either directly or indirectly which might bear on
28 an official's decision.” (Id. at p. 569, 25 Cal.Rptr. 441, 375 P.2d 289.) The court
concluded the term “made” encompassed the planning, preliminary discussions, and
drawing of plans and specification. (Id. at p. 571, 25 Cal.Rptr. 441, 375 P.2d 289.)

In addition to the violation of Government Code § 1090's prohibition of government consultant
conflicts of interest, the Davis Court also addressed common law conflict of interest violations of the
kind alleged in Plaintiffs' complaints by stating at page 301:

In Lexin, the Supreme Court stated that Government Code section 1090 “codifies the
long-standing common law rule that barred public officials from being personally
financially interested in the contracts they formed in their official capacities.” (Lexin,
supra, 47 Cal.4th at p. 1072, 103 Cal.Rptr.3d 767, 222 P.3d 214.) The statutes' overlap
with the common law rule is not completed because the statutes are concerned with
financial conflicts of interest and the common law rule encompassed both financial and
nonfinancial interests that could result in divided loyalty. (See Clark v. City of
Hermosa Beach (1996) 48 Cal.App.4th 1152, 1171, fn. 18, 56 Cal.Rptr.2d 223
[Political Reform Act of 1974 focuses on financial conflicts of interest while the
common law extended to noneconomic conflicts of interest].)

Because we have concluded the FAC stated a cause of action under Government Code
section 1090, it follows that Davis also has stated a common law claim for a conflict
of interest.

1 Likewise, in McGee II the Second District Court of Appeal said at page 247:

2 Section 1090 codifies the long-standing common law rule that barred public officials
3 from being personally financially interested in the contracts they formed in their
4 official capacities. Government Code section 1090 is concerned with ferreting out any
5 financial conflicts of interest, other than remote or minimal ones, that might impair
6 public officials from discharging their fiduciary duties with undivided loyalty and
7 allegiance to the public entities they are obligated to serve. Where a prohibited interest
8 is found, the affected contract is void from its inception...

6 Further, in McGee I the Second District Court of Appeal, citing to its prior decision in People v.
7 Vallerga (1977) 67 Cal.App.3d 847, 867 and footnote 5 therein, said at page 6:

8 The purpose of the prohibition is to prevent a situation where a public official would
9 stand to gain or lose something with respect to the making of a contract over which in
10 his official capacity he could exercise some influence.

10 Moreover, the Court in Taber stated at page 140:

11 The common law rule and section 1090 recognize the truism that a person cannot serve
12 two masters simultaneously. The evil to be thwarted by section 1090 is easily
13 identified: If a public official is pulled in one direction by his financial interest and in
14 another direction by his official duties, his judgment cannot and should not be trusted,
15 even if he attempts impartiality.

14 Thus under Taber, Davis and the McGee cases, it is incontrovertible that a school district
15 consultant who participated in the “making” of a leaseback construction contract by engaging in the
16 preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and
17 specifications and solicitation for bids relative to the project to be constructed by the leaseback
18 contract can not be awarded the leaseback contract for construction of the project and any leaseback
19 contract so awarded is void.

20 **A. BBC Is Automatically Liable For 100% Disgorgement Without Any Offset**

21 100% disgorgement is the remedy required by California law for a conflicted contract even if
22 it has been fully executed and performed. Specifically, in Thomson v. Call (1985) 38 Cal.3d 633 the
23 California Supreme Court considered on appeal the “question of what remedies are available once a
24 section 1090 violation is found and the fully performed underlying contract is adjudged void.” Id. at
25 638. The Thomson Court concluded:

26 Clearly, no recovery could be had for goods delivered or services rendered to the city
27 or public agency pursuant to a contract violative of section 1090 or similar
28 conflict-of-interest statutes. [Citations omitted] Moreover, the city or agency is entitled
to recover any consideration which it has paid, without restoring the benefits received
under the contract. Id. at 646-647.

1 The facts of this case represent but one of endless permutations generated by the basic
2 conflict-of-interest situation, and a different remedy could be tailored for each. The
3 trial court's approach adheres to precedent established by a long line of California
4 cases. It is consistent with the policy of strict enforcement of conflict-of-interest
5 statutes, it provides a strong disincentive for those officers who might be tempted to
6 take personal advantage of their public offices, and it is a bright-line remedy which
7 may be appropriate in many different factual situations. As we have seen, civil liability
8 under section 1090 is not affected by the presence or absence of fraud, by the official's
9 good faith or disclosure of interest, or by his nonparticipation in voting; nor should
10 these considerations determine the civil remedy.²⁸ For these reasons, and because of
11 the significant public policy goals which mandate strict enforcement of
12 conflict-of-interest statutes such as section 1090, we conclude that the remedy applied
13 by the trial court was justified, supported by both California case law and public policy.
14 Id. at 652.

15 The Second District Court of Appeal in Carson Redevelopment Agency v. Padilla (2006) 140
16 Cal.App.4th 1323 clarified that the 100% disgorgement required by Thomson is automatic at page
17 1336 where it stated:

18 Thomson does not expressly state that disgorgement of benefits received under a void
19 contract is automatic. However, Thomson gave its imprimatur to a long line of cases
20 applying that remedy, and it approved that remedy against Call. Thomson considered
21 a flexible rule, but then decided against it for policy reasons after considering the
22 unacceptable ramifications of such a rule. More recently, Finnegan held that a public
23 entity is entitled to recover any compensation it paid under a tainted contract without
24 restoring any of the benefits it received. (Finnegan, supra, 91 Cal.App.4th at p. 583,
25 110 Cal.Rptr.2d 552.) By logical import, Finnegan interpreted Thomson as a binding
26 precedent holding that the disgorgement remedy is automatic. For policy reasons, we
27 follow the lead of Finnegan. We do so for two reasons. Based on stare decisis, we pay
28 deference to the long history of consistent appellate case law recognized in Thomson.
Also, as a policy matter, it is the most effective way to give section 1090 all the teeth
that it needs.

For over 150 years in California, the rule has been that public contracts executed without full
compliance with all applicable legal requirements are: (1) void and unenforceable as being in excess
of the agency's power; (2) estoppel to deny their validity cannot be asserted; and (3) quasi-contract
recovery is not allowed. See, e.g., Zottman v. San Francisco (1862) 20 Cal. 96; Reams v. Cooley
(1915) 171 Cal. 150; Los Angeles Dredging Co. v. Long Beach (1930) 210 Cal. 348; Miller v.
McKinnon (1942) 20 Cal.2d 83, 87-88.

It is equally well settled that money paid under a void contract may be recovered in a suit filed
by a taxpayer on behalf of the governmental agency involved. Id. at 96. The Supreme Court noted "It
may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should
be denied him; but it should be remembered that he, no less than the officers of the corporation, when
he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is

1 complied with.” *Id.* at 89. Further, contractors are presumed to know the laws relating to public
2 contracting. *Id.* The rationale for the Court’s strict application of this doctrine is that to hold otherwise
3 would create a disincentive for contractors and public entities to follow the law. *Id.*

4 IV. SPECIFIC ISSUES FOR TRIAL

5 A. Plaintiffs’ Complaints Are Not Moot Because The Contracts at Issue Are Not the Kind 6 Which Are Subject to Validation

7 The Second District Court of Appeal has summarized the validation statutes and what they
8 apply to in Santa Clarita Organization for Planning & the Environment v. Abercrombie (2015) 240
9 Cal.App.4th 300 at pages 307–309 (emphasis added):

10 Code of Civil Procedure sections 860 through 870.5 set forth a procedure by which a
11 public agency (in a so-called “validation” claim or action) or anyone else (in a so-called
12 “inverse validation” or “reverse validation” claim or action) can file an in rem action
13 to obtain an expedited but definitive ruling regarding the validity (or invalidity) of the
14 public agency’s action. (Code Civ. Proc., § 860 et seq.; *308 *Planning & Conservation
15 League v. Department of Water Resources* (1998) 17 Cal.4th 264, 266, 70 Cal.Rptr.2d
16 635, 949 P.2d 488 (*Planning & Conservation League*) [noting that validation
17 proceedings are “a set of accelerated in rem procedures for determining the validity of
18 certain bonds, assessments and other agreements entered into by public agencies”];
19 *Kaatz, supra*, 143 Cal.App.4th at p. 19, 49 Cal.Rptr.3d 95). If the validation statutes
20 apply, the validation (or inverse validation) complaint must be filed within 60 days of
21 the act to be challenged (Code Civ. Proc., §§ 860 [validation claims or actions], 863
22 [inverse validation claims or actions]); notice of the claim must be served on “all
23 interested parties ... by publication” (*id.*, § 861); the claim or action must be given
24 preference over other civil actions (*id.*, § 867); any appeal of the trial court’s ruling
25 must be noticed within 30 days of the notice of entry of judgment (*id.*, § 870, subd.
26 (b)); and the judgment, if not appealed or once affirmed on appeal, “is forever binding
27 and conclusive ... against the agency and against all other persons” (*id.*, § 870, subd.
28 (a)).

29 Whether the special procedures of the validation statutes apply in the first place is the
30 trickier question. “The validation statutes ... do not specify the matters to which they
31 apply.” (*California Commerce Casino, supra*, 146 Cal.App.4th at p. 1423, 53
32 Cal.Rptr.3d 626; *Planning & Conservation League, supra*, 17 Cal.4th at p. 269, 70
33 Cal.Rptr.2d 635, 949 P.2d 488; *McLeod v. Vista Unified School Dist.* (2008) 158
34 Cal.App.4th 1156, 1165, 71 Cal.Rptr.3d 109 (*McLeod*)). **The validation statutes do
35 not apply just because a claim or action seeks to challenge--and thereby, in the
36 colloquial sense, to “invalidate”--an agency’s action.** (*Kaatz, supra*, 143 Cal.App.4th
37 at p. 19, 49 Cal.Rptr.3d 95 [“not all actions of a public agency are subject to
38 validation”].) Instead, we must ascertain whether the Legislature has elsewhere
39 declared the claim or action to be subject to the validation statutes. (Code Civ. Proc.,
40 § 860 [validation statute procedures apply to “any matter which under any other law
41 is authorized to be determined pursuant to this chapter”], italics added.) In assessing
42 whether a claim or action falls within the boundaries of a particular legislative
43 declaration that the validation statutes apply, we assess whether “ “[t]he gravamen of
44 a complaint and the nature of the right sued upon, rather than the form of the action or
45 relief demanded ... ’ ” falls within the language of the declaration. (*McLeod*, at p. 1165,
46 71 Cal.Rptr.3d 109, quoting *Embarcadero Mun. Improvement Dist. v. County of Santa
47 Barbara* (2001) 88 Cal.App.4th 781, 789, 107 Cal.Rptr.2d 6.)

1 ...

2 Along the same lines, Government Code section 53511 declares, more broadly, that the
3 validation statutes apply to “an action to determine the validity of [a local agency's]
4 bonds, warrants, contracts, obligations or evidences of indebtedness.” (§ 53511, subd.
5 (a), italics added.) We need not decide whether, as SCOPE has alleged, the Agency's
6 acquisition of Valencia converted it into a “retail water agency” under the Act section
7 15.1 (and thus subject to the validation procedures under § 16.1) because the Act
8 section 16.1 and Government Code section 53511 use identical language and the
9 California courts have read section 53511's reference to “contracts” “narrow[ly]” to
10 reach only those contracts that “are in the nature of, or directly relate[d] to a public
11 agency's bonds, warrants or other evidences of indebtedness.” (Kaatz, supra, 143
12 Cal.App.4th at pp. 37, 42, 49 Cal.Rptr.3d 95; Ontario v. Superior Court (1970) 2
13 Cal.3d 335, 343-344, 85 Cal.Rptr. 149, 466 P.2d 693 [concluding that the validation
14 statutes' legislative history counsels in favor of a narrow construction of “contract” in
15 § 53511];

16 This is consistent with California Commerce Casino, Inc. v. Schwarzenegger (2007) 146
17 Cal.App.4th 1406 where the Second District Court of Appeal stated at page 1429:

18 Guided by Ontario and other authorities, Kaatz found “[i]t is therefore clear that
19 ‘contracts’ under Government Code section 53511 should be assigned a restricted
20 meaning. Rather than authorizing proceedings to validate any public agency
21 contract—or even any contract constituting a financial obligation of a public agency
22 [fn. omitted]—the ‘contracts’ under Government Code 53511 are only those that are
23 in the nature of, or directly relate to a public agency's bonds, warrants or other
24 evidences of indebtedness.” (Kaatz, supra, 143 Cal.App.4th at p. 42, 49 Cal.Rptr.3d 95,
25 italics added.)

26 In deciding whether a municipal contract is the proper subject of a validation action, pursuant
27 to statute allowing local agency to bring action to determine validity of bonds, warrants, contracts,
28 obligations or evidences of indebtedness, a consideration is whether the lack of a prompt validating
procedure would impair the public agency's ability to operate and carry out its statutory purpose;
impairment encompasses the effects of the lack of a prompt validating procedure on the marketability
of public bonds, potential third-party lenders, higher interest rates, or even denial of credit, all of which
might hamper an agency's operations. Fontana Redevelopment Agency v. Torres (2007) 153
Cal.App.4th 902, 910.

The contracts at issue here are not subject to validation because they do not involve a challenge
to TUSD's “bonds, warrants or other evidences of indebtedness” as required by Santa Clarita and
California Commerce Casino. Here there is no indebtedness at all because each TUSD resolution
approving the challenged Construction Services Agreements and Sublease Agreement with BBC states
“WHEREAS, In order to ensure that money is sufficient to pay all costs will be available for the

1 Project the District desires to appropriate funds for the Project from its current fiscal year as provided
2 by the Sublease.” (Trial Exhibit 222-227) Further, the minutes for the meetings at which the
3 challenged contracts are awarded all state that they are “to be funded through Torrance Unified School
4 District General Obligation Bond Measure Y and Measure Z.” (Trial Exhibits 218, 348 & 350).
5 Finally, given the fact that the school construction projects that were the subject of the challenged
6 contracts were completed and available for use by TUSD without delay by BBC notwithstanding the
7 absence of resolution of Plaintiffs Actions the challenged contracts were not the proper subject of a
8 validation under Fontana.

9 **B. Plaintiffs’ Complaints Are Not Moot Because Conflict of Interest Claims Are Not Subject
10 to the Validation Statutes**

11 The Second District Court of Appeal also stated in Santa Clarita Organization for Planning &
12 the Environment v. Abercrombie (2015) 240 Cal.App.4th 300 at page 308:

13 Because the conflict-of-interest claim is brought pursuant to sections 1092, subdivision
14 (b) and 91003, neither of which are part of or subject to the validation statutes,
SCOPE's conflict of interest claim does not appear to be subject to the validation
statutes' shortened notice-of-appeal deadline.

15 The foregoing rule in SCOPE v. Abercrombie was recently adopted and followed by the Sixth
16 District Court of Appeal in Holloway v. Showcase Realty Agents, Inc. (2018) 22 Cal.App.5th 758
17 where the Court said at page 765–766:

18 At the outset, the Abercrombie court concluded that conflict of interest actions, such
19 as the present case, are not part of the validation statutes stating: “[b]ecause the conflict
20 of interest claim is brought pursuant to [Government Code] sections 1092, subdivision
21 (b) and 91003, neither of which are part of or subject to the validation statutes,
SCOPE's conflict of interest claim does not appear to be subject to the validation
statutes' shortened notice-of-appeal deadline.”

22 Based on the foregoing the Holloway Court concluded at page 766:

23 Based on ... Abercrombie's conclusion that conflict of interest actions are not
24 encompassed in the validations statutes, we find that Holloway was not required to
bring a validation action under Water Code section 30066 [relative to their conflict of
interest claims].

25 Likewise the First District Court of Appeal in California-American Water Co. v. Marina Coast
26 Water Dist. (2016) 2 Cal.App.5th 748, citing to SCOPE v. Abercrombie, stated at page 760:

27 ...[I]t is questionable whether a claim based on Government Code section 1090 is a
28 type of action subject to the validation statutes.

1 Based on the foregoing authorities, Plaintiffs' conflict of interest claims are not subject to the
2 validation statutes and therefore can not be moot thereby despite Defendants assertion to the contrary.
3 (Even if Plaintiffs conflict of interest claims were subject to the validation statutes they would not be
4 moot for the reasons stated in the following section.)

5 **C. Plaintiffs' Complaints Are Not Moot Since the Court Can Grant Plaintiffs 'Effectual
6 Relief' Notwithstanding the Challenged Contracts Are Fully Performed**

7 Despite Defendants' assertions to the contrary, this Court cannot find Plaintiffs' operative
8 complaints moot because the primary relief requested therein (100% disgorgement of all monies BBC
9 received from TUSD via the challenged contracts based on conflicts of interest) can still be granted.

10 In their Trial Briefs, Defendants generalize the Court's statements in Wilson & Wilson v. City
11 Council of Redwood City (2011) 191 Cal.App.4th 1559 into a universal rule of law that completion
12 of a project always moots a reverse validation action. Wilson will not bear that weight, and did not
13 purport to announce any such universal rule. The flaws in Defendants' argument is that it assumes that
14 all reverse validation actions are the same for purposes of mootness, and it tries to treat "mootness"
15 as some kind of idealized quality independent of the nature and issues of the action at hand.

16 Mootness is really just shorthand for "is there any meaningful relief that can still be granted?"
17 As Wilson put it, "The pivotal question in determining if a case is moot is therefore whether the court
18 can grant the plaintiff any effectual relief. If events have made such relief impracticable, the
19 controversy has become 'overripe' and is therefore moot." 191 Cal.App.4th at 1574 (citations omitted).

20 In Wilson, the relief granted by the trial court consisted of a retroactive invalidation of certain
21 public contracts, and a declaration that the city had lacked authority to enter into them. Id. at 1571.
22 (There were also some prospective items of relief, but the court separately held that they were unripe.)
23 The relief granted was therefore in the nature of historical criticism of the city's now-completed
24 actions, but without any real-world, present-day consequences. In other words, it was moot.

25 However, as Wilson recognizes, mootness must be judged in light of the relief sought. If there
26 remains relief available that would still be meaningful, the case is not moot. And that is precisely why
27 Defendants' reliance on Wilson must be rejected. Here, Plaintiffs seek a form of relief that is neither
28 meaningless nor moot, namely disgorgement of the funds BBC received from TUSD. It is analogous
to saying that while it may be moot to seek an injunction against a completed trespass, one may still

1 seek damages for it. Hence, in the context of this case, the question “is it moot?” can be rephrased as,
2 “is disgorgement an available remedy, notwithstanding that the challenged contracts have been fully
3 performed?”

4 On this question there is no contest. The issue was squarely decided in Thomson v. Call (1985)
5 38 Cal.3d 633. Government Code § 1090(a) prohibits officers or employees [including consultants]
6 from being “financially interested in any contract made by them in their official capacity.” The
7 Supreme Court ruled that disgorgement is available - indeed, required - in a § 1090 action even after
8 completion of the project. In Thomson the California Supreme Court stated “the primary issue
9 presented by this case: what is the appropriate remedy where a fully executed and performed contract
10 has been found to violate section 1090?....the city or agency is entitled to recover any consideration
11 which it has paid, without restoring the benefits received under the contract.” Id. at 646-647.

12 The facts of Wilson are that a law firm brought an action against “ the City Council of
13 Redwood City (City Council), the City of Redwood City (Redwood City), and the Redwood City
14 Redevelopment Agency (Redevelopment Agency) (hereafter collectively the City)¹⁰ to challenge the
15 approval and construction of a retail-cinema redevelopment project in Redwood City's downtown.
16 Wilson asked the court to invalidate resolutions enacted by the City Council and the Redevelopment
17 Agency and to void agreements entered into by the City to carry out the redevelopment.” Id. at 1563.
18 **Nowhere in Wilson is a conflict of interest alleged nor the corresponding remedy of disgorgement**
19 **sought against a defendant named in that action.** Instead, the prayer for relief “requested that the
20 court direct the City Council and the Redevelopment Agency to seek reimbursement “for all monies
21 illegally and improperly spent on the Project.” Id. at 1567. The foregoing relief is a remedy the
22 Wilson Court could not grant because “[i]t has long been held that a government entity's decision
23 whether to pursue a legal claim involves the sort of discretion that falls outside the parameters of waste
24 under section 526a and cannot be enjoined by mandate Daily Journal Corp. v. County of Los Angeles
25 (2009) 172 Cal.App.4th 1550, 1558. Instead the only relief the Wilson plaintiffs could obtain

26
27 ¹⁰ Neither the party that received the money from the city under the allegedly illegal
28 contract nor “All Persons Interested” in the action are recognized by the Wilson Court
as being parties to the action. They would have to be parties to the action in order to
grant disgorgement relief which is the remedy for illegal public entity contracts.

1 involved whether the developmental entitlements were proper since the party who received those
2 entitlements was not a party to the action.

3 Unlike in Wilson and the cases referenced therein, here Plaintiffs never wanted to stop the
4 construction of the subject projects.¹¹ Instead, Plaintiffs seek a determination and judgment against
5 BBC that the challenged contracts are void and it has to disgorge back to TUSD all monies TUSD paid
6 BBC thereunder based on common law and/or Government Code § 1090 conflicts of interest arising
7 out of the challenged contracts. Plaintiffs did not want to stop completion of the subject projects.
8 Wilson did not involve conflict of interest claims seeking disgorgement remedies as Plaintiffs’
9 complaints do. Likewise Millbrae School Dist. v. Super. Ct. (1989) 209 Cal.App.3d 1494 cited by
10 BBC only involved a challenge to a redevelopment plan and no claims of conflict of interest or
11 disgorgement as are present here.

12 The fact that the subject projects are complete is not dispositive in a conflict of interest case.
13 This Court can still grant Plaintiffs effectual relief i.e. enter judgment directing BBC to pay back to
14 TUSD all monies received under the challenged contracts regardless of whether the subject projects
15 are complete or not. 100% disgorgement is the remedy required by California law for a conflicted
16 contract even if it has been fully executed and performed.

17 Here Plaintiffs’ lawsuits name the contracting parties (TUSD and BBC) as defendants whereas
18 Wilson did not name the contracting party who may have received money and therefore Wilson could
19 not get any relief from that party. Moreover, based on Thomson v. Call, supra, Plaintiffs expressly
20 seek a judgment against BBC for disgorgement of all money paid by TUSD to BBC under the
21 challenged Sublease and Construction Services Agreements that are void on account of BBC’s
22 common law and/or Government Code § 1090 conflicts of interest. [TAC ¶¶ 14,15,17, 33-36;
23 Complaint ¶¶ 18, 19, 21, 61, 62; SAC ¶¶ 10.1, 14, 15, 33-36 and each Prayer for Relief ¶¶ 3-4].

24
25 ¹¹

In their operative complaints Plaintiffs did ask that “no further payments be made by DISTRICT to CONTRACTOR pending the disposition of this action.” [TAC ¶14; Complaint ¶ 18 and SAC ¶ 14]. However, Plaintiffs were agnostic as to whether such payments were made because they knew well settled law in California supported their requested remedy [Prayer for Relief ¶¶ 3-4] and required disgorgement of such payments when the challenged contracts were judicially declared void regardless of whether those contracts were fully executed and performed. Thomson v. Call (1985) 38 Cal.3d 633, 646-647.

1 Unlike the challenged contracts in Wilson which may have been voidable for failure to comply
2 with CEQA or other procedural prerequisites, the contracts at issue in this action are void ab initio due
3 to the conflicts of interest.¹² In Wilson and the cases cited therein the plaintiffs sought to stop
4 completion of projects and their actions were deemed moot once the projects were done because they
5 could no longer be stopped. Unlike Plaintiffs' actions here, no further relief was available to the
6 plaintiffs in Wilson and Millbrae so their complaints were moot. The Court here can grant the relief
7 requested by Plaintiffs so their complaints are not moot.

8 **D. BBC Should Not Be Allowed to Introduce Evidence of the Benefits of TUSD's Lease**
9 **Leaseback Arrangement or the Detriments of TUSD's Prior CM Multiple Prime**
10 **Arrangement**

11 The California Supreme Court stated a violation of section 1090 does not require actual
12 dishonesty or fraud or an actual loss to the public agency. Thomson v. Call (1985) 38 Cal.3d 633,
13 648. Whether a contract is fair, just and equitable to the public agency, or whether it is more
14 advantageous to the public entity than another contract has no bearing on the question of its
15 validity under California's conflict of interest prohibitions. Id. at 649. Specifically the Thomson
16 Court said

17 "It follows from the goals of eliminating temptation, avoiding the appearance of
18 impropriety, and assuring the city of the officer's undivided and uncompromised
19 allegiance that the violation of section 1090 cannot turn on the question of whether
20 actual fraud or dishonesty was involved. Nor is an actual loss to the city or public
21 agency necessary for a section 1090 violation." Thomson v. Call (1985) 38 Cal.3d
22 633, 648.

23 In short, if the interest of a public officer is shown, the contract cannot be sustained by
24 showing that it is fair, just and equitable as to the public entity. Nor does the fact that
25 the forbidden contract would be more advantageous to the public entity than others
26 might be have any bearing upon the question of its validity. Thomson v. Call (1985)
27 38 Cal.3d 633, 649

28 Likewise the Second District Court of Appeal in Schaefer v. Berinstein (1956) 140 Cal.App.2d
29 278 said at page 290:

30 ¹² "[A] contract in which a public officer is interested is void, not merely voidable."
31 Thomson v. Call (1985) 38 Cal.3d 633, 646. "A contract in violation of section 1090 is
32 void" not voidable McGee v. Balfour Beatty Construction, LLC (2016) 247 Cal.App.4th
33 235, 248. Further, the McGee Court stated "in contrast to the San Bernardino court, we
34 find Thomson v. Call, supra, 38 Cal.3d 633, 214 Cal.Rptr. 139, 699 P.2d 316 apposite
35 as our high court could not have concluded a contract was invalid in violation of section
36 1090 without implicitly concluding that the taxpayers challenging it had standing to
37 challenge it." Id.

1 The public officer's interest need not be a financial one; nor is it necessary to show
2 actual fraud, dishonesty, or loss to invalidate the transaction. The purpose of the statute
3 is to remove all indirect influence of an interested officer as well as to discourage
deliberate dishonesty. [citation omitted] It is not the character of the contract itself, but
the manner in which it is created, that renders it violative of sound public policy.

4 **E. Government Code §1092.5 Does Not Apply to Balfour Beatty Because They Were A
Direct Party to the Conflicted Contracts**

5 It is anticipated BBC will attempt to put on evidence at trial as to their Government Code §
6 1092.5 affirmative defense. Government Code § 1092.5 does not apply to *direct* parties to a conflicted
7 contract, as BBC is in this case. Instead, it applies only to innocent *third* parties impacted by, but not
8 directly involved in, the conflicted transaction. Otherwise, direct parties to conflicted public contracts
9 could structure their transactions to lease, sell, or encumber real property and thereby be immunized
10 against Government Code § 1090, which was enacted to protect the public (not the transgressors) from
11 conflicts of interest. The Legislature could not have intended that absurd result. Moreover, the
12 underlying legislative history, discussed below, makes abundantly clear that Government Code §
13 1092.5 applies only to “innocent third parties.” For these reasons, BBC’s assertion that they are
14 protected by Government Code § 1092.5 is wrong. Government Code § 1092.5 provides in relevant
15 part:

16 Notwithstanding Section 1092, no lease... [of] real property may be avoided, under the
17 terms of Section 1092, in derogation of the interest of a good faith lessee...where the
18 lessee... paid value and acquired the interest without actual knowledge of a violation
of any of the provisions of Section 1090. Gov. Code, § 1092.5

19 This Court’s interpretation of Government Code § 1092.5 is governed by the fundamental rules
20 of statutory construction. “Of primary importance, the court should ascertain the intent of the
21 Legislature so as to effectuate the purpose of the law. The provision under scrutiny must be given a
22 reasonable and common sense interpretation consistent with the apparent purpose and intention of the
23 lawmakers, practical rather than technical in nature, which, upon application, will result in wise policy
24 rather than mischief or absurdity. The court should take into account matters such as context, the
25 object in view, the evils to be remedied, the history of the times and of legislation upon the same
26 subject, public policy, and contemporaneous construction. . . .” San Diego Union v. City Council
27 (1983) 146 Cal.App.3d 947, 953-954.

1 Accordingly, to assist this Court in interpreting Section 1092.5, Plaintiffs have filed
2 concurrently herewith a complete copy of the legislative history – prepared by Legislative Intent
3 Service, Inc. – as Request for Judicial Notice In Support of Plaintiffs’ Trial Brief (“RJN”) Exhibit 2,
4 along with the declaration of the attorney who researched and provided those materials, attached to
5 the RJN as Exhibit 1.

6 The legislative history makes abundantly clear that Government Code § 1092.5 was never
7 intended to apply to first parties like BBC. To the contrary, it was only meant to apply to “innocent
8 third parties,” as evidenced by the legislative history of the statute itself. For instance, as explained
9 in the Background section of the Staff Analysis of Assembly Bill No. 532 (Bane):

10 The contractual conflict of interest law (Government Code [s]ection 1090, et seq.)
11 currently provides that state or local officers or employees shall not be financially
12 interested in any contract made by them in their official capacity. The purpose of the
13 law is to discourage fraud and self-dealing in public contracts.

14 Penalties for violations include (a) avoidance of the contract; (b) a fine of not more
15 than \$1,000; (c) imprisonment in the state prison; and (d) permanent disqualification
16 from holding public office.

17 Title companies and others have recently raised questions concerning the contract
18 avoidance provisions as they apply to **innocent third parties** who assume rights and
19 obligations in connection with a public contract to lease, sell, or encumber real
20 property.

21 For example, a lender who had no knowledge of illegality in making the contract might
22 have his trust deed security placed in jeopardy if the public agency or another party
23 sought to avoid the contract.

24

25 AB 532 applies an actual knowledge test, meaning that the **third party** must have
26 actual notice of the unlawful self-dealing of the public official. (RJN, Ex. 2, pp. 10-11.
27 [emphasis added].)

28 The foregoing legislative intent—that “AB 532 applies an actual knowledge test, meaning that
the third party must have actual notice of the unlawful self-dealing of the public official”—is repeated
consistently throughout the legislative history. (RJN, Ex. 2, pp. 12, 13, 15, 20, 21, 27, 47, and 48.)

 Plaintiffs acknowledges that “courts should start . . . with the actual language of the statute, and
if the text is clear as applied to a given case, and it does not fall into any of the exceptions, stop there.”
J.A. Jones Construction Co. v. Superior Ct. (1994) 27 Cal.App.4th 1568, 1575-1576. However,
ambiguous texts are another matter, and “[i]f something needs to be added or omitted to determine
how the statute should apply in a given case, [Code of Civil Procedure] section 1859 directs the court

1 to the intent of the Legislature in enacting that text.” *Id.* at p. 1576 [“If legislative intent is genuinely
2 reflected in the legislative history of a given bill, there is no good reason to ignore it. . . .”], citing
3 Wisconsin Public Intervenor v. Mortier (1991) 501 U.S. 597, 610, fn. 4.

4 Similarly, in People v. Arias (2008) 45 Cal.4th 169, the California Supreme Court emphasized
5 that, “[i]f the words in the statute do not, by themselves, provide a reliable indicator of legislative
6 intent, statutory ambiguities often may be resolved by examining the context in which the language
7 appears and adopting the construction which best serves to *harmonize* the statute internally and with
8 *related* statutes.” *Id.* at p. 177 [italics added]. “Literal construction should not prevail if it is contrary
9 to the legislative intent apparent in the statute . . . and if a statute is amenable to two alternative
10 interpretations, the one that leads to the more reasonable result will be followed.” *Id.* [internal
11 quotations and citations omitted].

12 Here, an understanding of the legislative history is necessary to harmonize the statute
13 internally. Given the facts of this case, and the context and underlying purpose of California’s conflict
14 of interest law as a whole, Government Code § 1092.5 is ambiguous insofar as a literal construction
15 would be absurd, and would be contrary to the legislative intent apparent in the statute. *Id.*

16 A literal construction of Government Code § 1092.5 would be absurd because it would work
17 to immunize direct parties to an illegal contract, which is not only illogical, but also contrary to the
18 entirety of conflict of interest law. Government Code § 1090 was enacted in order to “discourage
19 fraud and self-dealing in public contracts,” to invalidate illegal public contracts and, thereby, to punish
20 those who enter into them. “Recognizing the prophylactic purposes of conflicts statutes, the case law
21 makes clear that section 1090 should be construed broadly to ensure that the public has the official’s
22 absolute loyalty and undivided allegiance. The focus is on the substance, not the form, of the
23 challenged transaction, disregarding the technical relationships of the parties and looking behind the
24 veil which enshrouds their activities.” Sahlolbei, *supra*, 3 Cal.5th at p. 239 [internal citations and
25 quotations omitted]. It would be absurd, therefore, to prevent voiding those same contracts unless
26 doing so would protect an innocent third party.

27 Moreover, a literal construction of Government Code § 1092.5 would be contrary to the
28 legislative intent in the statute because, as articulated above, the legislative intent of the statute makes

1 abundantly clear that Government Code § 1092.5 was only meant to apply to “*innocent third parties*
2 who assume rights and obligations in connection with a public contract to lease, sell, or encumber real
3 property,” to “accord due weight to any injury that may be suffered by innocent persons [relying] on
4 the [the contract],” and to protect “a *third party* . . . against contract avoidance . . . unless he or she
5 could have discovered the illegality with due diligence.” Government Code § 1092.5 was not enacted
6 to protect those who were a party to the illegal transaction itself.

7 Furthermore, “language that appears unambiguous on its face may be shown to have a **latent**
8 **ambiguity**; if so, a court may turn to customary rules of statutory construction or legislative history
9 for guidance.” National Technical Systems v. Commercial Contractors, Inc. (2001) 89 Cal.App.4th
10 1000, 1008. “[A] latent ambiguity is said to exist where the language employed is clear and
11 intelligible and suggests but a single meaning, but some extrinsic evidence creates a necessity for
12 interpretation or a choice among two or more possible meanings.” Mosk v. Superior Ct. (1979) 25
13 Cal.3d 474, 495, fn. 18 [internal citation omitted], superseded on other grounds as stated in Adams v.
14 Commission on Judicial Performance (1994) 8 Cal.4th 630, 650. See also Whaley v. Sony Computer
15 Entertainment America, Inc. (2004) 121 Cal.App.4th 479, 487.

16 The California Supreme Court made this point precisely – in Sahlolbei, supra, 3 Cal. 5th 230
17 – when it referred to legislative-history materials to interpret Government Code § 1090. There, the
18 Supreme Court discussed the legislative history at length and decided that, “[i]n light of [that] history,”
19 it could understand and interpret the meaning of the statute and the terms used therein. Id. at p. 237
20 [“In light of this history, we conclude that the Legislature understood section 1090’s reference to
21 ‘officers’ to apply to outside advisors with responsibilities for public contracting similar to those
22 belonging to formal officers, notwithstanding [an earlier decision’s] definition of ‘public officer’ for
23 other statutes.”].

24 Here, as in Sahlolbei, the trial court should consider the legislative intent because (1) the plain
25 language of the statute compels an absurd result, and (2) the legislative intent makes clear that there
26 is a “latent ambiguity” not apparent from the text. And, with the legislative history in mind, the trial
27 court should conclude that Government Code § 1092.5 applies only to “innocent third parties” and not
28 to BBC, a direct party to the illegal contract at issue in this case. Any attempt to separate out a portion

1 of the trial here for Government Code § 1092.5 would be a waste of time and resources because
2 Government Code § 1092.5 does not apply to BBC since BBC was a direct party to the conflicted
3 contracts.

4 **D. BBC Cannot Meet All Three Requirements for Their Government Code §1092.5**
5 **Affirmative Defense: They Were Not a “Good Faith Lessee” Under the Challenged**
6 **Contracts**

7 BBC’s reliance on Section 1092.5 is misplaced for two reasons – even if, contrary to the
8 legislative history, the Legislature had intended for Section 1092.5 to apply to direct contracting
9 parties. That is especially true here because Section 1092.5 is an exception to Section 1090 and must
10 be narrowly construed. See, e.g., National City v. Fritz (1949) 33 Cal.2d 635, 636 (following canon
11 of statutory construction that exceptions are to be construed strictly and narrowly).

12 To prevail on its Government Code §1092.5 affirmative defense BBC is going to have to prove
13 it meets each of the following 3 elements (1) “good faith lessee”; (2) “paid value”; and (3) “acquired
14 the interest without actual knowledge of a violation of any of the provisions of Section 1090.”

15 First, there was never a valid lease that would allow BBC to claim that it is a “lessee” under
16 Section 1092.5. The only reason the Site Lease came into existence is because BBC abused its
17 professional advisory role under the 2008 Construction Management Services Agreement to persuade
18 TUSD to switch from the CM Multi-Prime delivery method to the Lease Leaseback delivery method
19 in violation of Section 1090. Specifically, at the February 7, 2011 meeting of TUSD’s governing
20 board , BBC made a presentation – the minutes and agenda of which show BBC performing in its
21 capacity as TUSD’s “staff” – and successfully persuaded the board to abandon the CM multi-prime
22 project delivery method originally contracted for in the 2008 Construction Management Services
23 Agreement and instead change course toward the LLB method where BBC would be TUSD’s general
24 contractor via the Lease Leaseback delivery method which requires a separate Site Lease. (SSDF ¶¶
25 51-52). Under the Lease Leaseback delivery method, BBC pays TUSD a mere \$1 and gets millions
26 of dollars from TUSD in return. (SSDF ¶¶ 53-61; Response to SSUMF ¶¶ 5-6). Taking advantage
27 of an existing, long-term professional advisory relationship to generate millions of dollars in revenues
28 at taxpayer expense is precisely the sort of “financial interest” that Section 1090 is intended to prohibit.
See, e.g., Bailey, supra, 103 Cal.App.3d at 196-197. As the product of BBC’s improper self-dealing,

1 the Site Lease is invalid and cannot, as a matter of law, bestow a legitimate status of “lessee” on BBC
2 for purposes of Section 1092.5; to allow otherwise would have the exception swallow the rule.

3 Second, BBC’s reliance on 1092.5 puts form over substance. The Supreme Court requires that
4 we look at the substance of the disputed transaction. “The focus is on the substance, not the form, of
5 the challenged transaction, disregarding the technical relationships of the parties and looking behind
6 the veil which enshrouds their activities.” Sahlolbei, supra, 3 Cal.5th at 239 [internal citations and
7 quotations omitted]. After all, Section 1090 is “concerned with any interest, other than perhaps a
8 remote or minimal interest, which would prevent the officials from exercising absolute loyalty and
9 undivided allegiance to the best interests of the [public entity].” Thomson v. Call (1985) 38 Cal.3d
10 633, 648.

11 In this regard, BBC ignores the fact that Plaintiff is not attacking the Site Lease *per se*. The
12 purpose of this lawsuit is not to save BBC the \$1 per year that it belatedly paid to TUSD. This lawsuit
13 challenges each project’s Sublease and Construction Services Agreements – two legally distinct
14 contracts – because those are the ones under which BBC receives millions of taxpayer dollars.
15 TUSD’s Agendas, Meeting Minutes, Back Up Materials and Resolutions relative to these contracts
16 all refer to them as individual agreements. (Response to SSUMF ¶ 5, subps. A-D). Case law sees the
17 contracts similarly. The construction of public facilities under the LLB method creates two separate
18 interests in real property. City of Desert Hot Springs v. County of Riverside (1979) 91 Cal.App.3d
19 441, 449 (“It seems perfectly clear that the lease-leaseback agreement created two leaseholds.”) (cited
20 with approval by Davis, supra, 237 Cal.App.4th at 277 n. 6).

21 Moreover, BBC cannot prove it was a “good faith lessee” under the challenged contracts
22 because the Site Lease (the only contract where BBC is the “Lessee” per page 2 ¶ E; page 3 Section
23 3; and page 9), Sublease Agreement (where BBC is the “Lessor” on page 3 ¶ I; 4; and signature page)
24 and Construction Services Agreements (where BBC is the “Contractor” on page 1 first paragraph and
25 signature page 45) are separate agreements. The fact that the foregoing agreements are separate
26 agreements is admitted by BBC in the Recitals on page 1 of the Construction Services Agreement:

27 WHEREAS, in connection with the approval of this Construction Services Agreement,
28 the District will enter into a site lease with Contractor (the "Site Lease"), under which
it will lease to the Contractor a portion of the Madrona Middle School site. and

1 improvements thereon, as described in Exhibit "A" of the Site Lease (the "Site") in
2 order for Contractor to construct improvements to this existing school site; and

3 WHEREAS, the Contractor will lease the Site and the Project back to the District
4 pursuant to a Sublease Agreement (the "Sublease") under which the District will be
5 required to make sublease payments to the Contractor for the use and occupancy of the
6 Site and Project;

7 Most importantly, the fact that the Site Leases and Sublease Agreements are separate
8 agreements is conclusively established by the anti merger provisions contained in Section 2 on page
9 4 of the Sublease Agreements which state:

10 Lessor hereby leases and subleases to District, and District hereby leases and subleases
11 from Lessor the Project and the Site, including any real property improvements now
12 or hereafter affixed thereto in accordance with the provisions herein for the full term
13 of this Sublease. The leasing by the Lessor to the District of the Site shall not effect or
14 result in a merger of the District's leasehold estate pursuant to this Sublease and its fee
15 estate as lessor under the Site Lease, and the Lessor shall continue to have and hold a
16 leasehold estate in said Site pursuant to the Site Lease throughout the term thereof and
17 the term of this Sublease.

18 Plaintiffs are not attacking the Site Lease *per se* because the purpose of this lawsuit is not to
19 recover to BBC the \$1 per year that it paid to TUSD under the Site Leases. To the contrary, Plaintiffs'
20 complaints seek a judicial determination that BBC's Sublease Agreements and Construction Services
21 Agreements – legally distinct contracts by which they were paid over \$100 million by TUSD – are
22 void due to conflicts of interest and recover those monies back to TUSD. TUSD's Agendas, Meeting
23 Minutes, Back Up Materials and Resolutions relative to BBC's Site Leases, Sublease Agreements and
24 Construction Services Agreements also all refer to them as individual agreements.

25 Finally, California Courts deem Site Leases, Sublease Agreements and Construction Services
26 Agreements as separate agreements as well. The construction of public facilities under the lease
27 leaseback delivery method creates two separate interests in real property. City of Desert Hot Springs
28 v. County of Riverside (1979) 91 Cal.App.3d 441, 449 ("It seems perfectly clear that the
lease-leaseback agreement created two leaseholds.") (cited with approval by Davis, *supra*, 237
Cal.App.4th at 277 n. 6).

BBC's reliance on Government Code § 1092.5 puts form over substance. The Supreme Court
requires that this Court look at the substance of the disputed transaction. "The focus is on the
substance, not the form, of the challenged transaction, disregarding the technical relationships of the
parties and looking behind the veil which enshrouds their activities." Sahlolbei, *supra*, 3 Cal.5th at

1 239 [internal citations and quotations omitted]. After all, Section 1090 is “concerned with any interest,
2 other than perhaps a remote or minimal interest, which would prevent the officials from exercising
3 absolute loyalty and undivided allegiance to the best interests of the [public entity].” Thomson v. Call
4 (1985) 38 Cal.3d 633, 648.

5 **E. BBC Cannot Meet All Three Requirements for Their Government Code §1092.5**
6 **Affirmative Defense: BBC Did Not Fully and Timely “Paid Value” as Required by**
7 **Section 1092.5.**

8 BBC cannot establish all of its payments under the Site Leases were timely since their
9 payments on the 3 Site Lease which are the subject of Case # YC068686 were paid well after the
10 Projects were completed per their Notices of Completion and well after TUSD made their final
11 payments under the Construction Services Agreements and Sublease Agreements as outlined in the
12 Summary of Facts section above.

13 Moreover, Section 6 of each of the Site Leases states: “The Lessee shall pay to the District as
14 and for advance rental hereunder \$1.00 per year or part thereof, or the aggregate sum One Dollar
15 [\$1.00 x number of years of lease] (\$1.00), *on or before* the date of commencement of the term of this
16 Site Lease.” . (Trial Exhibits 301, 304 & 307). This was not done by BBC on the Site Leases for
17 Madrona, Hickory or North High School.

18 Consequently, BBC cannot be said to have “paid value” as a lessee within the meaning of
19 Section 1092.5 on these projects and therefore can not qualify for this defense thereon.

20 **F. Government Code §1092.5 Does Not Eliminate Plaintiff’s Common Law Conflict of**
21 **Interest Basis of Disgorgement**

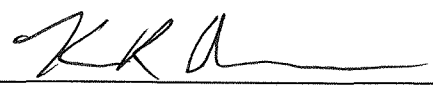
22 Plaintiffs’ operative complaints also alleged BBC’s challenged contracts were illegal under
23 California’s common law conflict of interest doctrine. [TAC ¶¶ 33, 35; Complaint ¶¶, 58, 61; SAC
24 ¶¶ 33, 35]. Government Code § 1092.5 is limited to conflicts arising under Government Code § 1090
25 which prohibits only financial interests. Government Code § 1092.5 does not extend to common law
26 conflicts of interest. Even if there is not a conflict pursuant to Government Code § 1090, the Attorney
27 General has found that special situations may still exist under the common law doctrine against
28 conflict of interest which, unlike Government Code § 1090, extends to non financial interests. 92
Ops.Cal.Atty.Gen. 19 (2009). Common-law conflicts of interest are broader than Government Code
§ 1090 conflicts because they involve interest other than financial interests. Davis v. Fresno Unified

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School District (2015) 237 Cal.App.4th 261, 301. See, e.g., Clark v. City of Hermosa Beach (1996) 48 Cal.App.4th 1152, 1171 (construing a public servant's personal bias and interests to constitute a conflict of interest under the common law doctrine in a situation where the public servant had no statutory conflict of interest)

Dated: January 9, 2019

Respectfully submitted,
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NETWORK

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