

**Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE**

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

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

Plaintiffs,

vs.

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

Defendants.

Case No.:

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1. This case challenges the constitutionality of a \$15 million gift and loan of taxpayer funds to a private entity, in violation of Arizona Constitution article IX, section 7. Pima County has agreed to fund the design and construction of a high-altitude balloon launch pad and company headquarters for World View Enterprises, Inc. to facilitate its luxury adventure tourism business. World View plans to provide rides for paying passengers on specialty weather balloons at a cost of approximately \$75,000 per ride.

2. World View has not yet transported a single tourist, nor has it obtained permission from the Federal Aviation Administration to do so.

3. To pay for the project, Pima County has refinanced its existing public debt, which relies on public property as collateral, to extend loans that benefit World View.

4. The purpose of the project is to enable World View, a private for-profit corporation described as “a near-space exploration company that utilizes proprietary high-altitude balloon technology to lift people and scientific payloads as much as twenty miles above earth for purposes of space tourism, other commercial application, and scientific research” to conduct its business and operations in Arizona.

5. As a recipient of a \$250,000 grant from the Arizona Commerce Authority in 2014, World View was required to either remain in Arizona or build a significant portion of its operations in Arizona within the 12-month award period.

6. Pima County has also bypassed competitive bidding requirements, both for contracts to build the headquarters and balloon pad and for the lease of the facility to World View. Pima County

agreed to complete the project in an accelerated manner, then used that deadline to claim that there was insufficient time for legally mandated competitive bidding. Instead, Pima County awarded the contracts to its pre-selected companies, Swaim Associates, Ltd., and Barker-Morrissey Contracting, Inc.

PARTIES, JURISDICTION, AND VENUE

7. Plaintiff Richard Rodgers is a Pima County resident and taxpayer. He resided in Tucson from 1963–1972 and returned to Tucson in 1981. He and his wife have been real estate investors since 1983, primarily investing in industrial real estate.

8. Plaintiff Shelby Manguson-Hawkins has been a Pima County resident and taxpayer since 1978. She owns four properties in Pima County. She is the owner of 5 Star Termite and Pest Control, Inc., which she founded in 1980.

9. Plaintiff David Preston has been a Pima County resident and taxpayer since 1983. Preston formed his Tucson accounting firm, David Charles Preston, CPA, PC, in 1984. His firm provides income tax services, business valuations, and litigation support for individuals, businesses, and non-profits.

10. As Pima County taxpayers, Plaintiffs are responsible for paying property, sales, and other taxes, and will bear a share of the burden for replenishing the public coffers of Pima County for revenues lost from the unlawful expenditures to be made by Pima County to or for the benefit of World View.

11. Defendant Charles H. “Chuck” Huckelberry, aka C.H. Huckelberry, is the County Administrator of Pima County. In that capacity he is responsible for negotiating, approving, and executing the contracts complained of in this action and is sued in his official capacity.

12. Defendants Sharon Bronson, Ray Carroll, Richard Elias, Allyson Miller, and Ramón Valadez are members of the Pima County Board of Supervisors, which is the governing body of Pima County. In that capacity they are responsible for approving and executing the contracts complained of in this action and are sued in their official capacities.

13. Defendant Bronson is the Chair of the Pima County Board of Supervisors.

14. Defendant Pima County is a political subdivision of the State of Arizona.

15. Jurisdiction is proper pursuant to Ariz. Const. art. VI, § 14, and A.R.S. §§ 12-123, 12-1831, and 12-1801.

16. Venue is proper pursuant to A.R.S. § 12-401.

FACTS COMMON TO ALL CLAIMS

17. On February 16, 2016, the Pima County Board of Supervisors approved Resolution No. 2016-5, authorizing Pima County to refinance existing public debt in the form of Pima County Certificates of Participation (“COPs”).

18. This refinancing enables Pima County to provide at least \$35 million in net proceeds, which the County will use for capital projects.

19. \$20 million of the COP proceeds will be repaid within 3 years and will fund the Regional Wastewater Reclamation Department’s capital maintenance and improvement program.

20. \$15 million of the COP proceeds will be repaid within 15 years and will fund the design and construction of an administrative and manufacturing facility, parking lot, and other exterior facilities (“Headquarters”) and a Balloon Pad, to be owned by Pima County and leased, used, and controlled by World View.

21. Pursuant to the COP Depository Trust Agreement, title to several Pima County public buildings and facilities is placed in trust with the Depository Trustee as a guarantee of repayment of the COPs. Those public buildings and facilities are then leased back to Pima County, pending repayment of the debt. These buildings and facilities include the Public Works Building, Legal Services Building, Public Works Parking Garage, Adult Detention Facility, and Public Service Center Office Tower and Parking Garage.

22. The refinancing adds an additional \$15 million in long-term debt to Pima County's existing debt and further subjects Pima County to the risk of losing the public buildings that serve as collateral.

23. On January 19 and February 9, 2016, respectively, Pima County and World View executed an agreement entitled "Lease-Purchase Agreement" with an effective date of January 19, 2016. The Lease-Purchase Agreement was made pursuant to the authority granted by the Pima County Board of Supervisors on January 19, 2016.

24. The Lease-Purchase Agreement calls for Pima County to design and construct World View's 135,000 square-foot Headquarters on a 12-acre parcel of land located in and owned by Pima County at a cost not to exceed \$14.5 million, and to further design and construct World View's 700-foot diameter Balloon Pad on a 16-acre parcel of land located in and owned by Pima County, at a cost not to exceed \$1.5 million.

25. The cost for construction of the Headquarters and Balloon Pad is a direct expenditure of Pima County's public funds.

26. The Lease-Purchase Agreement also provides that Pima County will apply for \$1 million in grant funding from the Arizona Department of Transportation and, if awarded that funding, will use such funds toward the costs of constructing the Balloon Pad.

27. The Lease-Purchase Agreement specifies that, subject to World View's purchase option, Pima County will be the owner of the Headquarters.

28. World View's purchase option entitles it to purchase the Headquarters for \$10 ("Second Option Price") during the six months prior to the 20th anniversary of the commencement date of the lease ("Second Option Term"), provided World View has fully performed its obligations under the lease.

29. The Lease-Purchase Agreement also allows World View to exercise its purchase option during "the period between the later of the 9th anniversary of the commencement date of the lease and the first early redemption date on the COPs, and the date that is 6 months after the 17th anniversary of the commencement date of the lease" ("First Option Term"). The First Option Price is determined by a complex formula: "(i) the principal amount required, as of the Closing date, to fully redeem any outstanding certificates from that certain 2016 series of taxable certificates of participation issued by County in the original principal amount of \$15,000,000 to fund construction of improvements required by the Lease (the "COPs"), plus (ii) the amount by which all principal and interest payments made on the COPs since issuance through the Closing date exceed the total of all rent payments made under the Lease through the Closing Date, plus (iii) an amount equal to the interest that could have been earned by investing, in the State Treasure [sic] of Arizona's long-term investment pool, on each COPs payment date since issuance, an amount equal to the difference between the COPs debt service payment and all rent paid under the lease since the prior COPs payment date."

30. The Lease-Purchase Agreement specifies rental rates that World View must pay the County for the Headquarters. That rate is \$5.00 per square foot for the first five years; \$8.00 per square foot for the next five years; \$10.00 per square foot for the next five years; and \$12.00 per square foot for the final five years. Plaintiffs are informed and believe, and on that basis allege, that these are substantially below market rates.

31. Defendant Huckleberry's January 19, 2016, written presentation to the Board of Supervisors explains that Pima County will not realize a positive return on its capital investment for the World View project until year 18 of the 20-year lease.

32. Defendant Huckleberry's January 19 written presentation also explains that Pima County will recover its principal and interest at the end of the 20-year lease term, at which point World View will, in theory, have repaid Pima County's initial subsidy and in addition paid approximately \$3.4 million.

33. The Lease-Purchase Agreement sets forth "Employment Targets" specifying the average number of full time equivalent ("FTE") employees that World View must employ at the project premises, and specifies the average annual salary of those employees during the 4-year period starting on the first anniversary of the commencement date and three successive five-year periods.

34. If World View fails to meet the Employment Targets by 10% or more due to circumstances beyond its reasonable control, including "unforeseeable economic circumstances or inability to recruit qualified personnel," World View must only use commercial best efforts to cure that failure.

35. The Lease-Purchase Agreement limits Pima County's right to cancel the Lease-Purchase Agreement unless World View fails to meet the Employment Targets by more than 10% due to circumstances beyond its reasonable control or fails to meet the Employment Targets by any amount due to circumstances within its reasonable control. Either such failure must continue for at least two successive quarters.

36. The Lease-Purchase Agreement authorizes, but does not require, Pima County to terminate the Agreement if World View fails to maintain the Employment Targets.

37. Neither party to the Lease-Purchase Agreement will be liable to the other for any consequential, special, or indirect damages in the event of a default.

38. The only remedy available to Pima County under the Lease-Purchase Agreement in the event of a failure by World View to meet the Employment Targets is to terminate the lease.

39. The Lease-Purchase Agreement does not provide any means whereby Pima County can recoup its expenditures for the design and construction costs of the project, or the risk of loss of its loan collateral deposited with the Depository Trustee, in the event of World View's default.

40. The Lease-Purchase Agreement assumes that the Headquarters and Balloon Pad will not generate Government Property Lease Excise Tax revenue for the benefit of Pima County or its residents. Plaintiffs are informed and believe, and on that basis allege, that Pima County does not anticipate any direct property tax revenue as a result of the project.

41. On January 19 and February 9, 2016, respectively, Pima County and World View, executed an agreement with an effective date of January 19, 2016, as authorized and approved on January 19, 2016, by the Pima County Board of Supervisors ("Operating Agreement").

42. The Operating Agreement specifies that the Balloon Pad will be controlled by World View and may only be used by third parties when World View is not actively utilizing the facility, subject to numerous restrictions imposed by World View.

43. Pima County will retain ownership of the Balloon Pad; however, World View will operate, maintain, and control access to the Balloon Pad.

44. Fees charged by World View for third party use of the Balloon Pad must be used for operation and maintenance of the facility.

45. World View will pay no fee to Pima County for World View's use of the Balloon Pad.

46. At World View's request, Pima County has agreed to complete construction of the Headquarters and the Balloon Pad by November 2016.

47. Defendant Huckleberry's January 19, 2016, written presentation to the Board of Supervisors explains that he, on behalf of Pima County, negotiated in secret with World View (using the "codename" "Project Curvature"), and consulted with Swaim and Barker-Morrissey for at least six months before seeking the Board of Supervisors' approval to contract with Swaim and Barker-Morrissey for design and construction of the Headquarters and the Balloon Pad.

48. The Board of Supervisors then awarded both contracts to Swaim and Barker-Morrissey without competitive bidding at its January 19, 2016, meeting pursuant to the "emergency" procurement exception under A.R.S. § 34-606 and Pima County Code § 11.12.060.

Count One—Gift Clause
ARIZ. CONST. art. IX, § 7

49. Plaintiffs incorporate the allegations in the preceding paragraphs.

50. Article IX, section 7 of the Arizona Constitution (the “Gift Clause”) makes it illegal for Pima County to “give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation”

51. Pima County has extended its credit, and therefore made a loan, in the aid of a private corporation by capitalizing the design and construction of the Headquarters and Balloon Pad and paying for that capitalization by refinancing its long-term public debt, and re-collateralizing numerous public buildings.

52. Taxpayer support of an unproven, for-profit luxury adventure-tourism business, including the direct payment for the design and construction of the Headquarters and the Balloon Pad, does not constitute a public purpose for the expenditure or lending of public funds.

53. Taxpayer support for the construction of a brand-new 135,000 square foot Headquarters for the private commercial benefit—and for ultimate acquisition by—a private for-profit corporation does not constitute a public purpose.

54. Placing county-owned buildings at further risk as collateral for the refinancing of public debt, and increasing the amount and extending the length of repayment of public indebtedness, all without any monetary or collateral contribution on the part of World View to capitalize the funding for design and construction of the Headquarters and Balloon Pad, amounts to a loan or extension of Pima County’s credit in aid and for the direct benefit of World View.

55. The financial and risk-free benefits enjoyed by World View by virtue of Pima County’s construction and provision of substantial private facilities, in the form of the Headquarters and Balloon Pad, all paid for by public debt, constitute a subsidy to World View.

56. In exchange for this lending of Pima County's credit, World View has not and will not be required to pledge or in any manner place at risk any of its collateral or funds.

57. Pima County has agreed to allow World View to pay rental rates less than the prevailing market rate for the use of the Headquarters.

58. Any jobs created in satisfaction of the Employment Targets will not be received by Pima County or any other public entity.

59. Satisfaction of the Employment Targets will not provide direct benefits to Pima County or any other public entity.

60. The Lease-Purchase agreement does not require World View to provide any jobs specifically to Pima County taxpayers.

61. The Employment Targets therefore do not constitute legal consideration.

62. World View will place none of its own assets at risk, either as design or construction loan collateral, will enjoy the primary and priority use of an adjacent Balloon Pad without paying a fee for such use, will control all use of the Balloon Pad by others, and will retain all profits arising out of such use.

63. The benefits received by Pima County from this project, if any ever do arise, are grossly disproportionate to the payments Pima County has obligated itself to make and the risks it has undertaken in aid of World View.

64. As Pima County taxpayers, Plaintiffs will bear a share of the burden for replenishing the public coffers of Pima County for public funds misspent by Defendants for the benefit of World View.

65. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief preventing enforcement of the Lease-Purchase Agreement and the Operating Agreement or performance on any contract adopted pursuant thereto.

Count Two—Mandatory Appraisal, Auction, and Rental Rates
A.R.S. § 11-256

66. Plaintiffs incorporate the allegations in the preceding paragraphs.

67. County boards of supervisors possess only those powers expressly conferred by statute or necessarily implied therefrom.

68. A.R.S. § 11-256 mandates a process of competitive bidding governing the lease of “any land or building owned by or under the control of the county,” in order to prevent favoritism, fraud, and public waste by encouraging free and full competition.

69. The Headquarters is “land or building[s] owned by or under the control of the county,” and any lease of the Headquarters by Pima County to World View is therefore subject to the requirements of A.R.S. § 11-256.

70. The Headquarters is worth more than \$5,000. *See* A.R.S. § 11-256(B).

71. Upon information and belief, prior to the execution of the Lease-Purchase Agreement, World View had never “owned, leased or otherwise possessed” the Headquarters. *See* A.R.S. § 11-256(E).

72. The Lease-Purchase Agreement purports to lease the Headquarters to World View for a term of twenty years. *See* A.R.S. § 11-256(E).

73. Prior to leasing the Headquarters to World View, Pima County did not appoint “[a]n experienced appraiser . . . to determine the rental valuation of such land or building.” A.R.S. § 11-256(B).

74. Pima County did not enter into the Lease-Purchase Agreement in compliance with A.R.S. § 11-256(B).

75. Pima County did not lease the Headquarters to World View “at a public auction to the highest responsible bidder, provided that the amount of bid is at least ninety per cent of the rental valuation as determined by the appraiser . . . and subject to such other terms and conditions as the board [of supervisors] may prescribe.” A.R.S. § 11-256(C).

76. Pima County did not enter into the Lease-Purchase Agreement in compliance with A.R.S. § 11-256(C).

77. Prior to leasing the Headquarters to World View, Pima County did not give “[n]otice of a proposed lease . . . by publication, once each week for four consecutive weeks, in a newspaper of general circulation in the county.” A.R.S. § 11-256(D).

78. Pima County did not enter into the Lease-Purchase Agreement in compliance with A.R.S. § 11-256(D).

79. The Lease-Purchase Agreement is void due to Pima County’s failure to comply with A.R.S. § 11-256(B), (C), and (D).

80. As Pima County taxpayers, Plaintiffs will bear a share of the burden for replenishing the public coffers of Pima County for public funds misspent by Defendants pursuant to the Lease-Purchase Agreement.

81. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief preventing enforcement of the Lease-Purchase Agreement or performance on any contract adopted pursuant thereto.

Count Three—Mandatory Competitive Bidding
A.R.S. §§ 34-603, -604

82. Plaintiffs incorporate the allegations in the preceding paragraphs.

83. Arizona statutes mandate a process of competitive bidding, contracting, and procurement in order to prevent favoritism, protect taxpayers, and promote government efficiency. *See* A.R.S. §§ 34-603, -604, and Title 34. These provisions require that a county publish notice of the availability of a project, A.R.S. § 34-603(C)(2), compile a list of applying firms, and negotiate with the firms on the list, A.R.S. § 34-603(E), or choose among submitted project proposals. A.R.S. § 34-603(F).

84. Arizona statutes provide an exception to these mandates whereby county officials may make “emergency procurements” of architectural and construction services “if a threat to the public health, welfare or safety exists or if a situation exists that makes compliance with this title impracticable, unnecessary or contrary to the public interest, except that these emergency procurements shall be made with such competition as is practicable under the circumstances.” A.R.S. § 34-606.

85. Pima County, in selecting and approving Swaim and Barker-Morrissey as the project architect and contractor, respectively, did so pursuant to a predetermined selection of these contractors by Defendant Huckelberry.

86. Plaintiffs are informed and believe, and on that basis allege, that Defendant Huckelberry had relied upon Swaim and Barker-Morrissey as unpaid consultants, and negotiated with them to obtain

their services in designing and constructing the Headquarters and Balloon Pad, during a period of at least 6 months prior to authorization by the County.

87. Plaintiffs are informed and believe, and on that basis allege, that Pima County used World View's demand for occupancy and use of the Headquarters and Balloon Pad by November 2016 as the rationale to rely on the "emergency" provisions of A.R.S. § 34-606. The construction of the Headquarters and Balloon Pad is not an "emergency" presenting any threat to public health or safety, nor were there any factors rendering compliance with the competitive bidding requirements impracticable.

88. In other words, Pima County agreed to an accelerated design/construction schedule with World View, and then excused itself from the competitive bidding practices and chose its preferred contractors under the guise of an "emergency" or "impracticability" that was caused solely by the County's choosing of an accelerated schedule.

89. As a consequence of the unlawful activities described herein, the contracts identified above were awarded in violation of applicable state procurement rules that require competition among bidders so as to reduce government expenditures, avoid unjust favoritism, and ensure government efficiency—all to the detriment of Plaintiff taxpayers.

90. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief preventing enforcement of Pima County's agreements with Swain and Barker-Morrissey in furtherance of the Lease-Purchase Agreement.

Count Four—County Procurement Requirements
Pima County Code §§ 11.12.060, 11.16.010

91. Plaintiffs incorporate the allegations in the preceding paragraphs.

92. The Pima County Procurement Code requires contracts for construction projects to comply with Arizona state law, including Arizona statutes providing for competitive bidding practices. *See Pima County Code §§ 11.04.010, 11.16.010.*

93. The Pima County Procurement Code provides an exception to these mandates when “upon the board’s declaration of an emergency or by written approval of the county administrator” in which case “the procurement director may: (a) Make emergency procurement of materials or services if there exists a threat to public health, welfare, property or safety; or (b) Formulate a limited competitive process if a situation exists which makes compliance with normal purchasing procedures impracticable or contrary to the public interest. The competition obtained shall be that appropriate under the particular circumstances.” Pima County Code § 11.12.060(A).

94. For the reasons set forth above, no emergency, threat to public health, welfare, property or safety, or other situation existed which rendered compliance with normal competitive procurement procedures impracticable or contrary to the public interest.

95. By authorizing no-bid contracts in the absence of an emergency, Defendants violated Pima County Code §§ 11.16.010 and 11.12.060 and authorized an unlawful procurement of architectural design and construction services by awarding contracts to Swain and Barker-Morrissey without required competitive bidding.

96. Defendants further violated Pima County Procurement Code § 11.12.060 by failing to “[f]ormulate a limited competitive process . . . [which] competition obtained shall be that appropriate under the particular circumstances.”

97. As a consequence of the unlawful activities described herein, Pima County's contracts with Swain and Barker-Morrissey in furtherance of the Lease-Purchase Agreement were awarded in violation of applicable county procurement rules that require competition among bidders so as to reduce government expenditures, avoid unjust favoritism, and ensure government efficiency—all to the detriment of Plaintiff taxpayers.

98. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief preventing enforcement of Pima County's agreements with Swain and Barker-Morrissey in furtherance of the Lease-Purchase Agreement.

REQUEST FOR RELIEF

For their relief, Plaintiffs request that this Court take the following actions:

A. Issue a declaratory judgment that the terms and conditions of the Lease-Purchase Agreement regarding the Headquarters and Balloon Pad constitute an unlawful gift of public funds and loan of public credit in contravention of the Arizona Constitution's Gift Clause;

B. Issue a declaratory judgment that the terms and conditions of the Operating Agreement regarding the Balloon Pad constitute an unlawful gift of public funds in contravention of the Arizona Constitution's Gift Clause;

C. Issue a declaratory judgment that the terms and conditions of the Lease-Purchase Agreement regarding the Headquarters constitute an unlawful lease in contravention of applicable Arizona statutes;

D. Issue a declaratory judgment that by awarding design and construction contracts for the Headquarters and Balloon Pad without competitive bidding, Defendant Pima County violated applicable Arizona statutes and Pima County ordinances;

E. Issue a permanent injunction enjoining enforcement of the Lease-Purchase Agreement and the Operating Agreement or performance on any contract adopted pursuant thereto;

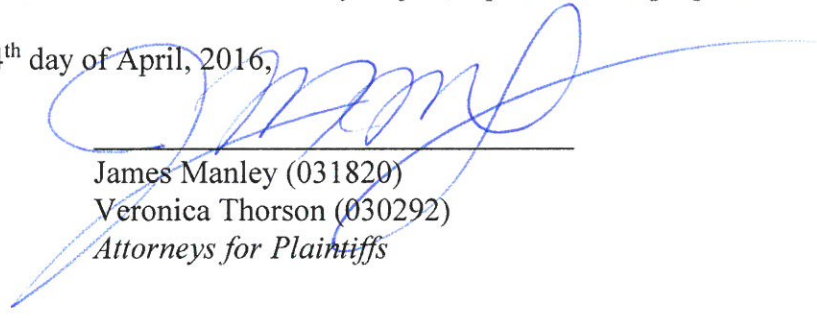
F. Preliminarily and permanently enjoin Defendants their officials, agents, and employees, from making any payments or otherwise expending any public funds whatsoever pursuant to the terms of the Lease-Purchase Agreement and the Operating Agreement;

G. Award Plaintiffs reasonable attorney fees pursuant to the private attorney general doctrine;

H. Award Plaintiffs costs as prevailing parties; and

I. Award such other and further relief as may be just, equitable, and proper.

Respectfully submitted this 14th day of April, 2016,



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