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July 21, 2015

The Honorable Tani Gorre Cantil-Sakauye, Chief Justice
The Honorable Kathryn M. Werdegar, Associate Justice
The Honorable Ming W. Chin, Associate Justice
The Honorable Carol A. Corrigan, Associate Justice
The Honorable Goodwin H. Liu, Associate Justice
The Honorable Mariano-Florentiono Cuéllar, Associate Justice
The Honorable Leondra R. Kruger, Associate Justice
Supreme Court of the State of California
350 McAllister Street
San Francisco, California 94102-4797

Re: *Davis v. Fresno Unified School Distric*t, Case No. S 227786
Opposition of the Beverly Hills Unified School District to
Petitions for Review of Court of Appeal Decision
Court of Appeal No. F068477
Fresno County Superior Court No. 12CECG03718

Dear Honorable Chief Justice and Associate Justices:

Our law firm serves as outside counsel to the Beverly Hills Unified School District and this *amicus curiae* letter is being written on its behalf solely with respect to the Court of Appeal's clarification as to the scope and purpose of Government Code section 1090.

It is the position of our client that the California Supreme Court should not accept the Petitions for Review that have been filed by both parties to the captioned lawsuit for the following reasons:

THE REQUISITES OF CALIFORNIA RULES OF COURT RULE 8.500(d)(1) HAVE NOT BEEN SATISFIED

1. Pursuant to California Rules of Court Rule 8.500(d)(1), the only possible ground upon which this case can be reviewed is to "settle an important question of law." However, the decision by the Court of Appeal respecting the reach of Government Code section 1090 in the civil arena dispositively noted that its import was not to "settle an important question of law," but rather was to clarify its import and application:

> "In summary, the courts in *Hanover* and *Hub City* interpreted the statute broadly to include individuals who are consultants to the public agency, but neither court decided whether the statutory terms 'officers' or 'employees' should be expanded to include legal entities such as corporations or limited liability companies."
>
> First, we conclude that the stricter definition of the statutory terms adopted by the court in *People v. Christiansen, supra*, 216 Cal.App.4th 1181 is appropriate in the context of criminal prosecution, but is not appropriate in the context of civil actions seeking to invalidate a contract with a public entity. . . . Therefore, we join the courts in *Hanover* and *Hub City* in concluding that, in civil actions, the term 'employees' in Government Code section 1090 encompasses consultants hired by the local government.
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> Second, as to whether the word 'employees' should be interpreted to exclude corporate consultants, we conclude that corporate consultants should not be categorically excluded from the reach of Government Code section 1090. Such a statutory interpretation would allow the use of the corporate veil to insulate conflicts of interest that otherwise would violate the prohibition against local government officers and employees from making contracts in which they are financially interested. A corporate consultant is as capable of influencing an official decision as an individual consultant. Because the statute's object is to limit the *possibility* of any influence, direct or indirect, that might bear on an official's decision (citation omitted) we 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 the Contractor (1) was an 'employee' for purposes of Government Code section 1090 . . . ."

(*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 300)

The interpretation accorded Government Code section 1090 by the Court of Appeal reaffirms the public policy of disallowing conflicts of interest in the award of contracts.

Under the circumstances, there is no need for the California Supreme Court to intervene.

2. The Court of Appeal in *Davis* reaffirmed the public policy established by the California Supreme Court 53 years ago in the case of *Stigall v. City of Taft* (1962) 58 Cal.2d 565 precluding conflicts of interest:

> "In *Stigall*, a civil action, the Supreme Court interpreted the statutory terms broadly to implement the objectives of the conflict of interest statute and did not rely on technical definitions or rules to limit the reach of the statute. Similarly, we conclude that technical definitions of the term 'employee' taken from other areas of law (such as the stricter definition adopted by the court in *People v. Christiansen*) should not be used to limit the scope of Government Code section 1090. Therefore, we join the courts in *Hanover* and *Hub City* in concluding that, in civil actions, the term 'employees' in Government Code section 1090 encompasses consultants hired by the local government."

(*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 300)

The import of Government Code section 1090 and the manner in which it is to be applied has been long settled, and further, its interpretation is not subject to dispute. Therefore, there is no important question of law that needs to be settled and the Petitions for Review should therefore be denied.

ANY RESTRICTION ON THE RIGHT OF A PUBLIC ENTITY TO INVALIDATE CONTRACTS THAT RESULT FROM A CONFLICT OF INTEREST AS PROHIBITED BY GOVERNMENT CODE SECTION 1090 WILL LEAD TO DISASTROUS RESULTS AS EVIDENCED BY THE TRIAL WHICH TOOK PLACE IN THE *CHRISTIANSEN* LITIGATION FOLLOWING THE REVERSAL OF KAREN CHRISTIANSEN'S CRIMINAL CONVICTION

3. The untoward consequences of disregarding the scope, purpose and precedential interpretation of Government Code section 1090 is illustrated in the trial of the civil action which took place after the Court of Appeal reversed Karen Christiansen's criminal convictions in *People v. Christiansen* (2013) 216 Cal.App.4th 1181. There, Karen Christiansen was charged with and convicted of four counts of conflict of interest and violation of Government Code section 1090 and the trial court sentenced her to 4 years and 4 months in prison and ordered her to pay restitution of approximately $3,500,000. The facts of the case are instructive as outlined by the Court of Appeal:

"In February 2005, Christiansen entered into a written contract with the District (the 2005 Contract). The 2005 Contract stated that in 2004 Christiansen became an employee of the District, with the title 'Director of Planning and Facilities.' The 2005 Contract provided that she would remain employed in that position through June 2007, and it spelled out the terms and conditions of that continuing employment.

In June 2006, Christiansen and the District entered into a new contract (the 2006 Contract). The 2006 Contract acknowledged that the District had employed Christiansen as the Director of Planning and Facilities 'continuously since August, 2004,' that '[d]uring this period of time the relationship between [t]he District and Karen Christiansen has been one of employer-employee,' that Christiansen had not been an independent contractor, and that she had been 'required to devote 100% of her professional time to fulfill her duties as Director of Planning and Facilities.' The 2006 Contract went on to provide that'[t]he District and Karen Christiansen have mutually decided that it is in the best interests of both that the employer-employee relationship between [t]he District and Karen Christiansen be terminated as of May 31, 2006, and that Karen Christiansen shall continue to provide services to [t]he District as a consultant, and not as an employee, beginning immediately thereafter.' The 2006 Contract further provided that '[i]t is the intent of [t]he District and Karen Christiansen that the transition be seamless as far as the operations of [t]he District and the responsibilities of Karen Christiansen are concerned and that Karen Christiansen continue to have the same responsibility she had as the Director of Planning and Facilities except for those duties and responsibilities which would be precluded due to her change in status from employee to consultant.' . . . a separate paragraph of the 2006 Contract further emphasized the termination of the employment relationship: 'both parties hereto in the performance of this Agreement will be acting in an independent capacity and not as agents, employees, partners, or joint venturers of one another.'

* * *

In February 2007, Christiansen assigned her interest in the 2006 Contract to Strategic Concepts, LLC. The District consented in writing to the assignment. Christiansen was the sole member and

> owner of Strategic Concepts, but it had several other employees . . . . In June 2008, the District entered into a new contract with Strategic Concepts (the 2008 Contract), again retaining Strategic Concepts to provide consulting services concerning 'the District's planning and management of District Facilities.' The 2008 Contract superseded all previous contracts between the District and Strategic Concepts. The 2008 Contract expressly stated that Strategic Concepts 'shall be and act as an independent contractor' and that both Strategic Concepts and all of its employees 'shall not be considered officers, employees or agents of the District.'"

In reversing the four convictions, the Court of Appeal stated:

> "Because it is undisputed that at all relevant times Christiansen was an independent contractor, she was not an employee within the meaning of section 1090, so her convictions must be reversed and the charges against her dismissed."

Subsequent to the above, Karen Christiansen's lawsuit against the Beverly Hills Unified School District was tried before a jury. The District's pivotal defense was that the contracts in question had been properly terminated because Karen Christiansen and Strategic Concepts, LLC's actions violated Government Code section 1090. Before the trial commenced, the judge ruled that Government Code section 1090 did not apply because Karen Christiansen and Strategic Concepts, LLC were independent contractors/consultants as delineated in the contracts described above, rather than an "employee" of the District. The court went on to rule that the District improperly terminated the contract in reliance on Government Code section 1090, that such termination was an anticipatory breach and the only issue to be tried was the amount of damages that were sustained by plaintiffs being precluded from performing services under the 2008 Contract and receiving a percentage of the $330,000,000 in bond funds that were to be used to refurbish the five schools. The Jury ruled in favor of Karen Christiansen and the judgment now exceeds $20,000,000. As a direct consequence of the foregoing refusal to enforce Government Code section 1090, the District filed a Notice of Appeal in Case No. BC420456 but the time for briefing has not yet arrived.

Needless to say, no school district can survive if unscrupulous contractors can escape the conflict of interest prohibitions contained in Government Code 1090 by simply changing their legal status to an independent contractor or consultant. Such an interpretation in the civil context would eviscerate the public policy of protecting not only public entities but also the taxpayers who must subsidize these unscrupulous contractors and special interests.

The decision in *Davis* will reinforce public integrity and ensure that any legal entity which violates the requisites of Government Code section 1090 will be subject to significant and substantial redress. For these reasons alone, the decision in *Davis* should stand and the California Supreme Court should not accept the Petitions for Review.

However, in the event the California Supreme Court decides to grant the Petitions for Review with respect to the Court of Appeal's lease-leaseback decision, it is respectfully requested that California Rules of Court Rule 8.1105(e) be invoked to order the portion of the opinion concerning Government Code section 1090 to be published.

Respectfully submitted,

GREENBERG GLUSKER FIELDS
CLAMAN & MACHTINGER LLP

By:
Fred A. Fenster

FAF/nhs

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1900 Avenue of the Stars, 21st Floor, Los Angeles, California 90067. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On July 21, 2015, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

AMICUS CURIAE LETTER

in a sealed envelope, postage fully paid, addressed as follows:

The Honorable Tani Gorre Cantil-Sakauye, Chief Justice
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102-4797

The Honorable Kathryn M. Werdegar, Associate Justice
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Honorable Donald S. Black
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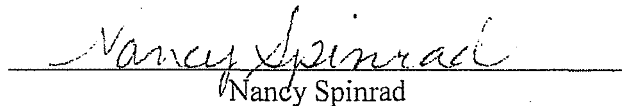
1130 O Street, Dept. 502
Fresno, CA 93721-2220

Clerk of the Court
Court of Appeal, Fifth District
2424 Ventura Street
Fresno, CA 93721

Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 21, 2015, at Los Angeles, California.



Nancy Spinrad