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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF ARIZONA**

8 Varxity Development Corp., a Canadian
corporation,

9 Plaintiff,

10 v.

11 Town of Payson, an Arizona municipal
corporation,

12 Defendant.

No. 2:21-cv-01216-SPL

**SEPARATE STATEMENT OF
FACTS IN SUPPORT OF TOWN
OF PAYSON’ MOTION FOR
SUMMARY JUDGMENT**

13 Pursuant to FRCP 56 and this Court’s Scheduling Order (Doc. 22), the Town of
14 Payson submits its Statement of Facts in Support of its Motion for Summary Judgment.

15 1. In 2014, the Town’s voters approved the General Plan Update 2014-2024. “The
16 General Plan is mandated by Arizona statute; it serves as a guide for Town policies and
17 provides a vision for the Town of Payson’s development.” (*See* Town of Payson General
18 Plan Update 2014-2024 at 1, attached as Exhibit 1; A.R.S. § 9-461.05.)

19 2. The General Plan identifies critical issues, priorities, and sets goals and strategies,
20 including for its existing park facilities, which includes the 82-acre Rumsey Park. (Ex. 1,
21 General Plan at 55, 62-63.).

22 3. On or about September 21, 2017, the Town entered a Consulting Services
23 Agreement with Varxity and Community Center Partners, LLC (“Tri-Party Agreement”).
24 (Resolution 3065 with Exhibit A, Consulting Services Agreement for Master-Planning
25 Rumsey Park and Development of a Community Center Partnership (“Tri Party
26 Agreement”), attached here as **Exhibit 2.**)

27 4. Its purpose was “to *initiate* and *facilitate* the necessary *Pre-Development Activities*
28 . . . reasonably required to *commence* the feasibility, design and development process of

1 the Project with CCP” (**Ex. 2**, Tri Party Agreement at 2, § 1 (emphasis added).)

2 5. The “Project” contemplated included a master plan and revitalization of Rumsey
3 Park, and construction of a community center, aquatic center, ice rink, athletic training
4 center, and college preparatory academy. (**Ex. 2**, Tri Party Agreement at 4, § 4.)

5 6. The Tri-Party Agreement expired “(a) March 31, 2018 or (b) such earlier date as
6 CCP may have fully provided the deliverables for the Pre-Development Activities”
7 (**Ex. 2**, Tri Party Agreement at 2-3, § 2.)

8 7. Termination required prior written notice and payment of a “Break Up Fee” by the
9 terminating party to the non-terminating party. (**Ex. 2**, Tri Party Agreement at 8-9, § 9.)

10 8. The Town and Varxity agreed to share the cost of CCPs services in an amount not
11 to exceed \$250,000, payable to CCP upon the completion of certain listed tasks. (**Ex. 2**,
12 Tri Party Agreement at 7, § 7(A).)

13 9. CCP invoiced the Town and Varxity for their respective shares as they completed
14 the tasks. (See CCP Invoices, attached here as **Exhibit 3**.)

15 10. By April 2018, CCP performed all required Pre-Development Activities. (**Ex. 3** at
16 VDC-00261; Deposition of Lane Moore, attached here as **Exhibit 4**, at 34:10-24.)

17 11. Ultimately, the Town and Varxity each paid CCP \$125,000. (**Ex. 3** at VDC-00261;
18 Town of Payson cancelled checks, attached here as **Exhibit 5**; Compl. ¶ 16.)

19 12. CCP’s Pre-Development Activities culminated in a master plan for the
20 revitalization and development of several new facilities in Rumsey Park. (Rumsey Park
21 Master Plan Report, attached here as **Exhibit 6**, at VDC-000101-102, VDC-00132-133;
22 Deposition of LaRon Garrett, attached here as **Exhibit 7**, at 32:5-11.)

23 13. The Town Council approved the Rumsey Park Master Plan on May 24, 2018.
24 (Resolution 3104, attached here as **Exhibit 8**.)

25 14. The Master Plan included redevelopment of Rumsey Park, replacing the pool with
26 a new aquatic facility, and building a new community center, and ice complex/training
27 center. (**Ex. 6** at VDC-00132-133.)

28 15. The Master Plan, however, was only a “first step.” (**Ex. 7**, Garrett Depos 32:5-11;

1 Ex. 8 at TOP00030.)

2 16. The Master Plan proposed financing the estimated \$39 - \$43 million in
3 development costs through a public-private partnership where the Town would lease
4 Rumsey Park to a nonprofit corporation that would be the “owner.” (**Ex. 6** at VDC-
5 00132-133.)

6 17. The Master Plan identified other “key agreements” that would be needed, including
7 a development agreement between either the Town and a developer, or the Town and a
8 nonprofit. (**Ex. 6** at VDC-00147-00148.)

9 18. Recognizing the challenge of successfully implementing a “risk-neutral” financial
10 plan, the Master Plan recommended the Town and Varxity “approve a Validation Phase”
11 to occur over six months. (**Ex. 6** at VDC-00153.)

12 19. On June 14, 2018, the Town approved Resolutions 3105 and 3106. (Resolution
13 3105 with Exhibit A, Agreement Between the Town of Payson and The Friends of Payson
14 Parks & Recreation, Inc., attached here as **Exhibit 9**; Resolution 3106 with Exhibit A,
15 Consulting Services Agreement for the Validation of the Rumsey Park Master Plan
16 Report, attached here as **Exhibit 10**.)

17 20. Resolution 3106 approved the Town entering into a new consulting agreement with
18 CCP wherein CCP was to gather information for the Town to “make an informed decision
19 regarding the future of Rumsey Park and its revitalization.” (**Ex. 10**, § 1 at TOP00047.)

20 21. Resolution 3105 approved the Town entering a fundraising agreement with the
21 Friends of Payson Parks and Recreation, Inc., in which Friends would accept and donate
22 funds to the Town in three phases based on set goals for each phase. (**Ex. 9**.)

23 22. In July 2019, Varxity was also moving forward with its validation phase,
24 “identifying and solidifying contracts for property” and “continuing to identify investment
25 avenues for our financial requirements to move forward.” (See July 22, 2018 email from
26 Lane Moore to Craig Swartwood and letter dated July 19, 2018, attached here as **Exhibit**
27 **11**.)

28 23. As a result of an election in August 2018, a new Mayor was elected and two local,

1 voter-initiated propositions (known as Propositions 401 and 402) restricted, or purportedly
2 restricted, the Town’s ability to lease its property (i.e. Rumsey Park). The Town, Varxity,
3 and CCP recognized, at the time, that the election results effectively prevented the Town
4 from moving forward with the validation phase. (See September 2, 2018 emails from Ron
5 Chambless and Lee Ploszaj, VDC-00472-00473, attached here as **Exhibit 12**; October 3,
6 2018 emails between Lane Moore and LaRon Garrett, VDC-00458-00459, attached here
7 as **Exhibit 13**; **Ex. 4**, Moore Depo. 13:22 - 14:7, 15:13 – 16:15, 35:15-24; **Ex. 7**, Garrett
8 Depo at 32:17 – 34:11.)

9 24. The Town Manager and Varxity’s CEO Lane Moore discussed the impact of
10 Propositions 401 and 402 on the Town’s ability to move forward in early October 2018.
11 (**Ex. 13**; **Ex. 4**, Moore Depo. 56:10 – 57:11, 57:18 – 59:11, 59:24 – 61:5.)

12 25. Specifically, the Town Manager confirmed that the Town “voted not to move
13 forward with anything validating the effects of 401 and 402.” (**Ex. 13**.)

14 26. He also explained that while the Town was waiting for funds from the Friends of
15 Payson for the validation phase, he did not “know if [the Town] will receive those funds
16 soon enough to meet [Varxity’s] timeline.” (**Ex 13**.)

17 27. Shortly after the election, Varxity discussed a similar project with a different entity,
18 MHA Foundation. (MHAF Letter, attached as **Exhibit 14**; **Ex. 4**, Moore Depo. 62:13 –
19 64:9, 65:11 – 66:18; Barclays November 28, 2018 letter, attached here as **Exhibit 15**;
20 Plaintiff’s Responses to RFA No. 5, 8, 9 and NUI No. 5, attached here as **Exhibit 16**.)

21 28. On November 14, 2018, MHA Foundation notified the Town that it was
22 communicating with Varxity and CCP about locating some or all of CCP and Varxity’s
23 planned facilities on property owned or controlled by MHAF. (**Ex. 14**.)

24 29. MHAF asked that the parties to the Tri-Party agreement enter a “standstill
25 agreement and/or covenant not to sue” before it would undertake discussions with Varxity
26 and CCP. (**Ex. 14**.)

27 30. On November 29, 2018, the Town Council approved Resolution 3132, which
28 authorized the Town to execute a General Release with Varxity and CCP. (Resolution

1 3132 with Exhibit A General Release of All Claims, attached here as Exhibit 17.)

2 31. Varxity and CCP did not sign the Release. (September 24, 2019 email string,
3 attached here as **Exhibit 18**.)

4 32. By September 24, 2019, Mr. Moore believed the Town “broke contract” since the
5 Town had not supported the project “since the change in leadership” [at the end of 2018].
6 (**Ex. 18**; **Ex. 4**, Moore Depo. 70:2 – 25; 71:9 – 72:20.)

7 33. Mr. Moore believed, or had reason to believe, the Town “had actively stopped
8 looking for funds” and was not moving forward with the project after the election. (**Ex. 4**,
9 Moore Depo 56:10 – 57:11, 57:16 – 59:11, 59:24 – 61:5; 71:7 – 72:20.)

10 34. On January 6, 2020, Varxity sent the Town a letter asking for the Town’s progress
11 on the project and requesting that if the Town was not going to move forward, that the
12 Town terminate the agreement “in writing and send reimbursement according to the tri-
13 party agreement.” (January 6, 2020 letter, attached here as **Exhibit 19**; *see also* **Ex. 4**,
14 Moore Depo. 71:7 – 72:20.)

15 35. The Town’s attorney responded by letter dated February 6, 2020, which stated that
16 the Town was not terminating the Tri-Party Agreement and invited Varxity to negotiate a
17 resolution. (February 6, 2021 letter, attached here as **Exhibit 20**.)

18 36. More than one year later, Varxity alleged that the February 6, 2020 letter
19 constituted anticipatory repudiation of the Tri-Party Agreement and demanded that the
20 Town pay Varxity the Break Up Fee defined in the Tri-Party Agreement. (See February 9,
21 2021 and March 2, 2021 letters, attached here as **Exhibit 21**.)

22 37. Varxity sent the Town a notice of claim on April 15, 2021. (April 15, 2021 Notice
23 of Claim, attached here as **Exhibit 22**.)

24 38. On May 13, 2021, the Town approved entering a non-binding, twelve-month
25 Memorandum of Understanding (“MOU”) with the Rim Country Educational Alliance
26 (“RCEA”). (*See* May 13, 2021 meeting minutes, attached as **Exhibit 23**; Town-RCEA
27 MOU, attached as **Exhibit 24**.)

28 39. The MOU was for the “initial planning for certain Improvements on [the RCEA]

1 Property by RCEA, and subsequent potential operation of such Improvements by the
2 Town.” (Ex. 24.)

3 40. The MOU identified several anticipated improvements, including office space; a
4 swimming pool; “gymnasium; multipurpose fitness area; and outdoor park amenities . . .”
5 (Ex. 24.)

6 41. The MOU is expired. (Ex. 24; action minutes and agenda for November 10, 2022
7 meeting, attached here as Exhibit 25.)

8 42. Mr. Moore testified as to his belief that as soon as the Town approved Rumsey
9 Park Master Plan, the Town was required to move forward with the project. (Ex. 4,
10 Moore Depo. 21:24 – 22:25, 37:10 – 38:3, 55:1 – 56:6; 91:3 – 93:2; 96:9-16; 98:8 –
11 100:11.)

12 43. Mr. Moore vaguely alleges that the conditional language throughout the Tri-Party
13 Agreement and the required “validation” phase were mere “formalities” based on oral
14 representations made *after* the Tri-Party Agreement. (Ex. 4, Moore Depo. 37:10 – 38:3,
15 55:1 – 56:6; 91:3 – 93:2; 96:9-24.)

16 44. The Tri-Party Agreement expressly addresses *Pre*-Development Activities only.
17 (See generally, Ex. 2 Recitals, §§ 1-3, 5-8, & Exhibits A & D; see also Ex. 4, Moore
18 Depo. 22:16-19.)

19 45. The Tri-Party Agreement recognizes that the parties *would negotiate* “a separate
20 Master Development Agreement(s).” (See Ex. 2 § 6(h) and Exhibit E; see also Ex. 4,
21 Moore Depo. 22:16-19; 24:18 – 25:10.)

22 46. The Tri-Party Agreement disclaims that the Town has “any liability for any future
23 payments of money or expenditures, except for those amounts appropriated, authorized,
24 and administratively allocated for this work,” and that the Town has “any liability for
25 payments for which it does not have sufficient revenues.” (See Ex. 2 § 27(B).)

26 47. The Tri-Party Agreement required approval of all parties to amend or alter its
27 terms. (See Ex. 2 § 19(B).)

28 48. The Tri-Party Agreement does not prohibit either the Town or Varxity from

1 exploring, investigating, discussing, or even developing any other project. (*See generally*
2 **Ex. 2**; *see also Ex. 16*.)

3 49. Mr. Moore believes the MOU breaches the Tri-Party Agreement because it
4 includes elements that are the same or similar to those included in the Rumsey Park
5 Master Plan. (**Ex. 4**, Moore Depo. 75:8 – 76:9, 76:18 – 77:22, 81:6 – 17, 82:2-12)

6 50. Mr. Moore alleges that he never reviewed the MOU or discussed its terms with the
7 Town. (**Ex. 4**, Moore Depo. 74:10-20.)

8 51. Mr. Moore admits that he has “no idea” whether the Town used any portion of the
9 Rumsey Park Master Plan in its discussions with RCEA. (Ex. 2, Moore Depo 48:4-6.)

10 52. The Town manager very clearly testified that they were distinct. (Deposition of
11 Troy Smith, attached here as **Exhibit 26**, at 38:15 – 40:23, 48:8-22.)

12 53. Varxity does not currently operate any schools, nor has Varxity ever operated any
13 schools. (**Ex. 4**, Moore Depo. 8:14 – 9:6, 82:24 – 83:20.)

14 54. Mr. Moore has experience as principal of schools in Canada. (**Ex. 4**, Moore Depo.
15 7:8 – 8:6, 9:1-15.)

16 55. As of the 2018 election, Varxity had no investors signed on, or contracts with
17 employees, or written letters of intent. (**Ex. 4**, Moore Depo. 30:19 – 3:5, 85:23 – 86:14;
18 87:22 – 88:2, 92:5 – 93:2.)

19 56. Varxity had not secured property upon which to construct a school, nor had he
20 looked for any other investor or funding after it was clear the Town was not moving
21 forward. (**Ex. 4**, Moore Depo. 25:11 – 27:1, 43:18 – 44:16, 44:25 – 46:8, 51:10 – 52:18,
22 101:4 – 101:24.)

23 57. Mr. Moore testified that the profits were based on Varxity’s pro forma, which he
24 based on an allegedly similar type of project started in Canada by a member of Varxity’s
25 board of directors, as well as “other schools and academies that are already *currently*
26 running.” (**Ex. 4**, Moore Depo. 82:14 – 83:20 (emphasis added).)

27 58. Mr. Moore admits there are no similar academies in the Southwest. (**Ex. 4**, Moore
28 Depo. 86:9-14.)

1 59. Varxity’s lost profit projects do not include construction costs or land acquisition
2 costs and assumes that COVID would have had some impact, but not enough to change
3 the projections . (Ex. 4, Moore Depo. 83:21 – 85:7, 85:23 - 86:5, 87:12-24, 101:4 –
4 101:24.)

5 60. Mr. Moore presumed that the economic incentives “offered” meant they were all
6 available for Varxity’s choosing, and he did not believe the Town would *negotiate* the
7 listed. (Ex. 4, Moore Depo. 93:18 – 100:17.)

8 RESPECTFULLY SUBMITTED this 3rd day of March 2023.

9
10 **SIMS MACKIN, LTD.**

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