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12 **UNITED STATES DISTRICT COURT**  
13 **FOR THE DISTRICT OF ARIZONA**

14 Varxity Development Corp., a Canadian  
15 corporation,

16 Plaintiff,

17 vs.

18 Town of Payson, an Arizona municipal  
19 corporation,

20 Defendant.

Case No. 2:21-cv-01216-SPL

**PLAINTIFF’S SEPARATE  
STATEMENT OF FACTS IN  
OPPOSITION OF DEFENDANT’S  
MOTION FOR SUMMARY  
JUDGMENT**

21 Pursuant to FRCP 56 and LRCiv 56.1(b), Plaintiff, Varxity Development Corp.,  
22 submits this Separate Statement of Facts in Opposition of Defendant’s Motion for Summary  
23 Judgment.

24 1. Unopposed except to the extent that Defendant alleges the General Plan is  
25 binding on Varxity or otherwise restricts Varxity’s rights under the Tri-Party Agreement.

26 2. Unopposed except to the extent that Defendant alleges the General Plan is  
27 binding on Varxity or otherwise restricts Varxity’s rights under the Tri-Party Agreement.

28 3. Unopposed.

4. Opposed. In addition to “initiat[ing] and facilitate[ing] necessary Pre-  
Development Activities” the Tri-Party Agreement was intended to “provide the Town of  
Payson Leadership a successful development plan, complete with Community Partners,

1 including the Academy, to achieve the goals for a new community recreation center, aquatic  
2 facility, and the master plan for Rumsey Park.” (See Tri-Party Agreement, attached to  
3 Defendant’s SSOF as **Exhibit 2**, at 2, § 1.) Additionally, the Tri-Party Agreement was  
4 intended to accomplish “the goals of the overall Economic Development Initiative.” (**Ex. 2**  
5 **to Defendant’s SSOF** at 2.)  
6

7 5. Unopposed.

8 6. Opposed. The actions of the parties to the Tri-Party Agreement demonstrate  
9 that the Tri-Party Agreement did not expire on or before March 31, 2018.  
10

11 a. The Rumsey Park Master Plan was not submitted by Community Center  
12 Partners (CCP) until April 2018, after Defendant alleges the Tri-Party  
13 Agreement expired. (**Ex. 6 to Defendant’s SSOF** at 1.)  
14

15 b. Defendant made a payment to CCP under the Tri-Party Agreement on April  
16 20, 2018, after Defendant alleges the Tri-Party Agreement expired. (**Ex. 5**  
17 **to Defendant’s SSOF** at 7.)  
18

19 c. Defendant approved the Rumsey Park Master Plan on May 24, 2018, after  
20 Defendant alleges that the Tri-Party Agreement expired. (**Ex. 8 to**  
21 **Defendant’s SSOF.**)  
22

23 d. As of July 23, 2018, Defendant and Plaintiff, who had not entered into a  
24 subsequent agreement, continued to move forward under the Tri-Party  
25 Agreement. (**Ex. 11 to Defendant’s SSOF.**)  
26

27 e. As of October 3, 2018, Defendant was still waiting on funds to validate the  
28 Rumsey Park Master Plan. (**Ex. 13 to Defendant’s SSOF.**)

- 1 f. On November 29, 2018, long after Defendant now alleges the Tri-Party  
2 Agreement expired, the Town Council passed Resolution 3132 the  
3 attachment to which proposed terminating the Tri-Party Agreement and  
4 releasing all claims related thereto. (**Ex. 17 to Defendant’s SSOF** at 2, ¶ 3.)  
5
- 6 g. The third party to the Tri-Party Agreement, CCP, believed that the  
7 Agreement remained intact and that Varxity retained contractual rights,  
8 including to reimbursement, at least as late as September 24, 2019. (**Ex. 18**  
9 **to Defendant’s SSOF** at 1-2.)
- 10 h. Varxity informed Defendant that it considered the Tri-party Agreement to  
11 be in place as of January 6, 2020. (**Ex. 19 to Defendant’s SSOF.**)
- 12 i. Defendant did not dispute that the Tri-Party Agreement was in place and  
13 effective in early 2020 and in fact indicated that:  
14
- 15 i. “The Town...[saw] no compelling reason to terminate the Tri-Party  
16 Agreement and potentially incur substantial costs for doing so.” (**Ex.**  
17 **20 to Defendant’s SSOF** at 1, ¶ 4.)
- 18 ii. Varxity would have been liable for the break-up fee if it terminated  
19 the Tri-Party Agreement in early 2020. (**Ex. 20 to Defendant’s**  
20 **SSOF** at 1, ¶ 4.)
- 21 iii. “...Town is not [as of February 6, 2020] terminating the Tri-Party  
22 Agreement” and therefore owed Plaintiff nothing. (**Ex. 20 to**  
23 **Defendant’s SSOF** at 2.)  
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j. Plaintiff understood that the Tri-Party Agreement remained in effect after the Town Council approved the Rumsey Park Master Plan. (**Exhibit 4 to Defendant’s SSOF** at 12 (22:20-25).)

7. Opposed. Payment of a break-up fee was the penalty for termination, it was not required for unilateral termination to occur. (**Ex. 2 to Defendant’s SSOF** at 8, § 9.)

8. Unopposed.

9. Unopposed.

10. Unopposed.

11. Unopposed.

12. Unopposed.

13. Unopposed.

14. Unopposed.

15. Opposed. The quoted “first step” language in Defendant’s SSOF ¶ 15 refers to the Town’s approval and adoption of the Rumsey Park Master Plan as the “first step.” It does not refer to the Tri-Party Agreement or the resulting Rumsey Park Master Plan as the first step. (**Ex. 8 to Defendant’s SSOF** at 2, final whereas clause.)

16. Unopposed.

17. Unopposed.

18. Unopposed.

19. Unopposed.

20. Unopposed.

21. Unopposed.

22. Unopposed.

1           23.    Opposed. The voter-initiated propositions (Propositions 401 and 402) did not  
2 restrict the Town’s ability to lease property and the Town treated those propositions as  
3 ineffective and unconstitutional. (Deposition of Town of Payson (Troy Smith) attached hereto  
4 as **Exhibit A**, 49:7 – 50:20.)

5  
6           24.    Unopposed.

7           25.    Unopposed.

8           26.    Unopposed.

9           27.    Unopposed.

10          28.    Unopposed.

11          29.    Unopposed.

12          30.    Unopposed.

13          31.    Unopposed.

14          32.    Opposed. Mr. Moore, who is not a lawyer or legal professional, felt that the  
15 Town may have broken the Tri-Party Agreement but believed that the Agreement remained  
16 in effect as of that date. Specifically, Mr. Moore wrote:

17  
18                            “My take is [The Town] broke contract and time to settle open contract  
19                            and walk away.”  
20

21  
22 **(Ex. 18 to Defendant’s SSOF at 1.)**

23          33.    Opposed. Though Mr. Moore believed that the Town had stopped looking for  
24 funds, Defendant’s actions, including the words of its attorney, told Mr. Moore that the Tri-  
25 Party Agreement remained in effect after the election. (**Exhibits 13 and 20 to Defendant’s**  
26 **SSOF.**)

27  
28          34.    Unopposed.

1 35. Unopposed.

2 36. Unopposed.

3 37. Unopposed.

4 38. Unopposed.

5 39. Unopposed.

6 40. Unopposed except to note that the MOU also describes pickleball courts, trails,  
7  
8 and baseball and softball fields. (**Ex. 24 to Defendant’s SSOF.**)

9 41. Unopposed.

10 42. Unopposed.

11 43. Opposed to the extent that Mr. Moore definitively, and not vaguely, alleges that  
12 the conditional language and validation phase were formalities based on his understanding of  
13 the Tri-Party Agreement and representations of the Mayor.

14 44. Opposed. The Tri-Party Agreement refers to CCP as the Master Developer (**Ex.**  
15  
16 **2 to Defendant’s SSOF** at § 3) and directs the parties to “approve and accept the  
17 Development program” and appoint CCP as the “Master Developer” and that the ultimate  
18 Master Development Agreement, contemplated by the Tri-Party Agreement “shall include  
19 the fully negotiated incentives contemplated in Exhibits ‘E’...” (**Ex. 2 to Defendant’s SSOF**  
20  
21 at § 6(H).)

22 45. Unopposed.

23 46. Unopposed.

24 47. Unopposed.

25 48. Unopposed.

26 49. Unopposed.

1 50. Unopposed.

2 51. Unopposed.

3 52. Opposed. The Town Manager, Mr. Troy Smith testified that he had not  
4 discussed the Rumsey Park Master Plan or the Tri-Party Agreement with the Mayor or Town  
5 Council but that the projects were distinct in his opinion. (**Ex. 26 to Defendant's SSOF** at  
6 38:4-11.) The Rumsey Park Master Plan and MOU themselves demonstrate the similarities  
7 between the projects. (**Ex. 6 to Defendant's SSOF** at 2-4; **Ex. 24 to Defendant's SSOF** at  
8 2, § 1.)  
9

10 53. Unopposed.

11 54. Unopposed.

12 55. Unopposed.

13 56. Unopposed.

14 57. Unopposed.

15 58. Unopposed.

16 59. Unopposed.

17 60. Unopposed.

18 **PLAINTIFF'S SEPARATE STATEMENT OF FACTS**

19 61. The Tri-Party Agreement calls for Plaintiff and Defendant to be fully  
20 reimbursed when the Project is financed. (**Ex. 2 to Defendant's SSOF** at § 7.)  
21

22 62. The Project contemplated by the Tri-Party Agreement included new baseball  
23 and softball fields, new football and soccer fields, pickleball and tennis courts, volleyball  
24 courts, basketball courts, hiking and biking trails, a community center, a pool and aquatics  
25 facility, and an ice rink and training facility. (**Ex. 6 to Defendant's SSOF** at 3-4.)  
26  
27  
28

1           63. The project that Defendant investigated and negotiated with the RCEA includes  
2 new baseball and softball fields, new “multipurpose” (i.e. football and soccer) fields,  
3 pickleball and tennis courts, a nature trail, a community center, a swimming pool and aquatics  
4 facility, and a gym and fitness training facility. (**Ex. A** at 36:3-7; **Ex. 24 to Defendant’s**  
5 **SSOF** at § 1.)  
6

7           64. In its Notice of Claim, Plaintiff alleged that Defendant breached the Tri-Party  
8 Agreement in March 2021. (**Ex. 22 to Defendant’s SSOF** at 3.)  
9

10           65. The Tri-Party Agreement required the parties to move forward and construct  
11 the Project. (Deposition of Lane Moore, attached hereto as **Exhibit B**, at 35:25-36:6.)  
12

13           66. The Tri-Party Agreement required the parties to appoint CCP as Master  
14 Developer in a follow-on agreement and move forward with construction. (**Ex. B** at 37:7-13.)  
15

16           67. The economic incentives listed in Exhibit E to the Tri-Party Agreement were  
17 offered and negotiated by Defendant at execution of that Agreement. (**Ex. B** at 94:17-95:2.)  
18

19           68. The break-up fee is a penalty clause which defines one element of damage  
20 suffered by a non-breaching party. (**Ex. B** at 77:23-78:4.)  
21

22           69. Defendant’s breach caused Plaintiff lost profits in the operation of its planned  
23 academy. (**Ex. 4 to Defendant’s SSOF** at 82:14-16.)  
24

25           70. Based on the financials of similar academies, Plaintiff believes that COVID-19  
26 would have ultimately boosted its profit. (**Ex. B** at 101:25-102:20.)  
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DATED this 3rd day of April 2023.

FR LAW GROUP PLLC

By: /s/ Richie J. Edwards

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 3, 2023, I electronically transmitted the above document (Response to Motion to Dismiss) to the Clerk’s Office using the ECF System for filing and caused a copy to be electronically transmitted to the following ECF registrant:

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