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November 1, 2011

John Melikian
The Fresno State Foundation
4910 N. Chestnut Ave.
Fresno CA 93726

RE: California State University, Fresno Foundation and Association, Inc.

Dear Mr. Melikian:

This letter summarizes the findings of the investigation by the Charitable Trusts Section ("CTS") of the Office of the Attorney General into various issues concerning a number of auxiliary organizations associated with Fresno State University ("University"). The auxiliary organizations include the California State University, Fresno Foundation ("Foundation"), the California State University, Fresno Association ("Association"), and the California State University, Fresno Athletic Corporation ("Athletic Corporation")¹. These organizations are all California nonprofit public benefit corporations.

BACKGROUND

Our investigation was focused on the auxiliary organizations and the Bulldog Foundation, which supports the University, and charitable trust issues arising with regard to the activities of those organizations. The issues investigated fell within three general areas: (1) the allegation that funds were misdirected to the athletic department through their matching gift program, (2) the allegation that organization directors improperly benefitting from no bid contracts, self-dealing, and conflicts of interest, and (3) the alleged violations of the Public Records Act (Gov. Code § 6250) by the Foundation and Association.

In performing this investigation, we requested, received, and reviewed documentary evidence. The documentary evidence reviewed included independent audits, court records, construction bid documents, and third party correspondence. Also, we had extensive

¹ You have informed us, and The California State University website represented, that another nonprofit public benefit corporation, the Bulldog Foundation, discussed in the matching gift section below, is not an auxiliary organizations of the University under California Code of Regulations, title 5, section 42400 et seq.

communication with the organizations' counsel. Based on that documentary evidence and the representations made we make the following findings and conclusions.

ANALYSIS OF ISSUES

I. MISDIRECTION OF DONATIONS TO THE ATHLETIC DEPARTMENT

A. The Matching Gift Program

This involved the receipt by the University, the Foundation, and the Bulldog Foundation of donations when a company would match an employee's gift to a nonprofit corporation. In return for participating in this program, businesses and individuals received various benefits, including tickets to University athletic events.

The University's review of various documents gathered in response to a Public Records Act request raised questions regarding the propriety of the matching gift program. The University discovered that many companies will not match an employee's gift if it is designated for athletic purposes. The policies of many companies also provide that they will not match an employee donation if the employee receives a personal benefit, such as tickets to athletic events, in exchange for the contribution.

It was brought to our attention that, over a 17-year period, 207 donor companies provided a total of \$2,880,568, in matching gifts that were directed to the athletic program at the University. In response to the matching grant program issue you have informed us of the following:

B. The Audit

The Association's Chairperson,² in consultation with the University President, engaged an outside accounting firm to conduct an independent audit. The purpose of the audit was to determine why the donations were misdirected to the athletic program and what needed to be done to correct the problem. The audit determined that the personnel managing the matching gift program did not intend to deceive the companies participating in the program. The audit identified the following problems which contributed to the issue: (1) poor judgment by management in the early stages of the program, (2) faulty internal certification processes, (3) lack of communication between the entities making the donations and those receiving the donations, and (4) poor monitoring by the responsible officials.

C. Response to the Audit

You have represented that, after the audit, the University contacted the 207 companies that participated in the matching gift program, fully disclosed to them the result of the above-described audit, and offered to reconcile the issue with the companies in one of the following

² As a neutral third party who had not been involved with the matching grant program, the Chairperson was selected to help in the independent audit.

ways: the company could (1) receive a full refund of its matching grant, (2) acknowledge the University's disclosure, but decline to have further action taken, thereby approving the original donation, or (3) provide a statement approving redirection of the matching gift to either the University's general scholarship fund, its general fund, or its library.

The options chosen by the companies resulted in the following dollar designations:

- \$1,480,339 of the funds designated as matching gifts did not need to be refunded or redirected for another purpose;
- \$1,361,993 of the funds designated as matching gifts were redirected to scholarships, the general fund, or the library; and
- \$25,570.34 was refunded to five companies, at their request.

The redirection and refund of the matching gifts were made from unrestricted funds held by the Foundation for the benefit of the University and the Athletic Corporation. The foregoing discussion accounts for \$2,867,902.34 of the amount at issue. The remaining balance is explained in the next paragraph.

The value of the matching gifts of companies that were no longer in business or were in bankruptcy at the time of the contact was \$12,665. Because the University was not able to resolve the misdirection of these matching gifts, \$12,665 in unrestricted funds was, we are informed, redirected to an academic scholarship fund.

D. Additional Corrective Actions

In addition to taking the necessary corrective action as to the gifts received, we are informed that the University and the auxiliary organizations have taken additional corrective action to ensure that this "matching gift issue" will not occur in the future, in part by prohibiting the acceptance of future matching gifts for athletics or other activities when those making the donation would receive membership or other benefit in exchange for the donation.

II. IMPROPER BENEFIT TO DIRECTORS

Our office also investigated allegations that a member of the Association's board of governors received a no-bid contract from the Association to build a theatre complex. This allegation raised two issues: (1) whether the transaction was awarded without a competitive bid process, and (2) whether the contract constituted a self-dealing transaction. (See Corp. Code, § 5233.)

A. The Bid Was Competitive

Our investigation indicates that the University and the Association are engaged in a public/private mixed-use real estate development project. This project began in 2002, when the Association sought bids to develop a 45-acre tract next to the Save Mart Center. The request for

proposals from the Association stated that the proposals should include, but not be limited to, theaters, entertainment attractions, shops, restaurants, hotels and parking facilities.

Based on the information provided, it appears that the Association received two responsive proposals and selected one. The development team that was selected included a local developer who demonstrated a greater understanding of the market demands and viable land use of the property. As such, the allegation that the bid process was not competitive appears to be without merit.

B. No Self-dealing

A self-dealing transaction is defined as a transaction to which a public benefit corporation is a party and in which one or more of its *directors has a material financial interest*. (Corp. Code, § 5233, subd. (a).) There are strict statutory requirements to which the board of directors must adhere in order to approve a self-dealing transaction.

In the present case, we are informed that none of the master developers selected for the project, nor their spouses, were on the board of directors of the Association at the time of selection. Therefore, the transaction does not fall within the statutory definition of self-dealing.

C. The Conflict of Interest is Not a Charitable Trust Issue

A concern has also been raised regarding a conflict of interest involving the Chief Executive Officer ("CEO") of the company selected to operate the movie theater. That CEO was found by a Fresno County Superior Court judge to have a conflict in violation of Government Code section 1090.³ However, the conflict arose because he was a *California State University trustee*. This conflict had nothing to do with the Association. Nor was the CEO a member of the board of directors of the Association. The CTS is responsible for enforcing the laws regulating the activities of charitable entities, hence our inquiry and review focused solely on potential charitable trust violations by the auxiliary organizations, and not on California State University issues. As this allegation does not involve a potential charitable trust violation, we offer no opinion as to its validity.

³"Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.

As used in this article, 'district' means any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries." (Gov. Code, § 1090.)

III. ALLEGED VIOLATION OF THE PUBLIC RECORDS ACT

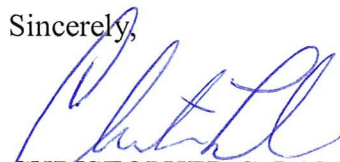
Finally, it was alleged that the University's auxiliaries (specifically the Association and the Foundation) refused to disclose the names of donors who executed seating license agreements for luxury suites at the Save Mart Center at Fresno State University, in violation of the Public Records Act (Gov. Code, § 6250 et seq.).

The Public Records Act is applicable to government agencies. The auxiliaries are public benefit corporations and not "state agencies" and were therefore not subject to the Public Records Act at the time this allegation arose⁴. (*California State University, Fresno Association, Inc. v. Superior Court* (2001) 90 Cal.App.4th 810.) Although the Association and the Foundation were not covered by the Public Records Act, we are informed that, subsequent to the Appellate Court's decision, the auxiliaries voluntarily produced the requested information in their possession. Therefore, the issue is moot.

CONCLUSION

Based on the above, we are closing our inquiry. Thank you for your cooperation during the pendency of our investigation. If you have any questions regarding the foregoing, please contact me within five business days of the date of this letter.

Sincerely,



CHRISTOPHER C. LAMERDIN
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

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⁴ As of January 1, 2012, public inspection of the records of California State University auxiliary organizations will be governed by the provisions of Education Code section 72690 et seq. (Sen, Bill No. 8 (2010-2011 Reg. Sess).)