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April 27, 2015

VIA EMAIL (governingboardmembers@palomar.edu) AND FACSIMILE: (760) 591-0698

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Re: Proposed Supplemental Retirement Program

Dear President Halcón and Members of the Governing Board:

Our law firm represents the Palomar Faculty Federation, Local 6161, CFT/AFT, AFL-CIO (“Federation”). We are writing concerning the Supplemental Retirement Program (“SRP”) which the Governing Board of the Palomar Community College District (“District”) will consider adopting on April 28, 2015. The purpose of this letter is to inform you of our determination that approval by the Governing Board of the SRP would run afoul of Government Code Section 1090 (“Section 1090”) and could expose representatives of the District to criminal liability, unless the Board acts to exclude administrators who have “sat on both sides of the table” during the SRP discussions. To explain why, we will first provide some background on the relevant law and then set forth the reasons why approving the SRP without excluding these administrators would violate Section 1090.

I. GOVERNMENT CODE SECTION 1090

Section 1090 codifies California’s longstanding common law prohibition against “self-dealing,” a prohibition which has been in place since 1851. (See, e.g., *Berka v. Woodward* (1899) 125 Cal.

119). In a nutshell, Section 1090 prohibits officers and employees of state and local government from having a personal financial interest in any contract they make in their official capacity.¹

When the financial interest at issue is possessed by an employee of a governmental entity, rather than by a Board member, the governmental entity is prohibited from entering into any contract in which the employee participated in making. "Participation" is further defined broadly to not only include executing the contract, but also includes any direct or indirect involvement in preliminary discussions or negotiations of the contract in question. (*Milbrae Assn. for Residential Survival v. City of Milbrae* (1968) 262 Cal.App.2d 222, 237).

Any contract made in violation of Section 1090 is void *ab initio*. (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323). In addition, willful violations of Section 1090 are punishable by a fine of up to \$1,000 or imprisonment in state prison, and violators are forever disqualified from holding any office in California. (Gov't Code Section 1097).

II. THE SELF-DEALING INVOLVED IN SRP

As you know, John Tortarolo ("Tortarolo"), the District's Assistant Superintendent/Vice-President for Human Resource Services, participated in the negotiation of the SRP with both the Federation and the Palomar Council of Classified Employees, Local 4522, CFT/AFT, AFL-CIO ("CCE"), and was the District agent who executed the relevant Memoranda of Understanding setting forth the terms of the SRP. We are also informed that the District's Superintendent/President Robert Deegan ("Deegan") and Assistant Superintendent/Vice-President for Instructional Services Berta Cuaron ("Cuaron") have actively participated in determining the assumptions that Public Agency Retirement Services ("PARS") has utilized in costing out the SRP, including by their participation in a Vice-Presidents meeting on April 6, 2015 in which the assumptions given to PARS were materially changed.

During the SRP negotiations with the Federation, the members of the Federation's negotiating team announced that they would not be participating in any SRP which may result from those negotiations.² The Federation then asked Tortarolo if District representatives would make the same commitment, but Tortarolo refused to do so. The Federation is now informed and believes that Tortarolo, Deegan and Cuaron are among the nine Educational Administrators who have enrolled in the SRP. As such, they each have a direct personal financial interest in the Governing Board approving the SRP. Because all three of them participated in crafting the SRP, it would therefore violate Section 1090 for the Governing Board to approve the SRP without excluding these three administrators from the program.

As you may know, there has recently been increased media scrutiny within the District's own geographic boundaries on the issue of similar self-dealing by administrators. Specifically, the

¹ Since 1986, Section 1090 has been applicable to community college districts. (Education Code Section 72533).

² To be clear, it would not violate Section 1090 if the Federation negotiators were to also participate in SRP, since their participation in the negotiations was in their capacity as Federation representatives and not as employees of the District. (See 80 Ops.Cal.Atty.Gen 41 (1997) [firefighters were allowed to sell a product they invented as private citizens to the fire department that employed them as long as they did not participate in the fire department's decision to enter into the sale]). Their decision to abstain was voluntary, out of a desire to be above any reproach.

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Voice of San Diego last week raised questions about the legality of administrators in the Poway Unified School District personally benefitting from salary increases they negotiate with the teachers' union. (See <http://www.voiceofsandiego.org/topics/education/poway-schools-execs-get-the-same-raises-they-negotiate-with-teachers/>). The situation which you now confront is, frankly, a dramatically more clear violation of Section 1090 than that in Poway Unified.

We therefore urge the Governing Board not to approve the SRP at its meeting on April 28 unless it specifically excludes from the program Deegan, Tortarolo, Cuaron, and any other administrators who participated in crafting the SRP.

Very truly yours,



Ricardo Ochoa
Attorney at Law

Cc: Robert P. Deegan, Superintendent/President, Palomar College (via email only)
Shannon Lienhart, Co-President, Palomar Faculty Federation (via email only)