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5 SAN YSIDRO SCHOOL DISTRICT

6 **EXEMPT FROM FILING FEE-**
7 **GOVERNMENT CODE SECTIONS 6103 & 26857**

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN DIEGO

10 SAN YSIDRO SCHOOL DISTRICT, a)
11 California school district,)
12 Plaintiff,)

13 vs.)

14 STUTZ ARTIANO SHINOFF & HOLTZ, a)
15 Professional Corporation, a California)
16 professional corporation, DANIEL R.)
17 SHINOFF, an individual, and DOES 1 through)
18 25, inclusive,)
Defendants.)

Case No.: 37-2015-00009253-CU-PN-CTL

COMPLAINT FOR

- (1) **PROFESSIONAL NEGLIGENCE;**
(2) **BREACH OF FIDUCIARY DUTY;**
(3) **FRAUD—INTENTIONAL**
MISREPRESENTATION;
(4) **FRAUD—NEGLIGENT**
MISREPRESENTATION;
(5) **CONSTRUCTIVE FRAUD**
(6) **MONEY HAD AND RECEIVED;**
(7) **UNFAIR BUSINESS PRACTICES;**
and
(8) **FALSE CLAIMS**

19 **SUMMARY OF THE COMPLAINT**

20 1. Lawyers for a school district failed to convey settlement offers, to mediate, or
21 to advise the client on settlement, falsely stating that the adversary was refusing to settle.

22 2. As a result, the case was not settled, but was instead tried. The lawyers lost the
23 case, resulting in an \$8.5 million judgment being entered against the cash-strapped District.

24 3. In the process, the lawyers profited, banking more than \$1.3 million.

25 4. The District seeks damages arising from the lawyers' malpractice and deceit.

26 **VENUE AND JURISDICTION**

27 5. Venue is proper in this Court because the events and injuries complained of in
28 this Complaint occurred in the City and County of San Diego.

1 **FACTS COMMON TO ALL CAUSES OF ACTION**

2 **A. The Solar Power Services Agreement**

3 12. On or about October 8, 2008, the District and EcoBusiness Alliance, LLC, dba
4 Manzana Energy (“EBA”) executed a Solar Power Services Agreement (hereafter, “SPSA”),
5 whereby the District leased to EBA for a period of 25 years certain premises upon which EBA
6 could build solar power generation systems and whereby the District agreed to purchase the
7 energy generated by the systems.

8 13. In broad terms, the SPSA allowed EBA to build solar energy systems on
9 school sites and sell the electricity generated by the systems to the district over a 25-year
10 period for quarterly payments totaling approximately \$18.9 million over the SPSA term.

11 **B. EBA Tried To Settle Before Suing**

12 14. On October 12, 2011, the Firm, representing the District, sent a letter to EBA,
13 stating that it had failed to perform under the contract to date. The letter stated: “It appears
14 by your inaction that you have abandoned the project and the [SPSA].” The letter explained
15 that, per the SPSA, EBA had fifteen months to begin construction of the systems, but had
16 failed to do so.

17 15. In response, EBA called a meeting with Defendant Shinoff of the Firm on
18 February 2, 2012, before any legal actions were taken by EBA. Shinoff commented initially
19 that his client had properly terminated the SPSA because, according to Shinoff, EBA had
20 done nothing to fulfill the Agreement. During the nearly two-hour meeting, EBA explained
21 and documented to Shinoff the underlying facts showing that his understanding was incorrect,
22 and provided him evidence of the work EBA had performed. During the meeting, EBA made
23 a settlement offer: to accept reinstatement of the wrongly terminated contract, the SPSA.

24 16. Following the explanation and the settlement offer, Shinoff reportedly told
25 EBA that, given the evidence presented in the meeting, it not only looked ugly for his client,
26 the District, but that it looked “fugly.”¹

27
28

¹ Dictionary.com defines “fugly,” politely, as “very ugly; extremely unattractive.”

1 17. Shinoff reportedly told EBA that he was going directly to meet with his client,
2 the District, and would report back.

3 18. Notwithstanding the promises, and despite multiple reminders from EBA’s
4 counsel, Shinoff never fulfilled his promise to consult with his client and then get back to
5 EBA, thus necessitating a formal government claim and then a lawsuit by EBA.

6 19. On information and belief, Defendants never conveyed the February 2012
7 settlement offer to the District Board.

8 20. As alleged here, because of the failure to communicate that settlement offer,
9 the District was harmed. It unnecessarily suffered a \$12 million jury verdict, an \$8.5 million
10 judgment, and bills of approximately \$1.5 million—all of which were incurred following the
11 uncommunicated settlement offer.

12 21. Furthermore, at no time did Defendants *ever* advise the District that the manner
13 of the District’s termination of the SPSA (including the notice of termination) was flawed, or
14 that any *arguable* flaws could be fixed. To the contrary, at all relevant times, Defendants
15 proceeded as if the District’s termination was both immutable and proper. As it turned out,
16 neither of these were facts.

17 **C. The Litigation**

18 *The Complaint*

19 22. When Shinoff did not respond to EBA, EBA filed its original Complaint on
20 April 5, 2012, and subsequently filed its First Amended Complaint (the “FAC”) on
21 October 29, 2012. The District served its Answer to the FAC on or about December 12, 2012.

22 *The Cross-Complaint*

23 23. The Firm answered the FAC and filed a cross-complaint against EBA for,
24 among other things, intentional concealment. The cross-complaint was ill-advised and was
25 eventually dismissed for lack of evidence to support it.

26 24. On information and belief, Defendants never obtained the District’s consent to
27 file the cross-complaint.

28

1 *Discovery And The Revelation Of A Bribe*

2 25. Extensive discovery occurred in the case, with some 45 depositions being
3 taken.

4 26. One of those deposed was the District's then-Superintendent, Manuel Paul.
5 During his sworn testimony on June 20, 2012, Paul admitted to receiving \$2,500 in the
6 parking lot of a Chula Vista steak house.

7 27. Paul testified that Loreto Romero, a local contractor allegedly hoping for work
8 in the District, gave him the cash as a campaign contribution for San Ysidro board member
9 Yolanda Hernandez.

10 28. The Firm had previously asserted in court documents that Paul was a key
11 witness in the case. Now, the Firm requested a protective order, arguing that "If [Paul] asserts
12 the Fifth Amendment to questions due to the pending criminal matter, the District will not be
13 able to introduce evidence with the Superintendent's knowledge, thus impeding the District's
14 ability to defend against the plaintiff's allegations."

15 *The February 2013 EBA Settlement Offer*

16 29. By 2013, it was clear that the District's case was not going well. It had much
17 to lose (\$19 million plus) and very little to gain. Even if it won at trial, any award in its favor
18 would be uncollectable, as EBA was a single-purpose entity, the only asset of which was the
19 contract with the District (the SPSA). For the District, there was no upside.

20 30. Meanwhile, EBA eventually moved for summary judgment on the cross-
21 complaint the Firm had filed without client consent. EBA contended—as appeared to be
22 undeniable—that the District had *no* evidence to support its claims. If the trial court granted
23 EBA's motion, the District would be subjected to liability for costs, attorneys' fees and a
24 potential malicious prosecution claim.

25 31. On information and belief, Defendants never counseled the District on the
26 benefits and detriments of allowing the motion for summary judgment to proceed to hearing.

27 32. As the hearing date approached, unbeknownst to the District Board, EBA again
28 approached the Firm in an attempt to settle the litigation. The overture was in writing this

1 time, a letter dated February 6, 2013. The letter reviewed Defendants' failure to respond to
2 the prior settlement offer a year before, and contended that "I [EBA's counsel] have doubts
3 whether you ever discussed the [February 2012] proposal with the District." In the letter,
4 EBA proposed two settlement options and also proposed a mediation:

5 Formulating a resolution of this case that preserves the District's
6 financial resources will not occur absent the parties engaging in
7 meaningful discussions. Rather than simply convey a monetary
8 demand, the purpose of this letter is to encourage such discussions.
9 To that end, it is proposed that the parties jointly retain Thomas E.
10 Sharkey to facilitate efforts by the parties to resolve this dispute.
11 Tom Sharkey is well known, well respected and has an established
12 track record as a Mediator.

13 This demand is one of time, as well as substance. . . .

14 33. The next day, on February 7, 2013, Defendant Shinoff acknowledged in
15 writing that he would need to bring EBA's proposal to the attention of the District Board.
16 However, Defendant Shinoff stated that the District Board was not meeting before the
17 deadline established by the proposal, the motion for summary judgment hearing date
18 (March 15, 2013).

19 34. What Shinoff said was not true: The District Board was scheduled to meet on
20 February 28, 2013, well before the deadline. The agenda for that meeting listed EBA as a
21 topic of discussion.

22 35. Although Defendant Shinoff told EBA's lawyer that the District Board would
23 not be meeting, when in fact it would be, Shinoff never conveyed the February 2013 proposal
24 to the District.

25 36. Instead of even discussing settlement with the District, Defendants took the
26 matter of the legal sufficiency of their cross-complaint to hearing. Following a hearing on the
27 scheduled date, March 15, 2013, the trial court *granted* EBA's summary judgment motion,
28 subjecting the District to liability for costs, attorneys' fees and a potential malicious
29 prosecution claim.

1 37. Meanwhile, the Court denied the Firm’s motion for summary judgment on the
2 FAC, meaning that the District still faced an exposure in excess of \$18 million on EBA’s
3 claims.

4 *Defendants And Paul Strategize On How To Testify Regarding His Criminal*
5 *Behavior, As Paul Eventually Takes The Fifth*

6 38. Rather than counsel the District on settlement, Defendants instead met secretly
7 with Superintendent Paul regarding his testimony.

8 39. Just two months after the ignored settlement proposal, on April 12, 2013, Paul
9 was again deposed.

10 40. Represented in the deposition by Defendants, this time Paul pleaded the Fifth
11 Amendment 43 times in less than an hour of testimony.

12 *No Settlement Efforts*

13 41. As the District’s case was unravelling, EBA’s counsel continued to raise the
14 subject of settlement and mediation, even with the trial judge (obviously, when Defendants
15 were present).

16 42. Defendants consistently, and without the knowledge of the District Board,
17 resisted the overtures. “The parties are too far apart” is what EBA’s counsel was told by
18 Shinoff and the Firm.

19 *The Trial*

20 43. After exhaustive discovery, Defendants should have re-assessed the case to
21 determine weakness in the District’s case, but they did not. The trial of EBA’s case
22 eventually occurred in January 2014.

23 44. The jury found the District failed to perform under the contract (the SPSA),
24 and awarded EBA damages of \$12 million. The trial court entered judgment on the special
25 verdict on February 27, 2014.

26 45. The trial court denied the District’s motion for new trial upon EBA’s consent
27 to a remittitur. It held that the award of future lost profits was speculative and gave EBA the
28 option of accepting a remittitur reducing the verdict that value from \$12 million to \$7.482

1 million, or retrying damages. EBA consented to the remittitur. After EBA accepted the
2 remittitur, the trial court entered a final order denying the motion for new trial, and entered an
3 amended judgment on August 5, 2014 reflecting the lower damages, but it also included costs
4 and attorneys' fees, for a total judgment of \$8,596,138.06.

5 *The Appeal*

6 46. On May 2, 2014, Defendants filed a Notice of Appeal.

7 47. On March 13, 2015, EBA filed a motion to dismiss the appeal because
8 Defendants purportedly appealed from the *wrong* judgment—they appealed only from the
9 judgment after the jury's verdict, not the final judgment following the remittitur.

10 **FIRST CAUSE OF ACTION**

11 **PROFESSIONAL NEGLIGENCE**

12 **(Against All Defendants)**

13 48. The District incorporates the paragraphs previously alleged as if fully alleged
14 here.

15 49. Defendants represented the District in connection with the EBA litigation.

16 50. Defendants continually represented the District on the same subject matter
17 until February 2015.

18 51. As alleged above, Defendants breached their duty to exercise reasonable care
19 and skill in performing legal services for the District.

20 52. The Firm failed to represent the District in conformity with the standard of
21 care. These breaches included, but are not limited to:

22 a. failing to communicate settlement offers to the District in violation
23 of Rule 3-510(A)(2) of the Rules of Professional Conduct;

24 b. failing to counsel the District on the risks and benefits of the
25 litigation;

26 c. failing to apprise the District of material developments in the
27 litigation in violation of Business and Professions Code section 6068;

28

1 d. failing to advise the District on available methods of ameliorating
2 any defects in the District's termination of the SPSA, including the benefits of
3 reinstating the agreement and/or correcting any defects in the District's notice of
4 termination of it;

5 e. failing to inform the District of the benefits and costs of the cross-
6 complaint Defendants had filed and were prosecuting without the District's
7 knowledge;

8 f. failing to mediate the case² and instead affirmatively
9 misrepresenting that EBA was refusing to settle;

10 g. appealing from the wrong judgment, and exposing the District
11 unnecessarily to the dismissal of its appeal; and

12 h. charging the District unreasonable and unconscionable fees (of
13 approximately \$1.5 million) in violation of Rule 4-200 of the Rules of
14 Professional Conduct.

15 53. As a proximate result of the conduct alleged above, the District has sustained
16 damages in an amount presently unknown, but in excess of \$10 million, the extent of which
17 will be proven at trial.

18 **SECOND CAUSE OF ACTION**

19 **BREACH OF FIDUCIARY DUTY**

20 **(Against All Defendants)**

21 54. The District incorporates the paragraphs previously alleged as if fully alleged
22 here.

23 55. Defendants owed the District a fiduciary duty to act with the utmost good faith
24 and in the best interests of the District while they represented it. That fiduciary duty included
25 an obligation to fully and promptly inform the District of any acts or events materially
26 concerning the subject matter of the retention.

27 _____
28 ² The first mediation occurred *after* the case was tried and the jury verdict entered.??

1 56. Defendants breached their fiduciary duty of full and fair disclosure by, among
2 other things, failing to inform the District Board of their opinion that the District was going to
3 lose the case because the case was very ugly (“fugly”), failing to inform the District Board of
4 material developments, concealing and misrepresenting EBA’s settlement posture, failing to
5 inform the District Board of settlement offers, taking unauthorized positions, and failing to
6 report EBA’s requests for mediation.

7 57. Defendants’ breaches of fiduciary duty were substantial factors in causing the
8 District to suffer harm by paying Defendant’s attorney and litigation expenses which it would
9 have not incurred had Defendants performed their fiduciary duty.

10 58. The conduct of Defendants as described herein was oppressive, fraudulent,
11 malicious, and despicable, because it was carried on with a willful and conscious disregard for
12 the rights of the District. Defendants were aware of the probable dangerous consequences of
13 their conduct and willfully and deliberately failed to avoid those consequences. This conduct
14 constitutes malice, oppression and fraud such that the District is entitled pursuant to
15 California Civil Code section 3294 to recover punitive damages in an amount sufficient to
16 punish and set an example of Defendants and to deter them from engaging in similar conduct
17 in the future.

18 **THIRD CAUSE OF ACTION**

19 **FRAUD - INTENTIONAL MISREPRESENTATION**

20 **(Against All Defendants)**

21 59. The District incorporates the paragraphs previously alleged as if fully alleged
22 here.

23 60. At various points in time, the precise dates of which are currently unknown to
24 Plaintiff, Defendant Daniel R. Shinoff, a partner of the Firm, represented to the District,
25 through the District Board, that (1) EBA was unwilling to settle, and, consequently, (2) the
26 District had no choice but to prepare the case for trial, and (3) that he believed that the District
27 was likely to prevail at trial and on appeal (the “Representations”).
28

1 61. The District tried the case, rather than settling, in reliance on the
2 Representations.

3 62. Since the action was tried and the appeal filed, the District Board has learned
4 that the Representations were untrue.

5 63. The District now believes that Defendants made the Representations in an
6 effort to induce it not to settle and, as a result, to pay increased fees to Defendants. Whatever
7 their motives, Defendants convinced the District that it had no alternative but to try the case.

8 64. On information and belief, the Firm knew that the Representations were not
9 true, but nevertheless intended that the District would rely on them. Further, had the risks of
10 trial been explained to the District Board properly, it would not have agreed to try the case.

11 65. The District justifiably relied on the Representations believing them to be true.

12 66. The Representations have since proved to be untrue.

13 67. As a direct result of Defendants' intentional misrepresentation as set forth
14 herein, the District has been damaged in an amount within the jurisdiction of this Court to be
15 proven at trial including interest, costs and other amounts, to which the District may be
16 entitled that is within the jurisdiction of this Court.

17 68. Furthermore, Defendants' acts, as set forth herein, were willful, oppressive and
18 malicious, and in conscious disregard of the District's rights, thereby justifying an award of
19 punitive damages against Defendants in an amount to be proven at trial.

20 **FOURTH CAUSE OF ACTION**

21 **FRAUD – NEGLIGENT MISREPRESENTATION**

22 **(Against All Defendants)**

23 69. The District incorporates the paragraphs previously alleged as if fully alleged
24 here.

25 70. At the time Defendants made the Representations to the District Board,
26 Defendants should have reasonably known that they were not true, but nevertheless intended
27 that the District would rely on them.
28

1 71. The District justifiably relied upon the Representations, believing them to be
2 true.

3 72. As a direct result of Defendants’ negligent misrepresentations as set forth
4 herein, the District has been damaged in an amount within the jurisdiction of this Court to be
5 proven at trial, including interest, costs and other amounts to which the District may be
6 entitled that is within the jurisdiction of this Court.

7 73. Furthermore, Defendants’ acts, as set forth herein, were willful, oppressive and
8 malicious, and in conscious disregard of the District’s rights, thereby justifying an award of
9 punitive damages against Defendants in an amount to be proven at trial.

10 **FIFTH CAUSE OF ACTION**
11 **CONSTRUCTIVE FRAUD**
12 **(Against All Defendants)**

13 74. The District incorporates the paragraphs previously alleged as if fully alleged
14 here.

15 75. A fiduciary relationship existed between the District and Defendants during the
16 time they rendered the legal services at issue.

17 76. The District chose to try the case in reliance on the Representations.

18 77. Since filing this action, the District has learned that the Representations were
19 untrue.

20 78. The District now believes that Defendants made the Representations in an
21 effort to induce it not to settle and, as a result, to pay increased fees to Defendants. Whatever
22 their motives, Defendants convinced the District Board that it had no alternative but to try the
23 case.

24 79. Despite having voluntarily accepted a role as trustees and fiduciaries, obliging
25 them to act in the best interest of the District, Defendants abused that trust and duty by,
26 among other acts, failing to disclose that they knew EBA was willing to settle on reasonable
27 terms.

1 80. At the time they made the Representations alleged herein to the District,
2 Defendants knew the Representations were false. The Defendants made the Representations
3 in an effort to convince the District to try the case. Furthermore, the District is informed and
4 believes, and thereon alleges, that Defendants committed the acts described herein with the
5 intent to violate their fiduciary obligations, to induce reliance by the District, and to otherwise
6 gain an advantage over the District.

7 81. As a result of Defendants' breach of their fiduciary duties owed to the District,
8 the District has sustained damages in an amount within the jurisdiction of this Court to be
9 proven at trial, including interest, costs and other amounts to which the District may be
10 entitled.

11 82. Further, as the aforementioned acts and conduct by Defendants were willful,
12 oppressive and malicious, and were undertaken with the intent to injure the District and to
13 further only Defendants' own interests, the District is also entitled to recover punitive and
14 exemplary damages in an amount to be proven at trial.

15 **SIXTH CAUSE OF ACTION**
16 **UNFAIR BUSINESS PRACTICES**
17 **(Against All Defendants)**

18 83. The District incorporates the paragraphs previously alleged as if fully alleged
19 here.

20 84. The conduct of Defendants as alleged throughout this Complaint constitutes
21 unfair business practices under the common law of California and unfair competition under
22 California Business and Professions Code sections 17200, et seq. Such conduct includes, but
23 is not limited to, violation of Rules 3-510(A)(2) and 4-200 of the Rules of Professional
24 Conduct and violation of Business and Professions Code section 6068.

25 85. On information and belief, Defendants' actions were performed with the
26 objective of enriching themselves, in violation of their known obligations to their client.

27 86. The actions of Defendants are also unfair business practices as they offend
28 established public policy and otherwise significantly harm or threaten competition.

1 **SEVENTH CAUSE OF ACTION**

2 **FALSE CLAIMS**

3 **(Against All Defendants)**

4 87. The District incorporates the paragraphs previously alleged as if fully alleged
5 here.

6 88. This cause of action is alleged pursuant to the False Claims Act, California
7 Government Code section 12650, et seq. (the "CFCA").

8 89. Defendants presented invoices approximately monthly, beginning in 2011 and
9 through the present.

10 90. The invoices Defendants submitted knowingly presented or caused to be
11 presented "a false or fraudulent claim for payment or approval" for work that was not
12 necessary or appropriate and was not performed in the District's best interests, but rather was
13 performed in the interest of generating fees for Defendants.

14 91. Defendants submitted their invoices with the specific intention of defrauding
15 the District, knowing that the work was not necessary or appropriate, and was not performed
16 in the District's best interests, but rather was performed in the interest of generating fees for
17 Defendants.

18 92. Alternatively, Defendants submitted their invoices with deliberate ignorance of
19 the truth or in reckless disregard of the truth regarding whether their services were necessary
20 or appropriate, and whether they were performed in the District's best interests.

21 **PRAYER FOR RELIEF**

22 WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

- 23 1. On all causes of action,
24 a. for general damages according to proof;
25 b. for special damages according to proof, including recovery of
26 all amounts paid in excess of the reasonable value of the
27 services performed by Defendants, rescission, and restitution
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in the full amount paid by the District to Defendants, plus
prejudgment interest in the amount specified in Civil Code
section 3287, subdivision (b), from the dates of payment until
paid, at the lawful rate (ten percent) specified by Civil Code
section 3289, subdivision (b);

- c. for costs of suit incurred herein, and
 - d. for such other and further relief as the Court deems just and proper.
- 2. On the second, third, and fifth causes of action,
 - a. for punitive damages.
 - 3. On the sixth cause of action,
 - a. for all remedies, including injunctive relief, appropriate disgorgement of defendants' profits by their improper and illegal acts, restitution, and attorneys' fees.
 - 4. On the seventh cause of action,
 - a. for treble damages;
 - b. for injunctive relief and
 - c. for attorneys' fees.

BRYAN C. VESS APC



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SAN YSIDRO SCHOOL DISTRICT