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ARB, INC.

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

10
11 ARB, INC.,

12 Plaintiff,

13 v.

14 ALWAYS PROTECTIVE SERVICES, LLC, a
California limited liability company;
15 HEATHER MAGILL, an individual; JEFF
SHEA, an individual; TOM MAGILL, an
16 individual; MATTHEW A. FLAMENCO, an
individual; and Does 1-20,

17 Defendants.
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19
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Case No. 30-2014-00713437-CU-BC-CJC

COMPLAINT FOR:

- (1) BREACH OF CONTRACT;
(2) PROMISSORY FRAUD;
(3) CONVERSION;
(4) VIOLATION OF PENAL CODE 496;
and
(5) DECLARATORY RELIEF.

Judge Gregory H. Lewis

21 Plaintiff ARB, Inc. (“ARB”) alleges as follows on information and belief:

22 **THE PARTIES**

23 1. ARB is, and at all material times mentioned herein was, a California corporation in
24 good standing organized and existing under the State of California with its principal place of
25 business in the County of Orange, State of California.

26 2. Defendant Always Protective Services, LLC (“APS”) is, and at all material times
27 mentioned herein was, a limited liability company organized and existing under the laws of the
28 State of California.

1 12. Subsequently thereafter, a dispute arose between ARB and APS over the quantity
2 and calculation of APS charges related to security work done at the **Project**, as well as APS'
3 representation of its disadvantaged business entity status. As such, ARB terminated its
4 relationship with APS on or about April 1, 2013.

5 13. Upon termination, APS contended that it was owed the sum of \$255,712.00 for
6 services performed in connection with the **Project**, while ARB disputed this contention.
7 ("**Dispute**").

8 14. In order to avoid litigation and resolve the **Dispute**, on or about November 22,
9 2013, APS and ARB entered into a settlement agreement and release whereby APS, in exchange
10 for the negotiated sum of \$135,360, agreed to settle and release any and all claims between it and
11 ARB in connection with the **Dispute** and **Project** (the "**Release**"), including any claim of
12 entitlement to the remaining sum of \$120,352, i.e., the difference between \$255,712 (what APS
13 claimed it was owed) and \$135,360 (the negotiated settlement amount). A true and correct copy
14 of the **Release** is attached as Exhibit A.

15 15. The **Release** provision regarding the release and the consideration provided,
16 specifically states:

17 NOW, THEREFORE, in consideration for the payment of One
18 Hundred Thirty-Five Thousand Three Hundred Sixty Dollars
19 (\$135,360.00) made by ARB, APS on behalf of itself and its past,
20 present and future members, shareholders, partners, agents, servants,
21 representatives, employees, officers, directors, affiliates,
22 subsidiaries, successors and assigns ('Releasing Parties'), **hereby**
23 **releases acquits and forever discharges ARB and its members,**
24 **shareholders, partners, agents, servants, representatives,**
25 **employees, officers, directors, insurers, successors and assigns,**
26 **and all other persons, firms, corporations, associations,**
27 **partnerships, parent companies, affiliates, subsidiaries and any**
28 **other entity connection therewith (collectively 'Released**
 Parties'), of and from any and all claims, actions, causes of
 action, demands, rights, damages, costs, expenses and/or
 compensation, of any nature whatsoever which APS now has or
 which may hereafter accrue to APS, known or unknown, foreseen or
 unforeseen, on account of, in connection with or in any way
 growing out of the Dispute, the services performed by APS for
 the Project, ARB's retention of APS for the Project, and ARB's
 termination of APS from the Project.

1 (Exhibit A; emphasis added.)

2 16. Defendant **Shea**, **APS**' Executive Vice President, executed the **Release** in Orange
3 County, California on **APS**' behalf as its authorized representative. The **Release** specifically
4 affirms **Shea**'s authority, stating:

5 APS further agrees that **its authorized representative has read and**
6 **fully understands this Release and is so authorized to execute**
7 **same**, and in so doing APS further acknowledges that ARB is
8 expressly relying upon the authority of such representation such that
9 this Release will be binding upon APS and all Releasing Parties.

8 (Exhibit A; emphasis added.)

9 17. On or about December 26, 2013, approximately a month after the **Release** was
10 executed, **ARB**, as part of its year-end accounting process, mistakenly issued and mailed a check
11 payable to **APS** for the sum of \$120,352, which is the difference between \$255,712 (the sum **APS**
12 claimed it was owed) and \$135,360 (the sum for which **APS** agreed to settle the **Dispute**).

13 18. Worse yet, **APS**, with full knowledge of the **Release** and its waiver of any
14 entitlement to the \$120,352, proceeded to cash the check on or about January 2, 2014.

15 19. On or about January 7, 2014, immediately upon discovering this error, **ARB**
16 contacted **APS** and advised **APS** of the mistake and requested that **APS** issue a reimbursement
17 check to **ARB** in the amount of \$120,352.

18 20. Inexplicably, on or about January 28, 2014, **APS** asserted for the first time that
19 contrary to its written representations in the **Release**, **Shea** was not an authorized representative of
20 **APS**. Although **ARB** reminded **APS** that **Shea** made a series of written and oral representations
21 confirming his authority and that he was **APS**' Executive Vice President, **APS** continues to refuse
22 to acknowledge **Shea**'s authority, honor the **Release** terms, and return the \$120,352.

23 21. As such, **ARB** has been left with no choice but to file this action and seek recovery
24 of the monies **Defendants** wrongfully acquired and are wrongfully withholding.

25 **FIRST CAUSE OF ACTION**

26 **[For Breach of Contract Against APS and Does 1 – 20]**

27 22. **ARB** repeats and realleges each allegation contained in the foregoing paragraphs of
28 the Complaint as if set forth in full herein.

1 30. **APS** entered into the **Release** on November 22, 2013 with the intention of
2 deceiving **ARB** into believing:

3 a. **APS** would release and waive all further claims it had against **ARB** in
4 connection with the **Project and Dispute**, including any claim of entitlement to the sum of
5 \$120,352; and

6 b. **Shea** had the authority to bind **APS** to the **Release**.

7 31. The representations made by **Shea** on behalf of **APS**, and at **Heather's** instruction
8 and/or with her consent, were false at the time they were made, **Shea**, **APS**, and **Heather** knew
9 they were false, and they were made for the purpose of inducing **ARB** to immediately provide
10 **APS** payment of \$135,360 under the terms of the **Release**.

11 32. At the time **Shea** made these false representations on behalf of **APS**, **ARB** was
12 ignorant of the true facts and believed the representations to be true. **ARB** in fact relied on the
13 representations by immediately delivering to **Shea**, **APS**, and **Heather** payment of \$135,360
14 pursuant to the **Release**. **ARB's** reliance was reasonable in that the false representations were
15 made to it orally and in writing by **Shea**, who held himself out as **APS' Executive Vice President**
16 with full authority to bind **APS** to the **Release**, and who had signed other documents on behalf of
17 **APS** with **APS' knowledge** and without objection by **APS**.

18 33. If **ARB** had known the true facts it would not have acted as it did and specifically,
19 would not have provided **APS** with payment and benefits under the **Release**.

20 34. **APS' officers** and/or directors **Heather** and **Shea** authorized, directed, and/or
21 participated in **APS' allegedly tortious conduct** alleged herein, and as such, are personally liable,
22 along with **APS**, for the tort of promissory fraud. (*See, Frances T. v. Village Green Owners Assn.*
23 (1986) 42 Cal.3d 490; *PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1380-1382.)

24 35. As a direct and proximate result of the fraud engaged in by **Shea**, **APS**, and
25 **Heather**, **ARB** has been damaged in an amount to be determined at time of trial, but not less than
26 \$120,352, plus interest.

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1 50. Where one, through mistake or fraud receives money to which he is not entitled, he
2 becomes the trustee of that money for the benefit of the one justly entitled to it. (Cal. Civ. Code
3 § 2224.) In the course of, and by virtue of the above-averred acts, **APS** – at the authorization,
4 direction, and/or with the participation of **Shea** and **Heather** – fraudulently converted and used the
5 \$120,352 for its own use and exclusive benefit and with the intent to deprive **ARB** of its use of the
6 monies.

7 51. One who fraudulently appropriates property which has been entrusted to him is
8 guilty of theft. (Cal. Pen. Code § 484.)

9 52. **APS, Shea, and Heather's** actions as described above constitute violations of
10 Penal Code Section 496. As a result of **APS, Shea, and Heather's** violation of Penal Code
11 section 496, **ARB** is entitled to a just award of treble damages (\$361,052), costs of suit, and
12 reasonable attorneys' fees. (Penal Code section 496(c); *Bell v. Feibush* (2013) 212 Cal.App.4th
13 1041.)

14 53. As a direct and proximate result of **APS, Shea, and Heather's** actions, **ARB** has
15 suffered, and continues to suffer, actual damages in amount to be proven at trial, but which
16 include, among other things, the value of the monies that it entrusted to **APS**, interest, attorneys
17 fees, and costs.

18 54. **Flamenco and Tom, and DOES 1-20**, were aware that **Shea, APS, Heather** and
19 **DOES 1-20**, planned to, and did, engage in the foregoing wrongful conduct and they agreed with
20 and intended that **Shea, APS, Heather, and DOES 1-20**, engage in the above wrongful conduct.

21 55. **Flamenco and Tom, and DOES 1-20**, gave substantial assistance and/or
22 encouragement to **Shea, APS, Heather, and DOES 1-20** for the purpose of facilitating the
23 wrongful conduct alleged herein, and that, as a result, **Flamenco and Tom, and DOES 1-20's**,
24 conduct was a substantial factor in causing harm to **ARB**.

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2. **On the Forth Cause of Action:**

a. For treble damages according to proof at trial, but not less than \$361,056.

3. **On the Fifth Cause of Action:**

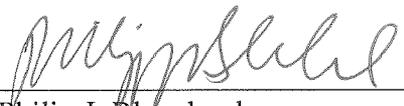
a. Alternatively, in the event APS is not bound the terms of the Release, a judicial declaration by the Court determining and declaring that APS must return the consideration it received under the terms of the Release, i.e., \$135,360.

4. **On All Causes of Action:**

- a. For interest to the extent allowed by law;
- b. for reasonable attorneys' fees to the extent allowed by law and/or the Release;
- c. for costs of suit incurred; and
- d. for such other and further relief as the Court deems just and proper.

Dated: March 28, 2014

RUTAN & TUCKER, LLP
PHILIP J. BLANCHARD
ELIOT M. HOUMAN

By: 

Philip J. Blanchard
Attorneys for Plaintiff
ARB, INC.

EXHIBIT A

RELEASE

THIS RELEASE is made effective this 22nd day of November, 2013 as between Always Protective Services LLC, located at 15068 Rosecrans Avenue, #164, La Mirada, California 90638 ("APS") and ARB, Inc., 26000 Commercentre Drive, Lake Forest, California 92630 ("ARB").

WHEREAS, ARB entered into a contract with Sempra Energy to perform work and provide services in connection with the San Diego Gas & Electric Retrofit and Short Notice Program in various locations throughout the greater San Diego area in California (the "Project").

WHEREAS, in connection with the Project, ARB retained APS to provide site security services at the relevant Project locations in 2012 and 2013. ARB terminated its relationship with APS on the Project on or about April 1, 2013.

WHEREAS, upon the termination of APS by ARB, APS contends it is owed the sum of \$255,712.00 for services performed in connection with the Project, and ARB contends that APS is not entitled to that sum (the "Dispute").

WHEREAS, ARB and APS desire to fully and finally settle and compromise any and all claims between and among them in connection with the Dispute and APS's work on the Project.

NOW, THEREFORE, in consideration for the payment of One Hundred Thirty-Five Thousand Three Hundred Sixty Dollars (\$135,360.00) made by ARB, APS on behalf of itself and its past, present and future members, shareholders, partners, agents, servants, representatives, employees, officers, directors, affiliates, subsidiaries, successors and assigns ("Releasing Parties"), hereby releases, acquits and forever discharges ARB and its members, shareholders, partners, agents, servants, representatives, employees, officers, directors, insurers, successors and assigns, and all other persons, firms, corporations, associations, partnerships, parent companies, affiliates, subsidiaries and any other entity connected therewith (collectively "Released Parties"), of and from any and all claims, actions, causes of action, demands, rights, damages, costs, expenses and/or compensation, of any nature whatsoever which APS now has or which may hereafter accrue to APS, known or unknown, foreseen or unforeseen, on account of, in connection with or in any way growing out of the Dispute, the services performed by APS for the Project, ARB's retention of APS for the Project, and ARB's termination of APS from the Project.

In further exchange for the consideration delineated hereinabove, APS and the Releasing Parties also agree to defend, indemnify and hold harmless ARB and the Released Parties from and against any and all claims, actions, causes of action, demands, fines, penalties, damages, costs and expenses (including attorney's fees) on account of, in connection with or in any way growing out of the Dispute, the services performed by APS for the Project, ARB's retention of APS for the Project, and ARB's termination of APS from the Project.

APS has received no inducement, promise or offer of any kind whatsoever except for the consideration delineated hereinabove, and this Release is executed without reliance on any statement or representation by the Released Parties.

It is understood and agreed that this settlement is the compromise of a disputed claim and that the consideration furnished is not to be construed as an admission of liability on the part of the Released Parties, and that the Released Parties have denied liability on the claim herein and intend merely to avoid litigation and buy their peace by this compromise. The compromise and settlement which forms the basis of this Release has been arrived at after thorough bargaining and negotiation and represents a final, mutually agreeable compromise.

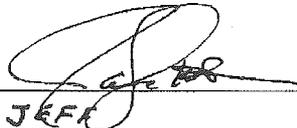
APS AGREES THAT ANY AND ALL RIGHTS UNDER SECTION 1542 OF THE CIVIL CODE OF CALIFORNIA AND OF ANY SIMILAR LAW OF ANY STATE OR TERRITORY OF THE UNITED STATES ARE HEREBY EXPRESSLY WAIVED. SAID SECTION 1542 READS AS FOLLOWS: "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR."

APS agrees that this Release contains the entire agreement between the parties hereto and that the terms of this release are contractual and not a mere recital.

APS further agrees that its authorized representative has read and fully understood this Release and is so authorized to execute same, and in so doing APS further acknowledges that ARB is expressly relying upon the authority of such representative such that this Release will be binding upon APS and all Releasing Parties.

DATED: 11/22/2013

ALWAYS PROTECTIVE SERVICES, LLC

By: 
JEFF

16 JS Name: ~~Jess~~ Shea
Title: Executive Vice President