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11 December 2008

The Honorable Donald Hafele
Circuit Judge
Palm Beach County Courthouse
205 North Dixie Highway
West Palm Beach, Florida, 33401

Re: *South Florida Water Management District v. State Of Florida* , Case No. 50-2008-CA-031975-XXXX-MB

Dear Judge Hafele:

We serve as counsel for New Hope Sugar Company and Okeelanta Corporation. We will be appearing before Your Honor on Friday morning, December 12, at 10:30 A.M. We enclose courtesy copies of the Complaint (filed by the Plaintiff for your convenience), as well as our Answer, our *Opposition To Validation Of Bonds And Motion To Set Discovery And Hearing Schedule Of New Hope Sugar Company And Okeelanta Corporation*, supporting exhibits, and copies of cited case law.

We apologize for our inability to get these materials to you earlier.

Very truly yours,

cc: Counsel of Record (without case materials)

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 50-2008-CA-031975XXXXMB

THE HONORABLE DONALD HAFELE

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, a water management district organized and existing under the laws of the State of Florida,

Plaintiff,

v.

THE STATE OF FLORIDA, et al.,

Defendants.

THE HONORABLE DONALD HAFELE

ANSWER OF NEW HOPE SUGAR COMPANY AND OKEELANTA CORPORATION TO PLAINTIFF'S COMPLAINT FOR VALIDATION

Defendants, New Hope Sugar Company and Okeelanta Corporation, tax payers and property owners of Palm Beach County, (collectively "New Hope") answer the Complaint For Validation filed on October 14, 2008, ("the Complaint") of Plaintiff, South Florida Water Management District, as follows:

1. Defendants admit that this Court has jurisdiction over bond validation matters, denied that this matter is ripe for review.

2. Admitted.

3. Admitted.

4. Defendants admit that Florida Statutes chapter 373 deals with the powers, duties and responsibilities of the Plaintiff, but is without knowledge of and therefore denies the remaining allegations of Paragraph 4.

5. Defendants are without knowledge of and therefore deny the first sentence of Paragraph 5 of the Complaint. Defendants deny the remainder of Paragraph 5 of the Complaint as the documents speak for themselves.

6. Admitted.

7. Defendants are without knowledge of and therefore deny the first sentence of Paragraph 7 of the Complaint. Defendants deny the remainder of Paragraph 7 of the Complaint as the documents speak for themselves.

8. Defendants would state that the language of the documents is the best evidence of what they mean and otherwise deny the allegations of Paragraph 8.

9. Defendants would state that the language of the documents is the best evidence of what they mean and otherwise deny the allegations of Paragraph 9.

10. Defendants would state that the language of the documents is the best evidence of what they mean and otherwise deny the allegations of Paragraph 10.

11. Defendants would state that the language of the documents is the best evidence of what they mean and otherwise deny the allegations of Paragraph 11, with the exception of the last sentence, about which they are without knowledge of and therefore deny.

12. Defendants are without knowledge and therefore deny the allegations in Paragraph 12 of the Complaint.

13. Defendants deny the allegations of Paragraph 13 of the Complaint as the document speaks for itself.

14. Defendants would state that the language of the documents is the best evidence of what they mean and otherwise deny the allegations of Paragraph 14.

15. Defendants would state that the language of the documents is the best evidence of what they mean and otherwise deny the allegations of Paragraph 15.

16. Defendants would state that the language of the documents is the best evidence of what they mean and otherwise deny the allegations of Paragraph 16.

17. Defendants would state that the language of the documents is the best evidence of what they mean and otherwise deny the allegations of Paragraph 17.

18. Defendants would state that the language of the documents is the best evidence of what they mean and otherwise deny the allegations of Paragraph 18.

19. Defendants would state that the language of the documents is the best evidence of what they mean and otherwise deny the allegations of Paragraph 19.

20. The allegations of Paragraph 20 are legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations of Paragraph 20 of the Complaint as the resolution speaks for itself.

21. The allegations of Paragraph 21 are legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations of Paragraph 21 of the Complaint as the resolution speaks for itself.

22. Denied.

23. Defendants would state that the language of the documents is the best evidence of what they mean and otherwise deny the allegations of Paragraph 23.

24. Defendants are without knowledge and therefore deny the allegations of Paragraph 24 of the Complaint.

25. The allegations of Paragraph 25 are legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations of Paragraph 25 of the Complaint as the resolution speaks for itself.

26. Defendants admit that the Plaintiff has undertaken various projects within the EAA and water conservation areas, admits that some of these activities are governed by some or all of the statutes cited, but otherwise denies the allegations of Paragraph 26.

27. Defendants admit that the acquisition of some of the lands and assets of USSC are likely not to be needed for public purposes, but otherwise denies the allegations of Paragraph 27.

28. Denied.

29. Paragraph 29 of the Complaint is a legal conclusion to which no response is required. To the extent a response is required, Defendants state that the District has not shown why it is "authorized to lease all or portion of the Initial Project to one or more private entities" when public funds are being used.

30. Denied.

31. Defendants admit that the Court validated certain bonds in 2006, would state that the bonding documents themselves are the best evidence of what they mean, and otherwise denies the allegations of Paragraph 31.

32. Denied.

33. Defendants deny the allegations of Paragraph 33 of the Complaint as the document speaks for itself.

34. Defendants deny or are without sufficient information to admit or deny each and every allegation contained within the complaint with the exception of those specifically admitted heretofore.

DEFENSES

A. The Complaint fails to state a cause of action and the Plaintiff is barred from issuing the bonds requested for the reasons set forth within the *Opposition To Validation Of Bonds And Motion To Set Discovery And Hearing Schedule Of New Hope Sugar Company And Okeelanta Corporation*, dated December 11, 2008, and filed in this action, which is incorporated in totality by reference within this paragraph and this pleading as if fully set forth.

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Attorneys for New Hope Sugar Company and Okeelanta Corporation

By: _____
Joseph P. Klock, Jr.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served via Federal Express this 11th day of December, 2008 to:

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And by hand delivery to:

Sheryl G. Wood, General Counsel
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Joseph P. Klock, Jr.

INDEX OF COMPOSITE EXHIBITS

Composite Exhibit No.	Exhibit A Governing Board Presentations
A-1	**August 2008** Update to Board – PowerPoint Presentation
A-2	**September 2008** Update to Board – PowerPoint Presentation
A-3	**October 2008** Update to Board – PowerPoint Presentation
A-4	**November 2008** Update to Board – PowerPoint Presentation
A-5	**December 2008** Update to Board – PowerPoint Presentation
A-6	**July 10, 2008** Video of presentations Board Budget Presentation
A-7	**June 30, 2008** Update to Board - PowerPoint Presentation

Composite Exhibit No.	Exhibit B – Video Of Presentations
B-1	**December 2008** Video of Meeting presentations, December 2, 2008 Morning session
B-2	**December 2008** Video of Meeting presentations, December 2, 2008 Afternoon session
B-3	**November 2008** Video of Meeting presentations, November 13, 2008 Morning session
B-3	**November 2008** Video of Meeting presentations, November 13, 2008 Afternoon session
B-4	**November 2008** Video of Workshop presentations, November 12, 2008
B-5	**October 2008** Video of Meeting presentations, October 9, 2008
B-6	**October 2008** Video of Workshop presentations, October 8, 2008
B-7	**August 2008** Video of Workshop presentations
B-8	**June 2008** Video of presentations

INDEX OF COMPOSITE EXHIBITS

Composite Exhibit No.	Exhibit C Summary Fact Sheets for Land-Only Alternative
C-1	Summary Fact Sheets River of Grass Acquisition: Purchase Contract and Lease Agreement, December 2008
C-2	Summary Fact Sheets River of Grass Acquisition: Due Diligence, December 2008
C-3	Summary Fact Sheets River of Grass Acquisition: Environmental Benefits and Public Process, December 2008

Composite Exhibit No.	Exhibit D: Proposed Agreements
D-1	Statements, Contracts Draft Agreement for Sale and Purchase among the United States Sugar Corporation, SBG Farms, Inc., Southern Gardens Groves Corporation and the South Florida Water Management District, November 24, 2008
D-2	Statements, Contracts Draft Lease Agreement between the South Florida Water Management District and the United States Sugar Corporation, November 24, 2008
D-3	Statement of Principles, June 24, 2008

Composite Exhibit No.	Exhibit E: Summaries of Appraisals
E-1	Appraisals Technical Review of Sewell Appraisal – Land Only
E-2	Appraisals Technical Review of Banting Appraisal – Land Only
E-3	Appraisals Technical Review of Draft Banting Appraisal – All Assets
E-4	Appraisals Technical Review of Draft Gillott Appraisal – All Assets

Composite Exhibit No.	Exhibit F: Fairness Opinion
F-1	Other Due Diligence Duff and Phelps, LLC, Letter Regarding the Fairness Opinion
F-2	Other Due Diligence Duff and Phelps, LLC, Presentation to SFWMD Governing Board

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CIVIL DIVISION

CASE NO. 50-2008-CA-031975XXXXMB

THE HONORABLE DONALD HAFELE

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Plaintiff,

v.

THE STATE OF FLORIDA, AND THE TAXPAYERS, PROPERTY OWNERS AND CITIZENS WITHIN THE JURISDICTION OF THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT, INCLUDING NONRESIDENTS OWNING PROPERTY OR SUBJECT TO TAXATION THEREIN AND OTHERS CLAIMING ANY RIGHTS, TITLE OR INTEREST IN THE CERTIFICATES OF PARTICIPATION HEREIN DESCRIBED, OR TO BE AFFECTED IN ANY WAY THEREBY,

Defendants.

OPPOSITION TO VALIDATION OF BONDS AND MOTION TO SET DISCOVERY AND HEARING SCHEDULE OF NEW HOPE SUGAR COMPANY AND OKEELANTA CORPORATION

New Hope Sugar Company (New Hope) and Okeelanta Corporation (Okeelanta) oppose the validation sought by the South Florida Water Management District (the "District"), request that the Court deny validation at the

December 12, 2008, hearing, and move for an Order of this Court setting forth a pleading and discovery schedule and providing for a final evidentiary hearing.[1]

New Hope and Okeelanta, pursuant to the well established principle that "any issue concerning the power to issue bonds is a proper one to be considered in a bond validation proceeding . . .,"[2] request this relief from the Court for several reasons:

(i) The District is abusing its authority and abrogating a previously issued validation order of this Court in attempting to issues these bonds;

(ii) The issuance of these bonds is for an illegal purpose, specifically, use of the District's taxing power to bail out a private company, allowing that company to sell its assets to the District and then indefinitely remain on the sold land to farm and profit from it while the taxpayers support its private purpose;

(iii) The bond issuance does not comply with law in that (a) the financing mechanism is founded upon non-supportive appraisals and an insufficient income stream, (b) the cost of supporting the asset purchase will hamper and cripple other previously-authorized projects that were approved by this Court as meeting a valid public purpose; and (c) the acquisition of property for other than a

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[1] Contemporaneously herewith, New Hope and Okeelanta have filed their Answer and Affirmative Defenses to the Complaint for Validation.

[2] *Jacksonville Shipyards, Inc. v. Jacksonville Electric Authority,* 419 So. 2d 1092, 1095 (Fla. 1982). Of special note is the fact that the Court must make a concerted effort to concern itself with a responsibility that it has in this type of case. Most bond validation cases see the State as the protector of the public's interests, but, where, as here, the State is "pushing the package," it becomes even more important for the Court to protect the public interest.

public purpose is not incidental, but rather is the centerpiece of the transaction; and

(iv) The issuance of the certificates of participation could result in the District's breach of agreements with holders of previously issued certificates of participation and third parties engaged in previously-approved District projects.

I. INTRODUCTION

The District is attempting to authorize up to $2.2 billion dollars in debt for the purpose of buying an as yet unspecified interest in the assets of United States Sugar Corporation (USSC), for an as yet undetermined purpose, at an as yet undetermined price, and on as yet unspecified terms. The Complaint claims that the District will be purchasing all the assets of USSC, selling off those that will not be used publicly and then using the remainder for what are portrayed as lofty environmental purposes. But, the ambiguity of the District's stated intent cannot be used to mask the significant flaws in its effort to authorize this debt:

First, there is as yet not even a final agreement between the District and USSC.[3] At the time the Complaint was filed the stated intent was for the District to purchase all assets of USSC. USSC would then be entitled to use the same assets it sold free of charge for a six year holdover period, at the end of which it would cease operating. The deal has recently changed significantly, however. The latest incarnation has the District purchasing solely the land of USSC, with

[3] At present the District and USSC have not settled on a transaction structure. New Hope and Okeelanta submit that it is premature to validate the COPs until the specifics of what the District is buying, what it is paying and when, if ever, it actually gets possession fully crystallize.

USSC keeping its mill and other industrial assets and continuing to operate its business by leasing back the land it sold at below market rent. It is unclear whether this is the final incarnation or whether some other structure will emerge. Until these details are known, the question remains open of whether the transaction serves any public purpose or is merely a thinly disguised public bailout of a failing company.

Second, while the Complaint and its attachments paint a colorful picture of a new "river of grass" flow way through the Everglades Agricultural Area (EAA), there are in fact no defined plans for the USSC land. All the District has at the moment are vague conceptual visions of what it might do with the land. These plans, furthermore, contemplate locating projects primarily on land **other** than the land that the District would acquire from USSC. And, even putting aside that the District is acquiring the wrong land for its stated purposes (vaguely defined as they are), the District has not explained the most basic details regarding its plans. The District has not described what projects would be built on the land or how much the projects would cost (which could be billions more above the land acquisition cost). And the District has not even considered where it will get the money for any proposed projects given that the asset purchase alone will leave it so financially strained that it cannot possibly hope to raise the billions needed to make any significant public use of the USSC land.[4]

[4] Videos of District Staff presentations at various Governing Board workshops and accompanying Slide Presentations used in those workshops fully bear this out and are attached as Composite Exhibits A and B, respectively.

Third, as noted, the District's main concepts of a flow way rely on a footprint that is largely outside the USSC landholdings. What the District presumes is that it will be able to trade the USSC land for the land it would need, most of which is owned by New Hope and Okeelanta. Bizarrely, however, the District has refused to engage in any meaningful discussions regarding land swaps. Instead, focused solely on completing its purchase, the District is committing the bulk of its borrowing capacity on USSC, without any idea of how it would actually do anything of public benefit as a result. In the process, the latest draft Purchase and Sale Agreement (Exhibit D-1) would leave the purchased land so encumbered by ongoing USSC lease rights that even were third parties inclined to engage in land swaps, the District would have nothing to trade.

Fourth, under the latest transaction structure, the District intends to let USSC continue to operate and use the assets it is selling to the state on preferential terms for years or even decades. USSC will have a seven-year lease at a fraction of market value to continue farming its land. USSC would also have a right of first refusal that guarantees it long-term control of the land far beyond that period. The only way USSC ever has to actually give up what it sold is if the District uses particular lands for water projects. But, as noted, the District's ambiguous plans for a flow way do not even involve most of the USSC land, and the District will have spent so much on the purchase that it will have no capacity to build projects on any of the land for many decades. The result of all of this is that USSC will receive a massive, ongoing public subsidy.

Fifth, the District has previously issued public debt and entered into third party agreements for Everglades restoration projects. The District's pursuit of the proposed transaction (whatever it might be) has already prejudiced the interests holders of that debt through the District's abandonment of projects securing that debt. . Moreover, because the District has, apparently, no plans for expending outstanding proceeds of that debt on the previously-approved projects (or redeeming or defeasing the outstanding debt), that debt could be deemed arbitrage bonds, with disastrous consequences for the debt holders and the District.

We submit -- and are confident discovery and a full evidentiary review of the issues will show -- that the effect of the proposed transaction and the purpose of the COPs is to directly transfer $1.34 to $1.75 billion dollars, and indirectly transfer hundreds of millions more via preferential leases, to USSC for no significant corresponding public benefit. Further, the District's own appraisal, dated December 2, 2008, provided by Duff & Phelps, Inc., special advisors to the District, attached hereto as Exhibit F, assesses the overall value of USSC's **entire** business as, at most, $1.3 billion. The latest District proposal – a purchase of some of USSC's assets for $1.34 billion – would give USSC for only a portion of its assets more than the total enterprise value of the company.[5]

[5] According to the portions of the Duff & Phelps report that have been publicly released, Duff & Phelps "...would find the transaction [the Initial Project] fair at a purchase price at or below $1.3 billion," referring to a purchase of all the USSC assets, not just the land. Under either proposed structure the District is paying hundreds of millions above this price.

And USSC would not just take this money and run; USSC intends to take the money and stay. USSC would lease back what it sold to the District at a fraction of market value for seven years, and continue operating their business with those assets for an indefinite period that could span decades.[6]

The District will no doubt claim that eventually, some day, once money becomes available from some unspecified source, the USSC land will be used to great public benefit. But, all they can offer now is mere speculation, artful maps and hopeful language with no inkling as to what or how anything will actually get built. What is not open to speculation, and what USSC has carefully structured, is that after USSC gets its billion-plus from the state it will continue to run its business uninterrupted under a seven-year below-market lease, and then, perhaps for decades, under a right of first refusal that guarantees USSC control of nearly everything it "sold" to the District.

II. FACTUAL BACKGROUND

a. The COPs and Initial Proposal

The Complaint seeks validation of $2.2 billion aggregate principal amount of Certificates of Participation, (the "COPs"). Their sole purpose is the acquisition of USSC by the District. Initially, and as reflected in the Complaint and its attachments, the District proposed to purchase all the assets of USSC for

[6] The District's "Agreement for Sale and Purchase", reflecting the Land-Only Alternative, is attached hereto in Composite Exhibit D, as is the preferential lease that accompanied the Land-Only Alternative. Both documents show that USSC will remain in control of its holdings for the foreseeable future. The District's own appraisals, attached as Exhibits D and F show that USSC is getting more than the District's estimated value for the Company, but then also getting to lease back what it sold at a fraction of the lease value.

$1.75 Billion (the "Initial Proposal"). USSC was to have a six-year free holdover period and continue operating during that time, on the premise that the full value of USSC was $2.2 billion. All of this was laid out in a Statement of Principles signed by the District and USSC the day the acquisition was first announced. *See* Ex. D-3. This proposed structure was portrayed, in public statements and in the Complaint, as the only alternative and the only way USSC would ever sell.

b. The Land-Only Alternative

The Statement of Principles provided that the final price was to be confirmed by appraisals. The District's analysis of the value of USSC, however, came back far below the $2.2 billion value of the Initial Proposal.

In an effort to address this problem, the District and USSC developed a new alternative land-only structure (the "Land-Only Alternative"). Under this proposal, USSC would sell only its land and remain in business and continue to farm for an indefinite period of time after still receiving more than the District's financial consultants, Duff & Phelps, estimated as the total value of the company.

The District has publicly released a draft contract, attached as Exhibit D-1. Under that agreement USSC is to receive $1.34 billion for all of its landholdings. As opposed to the Initial Proposal, under this structure, USSC stays in business, retaining ownership of its mill and refinery and other industrial assets. While the price is claimed to be $1.34 billion, it is actually hundreds of millions higher because USSC is also given a preferential lease of the land it would sell to the state. For the first six years, USSC can lease its lands at $50 per acre, even

though the District's own estimates are that the lease value is much higher. In the seventh year, USSC gets to lease the land for free.

For subsequent years, USSC gets a right of first refusal against the District competitively leasing the land, guaranteeing it long-term control until such time as the District can construct projects on the lands. And, that day will be a long-time coming. The District has, tellingly, provided no analysis of what it would cost to actually construct projects on the USSC land or how it would finance such projects. Under the terms of the proposed agreement, this means that USSC gets to cash out from the public treasury and continue private use of public lands for the indefinite future.

c. The Prior COPs

In April 2006, this Court, in Case No. 502005CA011646XXXXMB, validated the District's proposed issuance of $1.8 billion of certificates of participation to fund the District's Acceler8 Program, a suite of reservoirs, conveyance projects, and water treatment areas designed to improve water deliveries to the Everglades.[7] In November 2006, the District issued $546,120,000 of the Acceler8 COPs as Certificates of Participation, Series 2006 (the "2006 COPs") to fund five of the Acceler8 projects.

The District pledged in the Ground Lease for the 2006 COPs not to abandon any of the projects funded by the 2006 COPs. The proposed USSC acquisition has already resulted in the District's abandonment of some of the

[7] The Certificate of No Appeal (the "2006 Validation Order") in that case is attached as Exhibit G.

projects that the District previously pledged to complete as security for the holders of the 2006 COPs. The resultant financial stress on the District, would almost certainly result in the District's abandonment of additional projects. Unless the District either redeems, defeases or uses the remaining unspent portion of the 2006 COPs for an authorized purpose, they could be deemed arbitrage bonds, rendering the 2006 COPs taxable (a further breach of contract with the holders of the 2006 COPs) and resulting in tax penalties to the District.

As the District's finance director made clear in the very first public workshop on the USSC purchase, servicing the debt resulting from the USSC acquisition will involve redirection of existing revenues used for Everglades projects to pay debt service, which in turn will mean that the "scale, timing and need" for currently planned Everglades projects will need to be evaluated. [8] 6.30.2008 GB Workshop Video, Ex. B-8. What this means euphemistically is that the District will not be able to afford all its current commitments, and that the primary redirection of funds for the purchase will be from Everglades projects. The District already has abandoned a major reservoir and related projects and will likely delay or abandon other key projects that were to act as security for the 2006 COPs or that the remaining Acceler8 COPs were to construct. This is vaguely described in several presentations to the Governing Board. Given the

[8] Similarly, at its July 10, 2008, Workshop the staff again indicated that the proposal would result in cuts in Everglades programs and stated that several projects would be delayed or possibly eliminated. See 7.10.2008 GB Presentation, Ex. A-2 at 4-5. The District has never indicated what, if anything, will replace the functions of these targeted projects, beyond stating that *after* USSC is acquired and after the money is spent, it will hold a multi-year planning process to figure out what to do with the land.

significant potential impact on the District's prior debt holders and to this Court's prior order, it is critical that these issues be fully explored via discovery and a trial.

III. NEW HOPE AND OKEELANTA'S STANDING

Under Chapter 75, Florida Statutes, any taxpayer within the taxing authority that seeks validation has standing to appear, as of right, and challenge the validation. Section 75.07 explains that "Any property owner, taxpayer, citizen or person interested may become a party to the action by moving against or pleading to the complaint at or before the time set for hearing."

New Hope and Okeelanta each owns and farms property and is a taxpayer within the jurisdiction of the District. As such, each is a "property owner" and "taxpayer" entitled under section 75.07, Florida Statutes, to appear and oppose the Complaint for Validation filed by the District (the "Complaint"). Okeelanta is also a holder of 2006 COPs and is therefore also an "interested person" with standing under section 75.07.

New Hope and Okeelanta are, in fact, among the largest property owners in, and largest taxpayers to, the District. In addition to paying substantial *ad valorem* taxes to the District, New Hope, Okeelanta and other EAA farmers pay an agricultural privilege tax pursuant to §373.3592(6), Fla. Stat., the proceeds of which were intended by the Legislature to fund the farmers' share of water quality projects. These special purpose taxes will, according to statements by the

District, be diverted to debt service for the USSC acquisition, which will, in turn, place at risk their original intended purposes.

IV. THE BOND ISSUANCE VIOLATES THE CONSTITUTIONAL PUBLIC PURPOSE REQUIREMENT

a. No Public Purpose Has Been Shown.

"[V]alidation proceedings involve a determination not only of the authority of an agency to issue bonds or revenue certificates, but also whether the agency may lawfully expend the proceeds for the contemplated purpose." *State v. Suwannee County Development Authority*, 122 So. 2d 190 (Fla. 1960); *see also, State v JEA*, 789 So. 2d (Fla. 2001); *State v Osceola County*, 752 So. 2d 530 (Fla. 1999).

Bonds, COPs and other public financing may only be used to serve a public purpose. *See JEA*, 789 So. 2d at 272-73; *Osceola County*, 752 So. 2d at 536. While there may be an "incidental" private benefit, a public purpose must nonetheless be overarching. Put another way,

> [i]f there is only an incidental benefit to a private party, then the bonds will be validated since the private benefits "are not so substantial as to tarnish the public character" of the project. If, however, the benefits to a private party are themselves the paramount purpose of a project, then the bonds will not be validated even if the public gains something therefrom.

JEA, 789 So.2d at 272-73. The District and its attorneys attempt to clothe the debt issuance with the imprimatur of public purpose, but judicial review will show that the primary, paramount beneficiary is USSC, which gets to sell its land and keep it too.

Additionally, the Court must determine whether the agency issuing the bonds has "the authority to expend the proceeds for the purpose contemplated." *Suwannee County*, 122 So. 2d 190. In other words, "whether the purpose of the obligation is legal." *Osceola County*, 752 So. 2d at 535. The District may expend funds for land acquisition only where the land is necessary for "flood control, water storage, water management, conservation and protection of water resources, aquifer recharge, water resource and water supply development, and preservation of wetlands, streams, and lakes." Fla. Stat. §373.139(2). Thus, the question becomes whether the USSC acquisition will be used for these purposes. If not, the acquisition is not for a legal purpose and the validation must, in turn, be denied.

The District's filing falls far short of its burden of showing a purpose within the range of water-related uses defined by the Legislature in section 373.139. While providing vague conceptual plans and fluff statements from its staff to support the "river of grass restoration," the District actually has not yet developed any specific plans for the USSC lands much less identified a means to accomplish the land swaps and billions in additional financing needed to facilitate the conceptual flow way through the EAA. Indeed, the District staff has been clear when presenting the issue to the Governing Board that it does not intend to develop such plans until *after* the purchase is complete.[9]

[9] A merely remote possibility of achieving the stated public purpose cannot justify providing public funds to a private entity. *O'Neill v. Burns*, 198 So. 2d 1 (Fla. 1967)

Nothing in the materials filed by the District sets out with any specificity what will actually be done with the USSC land. Nothing sets out a plan for acquiring, and financing the acquisition of, the other land needed for the "restoration." And, even if one considered the vague descriptions of District staff attached to the complaint to set out a public purpose, there is nothing at all to indicate where the money would come from to build a flow way, reservoirs, or any other water infrastructure on the land being acquired.

Finally, the District has acquired significant amounts of land that it cannot use in a flow way under any conceivable scenario, particularly since the USSC land is non-contiguous and spread throughout the EAA. The complaint admits this in paragraph 27, and then cynically claims that the District will "diligently pursue the disposition of all land and assets" not needed. What it fails to note is that under the current contract and preferential lease (Ex. D), USSC has encumbered the land such that the District cannot "diligently pursue" anything other than facilitating USSC's continued farming, on preferential terms, at the public's expense.

b. The proceeds of the COPs will primarily benefit USSC, with any public benefit being merely tangential and speculative.

Article VII, Section 10 of the Florida Constitution prohibits use of public "taxing power or credit to aid any corporation, association, partnership or person." As noted, resolution of this issue will turn on whether a transaction

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(expenditure of public credit to private entity violates Florida constitution in absence of reasonable expectation that public purpose will be accomplished).

serves primarily a paramount public purpose or primarily benefits a private entity. *See JEA*, 789 So. 2d at 272-73; *Osceola County*, 752 So. 2d at 535-36.

The acquisition of property merely to be leased back to the seller on preferential terms does not meet this public purpose requirement. *See Brandes v City of Deerfield Beach*, 186 So. 2d 6 (Fla. 1966); *Suwannee*, 122 So. 2d at 191-92. While the District claims an eventual public benefit, for the foreseeable future the only benefits of the USSC acquisition under the current deal structure (i.e., Land-Only Alternative) are to grant a massive public subsidy to USSC. USSC receives more for a portion of its assets than the District's financial advisors, Duff & Phelps, opined was the maximum that any rational businessperson would pay for USSC's entire business. *See* Ex F-1. USSC then gets to lease back its land for a fraction of what the District appraisers claimed was the fair market lease value. The District will make annual debt service payments of over $100 million that result in little more than subsidizing USSC's business, and in return will get only a small fraction of that back from USSC through below market rent payments. This transaction is nothing more than a thinly-veiled bailout of a private company with the marginal possibility, some decades down the line, that some of these assets may be used in some way to bring some benefit to the Everglades.

V. THE COPS VIOLATE THE COVENANTS OF THE 2006 COPS PREVIOUSLY VALIDATED BY THIS COURT.

The USSC acquisition would result in the abandonment of projects that the District previously pledged to complete as security for the holders of the 2006

COPs. The extent of this is unclear as the District has been deliberately vague in its public workshops about which projects will be delayed or abandoned. Discovery on this issue is therefore key. Abandonment of particular projects would constitute a breach of the District's obligations under the 2006 COPs, essentially placing this Court in a position where it is asked to validate a debt issuance that will result in a breach of prior obligations validated by the Court.

Equally important is that the District appears to intend to use this Court's validation fiat to substitute the Initial Project for 2006 COP projects. The District claims that the public purpose of the prior COPs would be consistent with the USSC acquisition. This could later permit the District to use the remaining unspent proceeds of the 2006 COPs for purposes other than those provided in this Court's validation order. If that is the District's intent—and this Court validates these COPs—further breach of the covenants of the Acceler8 COPs (including the 2006 COPs) would result, as the terms of substitution for Acceler8 projects rests with third-parties (the United States Department of the Interior and the United States Army Corps of Engineers), not the District alone. There is no evidence to date that suggests that consent of those third parties has been obtained or even solicited. Discovery and a full exploration of these facts is necessary so the Court can properly determine whether the validation sought now is contrary to its 2006 Order or would impair the rights of COP-holders under that previously validated debt.

VI. THE FINANCIAL IMPACT OF THE COPS WOULD JEOPARDIZE EXISTING COMMITMENTS TO EVERGLADES RESTORATION.

The stated purpose of the USSC acquisition is for Everglades restoration. Yet, the District does not account for the impacts to existing projects, including Acceler8 projects, from diverting Everglades funding to paying for the USSC acquisition.[10] Nor is there any analysis of the implications of abandoning the federal-state Comprehensive Everglades Restoration Plan, giving up any federal funding while at the same time spending the bulk of the District's available resources on the USSC acquisition. No alternatives to the projects being shelved will be realized from the USSC acquisition for decades at best. All of this underscores that there is no substantial public purpose to the acquisition, only public detriment.

Under either the Initial Proposal or the Land-Only Alternative, the District would expend on USSC funds meant to be used for Everglades restoration and indebt itself to a point where it cannot meet the its commitments under state and federal law to achieve improvements in Everglades water quality. The lack of planning and cavalier use of public funds that would follow validation will imperil Everglades restoration based on nothing more than the speculative hope that a new, better restoration plan will someday rise like a phoenix from the ashes, and that it will happen to use some of the lands now being acquired. New Hope and Okeelanta submit, and are confident that discovery would show, that the District

[10] Any diversion away from those Aceller8 projects, such that 2006 COPs proceeds were not used to complete them, and in turn, the 2006 COPs were deemed arbitrage bonds would immediately impact not only the District but innocent holders of those COPs.

(i) has not yet defined any alternative projects to replace those being eliminated; (ii) has no defined plan for the use of the assets being acquired; (iii) has no ability to secure the funding needed to build the new restoration projects it vaguely alludes to in the attachments to the Complaint; and (iv) requires substantial landholdings of New Hope and Okeelanta to accomplish any reasonable alternative, but (v) has not and does not plan to negotiate any terms for such acquisition prior to closing with USSC and would allow the purchased land to be encumbered so as to preclude any land exchanges for years.

VII. DISCOVERY AND A FULL VETTING OF THE ISSUES ARE CRITICAL.

Chapter 75 contemplates that where a validation proceeding involves substantial contested issues of fact and law, the Court should adopt a procedure to fully explore and try those questions. Referencing the initial hearing, section 75.07, Florida Statutes, states that the Court should "make such orders as will enable it to properly try and determine the action and render a final judgment with the least possible delay." Fla. Stat. § 75.07. Further, an evidentiary hearing is the proper method for this Court to determine the legality of the proposed plan submitted by the District. *See Panama City Beach Community Redevelopment Agency v. State*, 831 So. 2d 662, 664 (Fla. 2002) (stating "[f]ollowing the State Attorney's answer and agreement with the plaintiffs in a joint stipulation, the trial court scheduled an initial hearing and a subsequent evidentiary hearing regarding the City's findings . . . ."); *see also City of Gainesville v. State*, 863 So.

2d 138, 143 (Fla. 2003) (stating "[t]he circuit court held an evidentiary hearing" prior to dismissal of the complaint.")

This case, with $2.2 billion in public money at issue at a time of historic financial stress on both the public and private sector, and with the fate of Everglades restoration in the balance, calls out for careful, deliberate review. The Complaint presents numerous complex issues of fact and law that New Hope and Okeelanta submit must be resolved by a full trial, following a meaningful opportunity for discovery.

Under the District's own timeline, the current state of financial markets would not allow issuance of the COPs until at least the mid 2009. Further, the sole draft agreement between the District and USSC is contingent on financing being available, and contemplates that validation might not occur until July 2009 and that closing will take place as late as September 25, 2009. Ex. D-1 p. 3 ¶4; *see also*, 12.2.2008 GB Presentation, Ex. A-5 at 76. Thus, there would be no prejudice whatsoever to the District from this Court allowing the issues presented to be fully vetted.

CONCLUSION

In light of the foregoing, the Court should not grant validation at the December 12, 2008, hearing. There are important issues that require careful and deliberate analysis. Much of the details of how the COP proceeds will be used lie with the District, and therefore a reasonable opportunity for discovery is critical. New Hope and Okeelanta therefore respectfully request that the Court

set a discovery and hearing schedule so that matters at issue can be fully adjudicated at trial.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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