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ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT
By [Signature] Deputy

Attorneys for Plaintiff
FBD VANGUARD CONSTRUCTION INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

FBD VANGUARD CONSTRUCTION
INC., a California corporation,

Plaintiff,

v.

TUCKER ENGINEERING, INC.,
a California corporation;
RUDOLPH AND SLETTEN, INC.,
a California corporation;
TRAVELERS CASUALTY AND
SURETY COMPANY OF AMERICA ,
a corporation;
KAISER FOUNDATION HEALTH
PLAN, INC., a corporation;
and DOES 1 through 50, inclusive,

Defendants.

Case No.

RG14732089

**COMPLAINT FOR BREACH OF
CONTRACT, ON COMMON COUNTS,
VIOLATION OF STATUTE, ACTION ON
MECHANICS' LIEN RELEASE BOND,
AND ENFORCEMENT OF STOP
PAYMENT NOTICE**

[Unlimited Jurisdiction]

Plaintiff FBD VANGUARD CONSTRUCTION INC. alleges:

GENERAL ALLEGATIONS

1. At all relevant times, Plaintiff FBD VANGUARD CONSTRUCTION INC.,
("Plaintiff") is, and has been, a duly organized corporation doing business in the County of
Alameda, State of California, and a contractor duly licensed to do business in the State of
California.

2. Plaintiff is informed and believes, and on that basis alleges, that Defendant TUCKER ENGINEERING, INC. ("TUCKER") is, and at all times herein mentioned was, a duly organized California corporation doing business in the County of Santa Clara, State of California, and a contractor duly licensed to do business in the State of California.

3. Plaintiff is informed and believes, and on that basis alleges, that Defendant RUDOLPH AND SLETTEN, INC. ("R&S") is, and at all times herein mentioned was, a duly organized California corporation doing business in the County of San Mateo, State of California, and a contractor duly licensed to do business in the State of California.

4. Plaintiff is informed and believes, and on that basis alleges, that Defendant TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA ("TRAVELERS") is, and was at all relevant times hereto, a corporation authorized to transact business as a corporate surety in the State of California.

5. Plaintiff is informed and believes, and on that basis alleges, that Defendant KAISER FOUNDATION HEALTH PLAN, INC. ("KAISER") is, and at all relevant times herein mentioned was, a corporation organized and existing under the laws of the State of California, with a capacity to sue and be sued.

6. The true names and capacities, whether individual, corporate, associate, governmental or otherwise, of Defendants DOES 1 through 50 are unknown to Plaintiff at the present time and Plaintiff, therefore, sues said Defendants by such fictitious names. When the true names and capacities of each Doe Defendant have been ascertained, Plaintiff will seek leave of this Court to amend this complaint accordingly.

7. Plaintiff is informed and believes, and thereon alleges, that Defendants, and each of them, designated herein as DOES 1 through 50 are responsible in some manner for the occurrences and happenings alleged herein, and Plaintiff's damages as alleged herein were and are the direct and proximate and/or legal result of the actions of said Defendants, and each of them.

8. Plaintiff is informed and believes, and thereon alleges, that at all times herein mentioned, Defendants, and each of them, were the agents, servants, employees and representatives of each of the remaining Defendants, and were acting within the scope of their

1 authority as such agents, servants, employees and representatives, and with the knowledge,
2 consent, permission, approval and ratification of the remaining Defendants, and each of them.
3 Plaintiff will seek leave of this Court to amend this complaint to show the true nature and extent
4 of the relationships of the Defendants to their Co-Defendants when said relationships have been
5 fully ascertained.

6
7 **FIRST CAUSE OF ACTION**
8 **(Against Defendants TUCKER ENGINEERING, INC.**
9 **and DOES 1 through 20 For Breach of Written Contract)**

10 9. Plaintiff incorporates by reference paragraphs 1 through 8 with the same force and
11 effect as if said paragraphs were set forth herein in full.

12 10. Plaintiff is informed and believes, and thereon alleges, that Defendant R&S
13 entered into a written contract (the "Prime Contract") with KAISER, as Owner, for the
14 construction of the work of improvement known as Kaiser Medical Center, San Leandro (the
15 "Project"). Plaintiff is informed and believes, and on that basis alleges, that the Project is located
16 at the streets of Merced and Fairway in San Leandro, California ("Property"). Plaintiff is also
17 informed and believes, and thereon alleges, that R&S then subcontracted with TUCKER to
18 perform certain work on the Project.

19 11. On or about August 26, 2010, TUCKER entered into two separate written
20 subcontracts ("Subcontracts") with Plaintiff pursuant to which Plaintiff agreed, for a stipulated
21 sum, to furnish certain labor, materials and equipment for concrete, concrete reinforcing, and
22 formwork work on the Project. True and correct copies of the two written Subcontracts are
23 attached hereto as Exhibit A. The original Subcontract sums were \$563,000.00 (for work to be
24 completed in 2010) and \$2,000,000.00 (for work after 2010). Change orders were later issued
25 that increased the contract sum, and Plaintiff also performed and changed work that remains
26 uncompensated. The total contract sum, as of April 30, 2014, was \$2,618,261.87, with further
27 adjustments depending on credits, backcharges, and additive change orders.

28 12. Pursuant to the terms of said written Subcontracts, Plaintiff furnished labor,
materials and equipment to Defendants TUCKER and DOES 1 through 20 for use in the
construction of the Project, and the labor, materials and equipment furnished to Defendants

1 TUCKER and DOES 1 through 20 were used in, on and for the construction of the improvements
2 at the Project.

3 13. The value of all labor, materials and equipment furnished by Plaintiff at the
4 request of Defendants, pursuant to the written Subcontracts, that remains due and owing totals
5 over \$1,006,000.00, plus interest. This amount may be adjusted in the future as Plaintiff and
6 TUCKER continue to negotiate and agree to certain credits, backcharges, and additive change
7 orders.

8 14. Plaintiff has timely performed all the terms and conditions of its written
9 Subcontracts except those it has been prevented or excused from performing, or which were
10 waived, by the acts of Defendants TUCKER, R&S, KAISER, and/or DOES 1 through 20 and the
11 other named Defendants as herein set forth.

12 15. Defendants TUCKER and DOES 1 through 20 breached the written Subcontracts
13 with Plaintiff by refusing to pay all of the sums due, and/or failing to make timely payments when
14 due, to Plaintiff despite Plaintiff's repeated requests, by mis-managing the Project, by failing to
15 timely and properly submit and process change orders for Plaintiff, and by failing to properly
16 coordinate work. Defendant TUCKER has also asserted improper and inflated backcharges
17 against Plaintiff, has not agreed to reasonable credits, and has breached the duty of good faith and
18 fair dealing implied in every contract. As such, Plaintiff has been damaged due to said breaches
19 and is owed a principal amount of at least \$1,006,000.00, together with prompt payment penalties
20 and interest at the maximum rate allowed by law according to proof. These damages have been
21 presented in claims from Plaintiff to TUCKER, and TUCKER has failed to respond and/or
22 compensate Plaintiff for its claimed damages. These amounts are now due, owing and unpaid.

23 16. Additionally, by reason of Defendants' failure and refusal to perform their
24 obligations under the written Subcontracts, Plaintiff has been required to retain the services of the
25 law firm of Murphy Austin Adams Schoenfeld LLP and has incurred, and will continue to incur,
26 attorneys' fees and related costs to collect the amounts due and owing to Plaintiff under the
27 Subcontracts.

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17. As a direct and proximate result of the foregoing breaches of contract, Plaintiff has been damaged in the principal sum of at least \$1,006,000.00, together with interest at the maximum rate allowed by law according to proof and contractual attorney fees pursuant to paragraph X of the General Provisions of the Subcontracts.

SECOND CAUSE OF ACTION
(Against Defendants TUCKER ENGINEERING and DOES 1 through 20 For Reasonable Value of Labor and Materials Furnished)

18. Plaintiff incorporates by reference paragraphs 1 through 17 with the same force and effect as if said paragraphs were set forth herein in full.

19. Within the last two years, Defendants TUCKER and DOES 1 through 20 became indebted to Plaintiff for the reasonable value of labor, equipment and materials furnished by Plaintiff to said Defendants at said Defendants' request for the Project. As of April 30, 2014, Plaintiff earned the amount of \$2,618,261.87 on the Project, has only been paid the sum of \$1,610,398.14, and there is now due, owing and unpaid to Plaintiff from said Defendants a sum of at least \$1,006,000.00, together with interest at the maximum rate allowed by law and reasonable attorneys' fees.

THIRD CAUSE OF ACTION
(Against Defendants TUCKER ENGINEERING, and DOES 1 through 20 On Open Book Account)

20. Plaintiff incorporates by reference paragraphs 1 through 19 above with the same force and effect as if said paragraphs were set forth herein in full.

21. Within the last two years, Plaintiff furnished to Defendants TUCKER and DOES 1 through 20, and each of them, at their special insistence and request, upon an open book account, labor, equipment and materials for the Project. While some sums have been paid on said account, there is now due, owing and unpaid to Plaintiff from said Defendants on said open book account, a sum of at least \$1,006,000.00, or an amount according to proof at trial, together with interest at the maximum rate allowed by law and reasonable attorneys' fees, or, in the alternative, attorneys' fees under Civil Code section 1717.5.

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FOURTH CAUSE OF ACTION
(Against Defendants TUCKER ENGINEERING
and DOES 1 through 20 On Account Stated)

22. Plaintiff incorporates by reference paragraphs 1 through 21 above with the same force and effect as if said paragraphs were set forth herein in full.

23. Within the last two years, an account was stated by and between Plaintiff and Defendants TUCKER and DOES 1 through 20, and each of them, wherein and whereby it was agreed that Defendants were indebted to Plaintiff for Plaintiff's work on the Project. While some sums of Defendants' indebtedness have been paid, there is now due, owing and unpaid to Plaintiff from said Defendants a sum of \$1,006,000.00, or an amount according to proof at trial, together with interest at the maximum rate allowed by law and reasonable attorneys' fees, or, in the alternative, attorneys' fees under Civil Code section 1717.5.

FIFTH CAUSE OF ACTION
(Against Defendants TUCKER ENGINEERING
and DOES 21 through 30 For Violation of Statute)

24. Plaintiff incorporates by reference paragraphs 1 through 23 above with the same force and effect as if said paragraphs were set forth herein in full.

25. Pursuant to Business and Professions Code section 7108.5, Defendant TUCKER and DOES 21 through 30 had an obligation to release to Plaintiff all progress payments for contract, earned monies and change order work performed by Plaintiff on the Project.

26. Despite repeated properly submitted payment requests, Plaintiff is informed and believes that Defendants improperly failed to pay, and continue to fail to pay, progress payments, earned monies for contract work and change orders due and owing to Plaintiff.

27. As a result of Defendants' failure to make the required payments, Plaintiff is entitled, pursuant to Business and Professions Code section 7108.5, to payment of progress payments in an amount in excess of the jurisdictional minimum of this Court, and to a charge thereon at the rate of 2% per month along with interest, attorneys' fees and costs in an amount according to proof at trial.

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SIXTH CAUSE OF ACTION
(Against Defendants RUDOLPH AND SLETTEN, INC. and TRAVELERS
CASUALTY AND SURETY COMPANY OF AMERICA and DOES
31 through 40 For Action on Mechanics' Lien Release Bond

28. Plaintiff incorporates by reference paragraphs 1 through 27 above with the same force and effect as if said paragraphs were set forth herein in full.

29. Plaintiff is informed and believes, and thereon alleges, that Defendants KAISER and/or DOES 31-40 are an owner or reputed owner, or claim some right, title, or interest in the Project and/or Property. Any such right, title, or interest in and upon the Project and/or Property described above is junior and inferior to Plaintiff's claim of lien.

30. Plaintiff furnished to TUCKER and/or DOES 1 through 20, at their special instance and request, certain labor, materials and equipment used and intended to be used in the work of improvement on the Project and the Property identified above. After allowance of all proper credits, there remains a balance due and owing for equipment and materials supplied in an amount not less than \$1,006,000.00.

31. No part of the above-referenced sum has been paid, although demand has been made therefor, and there is now due and owing to Plaintiff on account thereof a sum not less than \$1,006,000.00, with interest thereon at the maximum rate allowed by law.

32. On or about April 11, 2014, Plaintiff recorded in the Official Records of the Alameda County Recorder, as Document No. 201408199, its claim of lien upon the Property, after Plaintiff furnished and provided all services to said Property, in the amount of \$1,007,863.73.

33. Plaintiff is informed and believes, and thereon alleges, that 30 days had not elapsed or expired since the recordation of any valid notice of completion of said work of improvement and/or any cessation of labor thereon, and 90 days had not elapsed or expired since the completion of said work of improvement, or any cessation of labor thereon, prior to recording of Plaintiff's claim of lien in the Official Records of the Alameda County Recorder. A true and correct copy of said lien is attached hereto as Exhibit B and by this reference made a part hereof.

34. Plaintiff has complied with all statutory prerequisites to the recordation of a valid

1 mechanics' lien claim, including Civil Code sections 3097 and/or 8034, 8102, 8116, and 8200,
2 et seq.

3 35. After Plaintiff recorded its mechanics' lien, Plaintiff is informed and believes that
4 R&S, as principal, and TRAVELERS, as surety, duly made, executed, and issued a certain surety
5 bond in the amount of \$1,259,829.66. The aforesaid surety bond was made, issued, and executed
6 in accordance with Civil Code section 8424 as a bond for release of mechanic's lien, identifies
7 Plaintiff as the obligee, provides in relevant part that the bond enables the Property to be freed
8 from the effect of Plaintiff's mechanics' lien, and states that R&S and/or TRAVELERS shall pay,
9 or cause to be paid, all sums which Plaintiff, as lien claimant, may recover on said claim together
10 with costs of suit. A true and correct copy of the Bond for Release of Mechanic's Lien is
11 attached hereto as Exhibit C and by this reference made a part hereof.

12 36. Plaintiff is entitled to enforce its lien rights against the aforementioned bond, and
13 entitled to recover from Defendants and DOES 31 through 40 a sum of at least \$1,006,000.00,
14 together with interest at the maximum rate allowed by law and reasonable attorneys' fees.

15 **SEVENTH CAUSE OF ACTION**

16 **(Against Defendants KAISER FOUNDATION HEALTH PLAN, INC.
17 and DOES 41 through 50 For Enforcement of Stop Payment Notice**

18 37. Plaintiff incorporates by reference paragraphs 1 through 36 above with the same
19 force and effect as if said paragraphs were set forth herein in full.

20 38. Plaintiff is informed and believes, and on that basis alleges, that Defendant
21 KAISER and DOES 41 through 50 are, and all times herein mentioned were, the owners or
22 reputed owners of the Project and the labor, materials, equipment and related items furnished by
23 Plaintiff to the Project.

24 39. Defendants KAISER and DOES 41 through 50 are, and all times herein mentioned
25 were, the holders of certain proceeds allocated to the Project. Prior to the expiration of the period
26 within which stop payment notices must be filed as prescribed by California Civil Code section
27 8508, and on or about December 5, 2013, Plaintiff filed with KAISER and DOES 41 through 50 a
28 Stop Payment Notice for the amounts due and owing Plaintiff on the Project. A true and correct

1 copy of the Stop Payment Notice is attached hereto as Exhibit D and made a part hereof by
2 reference. That Stop Notice was filed with Defendant KAISER in accordance with California
3 Civil Code section 8502 and 8506.

4 40. On or about December 17, 2013, Plaintiff filed with KAISER and DOES 41-50 a
5 Partial Release of Stop Payment Notice, which reduced the amount of Plaintiff's Stop Payment
6 Notice to \$703,912.00. A true and correct copy of the Partial Release of Stop Payment Notice is
7 attached hereto as Exhibit E and made a part hereof by reference.

8 41. Plaintiff is informed and believes, and thereon alleges, that at all time material
9 hereto, including the date Defendant KAISER received Plaintiff's Stop Payment Notice
10 documents, Defendant KAISER, and DOES 41 through 50, had in its possession sufficient funds
11 from which it was obligated to make payments or advancements to defray the cost of the work of
12 improvement.

13 42. R&S and TUCKER, and DOES 41 through 50, claim an interest in or right to the
14 construction funds from which R&S and TUCKER were obligated to make payments or
15 advancements to defray the cost of the work of improvement. Such claims are subordinate and
16 subject to Plaintiff's right to as much of the funds as will satisfy its demand as set forth in the
17 above-mentioned Stop Payment Notice.

18 43. Plaintiff is entitled to enforce its Stop Payment Notice in the amount of at least
19 \$703,912.00, and in an amount according to proof, together with interest at the maximum rate
20 allowed by law and according to proof. Defendant KAISER, and DOES 41 through 50, is
21 obligated pursuant to Civil Code section 8522 to withhold payment from R&S, or from any
22 person acting with authority of R&S, a sufficient amount due, or to become due, to pay the
23 amount claimed by Plaintiff.

24 **WHEREFORE, PLAINTIFF PRAYS FOR JUDGMENT AS FOLLOWS:**

25 **ON THE FIRST, SECOND, THIRD, FOURTH,**
26 **AND SIXTH CAUSES OF ACTION**

27 1. For the sum of at least \$1,006,000.00, or an amount according to proof at trial,
28 together with interest thereon at the maximum rate allowed by law according to proof;

2. For contractual attorneys' fees, or, in the alternative, for attorneys' fees under Civil Code section 1717.5;

3. For costs of suit; and,

ON THE FIFTH CAUSE OF ACTION

4. For statutory charges of 2% per month, and interest, for unpaid progress payments and change orders, on an amount according to proof at trial;

5. For attorneys' fees and costs of suit as provided for under the contract and/or authorized by statute; and,

ON THE SEVENTH CAUSE OF ACTION

6. For judgment establishing Plaintiff's right, title, and interest in any funds withheld on account of Plaintiff's Stop Payment Notice, and declaring Plaintiff's right, title, and interest are superior to the claims of R&S and TUCKER in and to such funds;

7. For the sum of at least \$703,912.00, or an amount according to proof at trial, together with interest thereon at the maximum rate allowed by law according to proof;

ON ALL CAUSES OF ACTION

8. For such other and further relief as the Court deems just and proper.

Dated: July 8, 2014

MURPHY AUSTIN ADAMS SCHOENFELD LLP

By: 

D. MICHAEL SCHOENFELD
KENNETH I. SCHUMAKER
Attorneys for Plaintiff
FBD VANGUARD CONSTRUCTION INC.