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**FILED**  
ALAMEDA COUNTY

JUL - 9 2014

CLERK OF THE SUPERIOR COURT  
By *[Signature]* Deputy

7 Attorneys for Plaintiff  
FBD VANGUARD CONSTRUCTION INC.

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF ALAMEDA

10 FBD VANGUARD CONSTRUCTION  
11 INC., a California corporation,

12 Plaintiff,

13 v.

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

20 Defendants.  
21

Case No.

**RG 14732089**

**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]

22  
23 Plaintiff FBD VANGUARD CONSTRUCTION INC. alleges:

24 **GENERAL ALLEGATIONS**

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

MURPHY AUSTIN ADAMS SCHOENFELD LLP  
ATTORNEYS AT LAW

BY FAX

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

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

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

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

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

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

26           8.       Plaintiff is informed and believes, and thereon alleges, that at all times herein  
27 mentioned, Defendants, and each of them, were the agents, servants, employees and  
28 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 **FIRST CAUSE OF ACTION**  
7 **(Against Defendants TUCKER ENGINEERING, INC.**  
8 **and DOES 1 through 20 For Breach of Written Contract)**

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

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

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

27 12. Pursuant to the terms of said written Subcontracts, Plaintiff furnished labor,  
28 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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1 **FOURTH CAUSE OF ACTION**  
2 **(Against Defendants TUCKER ENGINEERING**  
3 **and DOES 1 through 20 On Account Stated)**

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

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

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

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

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

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

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

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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;

