

ARIZONA COURT OF APPEALS

DIVISION ONE

THOMPSON/McCARTHY COFFEE CO., an
Arizona corporation,

Plaintiff/ Appellant/
Cross-Appellee,

v.

REPUBLICBANKAZ, N.A.

Defendant/ Appellee/
Cross-Appellant.

Court of Appeals
Division One
No. 1 CA-CV 18-0349

Maricopa County
Superior Court
No. CV2014-014647

**PLAINTIFF/APPELLANT/CROSS-APPELLEE'S COMBINED
REPLY BRIEF, CROSS-APPEAL ANSWERING BRIEF,
AND CROSS-APPEAL APPENDIX**

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REPLY BRIEF

INTRODUCTION

Republic unquestionably lied to Dutch Bros., forged documents to cover up its lies, and then held Dutch Bros.'s collateral hostage when Dutch Bros. tried to flee this abusive lender. Republic does not dispute any of that. Instead, Republic claims it has a get-out-of-jail-free card because Dutch Bros. signed the Consent. But settled authority confirms it waited too long to assert that defense. The Court should reverse for that reason alone.

Moreover, Republic's misconduct makes the release unenforceable under two legal doctrines. But the superior court improperly denied Dutch Bros. a trial on the merits to resolve the many disputed issues of fact on both doctrines. Throughout the Answering Brief, Republic largely ignores the facts that would permit a reasonable factfinder to find in Dutch Bros.'s favor. But that is not how summary judgment works.

At bottom, the law cannot permit the bank to do what it did here. This Court should reverse.

ARGUMENT

I. Republic waived its release affirmative defense in two different ways.

As the Opening Brief explained (at 36–44), Republic waived the affirmative defense of release (a) by failing to plead it and (b) through its litigation conduct. These are independent bases supporting waiver.

A. By not pleading release, Republic waived the defense.

Republic acknowledges (at 41) that a party waives an affirmative defense by not pleading it. Republic also concedes (at 40–41) that it was required to separately plead release and waiver and (at 47) that it never did so. Consequently, under controlling Arizona authority, Republic waived the right to assert release as an affirmative defense. [Ariz. R. Civ. P. 8\(c\)](#) (2016); *City of Phoenix v. Fields*, [219 Ariz. 568, 574, ¶ 27](#) (2009). The superior court therefore erred in refusing to “exclude [release] as an issue in the case.” *City of Phoenix v. Linsenmeyer*, [86 Ariz. 328, 333](#) (1959) (citation omitted).

Republic nevertheless argues (at 41–49) that the Court should excuse Republic’s waiver for three reasons. None of them work.

1. Pleading waiver is not an adequate substitute for pleading release.

Republic first argues (at 41–43) that “waiver” and “release” are similar and stem from the same facts. But Republic does not dispute that Rule 8(c) lists the two defenses separately, that the defenses are analytically different, and that they have different elements. Republic also offers no case that excused a pleading failure because a defendant pleaded a defense that was merely “close enough.” To the contrary, under Rule 8(c), “it is the defendant’s duty to plead and prove each” separate affirmative defense, even if they “raise similar questions of law and fact.” *Jerger v. Rubin*, 106 Ariz. 114, 117 (1970).

Rule 8(c)’s requirement that the defendant must plead and prove each separate affirmative defense makes especially good sense for waiver and release because they are analytically different. Waiver requires an “express, voluntary, intentional relinquishment of a *known right* or such conduct as warrants an inference of such an intentional relinquishment.” *Russo v. Barger*, 239 Ariz. 100, 103, ¶ 12 (App. 2016) (emphasis added). “[W]ithout knowledge of a right there can be no waiver.” *SMP II Ltd. P’ship v. Ariz. Dep’t of Revenue*, 188 Ariz. 320, 324 (App. 1996) (citation omitted).

“A release,” on the other hand, “is a contract,” *Spain v. Gen. Motors Corp.*, [171 Ariz. 226, 227](#) (App. 1992), under which a party “abandons ‘a claim or right to the person against whom the claim exists or the right is to be enforced or exercised,’” *Cunningham v. Goettl Air Conditioning, Inc.*, [194 Ariz. 236, 241, ¶ 25](#) (1999) (quoting 66 Am. Jur. 2d *Release* § 1 (1973)). In other words, it involves “a surrender of a claimant’s right to prosecute a cause of action.” [66 Am. Jur. 2d Release § 1](#) (Feb. 2019 update).

In sum, release requires a contract whereas waiver does not. And a party can release both known and unknown claims but cannot waive unknown claims. Thus, the “facts” underlying the defenses are not “identical,” as Republic contends (at 41). And because these differences can radically affect how the plaintiff litigates, a defendant must plead the defenses separately to provide the plaintiff proper notice.

When the difference isn’t material, some cases use the terms “waiver” and “release” interchangeably, as Republic notes (at 42–43). This probably stems from the fact that waiver “is a vague term used for a great variety of purposes, good and bad, in the law.” *Robert W. Baird & Co. v. Whitten*, [244 Ariz. 121, 125, ¶ 9](#) (App. 2017) (citation omitted). Despite that immaterial imprecision in some cases, however, Republic does not dispute that the

defenses are in fact different. The superior court also recognized the distinction between release and waiver: “The Court finds the discussion of waiver to be superfluous, as the law on release is more applicable to the circumstances here.” [IR-91, at 3 n.2 (APP114).]

This is not about a “magic word,” (AB at 43), it’s about putting the plaintiff on notice of the defenses it will face. Pleading a defense in the same ballpark as another does not provide this notice and does not satisfy Rule 8. Tellingly, Republic has no answer to the analogy about laches and the statute of limitations, which are related but separate defenses. (OB at 45.)

The way this case played out confirms Rule 8(c)’s wisdom. Had Republic pleaded release instead of waiver (as Rule 8(c) required), Dutch Bros. would have known that Republic believed a *contract* existed that released Republic from liability, potentially covering even *unknown claims*. But instead Dutch Bros. had no idea that Republic would rely on a contractual release—i.e., the Consent—and would claim it covered unknown claims. Republic thus lulled Dutch Bros. into believing that it would not assert a contractual release of unknown claims when, in fact, that became Republic’s chief defense. This violates the fundamental purpose of

the pleading requirement—to “prevent surprise.” *Linsenmeyer*, 86 Ariz. At 333.

2. Providing mere notice of the Consent is not an adequate substitute for pleading release.

Republic next claims (at 44) that the Court should excuse its waiver because it disclosed and referenced the Consent “several other times in the trial court in a timely manner.” That claim is wrong on both the law and the facts.

On the law, Arizona courts routinely find a defense waived despite a plaintiff’s knowledge of the underlying facts supporting the defense. In *Russo*, for example, the defendants asserted a defense based on a forum selection clause. 239 Ariz. at 102, ¶ 7. The plaintiff unquestionably knew about that clause at the outset of the case because he sought rescission of the same contract. *Id.* at 102, ¶ 4. Despite the plaintiff’s actual knowledge, this Court concluded that the defendants had waived the defense. *Id.* at 104, ¶ 16. This is settled law. *See, e.g., Fields*, 219 Ariz. at 573, ¶ 22 (finding waiver despite plaintiffs’ knowledge); *In re Cortez*, 226 Ariz. 207, 211, ¶ 6 (App. 2010) (same).

Tellingly, Republic cites no Arizona case holding that later disclosing the underlying facts can cure a Rule 8 pleading failure. It cites (at 44) only *Trujillo v. Brasfield*, [119 Ariz. 8, 10](#) (App. 1978), which addressed a motion to amend an answer to assert a defense already raised in a motion to dismiss.

Republic also cites (at 44–45) several out-of-state cases, but each relied on the lack of prejudice to the plaintiff, not merely the plaintiff’s knowledge of the underlying facts. *See Reives v. Lumpkin*, [632 F. App’x 34, 35](#) (2d Cir. 2016) (unpublished) (“did not claim surprise or prejudice”); *Schmidt v. Eagle Waste & Recycling, Inc.*, [599 F.3d 626, 632](#) (7th Cir. 2010) (“has not shown any prejudice”); *Curry v. City of Syracuse*, [316 F.3d 324, 331](#) (2d Cir. 2003) (“was not prejudiced”); *Brinkley v. Harbour Recreation Club*, [180 F.3d 598, 612](#) (4th Cir. 1999) (“was not unfairly surprised or prejudiced”), *abrogated by Desert Palace, Inc. v. Costa*, [539 U.S. 90](#) (2003); *Cruey v. Gannett Co.*, [76 Cal. Rptr. 2d 670, 676](#) (Ct. App. 1998) (“has not shown that he was prejudiced”). Moreover, those cases conflict with binding Arizona authority.

On the facts, Republic claims (at 46) that it “included the [Consent]’s Bates number in its initial disclosure statement” and that Dutch Bros. had access to it. But the Consent *signed in 2013* (Bates No. RBAZ07963) was

buried under the misleading label of “Loan File for Loan No. 826007200 in the amount of \$597,100.00_(May 9, 2012 Loan)” with a date of “2011-2012”:

DOCUMENT DESCRIPTION	DATE	BATES NUMBERS
E-mail correspondence relating to loans-internal, with Thompson, Kathy Pease, SBA, and Mutual of Omaha	02/2008 – 12/2008	RBAZ 000001 - RBAZ 004890.011
Organizational Documents of TMCC and related entities	01/2009 – 12/2009	RBAZ 04891 - RBAZ 05649
Loan File for Loan No. 826005400 in the amount of \$1,026,300.00 (October 24, 2011 Loan)	2010-2012	RBAZ 05650 - RBAZ 06619
Loan File for Loan No. 826007200 in the amount of \$597,100.00_(May 9, 2012 Loan)	2011-2012	RBAZ 06620 - RBAZ 08351
Additional e-mails, SBA correspondence, and memoranda	2011 - 2013	RBAZ 08352 - RBAZ 08428

[IR-123, Ex. C at § VIII (APP343).]

It was buried on page 7,963 of an 8,428-page production grouped into only five inaccurate categories. That document dump and misleading categorization could not cure Republic’s Rule 8 pleading failure.

Republic does not dispute that it did not *meaningfully* identify the Consent until November 2016. [IR-123, Ex. C at § I (APP349), § II.C (APP353–55).] But that was too late. The parties had already litigated for 18 months and racked up over half a million dollars in fees. (OB at 29.) As

explained in the Opening Brief (at 39–44) and below (see [Reply Argument § I.B](#)), that is too late to assert even a defense that *was properly pled* from the beginning. It's far too late for Republic to cure the initial pleading failure.

3. Republic never moved for leave to amend its answer, and a hollow offer to amend does not cure the prejudice to Dutch Bros.

Finally, Republic argues (at 47–49) that it offered to amend its answer and that remanding would be “nothing but a formality.” But Republic never actually moved for leave to amend. At most, Republic’s counsel said it “should be allowed to amend.” [3/9/17 Tr. at 65:4–5 (APP391).] Had Republic sought leave, Dutch Bros. could have opposed the request on the basis that granting leave would cause Dutch Bros. “undue prejudice.” See *Carranza v. Madrigal*, [354 P.3d 389, 392, ¶¶ 12–13](#) (Ariz. 2015) (affirming denial of leave to amend where party “fail[ed] to move for leave to amend” and, even if it had, granting leave to amend would have unduly prejudiced opposing party).

Anticipating this argument, Republic asserts (at 47 n.2) that Dutch Bros. “admits that the additional opportunity to brief the [release] issue can cure any prejudice.” Not so. Dutch Bros. admitted (at 46–47) only that supplemental briefing could cure the prejudice resulting from Republic first

raising the defense in a reply brief (an issue not raised on appeal). Dutch Bros. expressly stated (at 47) that supplemental briefing *cannot* cure Republic's failure to plead the defense or assert it for 18 months.

Moreover, defendant's "mere amendment of its answer to allege a new affirmative defense does not foreclose any subsequent argument that it has waived by its conduct the defense." *Jones v. Cochise Cty.*, [218 Ariz. 372, 379, ¶ 23](#) (App. 2008). Amending would solve only the first waiver problem; Republic would still have to demonstrate that it did not subsequently waive its release defense through its litigation conduct, a showing Republic cannot make.

Fundamentally, Republic's argument that the superior court could allow amendment on remand would apply equally to all the failure-to-plead-an-affirmative-defense cases Dutch Bros. cited (at 36–37). But rather than remanding to allow amendment, those cases "excluded [the defense] as an issue in the case." *Linsenmeyer*, [86 Ariz. at 333](#) (citation omitted). This Court should do the same.

B. By substantially litigating the merits before asserting release, Republic waived its right to assert the affirmative defense.

Republic claims (at 41) that finding the release defense waived here based on a pleading defect would “elevate[] form far above substance.” But even if the Court were willing to overlook this glaring pleading defect, Republic’s subsequent litigation conduct waived its right to assert even a properly pleaded defense.

1. This issue gets de novo review.

Dutch Bros. explained (at 35–36) that this Court reviews de novo the ruling on waiver of an affirmative defense. Republic claims (at 49–50) that “[i]n general, whether a right has been waived is a question of fact” and that “[a] finding of no waiver will not be disturbed unless it is clearly erroneous.” (Citing *Goglia v. Bodnar*, [156 Ariz. 12, 19](#) (App. 1987).)

Since *Goglia*, however, Arizona courts have repeatedly clarified that waiver-by-litigation-conduct rulings present issues of law subject to de novo review. Under this modern rule, the Court reviews de novo because “the facts relevant to this inquiry are undisputed,” *Russo*, [239 Ariz. at 103, ¶ 11](#), “waiver by conduct is apparent from the extensive litigation record below,” *Fields*, [219 Ariz. at 575, ¶ 32](#), and “the facts relating to waiver are uncontested,

occurred after litigation began, and are wholly unrelated to the underlying facts of the claim.” *Jones*, 218 Ariz. at 380, ¶ 28. All these factors apply here, and thus the Court should review de novo this waiver issue.

2. Release is a threshold, potentially dispositive affirmative defense that is waived if not promptly asserted.

Republic agrees (at 49–51) that a party can waive even a properly pleaded affirmative defense through its subsequent litigation conduct. Republic also agrees (at 51–52) that waiver is appropriate when the defense is one “that courts can quickly and easily adjudicate early in the litigation,” thereby saving plaintiffs “considerable time and expense and the judicial system a significant expenditure of its resources.” (Quoting *Fields*, 219 Ariz. at 575, ¶¶ 30, 33.) Despite Republic’s implicit suggestion to the contrary (at 53–54), release is a defense that must be asserted promptly.

Arizona courts have held that several affirmative defenses are waived if not promptly asserted, including notice of claim, forum selection clause, and arbitration clause. See *Fields*, 219 Ariz. at 576, ¶ 33 (notice of claim); *Russo*, 239 Ariz. at 104, ¶ 16 (forum selection); *Cortez*, 226 Ariz. at 211, ¶ 6 (arbitration).

These defenses share several features. First, they present threshold defenses that either bar suit altogether (notice of claim) or direct where to file suit (forum selection; arbitration). Second, at the case's outset, the defendant does not need any discovery to assert the defenses. For affirmative defenses with these characteristics, "courts can quickly and easily adjudicate [them] early in the litigation," saving plaintiffs "considerable time and expense and the judicial system a significant expenditure of its resources." *Fields*, 219 Ariz. at 575, ¶¶ 30, 33.

Release shares these traits. First, a valid release completely "extinguishe[s]" covered claims. *Cunningham*, 194 Ariz. at 241, ¶ 25. Release involves "immunity or excuse from suit." 76 C.J.S. *Release* § 1 (Mar. 2019 update). Here, the superior court entered judgment based solely on release. Second, the defendant, as a party to the contract, does not need discovery to assert the defense at the case's outset. Here, Republic had the Consent in its possession. [IR-123, Ex. C at § VIII (APP343).]

3. Release is waivable even if rebuttals to the defense involve fact questions.

Tellingly, Republic cites no case refusing to apply the waiver-by-litigation-conduct doctrine to release or any other type of affirmative

defense. Instead, Republic argues (at 53 n.4) that “[t]his case does not involve threshold procedural defenses or defenses concerning the court’s power to hear a case.” Elsewhere, however, Republic calls it (at 50) a “case-dispositive release defense.” If a valid release covers the asserted claims, the case is over.

Republic asserts (at 54) that rebuttals to the affirmative defense of release “such as fraud, mistake, or duress, can be factually-intensive issues requiring discovery.” But that has nothing to do with asserting or waiving the defense. The *prima facie* case for release is simple, and a defendant cannot sit on a defense merely because the plaintiff’s *rebuttals* might be more complicated.

For example, even though the notice-of-claim defense unquestionably is waived if not promptly asserted, a plaintiff can rebut the defense with all sorts of fact- and discovery-intensive issues, such as a factual dispute over whether and when a plaintiff actually mailed the notice. *See, e.g., Lee v. State*, 225 Ariz. 576, 581, ¶ 17 (App. 2010) (“proof of mailing→rebuttable presumption→denial of receipt by governmental entity = material fact dispute”). In such a case, the trial court may even hold “a one or two day jury trial on this limited issue.” *Id.* In other words, a defense can still be

waivable through conduct even though resolving the plaintiff's *rebuttals* to the defense on the merits requires discovery and a jury trial.

So, if Republic had raised the defense, the parties and the superior court could have resolved the defense promptly. “[S]ome limited discovery directed at this discrete issue” would have occurred, and then the issue could have been resolved “expeditiously.” *Id.* The parties could have briefed the issue—and in a case like this where rebuttals to the defense involve disputed issues of fact, the court should have held a short trial on this issue. *Id.* Thus, Republic can and did waive the affirmative defense of release even though resolving Dutch Bros.’s rebuttals (economic duress and mutual mistake) on the merits would require resolving disputed issues of fact.

4. Republic waived its release defense by substantially litigating the merits of the case for 18 months.

Republic disputes whether the particular conduct in this case supports waiver. It does. Republic agrees (at 49) that the test for waiver by conduct is “evidence of acts inconsistent with an intent to assert” an affirmative defense. *Jones*, 218 Ariz. at 379, ¶ 23. Republic also does not dispute the key facts showing that Republic so acted:

- Republic’s first several disclosure statements neither raised “release” nor linked its unexplained “waiver” defense to the Consent. [IR-123, Ex. C at § II.C (APP338) (Republic’s initial disclosure statement); *id.* at 23, § II.C (Republic’s second supplemental disclosure statement).] This is inconsistent with an intent to assert that the Consent released Republic.
- When Republic first disclosed that it believed the Consent released Dutch Bros.’s claims, the case was already 2 years old and the parties had already substantially litigated the merits for 18 months. [*Id.* at § II.C (APP353–55).] This is inconsistent with an intent to assert that the Consent released Republic.
- Before disclosing the defense, the parties had exchanged nearly 30,000 pages of documents, including documents from five nonparties, including the SBA. [*Id.* at 31–32, § VIII.] This is inconsistent with an intent to assert that the Consent released Republic.
- Four experts had prepared reports unrelated to release. [*Id.* at § VI (APP362–64).] This is inconsistent with an intent to assert that the Consent released Republic.
- The parties had spent more than half a million dollars litigating the merits. [*Id.*, Ex. B at ¶¶ 3, 5 (APP328); IR-77 at 9; IR-122 at 2; 3/9/2017 Tr. at 27:1–7 (APP373).] This is inconsistent with an intent to assert that the Consent released Republic.

Republic downplays what actually happened over those 18 months by suggesting (at 55) that the discovery *could have* been relevant to the release issue. But almost everything the parties did was completely unrelated to the release defense. Republic’s own Rule 26.1 disclosures do not mention the defense, and thus are inconsistent with an intent to assert Consent. The reports from the four expert witnesses addressed issues other than release.

[IR-123, Ex. C at § VI (APP362–64).] The nearly 30,000 pages of documents and over \$550,000 in litigation fees and costs all occurred *before* Republic disclosed release—the parties subsequently incurred other expenses litigating release, but the \$550,000 does not include them. [IR-122 at 2.] Republic does not dispute that the parties conducted no discovery directed to the release defense before November 1, 2016. Thus, the fact that some of the documents later happened to be relevant to release or a rebuttal was pure coincidence. This undisputed evidence shows that Republic acted inconsistently with an intent to assert release.

Republic lists (at 55) several things the parties did not do before it raised release, such as filing discovery motions or taking depositions—even though Republic’s own time records demonstrate that Republic was preparing to take depositions before it discovered the Consent. [IR-114, Ex. A at 22, 24, 37, 49, 61.] That these things did not happen is irrelevant. What matters is that what *did* happen in this case, and what happened is inconsistent with an intent to assert release. By “engag[ing] in substantial conduct to litigate the merits that would not have been necessary had the defendant not delayed in asserting the defense,” *Ponce v. Parker Fire Dist.*, 234 Ariz. 380, 383, ¶ 11 (App. 2014), Republic waived the release defense.

5. Republic's remaining arguments lack merit.

Republic's attempts (at 50–55) to distinguish *Fields* fall short. Republic first argues (at 53) that unlike the *Fields* notice of claim, “the merits of a defense concerning a broad release of all known and unknown claims are not ‘apparent on the face’ of any simple document.” (Quoting *Fields*, 219 Ariz. at 575, ¶ 30.) But Republic contradicts this position by later highlighting (at 63) “the clarity of the release” and describing the Consent (at 58) as “a broadly-worded, explicit release that covers the claims in this case.” Like a defense based on a notice of claim, a release defense “is a matter that courts can quickly and easily adjudicate early in the litigation.” *Fields*, 219 Ariz. at 575, ¶ 30. (See Reply Argument § I.B.2.)

Republic also argues (at 54–55) that, unlike the defendant in *Fields*, it did not litigate issues “completely unrelated” to the release defense. Not so. E.g., Republic disclosed two expert witnesses who prepared expensive reports on issues unrelated to release. [IR-123, Ex. C at § VI (APP362–64).] Because of the manner in which Republic litigated, all that expert work became totally unnecessary. *Fields* controls.

Republic asserts (at 54) that it “was fully within its rights to develop the evidence needed to support the defense.” But the Complaint and

Consent is all it needed to develop its prima facie showing of release. As part of this argument, Republic again notes (at 54) the issues Dutch Bros. raised, but as explained above ([Reply Argument § I.B.3](#)), the fact that the *rebuttals* involve fact disputes does not mean that the defense itself is not a threshold, waivable defense.

Republic claims (at 57) that Dutch Bros. has not shown how the case would have changed had it promptly asserted the release defense, because the parties supposedly “would have conducted discovery on both liability and damages issues.” Not so. When Republic disclosed the release defense, the entire case changed. Republic quickly raised the issue on summary judgment (in a reply brief), Dutch Bros. requested additional discovery on the release issue, [*see* IR-62 at 11–15], and the case suddenly focused on the validity of the release. That is exactly what should have happened at the outset of the case, but instead this intense focus on the release came two years and \$550,000 too late. As *Lee* explains, the court could have focused on the release defense immediately. *See* [225 Ariz. at 581, ¶ 17](#). Or, the parties could have decided—before spending \$550,000—to settle the dispute. Or, Dutch Bros. could have decided to walk away. Republic’s notion that the parties would have still spent \$550,000 on discovery ignores reality.

This is exactly why courts find waiver through litigation conduct. “Had [Republic] intended to assert [its release] defense, there would have been no need for it to engage in disclosure or discovery; it would have been able to assert the defense immediately.” *Jones*, 218 Ariz. at 380, ¶ 27. Had Republic promptly asserted the defense, “years of litigation and expense could have been avoided, as well as the expenditure of significant judicial resources.” *Russo*, 239 Ariz. at 105, ¶ 19.

Republic next criticizes (at 56–57) the doctrine of waiver through litigation conduct, claiming it prevents a party from litigating multiple defenses at once. But that is not what happened here. Republic did not waive the release defense by simultaneously litigating other defenses. Instead, it waived the defense by not litigating release *at all* for 18 months.

Similarly, Dutch Bros. does not assert that Republic also waived its “no provable damages” defense. (AB at 57–58.) Provable damages is not an affirmative defense, but rather a failure of proof that can only occur after the plaintiff has developed its evidence. Moreover, the parties were actively litigating that issue, so Republic did not waive that defense. By contrast, Republic did *nothing* with release for 18 months, acting inconsistently with an intent to assert release.

II. There are disputed issues of fact as to whether Dutch Bros. acted under economic duress.

A. Republic's factual disputes precluded summary judgment.

Republic does not dispute that a release signed under duress is not binding, and cites essentially the same three-factor test Arizona courts apply for duress: “(1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party.” *Inter-Tel, Inc. v. Bank of Am.*, 195 Ariz. 111, 117, ¶ 39 (App. 1999) (citation omitted). (OB at 49; AB at 82.)

Republic expressly admits (at 81) that “economic duress depends upon the facts of each case.” It then essentially claims there is no dispute about whether: (1) Dutch Bros. in fact was in dire financial circumstances when it executed the Consent, and (2) Republic contributed to those financial circumstances. But both issues involve fact disputes that preclude summary judgment.

1. Republic's factual contentions concerning Dutch Bros.'s financial condition confirm that the parties dispute issues of material fact.

Republic claims (at 86) that Dutch Bros. “did not submit substantial evidence that the loans had to be transferred to Omaha in order for it to avoid

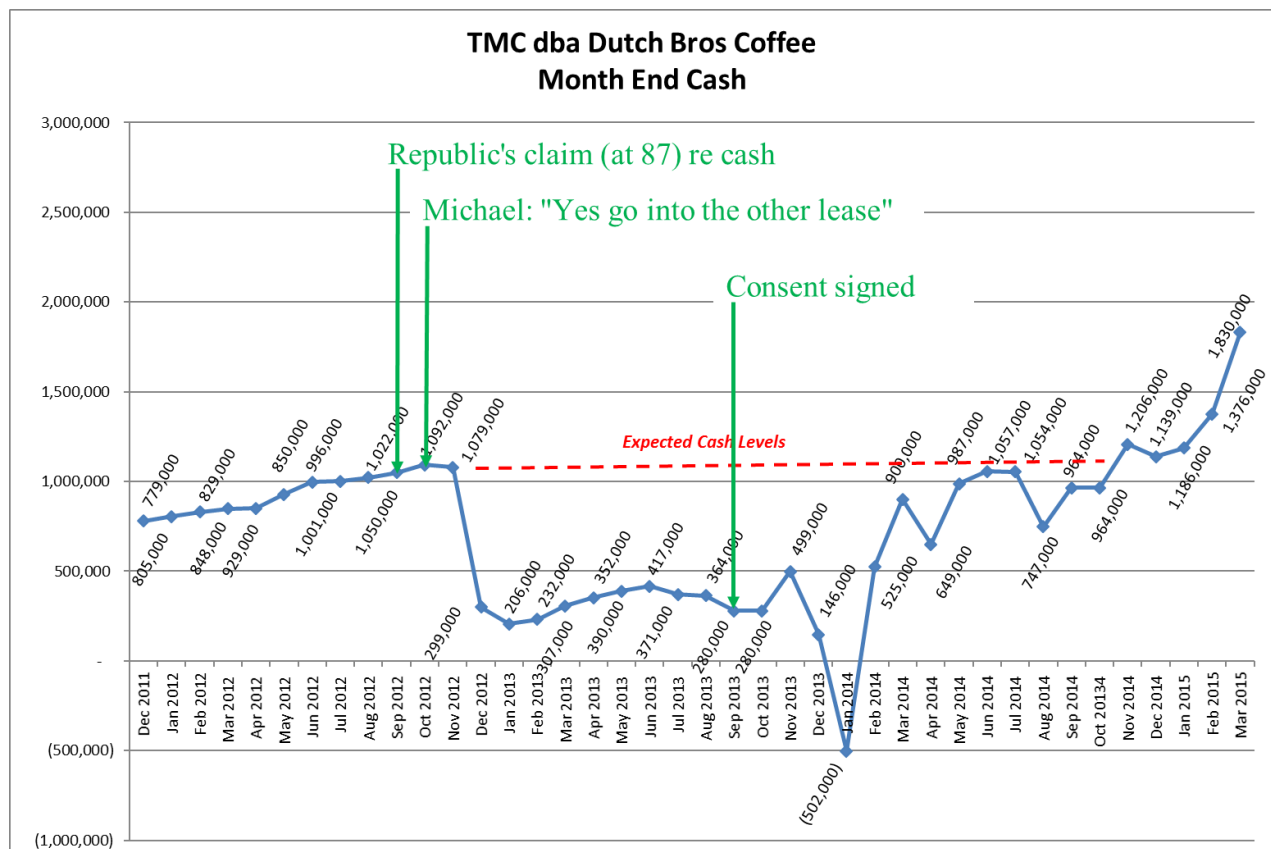
egregious financial loss.” But this ignores the evidence that would allow a reasonable factfinder to find that Dutch Bros. was under economic duress.

Tellingly, Republic does not dispute the key facts that would enable a reasonable factfinder to find in Dutch Bros.’s favor:

- Dutch Bros. signed a new 25-year lease at Republic’s urging. (OB at 11, 53.)
- When it signed the Consent, Dutch Bros. was “in a cash crunch.” (OB at 23.)
- It was so strapped for cash that it had to borrow from its principals to pay expenses out-of-pocket that should have been paid with loan proceeds. (OB at 53.)
- It “had drained its cash operating reserves.” (OB at 27–28.)
- It had incurred substantial expenses that urgently needed to be paid. (OB at 53.)
- No reasonable lender would accept the existing loans or issue new SBA loans without collateral. (OB at 54, 59.)
- Republic had tied up all of Dutch Bros.’s collateral and personal guarantees from Jim and Janice. (OB at 53.)
- Dutch Bros. had to sign the Consent before Republic would release Dutch Bros.’s collateral. (OB at 52, 54, 60, 61 n.2.)

Rather than address any of this, Republic instead misrepresents the facts or cites to irrelevant facts. For example, Republic claims (at 87) that Dutch Bros. “had \$978,000 in cash as of September 2012.” But that’s a full year before the Consent, and thus irrelevant. The chart below shows that

Republic cherry-picked a number near the absolute peak of Dutch Bros.'s cash during its relationship with Republic, and that the cash position became dire by September 2013, when Dutch Bros. signed the Consent:



[IR-49, Ex. 21, schedule 6.1 (green annotations added).]

Republic also claims (at 87) that “sales and net income were trending up.” That’s true, but misses the point. Dutch Bros. faced a *cash flow* problem, not an income problem. Business 101 teaches that a profitable company can still have negative cash flow resulting in a dire situation: Even for “a profitable firm[,] . . . [n]egative cash flows can persist for several years and

require substantial financing.” John G. Fulmer Jr., et al., *Growing Sales and Losing Cash: Assisting Your Small-Business Customer with Cash Flow Management*, 17 Com. Lending Rev. 14, 14 (July 2002). “Experienced lenders know that small but growing firms often encounter extended periods characterized by negative cash flows.” *Id.* On summary judgment, the court cannot use profits and growth to draw an inference in the moving party’s favor about cash flow.

Republic claims (at 87) that Dutch Bros.’s principals had substantial assets. But the principals were neither the borrowers nor the plaintiffs in this case. They had no obligation to bail out the company. Their finances are irrelevant.

Republic claims (at 87) that Dutch Bros. “paid off a \$420,000 loan” to another bank. But no inferences about this payment can be drawn, particularly when Republic does not say whether the loan had come due, or anything else about the payoff. Moreover, the cited document shows that *Republic* demanded this payoff, which would have exacerbated Dutch Bros.’s cash crunch. [IR-75, Ex. F at 1 (“Republic Bank asked the Borrower to pay off a loan . . .”).]

Republic claims (at 87–88) that Dutch Bros. financed the PV location “using cash from operating expenses reserved for its existing stores,” but that is precisely the problem. Dutch Bros. needed the cash to pay operating expenses like payroll, but instead had to use it to pay construction bills that the construction loan should have covered.

Republic admits (at 88) that Dutch Bros. requested a \$500,000 line of credit. It then asserts that Republic “offered” the line of credit and Dutch Bros. “did not take it.” Republic cites no evidence that it offered *Dutch Bros.* a line of credit (as opposed to Jim personally) or that Dutch Bros. “did not take it.” [Cf. IR-50 at 4, ¶ 25 (APP291) (line of credit request on behalf of “TMCC” (Dutch Bros.)).] Moreover, at that time, Republic’s agreement with the Comptroller of the Currency imposed higher standards for \$100,000+ loans and prohibited Republic from extending credit to certain borrowers. (OB at 22 (citing IR-63, Ex. 4 at 12, 16–17 (APP311–13)).) A reasonable factfinder thus could find that Republic could not have satisfied Dutch Bros.’s request for a credit line.

In addition, Republic repeatedly mischaracterizes Dutch Bros.’s position. It describes (at 86) Dutch Bros. as having “fear of tamping down on the timing of its planned expansion,” and refers (at 89) to a supposed

need to “*continue expanding* its chain stores.” Dutch Bros. of course wanted to expand its business and suffered significant losses from Republic’s delays. But the cornerstone of Dutch Bros.’s economic duress argument is the severe cash-flow problem, not just the delays. Dutch Bros. had *already* signed the leases and had *already* incurred substantial costs (at Republic’s urging).

Republic’s remaining bullets (at 88–89) are either irrelevant or show evidence of the cash crunch, which supports Dutch Bros.’s argument. In sum, Republic improperly invites the Court to weigh evidence and draw inferences in its favor, which confirms the superior court erred.

2. Republic’s factual contentions concerning Republic’s role in causing Dutch Bros.’s financial condition confirm that the parties dispute issues of material fact.

Republic also disputes (at 90) the role of “Republic’s allegedly wrongful assurances and delays.” Republic acknowledges (at 81) that Dutch Bros. was “already successful” and (at 87) increasingly profitable. What caused a successful, profitable company to experience a severe cash crunch? A reasonable factfinder could readily conclude that Republic’s conduct caused that otherwise-inexplicable cash crunch.

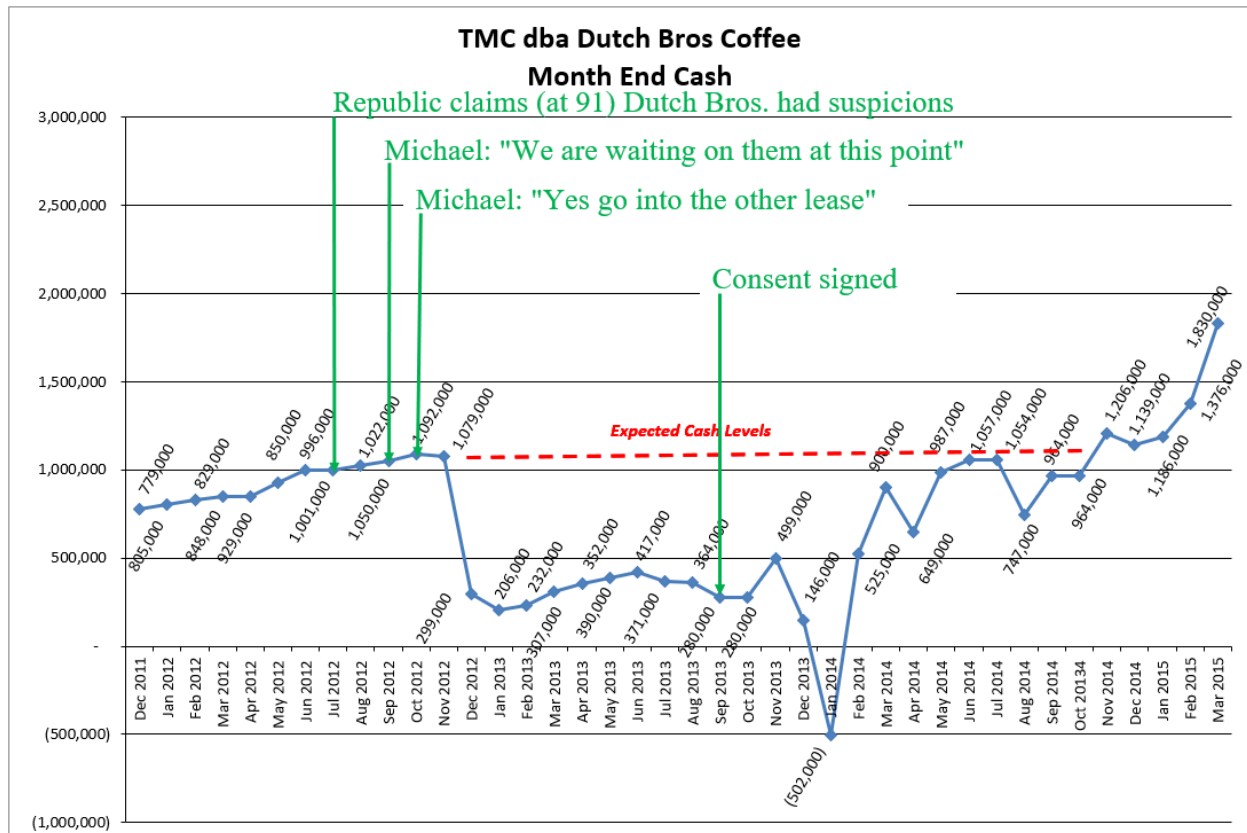
Republic cannot dispute that it engaged in extraordinary acts of lending fraud, including falsifying federal agency documents and

repeatedly lying to its borrower. (OB at 12–23.) And it does not dispute that it repeatedly assured Dutch Bros. that the loans were imminent (OB at 12–23) and expressly urged Dutch Bros. to sign new 25-year leases (OB at 53).

On top of that, Dutch Bros. was extremely creditworthy and should have had no problem obtaining new financing. But Republic stood in the way. Republic does not dispute that no reasonable lender would accept the existing loans or issue new SBA loans without collateral, (OB at 54, 59), and that Republic had tied up Dutch Bros.’s collateral plus personal guarantees from Jim and Janice (OB at 53). Yet Dutch Bros. had to sign the Consent before Republic would Release Dutch Bros.’s collateral. (OB at 52, 54, 60, 61 n.2.) Republic does not dispute that this made no commercial sense—Mutual of Omaha fully paid *everything* owed to Republic—so Republic had no valid reason to retain the collateral. (OB at 53–54.)

Rather than dispute these facts, Republic instead essentially argues (at 90–92) that its fraud was so obvious that it could not have caused financial trouble. Not so. First, no evidence would compel a factfinder to find that Dutch Bros. suspected outright fraud and forgeries, as opposed to mere incompetence, miscommunication, and ineptitude. Second, when Dutch Bros. expressed skepticism, Republic went out of its way to reassure Dutch

Bros. that the loans were imminent. For example, Republic claims (at 91) that by July 2012, Jim thought the PV application wasn't "correct, or submitted correctly," and had suspicions about the timing of the application. But months after that, after repeated questioning from Jim, Michael kept up the charade, claiming to have sent letters to the SBA, claiming to have received new demands from the SBA, and asserting that "we are waiting on them [the SBA] at this point." (OB at 20-21 (citing IR-46, Ex. 5 at 14).) Also after the July 2012 suspicions Republic highlights, Michael responded to Dutch Bros.'s express reservations by saying "yes[,] go into the other lease," and "I am not worried at all." (OB at 21.)



[IR-49, Ex. 21, schedule 6.1 (green annotations added).] Drawing inferences in Dutch Bros.'s favor, a reasonable factfinder could find that these repeated reassurances caused Dutch Bros. to continue spending money while anticipating the loans at every turn.

Consider someone waiting for dishwasher repair services. After the technician misses two appointments and is an hour late for the third appointment, the customer begins to think the technician has been lying and will never show. If the technician keeps calling to say "I'm on my way; be there in 20 minutes," the customer might reasonably wait around instead of

calling someone else. If a dispute later arose, a reasonable factfinder could conclude that these reassurances caused the customer to wait. Likewise, a reasonable factfinder could find that Dutch Bros. stuck with Republic because of Michael's reassurances, even if Jim thought several months earlier that Republic had mishandled the loan applications.

Citing no evidence, Republic also suggests (at 92) that economic conditions could have caused Dutch Bros.'s financial condition, but Republic also acknowledges (at 87) that Dutch Bros.'s "sales and net income were trending up." This is further proof that there are disputed issues of material fact.

B. Republic's remaining arguments lack merit.

1. Republic's earlier tortious conduct satisfies the wrongful act requirement.

Republic emphasizes (at 82–84) the "improper threat" requirement – the third factor of the three-part test. *See Inter-Tel*, [195 Ariz. at 117, ¶ 39](#) ("that said circumstances were the result of coercive acts of the opposite party"). As the Opening Brief explained (at 49), a special rule applies for economic duress. Even though taking advantage of a party's financial circumstances (e.g., hard bargaining) is not wrong, the third requirement is satisfied "when

the wrongful act of one party is the very thing that created the other party's financial difficulty." *Id.*, ¶ 37. In other words, if the party's *earlier* wrongful acts created the financial problems, then subsequently taking advantage of the problems is wrong for purposes of economic duress.

Here, Republic's actions that led to Dutch Bros.'s financial condition were themselves tortious and therefore satisfy *Inter-Tel*. Consequently, Republic's argument misses the point. This is not a case of mere pressure by creditors, driving a hard bargain, etc. (the examples Republic identifies).

2. Republic misstates the law on economic duress.

Republic asserts (at 85) that economic duress applies only in cases of "extreme financial distress." But to support this proposition, it cites dicta often addressing the unique facts of each case. For example, *Republic Nat'l Life Ins. Co. v. Rudine*, 137 Ariz. 62, 66 (App. 1983), and *Pleasants v. Home Fed. Sav. & Loan Ass'n*, 116 Ariz. 319, 321 (App. 1977), both articulated several bases for refusing to apply economic duress. In *Rudine*, the released party "did not cause the disparity in bargaining positions," and the releasing party "failed to demonstrate that [the releasing party]'s conduct, and not their own, was the cause of the duress." 137 Ariz. at 66. In *Pleasants*, "[a] reasonable alternative" existed. 116 Ariz. at 321. After listing these reasons,

both cases also listed things that one side did not show (“irreparable damage” in *Rudine*; “grievous economic loss” in *Pleasants*). Neither case suggests that economic duress requires showing those things; to the contrary, Arizona law does not require either “irreparable damage” nor “grievous economic loss.”

Republic’s characterization of the out-of-state cases is even more misleading. For example, Republic claims (at 86) that *Rich & Whillock, Inc. v. Ashton Dev., Inc.*, [204 Cal. Rptr. 86, 89](#) (1984), stands for the proposition that courts “require[] for economic duress pressure that would cause ‘bankruptcy or financial ruin.’” But the releasing party in *Rich & Whillock* did face “bankruptcy or financial ruin,” and nothing in the case purports to require that in every case of economic duress.

3. Republic cannot distinguish *Inter-Tel*.

Republic seeks (at 95–96) to distinguish *Inter-Tel* on three bases. None work.

First, Republic says (at 95) that Dutch Bros. “chose to use another lender.” As the Opening Brief explained (at 59–60), the borrower in *Inter-Tel* also found a new lender, so that “distinction” doesn’t work. Republic also claims (at 95) that Dutch Bros. “presented no evidence that Republic would

not provide it funding, [or] that it was stuck with Republic.” That ignores the relevant evidence:

- The SBA “declined the PV loan application due to [Republic’s] non-responsiveness.” (OB at 23.)
- Dutch Bros. applied for the PV loan in November 2011, but Republic never funded it. (OB at 13.)
- Republic does not dispute that it (at best) bungled the loans, and even committed outright fraud.

This evidence would permit a reasonable factfinder to conclude that Dutch Bros. had to seek another lender.

Second, Republic cites (at 95–96) *Inter-Tel’s* discussion of the borrower’s two attempts to find another lender. But Republic does not dispute that it had tied up Dutch Bros.’s collateral. (OB at 53.) And Republic does not dispute that no reasonable lender would make SBA loans without collateral. (OB at 54, 59.) Thus, a reasonable factfinder could find that Republic could not have obtained alternative financing. Republic also questions (at 95) whether “Republic pressured Thompson into signing the release,” but it does not dispute that Republic required Dutch Bros. to sign the Consent before releasing the collateral. (OB at 52, 54, 60, 61 n.2.) And, in fact, Republic would not have transferred the loans to Mutual of Omaha if Republic “were still subject to potential claims of [Dutch Bros].” [IR-35 at

7 (APP145).] As for Republic’s arguments (at 96) about whether Dutch Bros. objected to or attempted to negotiate the Consent, Dutch Bros. explained (OB at 58) that *Inter-Tel* forecloses this argument, holding that the lack of an objection to the release “will not justify a summary judgment in the bank’s favor.” [195 Ariz. at 119, ¶ 43](#).

Third, Republic disputes the severity of Dutch Bros.’s financial condition, but as explained above ([Reply Argument § II.A.1](#)), granting summary judgment on this basis is not proper given the evidence that would permit a factfinder to find economic duress.

4. Republic’s other key cases do not support summary judgment on these facts.

Republic claims (at 84) that *USLife Title Co. v. Gutkin*, [152 Ariz. 349](#) (App. 1986) “is instructive.” But Republic oversimplifies *Gutkin*. There, a title company bungled a series of real-property transactions. The title company’s mistake caused one party (Gutkin) to receive too much land, while others (Miones/Arena) received too little land. [Id. at 351–52](#). Miones/Arena threatened to sue the title company. The company agreed to pay Gutkin to quitclaim the excess property to the company to fix the mistake. The title company then sought to undo the transaction, claiming

duress. But the company “d[id] little to develop this argument on appeal.” *Id.* at 356.

This case is not “instructive” here. First, although Miones/Arena threatened litigation, there was no evidence that litigation would have put the company in serious financial risk. Second, no one except the title company (the party claiming duress) did anything wrong. Even if Gutkin took advantage of the company’s liability risk, Gutkin did nothing to put the company in that situation—it was the company’s mistake, not Gutkin’s. The company did not even argue “that Gutkin threatened or compelled it to assent against its will.” *Id.* at 357. As for Miones/Arena, they did nothing wrong by threatening to sue. *Id.*

Republic also repeatedly cites *Frank Culver Elec., Inc. v. Jorgenson*, 136 Ariz. 76 (App. 1983). There, a contractor and subcontractor essentially settled a dispute between them for less than the subcontractor initially demanded. The subcontractor claimed duress because it “was being pressured by its creditors.” *Id.* at 77. But nothing indicates that the contractor did anything to cause this pressure; the contractor’s mere knowledge of the pressure, without having done anything to cause it, “does not constitute business compulsion.” *Id.* at 78. The Court also explained

without elaboration that it could not conclude that the agreement “was the only reasonable alternative” for the subcontractor. *Id.*

Unlike the contracting parties in *Gutkin* and *Culver*, Republic’s own lies and fraud put Dutch Bros. in the situation that Republic later sought to exploit.

III. There are disputed issues of fact as to whether Dutch Bros. executed the Consent based on a unilateral mistake of fact.

Republic does not dispute that “a unilateral mistake induced by misrepresentations . . . may constitute grounds for avoiding a release . . . if at the time the release was entered into the other party knows or should have known of the mistake.” *Parrish v. United Bank*, 164 Ariz. 18, 20 (App. 1990).

Republic also does not dispute that if Dutch Bros. was mistaken, then Republic knew about the mistake. (See OB at 62.) Nor does Republic seriously dispute (at 64–65, 68–69, 79) that it—acting through its agent, Michael Harris—repeatedly lied to Dutch Bros. and fraudulently altered SBA documents.

Thus, the only thing left to decide is whether the superior court improperly resolved a disputed issue of material fact: whether Dutch Bros. knew or should have known about Republic’s misconduct when Dutch Bros.

executed the Consent. Because the superior court resolved this fact dispute in Republic's favor, this Court should reverse.

Republic essentially argues (at 63) that "the only reasonable conclusion from the evidence is that [Dutch Bros.] signed the release fully informed of the relevant facts and was not operating under any mistake." To make its case, Republic cherry-picks the evidence favoring its position, while ignoring evidence that would allow a reasonable factfinder to find for Dutch Bros.

A. A reasonable factfinder could conclude that Dutch Bros. entered into the Consent under a unilateral mistake.

The Opening Brief explained that in the superior court Dutch Bros. differentiated between two sets of torts (i.e., two sets of tortious misconduct) engaged in by Republic. (OB at 70.) The first set of misconduct involved Republic's representations concerning its competence and experience with SBA loans. The second set of misconduct focused on the fact "that Michael had [1] deliberately and intentionally stopped processing the PV loan, [2] failed to respond to the SBA's questions for months on end, and [3] forged documents to cover his tracks." (OB at 65 (citing IR-84, Ex. 24 at ¶¶ 2-3 (APP325)).) The unilateral mistake argument principally relied on the *second*

set of tortious misconduct. Decisively, a reasonable factfinder could find that when Dutch Bros. signed the Consent, it did not know about this *intentional* misconduct and deception. [IR-50 at 4, ¶¶ 26–27 (APP291); IR-84 at 1 ¶¶ 2–3 (APP325).]

Republic essentially ignores this crucial distinction, and therefore conveniently ignores the second set of misconduct. At best, the evidence Republic cites shows knowledge of only the following: (1) that the “timing of the application was ‘inaccurate’”; (2) the “‘opinion’ that ‘the SBA is just starting on our PV application, and the application isn’t even correct, or submitted correctly’”; and (3) that Dutch Bros. had met “with other lenders and expressly accused Republic of wrongdoing.” (AB at 73–74 (citations and emphasis omitted).) The only citation to the supposed accusation of “wrongdoing” relates to the claim that “Republic [was] not able to get us a promised loan approval for Paradise site.” [IR-130, Ex. A at RBAZ004235 (cited at AB at 74).]

All that evidence is consistent with Dutch Bros. suspecting rampant delays *due to inexperience and incompetence* (the first set of misconduct). This evidence all goes to Dutch Bros.’s “dissatisfaction with Republic.” (AB at 66.) A reasonable factfinder could believe all the evidence Republic

identified, and *still find* that Dutch Bros. did not know or suspect that Michael deliberately and intentionally stopped processing the PV loan, failed to respond to the SBA's questions for months on end, and forged documents to cover his tracks (the second set of misconduct). Republic has no response to the evidence concerning the second set of misconduct. Indeed, in the section of its brief presumably dedicated to the second set of misconduct, Republic summarizes the above evidence (at 80) as knowledge that Michael "had misrepresented the status of the loans and . . . was not processing the loan correctly." That recharacterization suffers from the same problem. An inexperienced and incompetent bank (the first set of misconduct) would likely process the loans incorrectly and misrepresent their status. A reasonable factfinder could still find that Dutch Bros. was ignorant as to the second set of misconduct.

B. Contrary to Republic's suggestion, Dutch Bros. does not contend that it had to be "absolutely certain" about what claims existed.

The rest of Republic's brief on this point (at 74-77) sets up and rebuts strawman arguments — whether Dutch Bros. needed to be "*absolutely certain*" about the facts or know "*every* single detail" about the fraud (versus having suspicions). Although the unilateral mistake defense would fail if the

undisputed facts demonstrated that Dutch Bros. had actual suspicions about the facts underlying the *second* set of misconduct, Republic points to no undisputed evidence of such suspicions.

As a result, “there is a factual issue as to whether the bank knew or should have known that [Dutch Bros.] was mistaken as to the facts surrounding [its] damages and this unilateral mistake may be a basis for avoiding the release.” *Parrish*, 164 Ariz. at 20. Thus, *Parrish*—not *Inter-Tel*—controls, and summary judgment was improper. (*See* OB at 64–65.)

C. Republic does not seriously defend the remaining aspects of the superior court’s rulings.

On summary judgment, the superior court distinguished *Parrish* on three grounds. (OB at 66–71.) Other than whether a factfinder could find unilateral mistake (addressed above), Republic does not dispute that the remaining two bases are irrelevant (i.e., the length of the release and the party’s sophistication level).

The superior court also erred in denying the motion for a new trial based on waiver. The superior court mistakenly characterized the motion as raising a new issue. (*See* OB at 71–76.) Republic acknowledges (at 79 n.8) but does not defend the waiver aspect of the superior court’s ruling. To the

contrary, Republic concedes (at 78–79) that Dutch Bros. “had *already submitted* evidence” on the second set of misconduct at the summary judgment stage and that the new trial arguments “add nothing new.” The superior court should have granted the motion.

CROSS-APPEAL ANSWERING BRIEF

CROSS-APPEAL INTRODUCTION

Republic's cross-appeal involves its requests for attorneys' fees and expert witness fees. The superior court denied both requests as waived and on the merits. If this Court reverses the judgment on *any* of the three issues raised in Dutch Bros.'s appeal, then Republic's cross-appeal is moot. If it reaches the merits of the cross-appeal, then it should affirm. The superior court correctly found that Republic's claims for attorneys' fees and expert witness fees were waived and lacked merit in any event for many reasons.

CROSS-APPEAL STATEMENT OF FACTS AND CASE*

Dutch Bros.'s Opening Brief explained the history of this dispute. Additional facts relevant to Republic's cross-appeal are summarized below.

* Selected record items cited are included in the Cross-Appeal Appendix attached at the end of this brief, cited by page numbers (e.g., [XAPP116](#)), which also match the PDF page numbers and function as clickable links. Other record items are cited with "IR-" followed by the record number.

I. Additional facts relevant to Republic’s claim for attorneys’ fees.

A. In its disclosure statements, Republic repeatedly asserted that the case did not arise out of contract for purposes of A.R.S. § 12-341.01(A).

In the operative complaint, Dutch Bros. did not claim attorneys’ fees. [See, e.g., IR-7 (XAPP120) (second amended complaint).] In its answer, Republic requested attorneys’ fees under A.R.S. § 12-341.01 (which governs actions “arising out of a contract”) and A.R.S. § 12-349 (which applies to frivolous lawsuits). [IR-11 at 4, ¶¶ 25–26.]

Republic initially focused exclusively on A.R.S. § 12-349. For example, its first several Rule 26.1 disclosure statements asserted A.R.S. § 12-349 as the sole basis for attorneys’ fees. [IR-123, Ex. C at § II.D (XAPP219, XAPP234).] In those same disclosure statements, Republic cited § 12-341.01 and expressly articulated that “[Dutch Bros.] has failed to state a claim *upon which an award of attorneys’ fees can be granted*” because “there was no express or implied contract that was *the basis* for either of [Dutch Bros.]’s claims.” [IR-123, Ex. C at § II.C (XAPP219, XAPP234, XAPP255, XAPP279–80, XAPP311) (emphases added).] Notably, in these disclosure statements Republic extensively discussed the original loan agreements between the parties. [E.g., IR-123, Ex. C at § I, ¶¶ 6, 15 (XAPP212–13) and surrounding text; *id.* at

§ I, ¶¶ 7, 17 (XAPP227–29) and surrounding text; *id.* at § I, ¶¶ 7, 17 (XAPP245, XAPP247) and surrounding text.] Republic, therefore, necessarily did not think that the case arises out of those original loan agreements.

As explained in the Opening Brief (at 28–29), those first few disclosure statements did not mention the Consent, did not mention the release defense, and did not articulate any basis for the affirmative defense of waiver that Republic pled in its answer. In its third supplemental disclosure statement, Republic first mentioned the Consent and disclosed its “waiver/release” defense. [IR-123, Ex. C at § II.C (XAPP252–54); *see also* 3/9/2017 Tr. at 63:18–64:1; IR-62 at 2; IR-77 at 9.] In that same disclosure statement, Republic for the first time disclosed that it believed it could recover fees under A.R.S. § 12-341.01, while at the same time maintaining that Dutch Bros.’s claims were not based on an express or implied contract. [IR-123, Ex. C at § II.D (XAPP255), § II.E (XAPP256).] Republic thus linked its attorneys’ fees claim to the Consent that accompanied the Loan Purchase and Sale Agreement; it never linked its claim for fees to the original loan agreements.

B. When Republic sought fees, it relied on the Loan Purchase and Sale Agreement, not the original loan agreements.

After Republic prevailed on the affirmative defense of release, it sought attorneys' fees. It principally relied on the express fee-shifting provision in the Loan Purchase and Sale Agreement between Republic and Mutual of Omaha Bank. [IR-113 at 7–8 ([XAPP133–34](#)).] (Republic has since abandoned that argument.)

Republic alternatively sought fees based on [A.R.S. § 12-341.01](#), arguing that the case arises out of contract, and [A.R.S. § 12-349](#). [IR-113 at 8–10 ([XAPP134–38](#)).] In connection with [§ 12-341.01](#) (and consistent with its Rule 26.1 disclosures) Republic again principally relied on the Loan Purchase and Sale Agreement: “The *pivotal contract* at issue here was the parties’ Loan Purchase Agreement, including the Consent” [*Id.* at 8 ([XAPP134](#)) (emphasis added).] To make its position even more explicit, Republic explained that “[p]ut another way, this case arises out of contract *because the Court has held that the Consent is a release, that this particular Consent is part of a larger contract – the Loan Purchase Agreement*” [*Id.* ([XAPP134](#)) (emphasis added).]

Republic mentioned the “original loan agreements” between Republic and Dutch Bros. only *once* in the briefing on attorneys’ fees — as an alternative to the alternative in the original fee application. [*Id.* at 9 ([XAPP135](#)).] Further confirming Republic’s position, Republic abandoned that position in its reply. [*See* IR-124 ([XAPP344](#)).]

C. The superior court denied fees.

In a lengthy ruling, the superior court denied Republic’s request for attorneys’ fees. [*See* IR-125 ([XAPP116](#)).] Republic has not challenged on appeal the court’s fees rulings concerning the Loan Purchase and Sale Agreement or [A.R.S. § 12-349](#).

The superior court found Republic had waived its claim for fees under [§ 12-341.01\(A\)](#) on the basis of the original loan agreements. [IR-125 at 3 n.2 ([XAPP118](#)).]

II. Additional facts relevant to Republic's claim that the parties agreed to shift expert witness fees.

A. Although the Indemnification Provision in the original loan agreements is broad, it says nothing about covering Republic's own intentional torts or negligence, and says nothing about applying to disputes between Republic and Dutch Bros.

The parties' original loan agreements contained the following indemnification provision ("Indemnification Provision") under which "Borrower" (Dutch Bros.) agreed to indemnify "Lender" (Republic):

Borrower agrees to indemnify, to defend and to save and hold Lender harmless from any and all claims, suits, obligations, damages, losses, costs and expenses (including, without limitation, Lender's attorneys' fees, as well as Lender's architect's and engineering fees), demands, liabilities, penalties, fines and forfeitures of any nature whatsoever that may be asserted against or incurred by Lender, its officers, directors, employees, and agents arising out of, relating to, or in any manner occasioned by this Agreement and the exercise of the rights and remedies granted Lender under this.

[IR-121, Ex. A at 10 ([XAPP165](#)).]

Although that provision is broad, it says nothing about covering Republic's own intentional torts or negligence, and likewise says nothing about applying in disputes between Republic and Dutch Bros.

B. Republic attempted to claim expert witness fees as taxable costs.

After Republic prevailed on the affirmative defense of release, it sought to recover its taxable costs. Republic's statement of costs included filing fees and the costs for a mediation, which are not in dispute. [IR-116 at 1 (XAPP143).] It also included, however, a line item for \$96,807.70 in expert witness fees. [*Id.* (XAPP143).] Republic cited A.R.S. §§ 12-332 and 12-341 as the only bases for recovering costs, without elaborating or expanding on how it could recover expert witness fees as costs. [*Id.* (XAPP144).]

In response, Dutch Bros. noted that expert witness fees are not taxable costs. [IR-117 at 1-2 (XAPP146-47).]

In reply, Republic for the first time asserted a right to recover the fees under a cost-and-fee-shifting provision in the Loan Purchase and Sale Agreement between Republic and Mutual of Omaha Bank. [IR-120 at 2-4 (XAPP149-51).] Republic also asserted that the Indemnification Provision covered expert witness fees. [IR-120 at 4-7 (XAPP151-54).] In its response to Republic's application for attorneys' fees, Dutch Bros. pointed out that the argument was improperly raised for the first time in a reply, and also addressed the merits. [IR-122 at 6-8 (XAPP198-00).]

C. The superior court refused to award expert witness fees as costs based on waiver and the merits.

The superior court declined to award Republic's expert witness fees as costs for several reasons. First, the superior court recognized that "[e]xpert fees are not identified as a recoverable cost in [A.R.S. § 12-332](#)." [IR-125 at 3 ([XAPP118](#)).] As for the Loan Purchase and Sale Agreement between Republic and Mutual of Omaha Bank, the court had already found that Dutch Bros. "was not a party to" that agreement. [IR-125 at 2 ([XAPP117](#)).] As for the Indemnification Provision, the superior court denied fees because (1) "Republic first raised the argument in its Reply," and therefore waived it, and (2) the cost-shifting statute does not apply to this "broad contractual indemnification provision[]" to shift expert witness fees. [IR-125 at 3 ([XAPP118](#)).]

Republic timely filed a cross-appeal. [IR-138.] The Court has jurisdiction over the cross-appeal under [A.R.S. § 12-2101\(A\)\(1\)](#).

CROSS-APPEAL ISSUES

1a. The superior court has broad discretion to deny attorneys' fees under A.R.S. § 12-341.01(A). Did the superior court have the discretion to deny fees when Republic waived the argument it asserts on cross-appeal?

1b. A.R.S. § 12-341.01(A) applies only to claims “arising out of a contract.” This case arises out of tort, not contract; it did not require breach of contract as a necessary prerequisite; and it did not seek to avoid or invalidate a contract. Did the superior court act within its broad discretion to deny Republic attorneys’ fees?

1c. In the alternative, should the Court remand for the superior court to consider whether to deny fees because of Republic’s delay in asserting the affirmative defense of release?

2a. Did the superior court act within its discretion in denying expert witness fees as taxable costs when Republic waived its request by raising it for the first time in a reply?

2b. The superior court has broad discretion in determining which items to allow as taxable costs. The taxable costs statute does not cover expert witness fees. Did the superior court act within its discretion in denying expert witness fees as taxable costs when the Indemnification Provision does not apply to Republic’s own wrongdoing, or to any first-party disputes between the parties?

CROSS-APPEAL ARGUMENT SUMMARY

The superior court had the discretion to deny Republic's request for attorneys' fees. On appeal, Republic asserts only a very narrow basis for fees ([A.R.S. § 12-341.01](#) based solely on the original loan agreements), but the superior court properly found that Republic waived that argument. ([Cross-Appeal Argument § I.B.](#)) The superior court also correctly found that this case arises out of tort, not contract. Dutch Bros. asserted only tort claims, and neither of the claims relied on a breach of contract or sought to avoid or invalidate a contract. ([Cross-Appeal Argument § I.C.](#)) Moreover, this Court could also remand on the alternative basis that Republic's delay in asserting the release defense justifies denying attorneys' fees. ([Cross-Appeal Argument § I.D.](#))

The superior court also had discretion to reject Republic's request for expert witness fees. The superior court correctly found that Republic waived the argument that the Indemnification Provision justified shifting expert witness fees because it waited until the reply to raise the argument. ([Cross-Appeal Argument § II.A.](#)) The superior court also correctly found that the Indemnification Provision does not justify shifting expert witness fees. The provision says nothing about covering Republic's own wrongdoing, or

about applying to first-party indemnification. Republic's interpretation is absurd and would make the Indemnification Provision unenforceable.

([Cross-Appeal Argument § II.B.](#))

CROSS-APPEAL ARGUMENT

I. The superior court acted well within its discretion to deny attorneys' fees.

A. Standard of review.

Because [A.R.S. § 12-341.01](#) is permissive ("may award"), whether to award fees is "a matter in the discretion of the trial court." *Suciu v. AMFAC Distrib. Corp.*, [138 Ariz. 514, 520](#) (App. 1983). This Court "cannot substitute [its] judgment for that of the trial judge." *Id.* "[T]he burden is on [Republic] to show the trial court abused its discretion" in denying fees. *Ayres v. Red Cloud Mills, Ltd.*, [167 Ariz. 474, 481](#) (App. 1990).

B. Republic's actions gave the superior court valid bases to find that Republic waived § 12-341.01 as to claims supposedly arising out of the original loan agreements.

On appeal, Republic argues (at 104-19) that it is entitled to its attorneys' fees under [A.R.S. § 12-341.01](#) because the claims in this case allegedly arise out of the original loan agreements. It has abandoned all claims to attorneys' fees arising out of the Loan Purchase and Sale Agreement or [A.R.S. § 12-349](#). Republic's actions, however, gave the

superior court valid bases to find that Republic waived [§ 12-341.01](#) as to the original loan agreements.

As a threshold matter, Republic argues (at 118) that the superior court simply missed an argument it asserted in its fee application. But Republic never moved to reconsider this ruling or otherwise pointed out this supposed error to the superior court.

Moreover, the record supports finding waiver. In the superior court, Republic relied almost exclusively on the Loan Purchase and Sale Agreement as the basis for fees. Republic principally relied on the express fee-shifting provision in the Loan Purchase and Sale Agreement between Republic and Mutual of Omaha Bank. [IR-113 at 7–8 ([XAPP133–34](#)).]

As an alternative, Republic sought fees based on [A.R.S. § 12-341.01](#), arguing that the case arises out of contract. [IR-113 at 8–10 ([XAPP134–36](#)).] In connection with [§ 12-341.01](#), Republic again principally relied on the Loan Purchase and Sale Agreement: “The *pivotal contract* at issue here was the parties’ Loan Purchase Agreement, including the Consent” [IR-113 at 8 ([XAPP134](#)) (emphasis added); *see also id.* ([XAPP134](#)) (“Put another way, this case arises out of contract because the Court has held that the Consent is a

release, that this particular Consent is part of a larger contract—the Loan Purchase Agreement”).]

Republic mentioned the “original loan agreements” between Republic and Dutch Bros. only once in the briefing on attorneys’ fees—as an alternative to the alternative in the original fee application. [IR-113 at 9 (XAPP135).] But Republic had never disclosed that basis (as Dutch Bros. noted in its response), and presumably for that reason Republic abandoned this basis in its reply (which did not refer to the original loan agreements at all). [See IR-122 at 3–5 (XAPP195–97) (noting waiver and failure to disclose in response); IR-124 (XAPP344) (not asserted in reply).]

This gave the superior court discretion to find that Republic had waived this basis for fees, and instead was relying on what Republic emphasized was the “pivotal contract,” the Loan Purchase and Sale Agreement. [IR-125 at 3 n.2 (XAPP118).] *Cf. IDA Moorhead Corp. v. Leach*, No. 1 CA-CV 15-0166, 2016 WL 6647736, at *2 n.2 (Ariz. App. Nov. 10, 2016) (unpublished) (holding that a “brief reference” in “one sentence” in a superior court filing did not properly preserve an issue).

Moreover, the superior court’s waiver ruling makes perfect sense in light of how Republic litigated this case. Even before filing the fee

application, Republic's claim for attorneys' fees at all times relied almost exclusively on [A.R.S. § 12-349](#) and the Loan Purchase and Sale Agreement between Republic and Mutual of Omaha Bank—not the original loan agreements between Republic and Dutch Bros. As explained above ([Cross-Appeal Facts & Case § I.A](#)), Republic's Rule 26.1 disclosure statements show that Republic knew this case did not arise out of the original loan agreements. The first few disclosure statements extensively discussed the original loan agreements but emphatically denied that there was any "express or implied contract that was *the basis* for either of [Dutch Bros.]'s claims," and that there was no "claim upon which an award of attorneys' fees can be granted." [IR-123, Ex. C at § II.C ([XAPP219](#), [XAPP234](#), [XAPP255](#), [XAPP279-80](#), [XAPP311](#)) (emphases added).] Tellingly, those first few disclosure statements did not cite [§ 12-341.01](#).

Republic's disclosure statements did not rely on [§ 12-341.01](#) until Republic finally mentioned the Consent attached to the Loan Purchase and Sale Agreement and disclosed its "waiver/release" defense. [IR-123, Ex. C at § II.C ([XAPP252-54](#)), § II.E ([XAPP256](#)).] In other words, before Republic disclosed the Loan Purchase and Sale Agreement (when only the original loan transactions were at issue), Republic did not think it could request fees

under § 12-341.01. Republic thought that § 12-341.01-based fees materialized only after it asserted the Loan Purchase and Sale Agreement and the accompanying Consent (not the contracts Republic now claims the case arises out of).

Anticipating this argument, Republic preemptively counters (at 115–16) that the passage in its disclosure statements—that “[Dutch Bros.] has failed to state a claim upon which an award of attorneys’ fees can be granted” because “there was no express or implied contract that was the basis for either of [Dutch Bros.]’s claims”—merely “denied the central allegations” of the case. (Emphasis omitted.) But in context, that makes no sense. First of all, Dutch Bros. was not claiming attorneys’ fees (under § 12-341.01 or otherwise), so the reference to § 12-341.01 had to refer to Republic’s own fee request rather than a defensive position. Second, if Republic thought that this case was about promises made in the original loan agreements (as it now claims), then it would have argued about those promises rather than using the parlance of § 12-341.01 to say that no contract formed “*the basis* for either of [Dutch Bros.’s] claims.” [IR-123, Ex. C at § II.C (XAPP219, XAPP234, XAPP255, XAPP279–80, XAPP311) (emphasis added).] Simply put, if Republic thought this case arises out of contract and entitled

the prevailing party to attorneys' fees under [§ 12-341.01](#), it would not have said any of that. In context, the sequence shows that Republic thought that § 12-341.01-based fees materialized only after it asserted the Loan Purchase and Sale Agreement and the accompanying Consent.

In short, Republic sought to recover fees based on a theory it never disclosed (and in fact disclaimed), and which it failed to develop sufficiently to preserve the issue. For these reasons, the record provides ample bases to support the superior court's ruling that Republic waived [§ 12-341.01](#) as to claims supposedly arising out of the original loan agreements. This Court should affirm that ruling.

C. The superior court correctly found that Dutch Bros.'s claims did not arise out of contract.

The Court may also affirm because the claims did not arise out of contract. As the party seeking fees, Republic bears the burden of establishing its entitlement to attorneys' fees and of showing that "the trial court abused its discretion" in denying fees. *Ayres*, [167 Ariz. at 481](#). Republic has not met these burdens.

1. A.R.S. § 12-341.01(A) generally does not apply to tort claims, including the claims asserted here.

A.R.S. § 12-341.01(A) permits the superior court to award attorneys' fees only in cases "arising out of a contract." The superior court correctly held that "§ 12-341.01(A) does not apply when a party successfully prevails on an affirmative defense of release when plaintiff's claims are grounded in tort," [IR-125 at 3 (XAPP118)], and Republic has not appealed that ruling. Thus, the statute applies only if Dutch Bros.'s own *affirmative* claims arise out of contract. They do not.

Tort claims generally do not trigger § 12-341.01(A). Here, Dutch Bros. asserted only tort claims, for negligent misrepresentation and fraudulent inducement. [IR-7 at 5-6 (XAPP124-26).] The Arizona Supreme Court has held that "fraudulently inducing one to enter into a contract with a third party is not the type of tort falling within the ambit of A.R.S. § 12-341.01(A)." *Morris v. Achen Const. Co., Inc.*, 155 Ariz. 512, 514 (1987). "The duty not to commit fraud is obviously not created by a contractual relationship. . . ." *Id.* The Supreme Court likewise held "that attorney's fees are not recoverable under § 12-341.01(A) for misrepresentation" under a statute because that claim "sounds mainly in tort and its existence does not depend upon a

breach of the contract.” *Sparks v. Republic Nat’l Life Ins. Co.*, [132 Ariz. 529, 544](#) (1982).

2. Republic has not met its burden of showing that this case triggers the narrow exception for tort claims that require breach of contract as a necessary prerequisite.

Under a narrow exception, “a tort claim will ‘arise out of a contract’ only when the tort could not exist ‘but for’ [1] the *breach* or [2] *avoidance* of contract.” *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, [198 Ariz. 10, 15–16, ¶ 27](#) (App. 2000) (emphasis added).

This exception is narrow. As Republic recognizes (at 105), “fees are not appropriate based on the mere existence of a contract somewhere in the transaction.” *Marcus v. Fox*, [150 Ariz. 333, 335](#) (1986). The fee-shifting statute does not apply “if the contract is a factual predicate to the action but not the essential basis of it.” *Hanley v. Pearson*, [204 Ariz. 147, 151, ¶ 17](#) (App. 2003). Said another way, “[t]he existence of a contract that merely puts the parties within tortious striking range of each other does not convert ensuing torts into contract claims.” *Ramsey*, [198 Ariz. at 15, ¶ 27](#).

As for requiring a breach (the first part of the exception *Ramsey* summarized), a tort can arise out of contract when the tort “could not exist but for the breach of the contract.” *Sparks*, [132 Ariz. at 543](#). For example, the

tort of insurance bad faith is based on the term *implied into every insurance contract* “that the insurance company must act in good faith in dealing with its insured on a claim,” and breach of the insurance contract is a necessary prerequisite to the claim. *Id.* at 544. By contrast, when the claim in a particular case does not require a breach of a contract, that part of the exception does not apply. *See, e.g., Morris*, 155 Ariz. at 514 (no fees when “the evidence offered to prove the tort does not also prove a breach of contract”). In other words, if the source of the breached duty is the contract itself, then A.R.S. § 12-341.01 applies; otherwise it does not.

Here, unlike in *Sparks*, Dutch Bros. did not have to prove any breach of the original loan agreements to prevail, and Dutch Bros. did not frame its case around any breach. Republic had a “duty not to commit fraud” or make misrepresentations regardless of the original loan agreements. *Morris*, 155 Ariz. at 514. At best, the original loan agreements merely “put[] the parties within tortious striking range of each other,” *Ramsey*, 198 Ariz. at 15, ¶ 27; the torts do not rely on them.

Republic identifies (at 110–11) several promises and representations asserted in the complaint, and claims that the torts are based on “a duty that exists only because of” these promises and representations. But merely

identifying promises is not enough. The torts Dutch Bros. alleged do not require breaching the original loan agreements, which are the only contracts Republic raises in connection with its [§ 12-341.01](#) argument on appeal. The list below provides the context and explanation for each of the promises Republic identifies:

Alleged promise (at 110) in context: “In or about October 2010, [Republic] contacted [Dutch Bros.] and offered to make small business loans guaranteed by the U.S. Small Business Administration (‘SBA’) to [Dutch Bros.] to finance the continued expansion of [the] Dutch Bros. coffee store chain in the Phoenix metropolitan area.” [IR-7 at ¶ 6 ([XAPP121](#)).]

Discussion:

- This is a background fact explaining the parties’ relationship (the third paragraph under the “FACTS” heading).
- The torts do not rely on any breach of the “offer[] to make” SBA loans. Nor could they, because Republic in fact did make SBA loans.

Alleged promise (at 110) in context: “[Republic] represented to [Dutch Bros.] that it would provide SBA loan funding for [Dutch Bros.] to build, equip, and open additional Dutch Bros. coffee stores in a *timely manner*.” [IR-7 at ¶ 9 ([XAPP121](#)) (emphasis added).]

Discussion:

- The material representation here is that Republic would work “in a timely manner.” Timeliness is not a term of the original loan agreements, and thus Dutch Bros. did not need to prove a breach of the original loan agreements in order to rely on this representation in proving the torts.

Alleged promise (at 111) in context: “Based upon representations made by [Republic] that it would make available SBA-guaranteed loans using its *competent and experienced employees*, [Dutch Bros.] in or about October 2010 chose to use [Republic] as its SBA lender for expanding its Dutch Bros. coffee store chain.” [IR-7 at ¶ 12 ([XAPP121](#)) (emphasis added).]

Discussion:

- The material representation here is the competence and experience of Republic’s employees. The context of the two preceding paragraphs of the complaint (¶¶ 10–11) confirm that; they use the phrases “competent and experienced” and “**experienced** staff.”
- Republic’s competence and experience is not a term of the original loan agreements, and thus Dutch Bros. did not need to prove a breach of the original loan agreements in order to rely on this representation in proving the torts.

Alleged promise (at 111) in context: “[Republic] caused numerous *delays* in obtaining SBA approvals and making loan funds available for this first loan.” [IR-7 at ¶ 16 ([XAPP122](#)) (emphasis added).] / “[Republic] did not make the proceeds of the \$1,026,300 loan available [*in a timely fashion*].” [*Id.* at ¶ 17 ([XAPP122](#)) (alteration by Republic, Cross-Appeal Opening Br. at 111) (emphasis added).]

Discussion:

- Timeliness is not a term of the original loan agreements, and thus Dutch Bros. did not need to prove a breach of the original loan agreements in order to rely on this representation in proving the torts.
- The delays are evidence that the representations about competence and experience were false. The delays also support damages for the torts.

Alleged promise (at 110) in context: “Due to continuing delays by [Republic], [Dutch Bros.], in September 2012, notified [Republic] and began construction of the PV Mall Store using operating funds which had been set aside by [Dutch Bros.] to pay for operating expenses of its other stores.

[Republic] promised to provide [Dutch Bros.] an SBA-guaranteed loan to replenish the operating funds [Dutch Bros.] advanced to pay the costs to construct and equip the PV Mall Store. [¶] [Republic]’s failure to timely provide funding for the PV Mall Store as promised delayed the opening of that store. The PV Mall Store opened in January 2013 using [Dutch Bros.]’s operating funds.” [IR-7 at ¶¶ 22–23 ([XAPP123](#)).]

Discussion:

- Michael’s promise to replenish Dutch Bros.’s operating funds was not a term of the original loan agreements, and thus Dutch Bros. did not need to prove a breach of the original loan agreements in order to rely on this representation in proving the torts.
- The torts are not based on Michael’s failure to replenish Dutch Bros.’s operating funds. Rather, the delays are evidence that the representations about competence and experience were false. The delays also support damages for the torts.

Thus, the torts Dutch Bros. asserted do not rely on any breach of the original loan agreements at all. Moreover, plucking promises and representations from the complaint does not prove otherwise. Dutch Bros. could have included specific allegations about breaches of the original loan agreements in the complaint without making the case fee-eligible under [§ 12-341.01](#), particularly if the asserted torts did not rely on such contractual breaches.

After exhausting the complaint, Republic then turns (at 112–13) to other promises buried in the record. Its citations, however, have almost nothing to do with what Dutch Bros. needed to prove its claims. They all

come from the evidentiary materials submitted in connection with opposing Republic's release defense — not proving up Dutch Bros.'s own claims. They all come from IR-46, IR-47, and IR-50, which were submitted in opposition to Republic's motion for summary judgment based on the release defense, and IR-130, which was submitted in connection with the motion for a new trial on the release defense. Dutch Bros. does not allege that a plaintiff's rebuttals to the defendant's affirmative defense make a case fee-eligible under [§ 12-341.01](#), nor could it. Moreover, like the items Republic plucked from the complaint, the promises Republic identified here are not ones that Dutch Bros. would rely on to prove the torts. For example, Republic repeatedly references (at 112–13) Michael's promise to fund loans up to the \$5 million SBA limit. But that was not a term in the original loan agreements, the alleged torts do not rely on the \$5 million promise, and on appeal Republic does not contend that the case arises from any contract other than the original loan agreements. Republic's Answering Brief (e.g., at 110) repeatedly uses the phrase “ongoing contractual relationship,” but does not develop an argument based on anything other than the original loan agreements. Moreover, Republic never asserted below [IR-113 ([XAPP127](#))],

and therefore waived, any argument about an “ongoing contractual relationship” separate from the original loan agreements.

To top it off, the only possible agreements Dutch Bros. could have relied on were the two original loan agreements that do not involve the PV Loan. This case does not arise out of those contracts. And because the PV Loan was never consummated, and therefore not reduced to writing, the statute of frauds would bar any contract claims relating to that agreement.

Thus, Republic has not met its burden of showing that Dutch Bros.’s claims in this case rely on a contractual breach (the first part of the exception *Ramsey* summarized).

3. Republic has not met its burden of showing that this case triggers the narrow exception for tort claims designed to avoid or invalidate contracts.

The second aspect of the exception articulated in *Ramsey* addresses when a party uses a tort for “avoidance of contract.” [198 Ariz. at 15, ¶ 27](#). More colloquially, this exception applies when a party seeks to use a tort claim to “invalidate [a] contract.” *Marcus*, [150 Ariz. at 335](#).

Dutch Bros. plainly does not seek to invalidate or avoid the original loan agreements. To the contrary, Dutch Bros. already fulfilled its end of the bargain. This part of the exception thus does not apply at all.

Republic references this principle (at 107) and calls *Marcus* “especially analogous” (at 113), but does not actually contend that Dutch Bros. seeks to invalidate or avoid the original loan agreements. Instead, Republic claims (at 113) that *Marcus* applies to “indirect attempt[s] to litigate contract rights by way of a tort action.” As explained above, however, Dutch Bros. is not attempting to litigate contract rights at all. And the exception articulated in *Marcus* is much narrower than that, as confirmed by subsequent cases. *Morris* distinguished *Marcus* in part by pointing out that “there is no contention . . . that any contract is invalid.” [155 Ariz. at 514](#). And *Ramsey* summarized *Marcus* as applying when a party seeks to “void” a contract. [198 Ariz. at 14, ¶ 21](#).

Thus, because Dutch Bros. did not seek to void or invalidate a contract, Republic has not met its burden of showing that the second *Ramsey* exception applies.

4. Republic’s remaining arguments on why this case arises out of contract lack merit.

Republic makes several other arguments for why this case arises out of contract, but none of them work. For example, Republic cites cases (at 105) concerning the general breadth of the phrase “arising out of.” But as

discussed above in this brief (and later in Republic's own brief), Arizona has a robust body of cases covering the phrase "arising out of" in the unique context of § 12-341.01(A). Those specific cases, not the general "arising out of" cases, control here.

Republic then tries to distinguish *Morris* (at 114–15) by emphasizing that it involved a contract with a third party (i.e., a lawsuit between A and B involving a contract between A and C). But *Morris* applied the standard test, which asks whether the tort at issue requires "a breach of the contract itself." 155 Ariz. at 514. It explained that "[i]n a fraudulent inducement case, the evidence offered to prove the tort does not also prove a breach of contract." *Id.* That conclusion is true here, just like in *Morris*. Although *Morris* distinguished *Marcus* in part because the parties in *Morris* "are not the parties to the contract," it also distinguished *Marcus* by pointing out that "there is no contention, as between them, that any contract is invalid" (just like here). *Id.* Republic counters (at 114–15) that "the fact that a contract in *Marcus* was being *invalidated*, while the alleged contract here was being *enforced*, should make no difference." But this action does not seek to enforce the original loan agreements at all, so that misses the point.

Same with Republic's contention (at 115) that the "ongoing contractual and lending relationship was allegedly the source of Republic's purported duties to timely and competently process a series of loans." The duty not to defraud or misrepresent does not stem from the original loan agreements. And the fact that Republic had to insert the ambiguity-creating phrases "ongoing" and "lending relationship" in its brief shows that Republic knows this case is not about its duties under the original loan agreements. At best, the original loan agreements brought the parties together, putting them "within tortious striking range of each other." *Ramsey*, 198 Ariz. at 15, ¶ 27. But that does not make the contract the "essential basis of" the case, *Hanley*, 204 Ariz. at 151, ¶ 17, or "convert ensuing torts into contract claims," *Ramsey*, 198 Ariz. at 15, ¶ 27.

Finally, Republic argues (at 116-17) that some cases involving negligent misrepresentation and fraudulent inducement could arise out of contract. Dutch Bros. has never contended otherwise. As an example, Republic cites (at 117) the principle that professional malpractice cases generally do not arise out of contract for § 12-341.01 purposes, but that an exception exists when the "gravamen of the litigation" relies on the "express[]" terms of the contract. (Citations omitted.) Here, however, the

“gravamen of the litigation” does not rely on the express terms of the underlying loan agreements at all. Republic has not identified any term in the loan agreements that forms the basis for Dutch Bros.’s tort claims.

For all of these reasons, Republic has not met its burden of proving its entitlement to fees under [A.R.S. § 12-341.01](#).

D. In the alternative, the Court should remand to consider whether Republic’s delay in asserting the release defense justifies denying attorneys’ fees.

The superior court also could have denied attorneys’ fees because Republic’s delay in asserting the release defense justifies denying attorneys’ fees. Dutch Bros. raised this issue below. [IR-122 at 8–13 ([XAPP200-05](#)).] The superior court never reached the issue because the court denied fees for other reasons. If the Court reverses the denial of fees for any reason, it should remand to give the superior court an opportunity to consider this issue in the first instance.

Under the standard factors governing attorneys’ fee awards under [§ 12-341.01](#), the superior court has the discretion to refuse to award fees because, among other things, “[t]he litigation could have been avoided or settled and the successful party’s efforts were completely superfluous in achieving the result.” *Associated Indem. Corp. v. Warner*, [143 Ariz. 567, 570](#)

(1985). This Court has repeatedly recognized that if a defendant had timely asserted a dispositive defense, “years of litigation and expense could have been avoided.” *Russo v. Barger*, 239 Ariz. 100, 105, ¶ 19 (App. 2016); *see also City of Phoenix v. Fields*, 219 Ariz. 568, 575, ¶ 33 (2009) (“[T]he plaintiffs would have been spared considerable expense and the judicial system a significant expenditure of its resources.”).

Here, Republic could have avoided litigation or possibly settled at a very early stage by asserting the release defense at the earliest possible moment. (See [Reply Argument § I.B.5](#).) A party with a valid, enforceable release should call opposing counsel right after seeing the complaint to promptly end the litigation. Here, by contrast, Republic sat on the Consent for 18 months, forcing the parties to spend more than \$550,000 before even mentioning release. [IR-122 at 2 ([XAPP194](#)); *see also* IR-123, Ex. B at ¶¶ 3, 5 ([XAPP208-09](#)); IR-77 at 9; 3/9/2017 Tr. at 27:1–7.] That figure does not count any fees the parties incurred litigating over the enforceability of the Consent or any other issues after Republic disclosed the release defense. Thus, all or nearly all of the \$550,000 “would not have been necessary had the defendant not delayed in asserting the defense.” *Ponce v. Parker Fire Dist.*, 234 Ariz. 380, 383, ¶ 11 (App. 2014).

The parties could have saved half a million dollars if Republic had timely asserted the defense. Republic should not be rewarded for its delay. Consequently, if this Court reverses the denial of fees, it should remand with instructions for the superior court to consider whether to exercise its discretion to deny fees.

II. The superior court had the discretion to deny awarding expert witness fees as a taxable cost.

Republic argues (at 120–24) that its expert witness fees are taxable costs because the Indemnification Provision covers them. The superior court properly found that Republic waived this argument below, and that, in any event, the Indemnification Provision does not make expert witness fees taxable costs.

A. The Court should affirm on this issue because Republic waived it below by raising it for the first time in a reply.

1. Applicable standards.

In the superior court, an argument “raised for the first time in a reply is waived.” *Westin Tucson Hotel Co. v. State Dep’t of Revenue*, [188 Ariz. 360, 364](#) (App. 1997). Rule 7.1 codifies the limitation that a reply “may address only those matters raised in the responsive memorandum,” not new arguments. [Ariz. R. Civ. P. 7.1](#). The superior court has discretion to “deem

waived arguments not raised in the original motion.” *MidFirst Bank v. Chase*, 230 Ariz. 366, 369 n.4 (App. 2012). When the superior court has made that finding, this Court “do[es] not consider th[e] argument on appeal.” *Id.*

2. The superior court acted well within its discretion in finding that Republic waived this argument.

On appeal, Republic effectively concedes that ordinarily a party may not recover its expert witness fees under the taxable cost statute, A.R.S. § 12-332. It instead points to § 12-332(A)(6), which provides that the court may award “[o]ther disbursements that are made or incurred pursuant to an order or agreement of the parties.” In light of this provision (as construed by *Ahwatukee Custom Estates Mgmt. Ass’n v. Bach*, 193 Ariz. 401 (1999)), Republic insists (at 120–21) that the superior court had the “discretion to award [expert witness fees] pursuant to” the Indemnification Provision.

Yet this argument—that the Indemnification Provision entitles Republic to recover expert witness fees under § 12-332(A)(6)—did not appear in its application for costs. [See IR-116 (XAPP143).] Nor did Republic make any argument for how the Indemnification Provision applied in these circumstances, let alone how it covers expert-witness fees. Republic did not even attach copies of the agreements.

This argument (and the documents supporting it) appeared for the first time in a reply. [See IR-120 to -121 ([XAPP148-56](#).)] Accordingly, the superior court properly exercised its discretion to reject the argument because “Republic first raised the argument in its Reply.” [IR-125 at 3 ([XAPP118](#).)] Thus, this court need “not consider this argument on appeal.” *MidFirst*, [230 Ariz. at 369 n.4](#); accord *Westin*, [188 Ariz. at 364](#) (“[W]e conclude that the issue is waived” because appellant raised the issue in superior court for the first time in a reply brief.).

3. Dutch Bros.’s response to the argument in an unrelated pleading did not obligate the superior court to rule on the merits because the argument was already waived at that point.

Republic does not cite the controlling rule (Rule 7.1) or the controlling cases. Instead, it asserts (at 123–24) that Dutch Bros. had an opportunity to respond to the new argument because Dutch Bros. addressed it in an unrelated filing. But that misses the point. When Dutch Bros. addressed the argument, Republic had already waived it; the fact that the opposing party ultimately responds to a waived argument does not require the court to ignore the waiver.

If the rule were otherwise – that a trial court cannot find waiver if the opposing party squeezes a response into an unrelated pleading – it would create bad incentives. The opposing party should not be made worse off because it finds a way to say something on the newly-raised issue. And it should not have to worry that addressing the waived argument will eliminate the trial court’s ability to find waiver, and then balance that downside against the risks of not responding at all. Republic’s position would also needlessly increase the burden on trial court judges by requiring them to fumble through the record to make sure that a waived argument wasn’t addressed in some unrelated pleading.

Fundamentally, although the superior court may have had discretion to do the work of cobbling together the parties’ arguments in unrelated pleadings, it had no obligation to fix Republic’s mistake. Likewise, even if a different superior court judge could have reached a different conclusion, this judge still acted well within her discretion to find that Republic had waived the argument.

Recognizing its waiver, Republic also urges the Court (at 124) to exercise its discretion to consider its argument notwithstanding the waiver. Republic relies on a case addressing a potentially waived issue because “the

question[s raised are] of statewide importance.” *City of Sierra Vista v. Sierra Vista Wards Sys. Voting Project*, 229 Ariz. 519, 524 n.8 (App. 2012) (alteration in original). This issue, which involves shifting costs under a specific contract between two parties, presents no issue of statewide importance and does not justify the Court exercising its discretion to address a waived issue.

B. If the Court reaches the merits, it should affirm on this issue because the Indemnification Provision does not apply in these circumstances.

1. Standard of review.

Although awarding costs to the prevailing party is mandatory, the superior court has discretion in “which items to allow” as taxable costs. *Ahwatukee*, 193 Ariz. at 402, ¶ 6 (citation omitted). When determining whether costs are recoverable under an agreement between the parties “a court must determine and effectuate the intent of the parties. Doing so generally requires that the court engage in fact finding, and we leave to the sound discretion of the trial court a determination of how to so proceed.” *Id.* at 404, ¶ 14 (citation omitted).

2. The superior court had discretion to find that the Indemnification Provision does not justify awarding expert witness fees as taxable costs in these circumstances.

Republic's contention (at 120–23) that it could recover expert witness fees under an allegedly broad Indemnification Provision also lacks merit. Republic recognizes (at 120) that “expert witness costs are not listed as recoverable costs under [A.R.S. § 12-332](#).” It thus points to the Indemnification Provision and cites [A.R.S. § 12-332\(A\)\(6\)](#), which allows parties to shift costs when an agreement indicates that the parties intended to do so. *See also Ahwatukee*, 193 Ariz. at 404, ¶ 14 (construing [A.R.S. § 12-332\(A\)\(6\)](#) and explaining that when deciding whether a contract shifts costs, “a court must determine and effectuate the intent of the parties”).

Here, the Indemnification Provision does not reflect that the parties intended to shift expert witness fees as taxable costs in litigation between them. Decisively, the Indemnification Provision (a) does not apply to Republic's own wrongdoing, (b) does not apply to first-party disputes, and (c) would be void and unenforceable as applied in this situation.

(a) Republic has not met its burden of showing that the Indemnification Provision covers Republic's own wrongdoing.

Indemnification typically involves Party A indemnifying Party B for Party A's wrongdoing. For example, a plumbing subcontractor might indemnify a general contractor so that if a homeowner sues the general contractor for plumbing problems caused by the plumber, the plumber rather than the general contractor will absorb any losses resulting from the plumber's own wrongdoing.

In contrast, here Republic maintains that the Indemnification Provision requires the indemnifying party to indemnify the indemnified party for the *indemnified party's own wrongdoing*. (As if, in the analogy above, the plumbing subcontractor indemnified the general contractor for problems caused by the general contractor.) Arizona law has strict rules about whether and when to allow such indemnification for the indemnified party's own wrongdoing. For intentional torts, Arizona has long recognized that "[p]ublic policy forbids indemnifying a person for his own wil[l]ful wrongdoing." *Phoenix Control Sys., Inc. v. Ins. Co. of N. Am.*, [165 Ariz. 31, 35](#) (1990); accord *Transamerica Ins. Grp. v. Meere*, [143 Ariz. 351, 356](#) (1984) ("[P]ublic policy . . . forbids contracts indemnifying a person against loss

resulting from his own willful wrongdoing.”). This public-policy rule applies most often in third-party indemnification scenarios, such as insurance contracts. As explained below ([Cross-Appeal Argument § II.B.2.c](#)), the public-policy rule applies even more strongly for first-party indemnification.

For negligence, “[i]t is well established in Arizona that an agreement for indemnity will not be interpreted to indemnify against the indemnitee’s own negligence or wrongdoing unless that provision is *expressly* provided for within the indemnification agreement in *clear and unambiguous* terms.” *Hauskins v. McGillicuddy*, [175 Ariz. 42, 50](#) (App. 1992) (emphases added). Republic does not even attempt to satisfy the clear-and-unambiguous requirement, nor could it. The Indemnification Provision contains no express provision indicating that it specifically includes Republic’s own negligence. [See IR-121, Ex. A at 10 ([XAPP165](#)).]

Dutch Bros. asserted both intentional torts and negligence-based torts. [IR-7 at 5–6 ([XAPP124–26](#)).] Under either doctrine, the Indemnification Provision cannot indemnify Republic for its own wrongdoing.

(b) Arizona has not recognized first-party indemnification, and these facts would not support first-party indemnification in any event.

Indemnification also typically applies only to claims brought by third parties, not disputes between the parties to the indemnification agreement. Continuing the plumbing example from above, the plumber would indemnify the general contractor if the homeowner sued, but the indemnification provision would not apply in a lawsuit between the general contractor and the plumber. In this case, however, Republic maintains that the Indemnification Provision requires the indemnifying party (Dutch Bros.) to indemnify the indemnified party (Republic) in a dispute between Dutch Bros. and Republic (i.e., first-party indemnification).

“Currently, there is a split of authority as to whether an indemnification provision applies to claims between the parties to the agreement [i.e., first-party claims] or only to third-party claims.” *NevadaCare, Inc. v. Dep’t of Human Servs.*, [783 N.W.2d 459, 470](#) (Iowa 2010). Not all jurisdictions recognize first-party indemnification. *See, e.g., Travelers Indem. Co. v. Dammann & Co.*, [594 F.3d 238, 255](#) (3d Cir. 2010) (“[W]e, like the District Court, have unearthed no New Jersey case that actually permits an indemnitee to maintain [this] sort of claim”); *MVW Mgmt., LLC v.*

Regalia Beach Developers LLC, [230 So. 3d 108, 112](#) (Fla. Ct. App. 2017) (“Generally in Florida, indemnity provisions apply only to third-party claims.”).

Republic cites no Arizona cases recognizing first-party indemnification. Moreover, this Court should not adopt first-party indemnification for the first time when the issue was waived in the superior court.

To top it off, even jurisdictions that do recognize first-party indemnification place strict limits on when it applies: It applies only when the provision’s express terms call out first-party indemnification “clearly and unambiguously,” “exclusively or unequivocally,” or in “unmistakably clear” terms:

- “[I]ndemnity provisions are limited to third-party claims unless a contract *clearly and unambiguously* shows an intent to extend indemnity to first-party claims” *MVW Mgmt.*, [230 So. 3d at 113](#).
- “New York law construes indemnity clauses not to cover claims by the indemnitee against the indemnitor unless the coverage language indicates an ‘*unmistakably clear*’ intent to include such claims, or is ‘*exclusively or unequivocally* referable to claims between the parties themselves.’” *BNP Paribas Mortg. Corp. v. Bank of Am., N.A.*, [778 F. Supp. 2d 375, 412](#) (S.D.N.Y. 2011) (citations omitted).

- “[U]nder New York law, absent ‘*unmistakably clear*’ language in an indemnification provision that demonstrates the parties intended the clause to cover first-party claims,” the provision applies only to third-party claims. *Lehman XS Tr. v. GreenPoint Mortg. Funding, Inc.*, [916 F.3d 116, 125](#) (2d Cir. 2019).
- “The agreement does not state the intent to indemnify against first-party actions in *clear and unequivocal* terms.” *Flaherty & Collins, Inc. v. BBR-Vision I, L.P.*, [990 N.E.2d 958, 968](#) (Ind. Ct. App. 2013).

(Emphases added.)

In this case, the Indemnification Provision fails these strict tests. It says nothing about first-party claims, let alone clearly, unambiguously, and unequivocally. To the contrary, it uses phrases like “defend” and “hold harmless,” [IR-121, Ex. A at 10 ([XAPP165](#))], that make no sense when applied to first-party indemnification. After all, Dutch Bros. “cannot ‘defend’ [Republic] from itself.” *Travelers*, [594 F.3d at 255](#). Likewise, the phrase “‘hold harmless’ indicates an intent by the parties to protect a party from claims made by third parties rather than those brought by a party to the contract.” *NevadaCare*, [783 N.W.2d at 471](#).

Courts have good reason to treat claims of first-party indemnification skeptically. In many situations, applying an “indemnification provision to a contract dispute between the contracting parties would yield an absurd result.” *Colonial Pipeline Co. v. Nashville & E. R.R. Corp.*, [253 S.W.3d 616, 624](#)

(Tenn. Ct. App. 2007). Among other things, the “law disfavors contracts that shift the cost of a party’s misconduct from the perpetrator to the injured party because they relieve one party of the obligation to use due care and shift the risk of injury to the party who is probably least equipped to take the necessary precautions to avoid injury and bear the risk of loss.” *MVW Mgmt.*, [230 So. 3d at 112](#) (citation omitted).

Republic emphasizes (at 121–23) the breadth of the Indemnification Provision. Courts routinely reject that argument. What matters is not how broad a provision is, but how *specific* it is. Many courts have refused to shift costs or attorneys’ fees based on broad indemnification provisions because the provisions are not sufficiently specific. *See, e.g., Colonial Pipeline Co.*, [253 S.W.3d at 624](#) (refusing to shift court costs and fees based on provision requiring one party to “indemnify and save harmless [the other party] from and against all claims [and] suits”); *Hooper Assocs., Ltd. v. AGS Computs., Inc.*, [74 N.Y.2d 487, 492](#) (1989) (refusing to shift fees based on provision requiring one party to “indemnify and hold harmless [plaintiff] . . . from any and all claims, damages, liabilities, costs and expenses, including reasonable counsel fees”); *Oscar Gruss & Son, Inc. v. Hollander*, [337 F.3d 186, 199](#) (2d Cir. 2003) (refusing to shift fees based on provision requiring one party to

“reimburse the [other] promptly for any legal or other expenses reasonably incurred by it in connection with . . . defending . . . any lawsuits . . . arising in any manner out of or in connection with the rendering of services”).

Republic also emphasizes (at 123) that the provision “contains no express or implied limitations to third-party claims.” But that gets the standard precisely backwards. Even in jurisdictions that recognize first-party indemnification agreements, “[a]n indemnification provision that is silent or unclear whether it applies to first-party claims will normally be interpreted to apply only to third-party claims.” *MVW*, 230 So. 3d at 112. Said another way, because the intent to apply to first-party indemnification must be “unmistakably clear,” *BNP*, 778 F. Supp. 2d at 412, silence means that a provision applies only to third-party claims.

(c) Republic’s proposed construction of the Indemnification Provision violates Arizona public policy.

Republic combines two doctrines (indemnification for Republic’s own wrongdoing plus first-party indemnification), about which courts are already skeptical, even though the Indemnification Provision does not support applying either doctrine. By combining them in this manner, Republic asks the Court to construe a garden-variety indemnification

provision in an exceptionally unusual way. Under Republic's proposed construction, Dutch Bros. effectively gave Republic a prospective, unlimited, advance consent for both negligence and intentional torts, even though the Indemnification Provision says no such thing.

The Indemnification Provision requires "Borrower" (Dutch Bros.) to "indemnify" and "to defend" "Lender" (Republic), including being on the hook for "damages" and "losses," plus "attorneys' fees." [IR-121, Ex. A at 10 ([XAPP165](#)).] That is all fine for third-party indemnification involving the borrower's wrongdoing. But applying that provision in a suit like this between the borrower and the lender is crazy. It would effectively create a get-out-of-jail-free card for the lender because in any lawsuit, the lender would always win.

It means that if Dutch Bros. sued Republic and Republic wins, Dutch Bros. will have to pay all of Republic's fees and expenses. That much might be unremarkable if the provision were clear (although this one isn't clear). But if Dutch Bros. won, then the Indemnification Provision would negate every penny of victory, because Dutch Bros. would have to pay Republic for the "damages" that Republic owed to Dutch Bros. And Dutch Bros. would have to pay all the attorneys' fees and other expenses that Republic spent

losing to Dutch Bros. A pyrrhic victory to say the least. In other words, Republic thinks that Dutch Bros. must defend Republic against itself—against Dutch Bros. Win or lose, Republic always wins. That’s not indemnification; it’s an advance consent to unlimited intentional torts, including the fraud alleged in this case.

The parties could not possibly have intended such an absurd result from an unremarkable indemnification provision. If they intended something so extraordinary, they would have said so—and the provision would be unenforceable, in any event.

Republic cites only two out-of-state cases (at 121) supporting the validity of first-party indemnification claims. But neither case supports the unprecedented construction Republic seeks. In both cases, the California courts recognized that indemnification “ordinarily relates to third party claims.” *Dream Theater, Inc. v. Dream Theater*, [124 Cal. App. 4th 547, 555](#) (2004); accord *Zalkind v. Ceradyne, Inc.*, [194 Cal. App. 4th 1010, 1024](#) (2011) (“Indemnity generally refers to third party claims.”). The courts applied first-party indemnification only after identifying specific textual indications that the indemnification provisions *must* include first-party indemnification, including multiple provisions that “make[] no sense,” “would not be

necessary,” and “would be superfluous” if applied only to third-party indemnification. *Dream Theater*, 124 Cal. App. 4th at 555; *Zalkind*, 194 Cal. App. 4th at 1028–29. Republic identifies no such provisions in the indemnification clause between Republic and Dutch Bros.

Moreover, the California cases both apply first-party indemnification principally to the indemnifying party’s own wrongdoing. Both cases involve disputes between the buyer and the seller of a business. Both cases allow the seller to indemnify the buyer for the *seller’s* wrongdoing, and/or vice-versa:

Sellers agreed to indemnify *buyer* . . . against (a) any breach by *Sellers* of any representations or warranties made in the Contract; (b) any breach of any covenant in the Contract or ancillary documents; and (c) all liabilities *except those buyer* assumed. *Buyer* . . . agreed to indemnify *seller* . . . against (a) any breach by *buyer* of any representations or warranties made in the Contract; (b) any breach of any covenant in the Contract or ancillary documents; and (c) all liabilities *buyer* assumed.

Dream Theater, 124 Cal. App. 4th at 554 (emphases added).

[*Buyer*] shall indemnify, hold harmless and defend the [*sellers*] . . . from and against any and all damages, losses incurred by [the *sellers*] that arise from or are in connection with: [¶] . . . [¶] (b) Any breach or default by [*buyer*] of its covenants or agreements contained in this Agreement.

Zalkind, 194 Cal. App. 4th at 1023 (some alterations in original).

The California courts even emphasized “the complementary structure of the indemnity clauses” and the “reciprocal obligations” they create. *Dream Theater*, [124 Cal. App. 4th at 555](#).

Those provisions are the opposite of Republic’s proposed construction here. In the parlance of the California cases, Republic would have the “seller” indemnify the “buyer” for the “*buyer’s*” own wrongdoing. That absurdity results from Republic’s attempt to simultaneously invoke two separate doctrines, each of which deviates from the default rules of indemnification, despite nothing in the indemnification clause’s text supporting either deviation. Tellingly, Republic cites no case that combines these two separate doctrines—in such a case, the outcome of any dispute between the parties would be preordained and the litigation would be entirely pointless.

At bottom, the Court should not interpret a garden-variety indemnification provision as including a prospective, unlimited, exculpatory release covering negligence and intentional torts. That would violate Arizona public policy. The Court should not break new ground in indemnification law merely to shift liability for a party’s own expert witness fees on an issue that was waived below.

CONCLUSION

The Court should reverse, vacate, and remand. If this Court reverses the judgment on any of the three issues raised in Dutch Bros.'s appeal, then Republic's cross-appeal is moot. If the Court affirms on all three issues raised in the appeal, then it should also affirm the superior court's denial of attorneys' fees and expert witness fees.

RESPECTFULLY SUBMITTED this 16th day of May, 2019.

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A.R.S. § 12-332

Taxable costs and jury fee in superior court

A. Costs in the superior court include:

1. Fees of officers and witnesses.
2. Cost of taking depositions.
3. Compensation of referees.
4. Cost of certified copies of papers or records.
5. Sums paid a surety company for executing any bond or other obligation therein, not exceeding, however, one per cent on the amount of the liability on the bond or other obligation during each year it was in force.
6. Other disbursements that are made or incurred pursuant to an order or agreement of the parties.

B. A jury fee shall also be included in the judgment and taxed as costs and shall be fixed by the court at the time the judgment is given. The jury fee shall include the cost of reimbursement for juror travel expenses. The jury fee shall be paid to the clerk of the court for transmittal to the county treasurer who shall dispose of it as other similar money is disposed of. An action to collect jury fees shall be commenced:

1. Only if the judgment fixing the jury fees is recorded in the office of the county recorder not later than thirty days after the judgment is rendered.
2. At any time after the date of the recording of the judgment fixing the jury fees and the judgment does not expire until it is paid in full.

C. The court may at any time for good cause shown relieve a person from payment of a jury fee if the court believes that such relief is proper.

A.R.S. § 12-341.01

Recovery of attorney fees

A. In any contested **action arising out of a contract**, express or implied, the court may award the successful party reasonable attorney fees. If a written settlement offer is rejected and the judgment finally obtained is equal to or more favorable to the offeror than an offer made in writing to settle any contested action arising out of a contract, the offeror is deemed to be the successful party from the date of the offer and the court may award the successful party reasonable attorney fees. This section shall not be construed as altering, prohibiting or restricting present or future contracts or statutes that may provide for attorney fees.

B. The award of reasonable attorney fees pursuant to this section should be made to mitigate the burden of the expense of litigation to establish a just claim or a just defense. It need not equal or relate to the attorney fees actually paid or contracted, but the award may not exceed the amount paid or agreed to be paid.

C. The court and not a jury shall award reasonable attorney fees under this section.

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11.	ANSWER TO SECOND AMENDED COMPLAINT	May. 11, 2015
12.	CREDIT MEMO	May. 13, 2015
13.	ME: 150 DAY MINUTE ENTRY [05/09/2015]	May. 13, 2015
14.	STIPULATION TO EXTEND DEADLINES TO EXCHANGE INITIAL RULE 26.1 DISCLOSURE STATEMENTS AND TO FILE RULE 16(B) JOINT REPORT AND PROPOSED SCHEDULING ORDER	Jul. 21, 2015
15.	FIRST REVISED STIPULATION TO EXTEND DEADLINES TO EXCHANGE INITIAL RULE 26.1 DISCLOSURE STATEMENTS AND TO FILE RULE 16(B) JOINT REPORT AND PROPOSED SCHEDULING ORDER	Aug. 11, 2015
16.	ME: ORDER ENTERED BY COURT [08/19/2015]	Aug. 20, 2015
17.	ME: 100 DAY NOTICE [08/26/2015]	Aug. 26, 2015
18.	JOINT REPORT	Aug. 31, 2015
19.	ME: CASE ON INACTIVE CALENDAR [08/29/2015]	Sep. 2, 2015
20.	ME: STATUS CONFERENCE SET [09/17/2015]	Sep. 18, 2015
21.	ME: ORDER ENTERED BY COURT [10/07/2015]	Oct. 8, 2015

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No.	Document Name	Filed Date
22.	SCHEDULING ORDER	Oct. 8, 2015
23.	STIPULATION REQUESTING APPROVAL OF FIRST AMENDED SCHEDULING ORDER	Jan. 6, 2016
24.	FIRST AMENDED SCHEDULING ORDER	Jan. 22, 2016
25.	ACCEPTANCE OF SERVICE	Apr. 27, 2016
26.	JOINT MOTION TO VACATE AND CONTINUE SCHEDULED MEDIATION AND TRIAL SETTING CONFERENCE	Jun. 1, 2016
27.	ME: STATUS CONFERENCE SET [06/07/2016]	Jun. 8, 2016
28.	ME: HEARING VACATED [06/08/2016]	Jun. 13, 2016
29.	JOINT MOTION TO CONTINUE DEADLINE FOR FILING JOINT AMENDED SCHEDULING ORDER AND STATUS REPORT	Jun. 30, 2016
30.	SECOND JOINT MOTION TO CONTINUE DEADLINE FOR FILING JOINT AMENDED SCHEDULING ORDER AND STATUS REPORT	Jul. 8, 2016
31.	ORDER	Jul. 15, 2016
32.	JOINT REPORT	Jul. 22, 2016
33.	SECOND AMENDED SCHEDULING ORDER	Aug. 15, 2016
34.	STIPULATED PROTECTIVE ORDER	Oct. 19, 2016
35.	REPUBLICBANKAZ N.A.'S MOTION FOR SUMMARY JUDGMENT	Dec. 2, 2016
36.	(PART 1 OF 8) REPUBLICBANKAZ, N.A.'S SEPARATE STATEMENT OF FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	Dec. 2, 2016
37.	(PART 2 OF 8) REPUBLICBANKAZ, N.A.'S SEPARATE STATEMENT OF FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	Dec. 2, 2016
38.	(PART 3 OF 8) REPUBLICBANKAZ, N.A.'S SEPARATE STATEMENT OF FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	Dec. 2, 2016
39.	(PART 4 OF 8) REPUBLICBANKAZ, N.A.'S SEPARATE STATEMENT OF FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	Dec. 2, 2016
40.	(PART 5 OF 8) REPUBLICBANKAZ, N.A.'S SEPARATE STATEMENT OF FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	Dec. 2, 2016

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No.	Document Name	Filed Date
41.	(PART 6 OF 8) REPUBLICBANKAZ, N.A.'S SEPARATE STATEMENT OF FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	Dec. 2, 2016
42.	(PART 7 OF 8) REPUBLICBANKAZ, N.A.'S SEPARATE STATEMENT OF FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	Dec. 2, 2016
43.	(PART 8 OF 8) REPUBLICBANKAZ, N.A.'S SEPARATE STATEMENT OF FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	Dec. 2, 2016
44.	(PART 1 OF 6) RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	Jan. 17, 2017
45.	(PART 2 OF 6) RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	Jan. 17, 2017
46.	(PART 3 OF 6) RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	Jan. 17, 2017
47.	(PART 4 OF 6) RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	Jan. 17, 2017
48.	(PART 5 OF 6) RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	Jan. 17, 2017
49.	(PART 6 OF 6) RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	Jan. 17, 2017
50.	NOTICE OF FILING	Jan. 17, 2017
51.	JOINT MOTION TO AMEND SCHEDULING ORDER	Jan. 19, 2017
52.	ME: ORAL ARGUMENT SET [01/27/2017]	Jan. 30, 2017
53.	REPUBLICBANKAZ, N.A.'S MOTION TO EXCEED PAGE LIMIT	Jan. 30, 2017
54.	ME: STATUS CONFERENCE SET [02/02/2017]	Feb. 3, 2017
55.	ORDER GRANTING MOTION TO EXCEED PAGE LIMIT	Feb. 6, 2017
56.	(PART 1 OF 2) REPUBLICBANKAZ, N.A.'S REPLY TO THOMPSON/MCCARTHY COFFEE CO.'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	Feb. 6, 2017
57.	(PART 2 OF 2) REPUBLICBANKAZ, N.A.'S REPLY TO THOMPSON/MCCARTHY COFFEE CO.'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	Feb. 6, 2017
58.	DEMAND FOR JURY TRIAL	Feb. 7, 2017

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No.	Document Name	Filed Date
59.	ME: HEARING RESET [02/08/2017]	Feb. 13, 2017
60.	REPUBLICBANKAZ, N.A.'S OBJECTION TO DEMAND FOR JURY TRIAL	Feb. 13, 2017
61.	THIRD AMENDED SCHEDULING ORDER	Feb. 16, 2017
62.	(PART 1 OF 3) PLAINTIFF'S MOTION FOR SUPPLEMENTAL BRIEFING AND REQUEST FOR CONTINUANCE OF ORAL ARGUMENT	Feb. 20, 2017
63.	(PART 2 OF 3) PLAINTIFF'S MOTION FOR SUPPLEMENTAL BRIEFING AND REQUEST FOR CONTINUANCE OF ORAL ARGUMENT	Feb. 20, 2017
64.	(PART 3 OF 3) PLAINTIFF'S MOTION FOR SUPPLEMENTAL BRIEFING AND REQUEST FOR CONTINUANCE OF ORAL ARGUMENT	Feb. 20, 2017
65.	ME: ORAL ARGUMENT RESET [02/23/2017]	Feb. 23, 2017
66.	WITHDRAWAL OF DEMAND FOR JURY TRIAL	Feb. 27, 2017
67.	(PART 1 OF 9) REPUBLICABANKAZ, N.A.'S OBJECTION TO PLAINTIFF'S MOTION FOR SUPPLEMENTAL BRIEFING AND REQUEST FOR CONTINUANCE OR ORAL ARGUMENT	Mar. 2, 2017
68.	(PART 2 OF 9) REPUBLICABANKAZ, N.A.'S OBJECTION TO PLAINTIFF'S MOTION FOR SUPPLEMENTAL BRIEFING AND REQUEST FOR CONTINUANCE OR ORAL ARGUMENT	Mar. 2, 2017
69.	(PART 3 OF 9) REPUBLICABANKAZ, N.A.'S OBJECTION TO PLAINTIFF'S MOTION FOR SUPPLEMENTAL BRIEFING AND REQUEST FOR CONTINUANCE OR ORAL ARGUMENT	Mar. 2, 2017
70.	(PART 4 OF 9) REPUBLICABANKAZ, N.A.'S OBJECTION TO PLAINTIFF'S MOTION FOR SUPPLEMENTAL BRIEFING AND REQUEST FOR CONTINUANCE OR ORAL ARGUMENT	Mar. 2, 2017
71.	(PART 5 OF 9) REPUBLICABANKAZ, N.A.'S OBJECTION TO PLAINTIFF'S MOTION FOR SUPPLEMENTAL BRIEFING AND REQUEST FOR CONTINUANCE OR ORAL ARGUMENT	Mar. 2, 2017
72.	(PART 6 OF 9) REPUBLICABANKAZ, N.A.'S OBJECTION TO PLAINTIFF'S MOTION FOR SUPPLEMENTAL BRIEFING AND REQUEST FOR CONTINUANCE OR ORAL ARGUMENT	Mar. 2, 2017
73.	(PART 7 OF 9) REPUBLICABANKAZ, N.A.'S OBJECTION TO PLAINTIFF'S MOTION FOR SUPPLEMENTAL BRIEFING AND REQUEST FOR CONTINUANCE OR ORAL ARGUMENT	Mar. 2, 2017

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No.	Document Name	Filed Date
74.	(PART 8 OF 9) REPUBLICABANKAZ, N.A.'S OBJECTION TO PLAINTIFF'S MOTION FOR SUPPLEMENTAL BRIEFING AND REQUEST FOR CONTINUANCE OR ORAL ARGUMENT	Mar. 2, 2017
75.	(PART 9 OF 9) REPUBLICABANKAZ, N.A.'S OBJECTION TO PLAINTIFF'S MOTION FOR SUPPLEMENTAL BRIEFING AND REQUEST FOR CONTINUANCE OR ORAL ARGUMENT	Mar. 2, 2017
76.	REPUBLICBANKAZ, N.A.'S NOTICE IN COMPLIANCE WITH 12 C.F.R. 437(B)(3)(III)	Mar. 7, 2017
77.	(PART 1 OF 3) PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR SUPPLEMENTAL BRIEFING	Mar. 8, 2017
78.	(PART 2 OF 3) PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR SUPPLEMENTAL BRIEFING	Mar. 8, 2017
79.	(PART 3 OF 3) PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR SUPPLEMENTAL BRIEFING	Mar. 8, 2017
80.	REPUBLICBANKAZ, N.A.'S MOTION TO STRIKE PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR SUPPLEMENTAL BRIEFING	Mar. 8, 2017
81.	PLAINTIFF'S RESPONSE OPPOSING DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR SUPPLEMENTAL BRIEFING	Mar. 8, 2017
82.	ME: MATTER UNDER ADVISEMENT [03/09/2017]	Mar. 14, 2017
83.	(PART 1 OF 2) PLAINTIFF'S SUR-RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	Mar. 28, 2017
84.	(PART 2 OF 2) PLAINTIFF'S SUR-RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	Mar. 28, 2017
85.	(PART 1 OF 2) REPUBLICBANKAZ, N.A.'S NOTICE OF RESPONSE FROM OFFICE OF THE COMPTROLLER OF THE CURRENCY	Apr. 17, 2017
86.	(PART 2 OF 2) REPUBLICBANKAZ, N.A.'S NOTICE OF RESPONSE FROM OFFICE OF THE COMPTROLLER OF THE CURRENCY	Apr. 17, 2017
87.	THOMPSON/MCCARTHY COFFEE CO.'S NOTICE OF RESPONSE FROM OFFICE OF THE COMPTROLLER OF THE CURRENCY	Apr. 24, 2017
88.	NOTICE OF JOINT STIPULATION REGARDING DISCOVERY DEADLINES	May. 2, 2017
89.	ME: RULING [05/18/2017]	May. 19, 2017

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No.	Document Name	Filed Date
90.	JOINT REQUEST FOR AN EXTENSION OF DISCOVERY DEADLINES	May. 25, 2017
91.	ME: UNDER ADVISEMENT RULING [05/30/2017]	Jun. 1, 2017
92.	ME: STATUS CONFERENCE SET [06/01/2017]	Jun. 2, 2017
93.	(PART 1 OF 2) REPUBLICBANKAZ, N.A.'S SECOND NOTICE OF RESPONSE FROM OFFICE OF THE COMPTROLLER OF THE CURRENCY	Jun. 14, 2017
94.	(PART 2 OF 2) REPUBLICBANKAZ, N.A.'S SECOND NOTICE OF RESPONSE FROM OFFICE OF THE COMPTROLLER OF THE CURRENCY	Jun. 14, 2017
95.	ME: HEARING CONTINUED [06/15/2017]	Jun. 20, 2017
96.	DEFENDANT'S PORTION OF JOINT REPORT	Jun. 23, 2017
97.	PLAINTIFF'S PORTION OF THE JOINT REPORT	Jun. 23, 2017
98.	ME: STATUS CONFERENCE SET [06/20/2017]	Jun. 28, 2017
99.	ME: STATUS CONFERENCE SET [06/26/2017]	Jun. 28, 2017
100.	(PART 1 OF 8) REPUBLICBANKAZ, N.A.'S RESPONSE TO THOMPSON/MCCARTHY COFFEE CO.'S SUR-RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	Jul. 6, 2017
101.	(PART 2 OF 8) REPUBLICBANKAZ, N.A.'S RESPONSE TO THOMPSON/MCCARTHY COFFEE CO.'S SUR-RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	Jul. 6, 2017
102.	(PART 3 OF 8) REPUBLICBANKAZ, N.A.'S RESPONSE TO THOMPSON/MCCARTHY COFFEE CO.'S SUR-RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	Jul. 6, 2017
103.	(PART 4 OF 8) REPUBLICBANKAZ, N.A.'S RESPONSE TO THOMPSON/MCCARTHY COFFEE CO.'S SUR-RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	Jul. 6, 2017
104.	(PART 5 OF 8) REPUBLICBANKAZ, N.A.'S RESPONSE TO THOMPSON/MCCARTHY COFFEE CO.'S SUR-RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	Jul. 6, 2017

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No.	Document Name	Filed Date
105.	(PART 6 OF 8) REPUBLICBANKAZ, N.A.'S RESPONSE TO THOMPSON/MCCARTHY COFFEE CO.'S SUR-RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	Jul. 6, 2017
106.	(PART 7 OF 8) REPUBLICBANKAZ, N.A.'S RESPONSE TO THOMPSON/MCCARTHY COFFEE CO.'S SUR-RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	Jul. 6, 2017
107.	(PART 8 OF 8) REPUBLICBANKAZ, N.A.'S RESPONSE TO THOMPSON/MCCARTHY COFFEE CO.'S SUR-RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	Jul. 6, 2017
108.	ME: MATTER UNDER ADVISEMENT [07/10/2017]	Jul. 13, 2017
109.	WAIVER AND ACCEPTANCE OF SERVICE	Aug. 15, 2017
110.	(PART 1 OF 2) REPUBLICBANKAZ, N.A.'S THIRD NOTICE OF RESPONSE FROM OFFICE OF THE COMPTROLLER OF THE CURRENCY	Sep. 8, 2017
111.	(PART 2 OF 2) REPUBLICBANKAZ, N.A.'S THIRD NOTICE OF RESPONSE FROM OFFICE OF THE COMPTROLLER OF THE CURRENCY	Sep. 8, 2017
112.	ME: UNDER ADVISEMENT RULING [09/08/2017]	Sep. 12, 2017
113.	(PART 1 OF 3) REPUBLICBANKAZ, N.A.'S APPLICATION FOR AWARD OF ATTORNEYS' FEES AND COSTS	Oct. 2, 2017
114.	(PART 2 OF 3) REPUBLICBANKAZ, N.A.'S APPLICATION FOR AWARD OF ATTORNEYS' FEES AND COSTS	Oct. 2, 2017
115.	(PART 3 OF 3) REPUBLICBANKAZ, N.A.'S APPLICATION FOR AWARD OF ATTORNEYS' FEES AND COSTS	Oct. 2, 2017
116.	STATEMENT OF COSTS	Oct. 2, 2017
117.	RESPONSE AND OPPOSITION TO REPUBLICBANKAZ'S STATEMENT OF COSTS	Oct. 16, 2017
118.	FIRST NOTICE OF EXTENSION OF TIME TO FILE: 1) RESPONSE TO REPUBLICBANKAZ, N.A.'S APPLICATION FOR ATTORNEYS' FEES AND COSTS, AND 2) REPLY TO PLAINTIFF'S RESPONSE TO REPUBLICBANKAZ, N.A.'S APPLICATION FOR ATTORNEYS' FEES AND COSTS	Oct. 20, 2017

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No.	Document Name	Filed Date
119.	ORDER	Oct. 25, 2017
120.	(PART 1 OF 2) REPLY TO PLAINTIFF'S RESPONSE AND OPPOSITION TO REPUBLICBANKAZ'S STATEMENT OF COSTS	Oct. 27, 2017
121.	(PART 2 OF 2) REPLY TO PLAINTIFF'S RESPONSE AND OPPOSITION TO REPUBLICBANKAZ'S STATEMENT OF COSTS	Oct. 27, 2017
122.	(PART 1 OF 2) RESPONSE TO REPUBLICBANKAZ'S APPLICATION FOR AWARD OF ATTORNEYS' FEES AND COSTS	Nov. 4, 2017
123.	(PART 2 OF 2) RESPONSE TO REPUBLICBANKAZ'S APPLICATION FOR AWARD OF ATTORNEYS' FEES AND COSTS	Nov. 4, 2017
124.	REPLY IN SUPPORT OF REPUBLICBANKAZ, N.A.'S APPLICATION FOR AWARD OF ATTORNEYS' FEES AND COSTS	Nov. 17, 2017
125.	ME: RULING [01/16/2018]	Jan. 18, 2018
126.	JUDGMENT	Jan. 19, 2018
127.	MOTION FOR NEW TRIAL	Feb. 5, 2018
128.	FIRST NOTICE OF EXTENSION OF TIME TO FILE DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR NEW TRIAL	Feb. 26, 2018
129.	(PART 1 OF 2) DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR NEW TRIAL	Mar. 2, 2018
130.	(PART 2 OF 2) DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR NEW TRIAL	Mar. 2, 2018
131.	FIRST NOTICE OF EXTENSION OF TIME TO FILE PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR NEW TRIAL	Mar. 12, 2018
132.	REPLY IN SUPPORT OF MOTION FOR NEW TRIAL	Mar. 20, 2018
133.	NOTICE OF FILING OF EXCERPTS OF OFFICIAL TRANSCRIPTS	Apr. 2, 2018
134.	NOTICE OF APPEAL	May. 22, 2018
135.	ME: RULING [05/21/2018]	May. 23, 2018
136.	AMENDED NOTICE OF APPEAL	May. 23, 2018
137.	PLAINTIFFS/APPELLANTS' NOTICE OF TRANSCRIPT ORDER	Jun. 6, 2018



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No.	Document Name	Filed Date
138.	NOTICE OF CROSS-APPEAL	Jun. 7, 2018

APPEAL COUNT: 1

RE: CASE: UNKNOWN

DUE DATE: 06/20/2018

CAPTION: THOMAS MCCARTHY LLC VS REPUBLICBANKAZ NA

EXHIBIT(S): NONE

LOCATION ONLY: NONE

SEALED DOCUMENT: NONE

DEPOSITION(S): NONE

TRANSCRIPT(S): NONE

COMPILED BY: varelam on June 20, 2018; [2.5-17026.63]
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CERTIFICATION: I, CHRIS DeROSE, Clerk of the Superior Court of Maricopa County, State of Arizona, do hereby certify that the above listed Index of Record, corresponding electronic documents, and items denoted to be transmitted manually constitute the record on appeal in the above-entitled action.

The bracketed [date] following the minute entry title is the date of the minute entry.

CONTACT INFO: Clerk of the Superior Court, Maricopa County, Appeals Unit, 175 W Madison Ave, Phoenix, AZ 85003; 602-372-5375

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2014-014647

01/16/2018

HONORABLE DAWN M. BERGIN

CLERK OF THE COURT
S. Ortega
Deputy

THOMPSON MCCARTHY D B, L L C, et al.

DANIEL J SLAVIN

v.

REPUBLICBANKAZ N A

WILLIAM SCOTT JENKINS JR.

RULING

The Court has reviewed the following: (1) Defendant RepublicBankAZ, N.A.'s ("Republic") Application for Attorneys' Fees and Costs filed on October 2, 2017; (2) Plaintiff's Response; (3) Defendant's Reply; (4) Republic's Statement of Costs filed on October 2, 2017; (5) Plaintiff's Response; (6) Republic's Reply; and (7) Republic's proposed form of judgment. The Court denies the request for oral argument, finding that it would not be of assistance in deciding the issues presented. It now makes the following findings and orders.

From approximately 2010 to 2013, Republic made construction loans to Plaintiff so that it could expand its business (the "Construction Loans"), which were guaranteed by the Small Business Administration ("SBA"). Plaintiff claims that Republic represented that it had special expertise in obtaining and closing SBA guaranteed loans. However, after allegedly experiencing multiple problems and delays with Republic's loan servicing, Plaintiff decided to replace Republic with Mutual of Omaha ("MOH"). Republic agreed to sell Plaintiff's remaining two loans to MOH pursuant to a Loan Purchase and Sale Agreement ("LPSA"). In connection with the LPSA, Plaintiff signed a document entitled "Consent of Obligors and Pledgors" (the "Release").

Plaintiff filed the operative Second Amended Complaint ("SAC") in this action on April 7, 2015, alleging negligent misrepresentation and fraudulent inducement. It claimed that Republic misrepresented its expertise with SBA loans in order to induce Plaintiff to select Republic as its lender and to enter into the Construction Loans. By minute entry dated

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MARICOPA COUNTY

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September 8, 2017, the Court found that Plaintiff's claims were barred by the Release, and granted Republic's Motion for Summary Judgment.

Attorneys' Fees

Republic now seeks \$402,835.50 in fees pursuant to: (1) a fee provision in the LPSA; (2) A.R.S. §12-341.01(A); and (3) A.R.S. §12-349.

A. The LPSA

Paragraph 5.4 of the LPSA provides that "in the event of a lawsuit or arbitration proceeding under this Agreement or any of the Assignment Documents, the prevailing party shall be entitled to recover costs and reasonable attorneys' fees incurred in connection with the lawsuit or arbitration proceeding, as determined by the court or arbitrator (and not by a jury)." The problem for Republic is that Plaintiff is not a party to the LPSA.

Republic points to the Court's finding in the May 30, 2017 minute entry that even though Plaintiff was not a party to the LPSA, it was nonetheless bound by the Release. But this determination does not translate into a finding that Plaintiff was bound by all of the provisions of the LPSA. Indeed, it would be impossible to make such a finding because the purpose of the LPSA was the sale of loans by Republic to MOH. **In short, because Plaintiff was not a party to the LPSA, it is not subject to its attorneys' fees provision.**¹

B. A.R.S. §12-341.01(A)

To qualify for a fee award under A.R.S. §12-341.01(A), an action must "arise out of contract." Plaintiff alleges that its claims are based in tort and therefore do not arise out of contract. Republic points to *Ramsey Air Meds., LLC v. Cutter Aviation, Inc.* 198 Ariz. 10, 15-16 (App. 2000), where the court held that a tort claim may arise out of contract if it could not exist "but for" the contract. Republic also cites *Marcus v. Fox*, 150 Ariz. 333, 336 (1986) in its Reply for the proposition that a fraudulent inducement claim can arise out of contract. However, Republic relies on the LPSA and the Release as the contract supporting application of A.R.S. §12-341.01(A). While the Court acknowledges that Plaintiff resisted Republic's Motion for Summary Judgment by arguing that Republic's fraudulent misrepresentations invalidated the Release, its affirmative cause of action for fraudulent inducement was predicated upon Republic

¹ The Court also notes that Republic did not reference the LPSA attorneys' fees provision in its Answer as a basis for recovery of fees. Arizona law holds that if a party who seeks attorneys' fees pursuant to a contractual fee provision fails to reference the contract as a basis for recovering fees in its pleading, a waiver results. *See Berry v. 352 E. Virginia, LLC*, 228 Ariz. 9, 13 (App. 2011); *Robert E. Mann Constr. Co. v. Liebert Corp.*, 214 Ariz. 129, 133 (App. 2003).

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inducing it to enter into a borrower-lender relationship (including the Construction Loans) through misrepresentations.²

Under Arizona law, §12-341.01(A) does not apply when a party successfully prevails on an affirmative defense of release when plaintiff's claims are grounded in tort. See *Benjamin v. Gear Roller Hockey Equipment, Inc.*, 198 Ariz.462, 466 (App. 2000), *abrogated on other grounds*, *Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403 (2005). Because Republic has failed to establish that the fraudulent inducement and negligent misrepresentation claims arise out of the Release, and the claims are grounded in tort, A.R.S. §12-341.01(A) does not apply.

C. A.R.S. §12-349

Republic also contends that it is entitled to attorneys' fees under A.R.S. §12-349(A)(1) and (3), which allow a court to award attorneys' fees if an opposing attorney or party brings or defends a claim without substantial justification or unreasonably expands or delays the proceedings. A claim or defense is "without substantial justification" under §12-349(A)(1), if it was groundless and not made in good faith. The Court cannot find that Plaintiff's claims were either groundless or made in bad faith. Similarly, while Plaintiff's claims may have proved meritless, they were not frivolous, and pursuing them does not constitute an unreasonable expansion or delay of the proceedings.

Costs

Plaintiff seeks total costs in the amount of \$99,082.10, which includes \$96,807.70 incurred for the preparation of expert witness reports. Expert fees are not identified as a recoverable cost in A.R.S. §12-332. Republic, however, argues for the first time in its Reply in Support of its Statement of Costs that the indemnification clause in the Construction Loans qualifies under §12-332(A)(6) as "[o]ther disbursements that are made or incurred pursuant to an order or agreement of the parties." The Court rejects this argument for two reasons. First, Republic first raised the argument in its Reply, thereby depriving Plaintiff of an opportunity to respond to it. Second, the Court reads §12-332(A)(6) as covering specific costs or disbursements that the parties agree one or the other should pay or that they agree to share. There is no authority to support that the legislature intended to import any costs that might fall within the scope of broad contractual indemnification provisions, such as the one contained in the Construction Loans.

²The Court notes that Republic did not identify the Construction Loans as a basis for application of §12-341.01(A). In other words, Republic did not argue that Plaintiff was seeking to recover for Republic fraudulently inducing it to enter into the Construction Loans; instead, it relied solely on the LPSA/Release.

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MARICOPA COUNTY

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The Court finds that the remaining costs requested are reasonable and were necessary to the litigation.

For the reasons set forth above,

THE COURT FINDS that Republic has failed to show that Plaintiff's claims arise out of contract under A.R.S. §12-341.01(A).

THE COURT FURTHER FINDS that Republic has failed to establish that it is entitled to attorneys' fees under A.R.S. §12-349.

THE COURT FURTHER FINDS that Republic is entitled to costs in the amount of \$2,274.40.

A separate judgment will issue.

Francis J. Slavin, #002972
Daniel J. Slavin, #024780
FRANCIS J. SLAVIN, P.C.
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Attorneys for Plaintiff Thompson/McCarthy Coffee Co.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THOMPSON/McCARTHY COFFEE CO.,
an Arizona corporation,

Plaintiff,

v.

REPUBLICBANKAZ, N.A.,

Defendant.

Case No. CV2014-014647

SECOND AMENDED COMPLAINT

Plaintiff Thompson/McCarthy Coffee Co., an Arizona corporation alleges as follows:

PARTIES, JURISDICTION AND VENUE

1. This Court has jurisdiction and venue over this action because the acts and events which are the subject of this lawsuit arose in Maricopa County, Arizona.

2. Thompson/McCarthy DB LLC was an Oregon limited liability company authorized to transact and conduct business through its certification as a company in good standing with the Arizona Corporation Commission at all relevant times during which the alleged acts and events arising hereunder took place. Thompson/McCarthy Coffee Co., an Arizona corporation, is the successor in interest of Thompson/McCarthy DB LLC.

3. At all relevant times, RepublicBankAz, N.A. ("RBAZ") was a licensed bank conducting business in the State of Arizona with its principal place of business being 909 East Missouri Avenue, Phoenix, Arizona.

FACTS

4. TMC is a franchisee of Dutch Bros. coffee stores.

5. During the 2-year period of 2007 to 2009, TMC, using its own investment funds, constructed, equipped and opened six (6) Dutch Bros. coffee stores in the Phoenix metropolitan area. In 2011, TMC opened a 7th store in Gilbert, Arizona, using its own funds.

6. In or about October 2010, RBAZ contacted TMC and offered to make small business loans guaranteed by the U.S. Small Business Administration ("SBA") to TMC to finance the continued expansion of TMC's Dutch Bros. coffee store chain in the Phoenix metropolitan area.

7. RBAZ explained that the SBA maximum guarantee for loans made to a qualified borrower was \$5.0 million. This would allow TMC to build and equip up to ten (10) additional coffee stores.

8. TMC informed RBAZ that TMC planned to obtain SBA loans up to the \$5.0 million limit and open its new coffee stores during the 3-year period from 2011 through 2014.

9. RBAZ represented to TMC that it would provide SBA loan funding for TMC to build, equip, and open additional Dutch Bros. coffee stores in a timely manner.

10. RBAZ represented itself as being competent and experienced in timely obtaining and closing SBA guaranteed loans.

11. RBAZ represented that it had experienced staff available to be able to provide the funding of the SBA Loans TMC was seeking in a timely manner.

12. Based upon representations made by RBAZ that it would make available SBA-guaranteed loans using its competent and experienced employees, TMC in or about October 2010 chose to use RBAZ as its SBA lender for expanding its Dutch Bros. coffee store chain.

13. In or about November 2010, TMC made its first application with RBAZ for an SBA-guaranteed loan in the amount of \$1,026,300 to fund the construction of two (2) new coffee stores, one to be located in Tempe at 6461 South Rural Road, and the other at 1122 South Greenfield Road in Mesa. As part of the SBA application process, TMC was required

1 by RBAZ to submit detailed financial operating statements for the existing seven (7) Dutch
2 Bros. coffee stores together with personal financial statements of Mr. Thompson and Dr.
3 McCarthy.

4 14. RBAZ assured TMC that RBAZ would make SBA-guaranteed loans up to the
5 SBA maximum of \$5.0 million for TMC's intended purpose to construct, equip and open
6 new coffee stores during the years 2011 through 2014.

7 15. As a condition to making the SBA loans for TMC's new coffee stores, RBAZ
8 required TMC to pledge TMC's seven (7) initial stores as additional collateral, and also
9 required Jim Thompson and his spouse Janice McCarthy, owners of TMC, to personally
10 guarantee repayment of the loans.

11 16. RBAZ caused numerous delays in obtaining SBA approvals and making loan
12 funds available for this first loan.

13 17. RBAZ did not make the proceeds of the \$1,026,300 loan available for TMC's
14 use until December 2011.

15 18. In January 2012, TMC signed a ground lease for a new store at 12th Street and
16 Glendale Avenue in Phoenix, and submitted to RBAZ an application for a \$597,100 SBA-
17 guaranteed loan to construct and equip that store. The loan was approved by SBA in March
18 2012, but RBAZ did not make loan proceeds available for TMC's use to construct the store
19 until June 2012.

20 19. As of August 2012, RBAZ had closed two (2) loans with TMC for only 3
21 coffee stores, one each in Tempe and Mesa and the 12th Street and Glendale Store in
22 Phoenix. The total amount of the loans was \$1,623,400.

23 20. In January 2012, TMC also signed a ground lease for a new store to be located
24 on Paradise Valley Mall Parkway, lying north of Cactus Road in Phoenix ("PV Mall Store")
25 and submitted to RBAZ an application for a \$640,400 SBA-guaranteed loan to construct and
26 equip the store.

27 21. Due to delays caused by RBAZ, in June 2012, RBAZ asked TMC to submit a
28 new loan application for the PV Mall Store.

1 22. Due to continuing delays by RBAZ, TMC, in September 2012, notified RBAZ
2 and began construction of the PV Mall Store using operating funds which had been set aside
3 by TMC to pay for operating expenses of its other stores. RBAZ promised to provide TMC
4 an SBA-guaranteed loan to replenish the operating funds TMC advanced to pay the costs to
5 construct and equip the PV Mall Store.

6 23. RBAZ's failure to timely provide funding for the PV Mall Store as promised
7 delayed the opening of that store. The PV Mall Store opened in January 2013 using TMC's
8 operating funds.

9 24. Due to the numerous failed assurances and representations of RBAZ to timely
10 fund SBA loans for the planned expansion of TMC's coffee store chain, TMC, in January
11 2013, notified RBAZ that it could no longer rely upon RBAZ as its lender.

12 25. In or about January 2013, TMC contacted Mutual of Omaha Bank to become
13 TMC's new SBA lender.

14 26. Due to the fact that RBAZ had secured every source of TMC's and its
15 principals' and guarantors' collateral, TMC had to find a new lender who would be willing to
16 acquire RBAZ's loans and their secured collateral consisting of ten (10) coffee stores and to
17 make SBA loans to fund the costs of developing additional coffee stores.

18 27. In or about early 2013, Mutual of Omaha Bank began the process of acquiring
19 from RBAZ the SBA loans that RBAZ had made to TMC. In or about September 2013, the
20 SBA approved the purchase and assignment of the two (2) RBAZ loans to Mutual of Omaha
21 Bank including the collateral for the loans.

22 28. As a result of engaging Mutual of Omaha Bank to acquire the SBA loans that
23 had processed through RBAZ, TMC incurred costs and expenses it otherwise would not have
24 had to incur and suffered delays in constructing and opening additional coffee stores.

25 29. TMC opened 2 more stores in 2013, again using its own operating funds which
26 negatively impacted available cash flow needed by TMC to timely pay operating expenses
27 for its Arizona coffee stores. Eventually, Mutual of Omaha Bank made SBA-guaranteed
28

1 loans to TMC, the proceeds of which were used to replenish TMC's operating funds and to
2 fund the costs to construct and equip new coffee stores.

3
4 **COUNT ONE**

5 **(Negligent Misrepresentation)**

6 30. Plaintiff incorporates the foregoing allegations as though fully restated herein.

7 31. RBAZ represented to TMC that it was capable of processing SBA loans in a
8 timely and competent manner.

9 32. Upon belief, RBAZ from time to time represented to TMC that it had
10 submitted TMC's loan applications to the SBA for approval when in fact RBAZ had not
11 made the submittal(s).

12 33. Upon belief, RBAZ from time to time represented it was taking certain actions
13 with regard to facilitating the SBA loan process when in fact RBAZ had not.

14 34. Upon belief, RBAZ from time to time reported to TMC the progress of TMC's
15 loan applications submitted to the SBA which reports were false and misleading.

16 35. Upon belief, RBAZ's loan underwriting department was understaffed and
17 lacked sufficient knowledge and experience required to carry-out the functions reasonably
18 necessary to provide SBA-guaranteed loans required by TMC to expand its local coffee store
19 chain.

20 36. RBAZ intended for TMC to rely upon RBAZ's misrepresentations for purposes
21 of attracting and retaining TMC as a customer of RBAZ.

22 37. RBAZ intended that TMC rely on such misrepresentations and made such
23 misrepresentations for that purpose.

24 38. RBAZ failed to exercise reasonable care in representing to TMC that RBAZ
25 had the requisite knowledge and experience to timely process TMC's loan requests with the
26 SBA.

27 39. RBAZ failed to exercise reasonable care when representing to TMC that
28 RBAZ had timely submitted and processed TMC's loan requests with the SBA.

1 40. TMC had the right to rely on RBAZ's misrepresentations.

2 41. TMC relied upon RBAZ's misrepresentations.

3 42. TMC was justified in relying on RBAZ's misrepresentations.

4 43. As a result of TMC's reliance on RBAZ's misrepresentations, TMC was
5 delayed in opening new coffee stores and suffered lost profits and incurred costs for the
6 transfer to Mutual of Omaha Bank of the SBA loans made by RBAZ and the collateral
7 securing repayment of those loans and future SBA loans.

8 44. It was reasonably foreseeable that RBAZ's delays in timely processing TMC's
9 loan applications and funding the loans would delay the construction and openings of TMC's
10 stores and cause TMC to suffer lost profits.

11 WHEREFORE, Plaintiff prays for judgment against RBAZ as follows:

12 (a) For damages in an amount to be proven at trial; and

13 (b) For such other equitable and legal relief as the Court deems just.

14
15 **COUNT TWO**

16 **(Fraudulent Inducement)**

17 45. Plaintiff incorporates the foregoing allegations as though fully restated herein.

18 46. RBAZ's representations were material as to whether RBAZ had the requisite
19 knowledge, experience and capability to meet the needs expressed by TMC to fund the
20 planned expansion of its coffee store chain through SBA-guaranteed loans.

21 47. RBAZ's representations to TMC were made falsely with knowledge of their
22 falsity or recklessness as to whether they were true or false.

23 48. RBAZ made the representations with the intent of misleading TMC into
24 relying on them in a manner reasonably contemplated by RBAZ.

25 49. TMC was ignorant of the falsity of RBAZ's representations.

26 50. TMC, who was seeking an experienced SBA lender to make SBA loans to fund
27 the costs of expanding its coffee store chain, had the right to rely on RBAZ's representations.

28 51. TMC justifiably relied on RBAZ's misrepresentations.

XAPP126

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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THOMPSON/McCARTHY COFFEE CO.,
an Arizona corporation,

Plaintiff,

vs.

REPUBLICBANKAZ, N.A.,

Defendant.

Case No. CV2014-014647

**REPUBLICBANKAZ, N.A.'s
APPLICATION FOR AWARD OF
ATTORNEYS' FEES AND COSTS**

(Assigned to Hon. Dawn Bergin)

Pursuant to the *Under Advisement Ruling* (the "Ruling") filed on September 12, 2017, and Rule 54(g), Ariz. R. Civ. P., RepublicBankAZ, N.A. ("Republic") hereby applies to the Court for an award of attorneys' fees in the amount of \$402,835.50, costs in the amount of \$97,506.50, expended by Republic in defense of the claims asserted by Thompson/McCarthy Coffee Co.'s ("TMCC") in this action.

Specifically, Republic obtained summary judgment against TMCC on its claims of Negligent Misrepresentation and Fraudulent Inducement as alleged in TMCC's *Second Amended Complaint* dated April 7, 2015 (hereafter the "Complaint"). On December 2, 2016, Republic filed its *Motion for Summary Judgment and Separate Statement of Facts in Support of Motion for Summary Judgment* (collectively the "MSJ"), seeking to dismiss

1 the Complaint based upon the fact that as part of the *Loan Purchase and Sale Agreement*
2 (*With Consent of Obligors and Pledgors*) (hereafter the "Loan Purchase Agreement")
3 dated September 19, 2013, between Republic and TMCC's substitute lender, Mutual of
4 Omaha Bank, TMCC voluntarily executed the *Consent of Obligors and Pledgors* (the
5 "Consent"), thereby waiving and releasing any and all claims, liabilities, demands,
6 damages and causes of action of any kind against Republic. Following protracted
7 litigation in connection with Republic's MSJ, the Court ultimately held that (i) the
8 Consent is a valid and enforceable contract, absent fraud or unilateral mistake; and (ii)
9 TMCC failed to evidence Republic's fraud or unilateral mistake in connection with the
10 Consent, and thus granted Republic's MSJ. [See June 1, 2017 *Under Advisement Ruling*;
11 see also September 8, 2017 *Under Advisement Ruling*] As such, Republic is the
12 prevailing party and should be awarded its attorneys' fees and costs incurred in defending
13 against the Complaint.

14 This Application is supported by the entire record before the Court, the *Affidavit of*
15 *in Support of Application for Award of Attorneys' fees and Costs* (the "Jenkins Affidavit"),
16 attached hereto as **Exhibit "1"**, the *Statement of Costs* filed contemporaneously herewith,
17 and the following Memorandum of Points and Authorities.

18 MEMORANDUM OF POINTS AND AUTHORITIES

19 I. PROCEDURAL AND FACTUAL BACKGROUND.

20 Although TMCC's initial *Complaint* was filed on December 4, 2014, followed by
21 its *Amended Complaint* filed on April 3, 2015, this case truly began with the filing of
22 TMCC's Second Amended Complaint (the Complaint) on April 7, 2015. TMCC initiated
23 the discovery process immediately from the outset of litigation by propounding *Plaintiff's*
24 *Request for Production of Documents and Things to RepublicBankAZ, N.A.* on April 13,
25 2015, just a week after the filing of its Complaint. Consequently, in order to (i)
26

1 investigate the merits of TMCC's claims of misrepresentation and fraud, (ii) comply with
2 Rule 26 and 26.1, Ariz. R. Civ. P., and (iii) respond to TMCC's initial discovery requests,
3 Republic embarked upon a close examination of TMCC's allegations and in so doing,
4 between April 7, 2015 (when TMCC filed its Complaint) and December 2, 2016 (when
5 Republic filed its MSJ), Republic produced approximately 10,000 pages of documents,
6 received 18,200 pages of documents from TMCC, and thus reviewed nearly 28,200 pages
7 of disclosed and discoverable documents alone. To date, the parties have exchanged
8 approximately 29,600 pages throughout the discovery process, including but not limited to
9 documents in response to the parties' subpoenas, inquiries and correspondence from the
10 United States Office of the Comptroller of Currency (the "OCC"), and data in support of
11 expert reports and rebuttals.

12 But as evidenced by the parties' procedural and discovery history set forth below, it
13 is TMCC's actions which caused Republic to incur substantial fees and costs, particularly
14 once Republic's MSJ was filed.

15 **A. Pertinent Procedural History.**

16 TMCC filed its original complaint on December 4, 2014 but did not serve it. After
17 filing an amended complaint on April 3, 2015, TMCC served Republic with the amended
18 complaint and summons. On April 7, 2015, TMCC filed a second amended complaint.
19 On April 13, 2015, TMCC served a *Request for Production of Documents and Things* on
20 Republic, before Republic's answer was due. Republic filed its *Answer to Second*
21 *Amended Complaint* on May 11, 2015 (the "Answer"), and its responses to the discovery
22 requests along with 8,400 pages of documents on July 2, 2015.

23 **TMCC Forced Republic to Request and Produce Duplicate SBA Documents**

24 In May 2016, Republic produced almost 1,000 pages of documents from the U.S.
25 Small Business Administration ("SBA") relating to TMCC loans and applications.
26

1 Republic informed TMCC that the SBA had confirmed it produced all documents in its
2 possession. TMCC refused to accept this and demanded that Republic ask the SBA to
3 produce all documents relating to one of the loan applications again, thereby causing
4 Republic to engage in unnecessary additional communications with the SBA and review
5 of documents. After numerous exchanges with the SBA, in July 2016, the SBA
6 reluctantly re-produced certain documents that were identical to the documents in the first
7 production.

8 TMCC Refused to Respond to Republic's Settlement Offer.

9 On November 14, 2016, Republic sent a settlement letter ("Settlement Letter") to
10 TMCC pursuant to Rule 408. The Settlement Letter offered that the parties each "walk
11 away" and bear their own costs and fees, because TMCC in the Consent, had released all
12 claims against Republic. [See Settlement Letter attached hereto as **Exhibit "2"**] On
13 November 22, 2016, counsel for TMCC sent an email to counsel for Republic stating:
14 "Still evaluating your letter. Expect to respond tomorrow." Counsel for TMCC also
15 reiterated this over the phone during a call that same day. [See Exhibit A to Jenkins
16 Affidavit]. Republic waited for another ten days before filing its MSJ. Even after the
17 MSJ was filed, TMCC never responded to the Settlement Letter.

18 TMCC Delayed Submitting a Request to the OCC.

19 In December 2016, Republic told TMCC that, pursuant to federal statute, it could
20 not disclose the requested OCC documents because they were non-public information, and
21 that TMCC had to submit a request to the OCC. TMCC did not send its request under the
22 Freedom of Information Act ("FOIA Request") to the OCC until February 2017. Later,
23 TMCC argued that this OCC information was relevant and that the Court should delay its
24 ruling on the MSJ until after it was received. Consequently, due to TMCC's FOIA
25 Request, Republic was thereafter obligated to provide written submissions to the OCC in
26

1 addition to the ongoing litigation. Republic also filed four notices with the Court (per
2 federal statute obligating Republic to keep the Court informed of the ongoing OCC
3 matter) relating to the FOIA Request while summary judgment was pending.

4 *TMCC Filed an Untimely Demand for Jury Trial.*

5 On February 7, 2017, TMCC filed a *Demand for Jury Trial*. Republic filed an
6 objection on February 13, as TMCC had unequivocally waived the right to a jury trial in
7 the *Joint Report and Proposed Scheduling Order* dated August 31, 2015. TMCC
8 subsequently withdrew the jury trial demand.

9 *TMCC's Unnecessary Supplemental Briefing after the MSJ was Fully Briefed.*

10 On December 2, 2016, Republic filed its MSJ. On January 17, 2017, TMCC filed
11 its response to the MSJ. On February 6, 2017, Republic filed its reply in support of the
12 MSJ. Then, after the summary judgment briefings were completed, on February 21, 2017,
13 TMCC filed *Plaintiff's Motion for Supplemental Briefing and Request for Continuance of*
14 *Oral Argument* (the "Motion for Supplemental Briefing"). Republic objected to the
15 Motion for Supplemental Briefing on March 2, 2017. On March 8, 2017, TMCC filed a
16 reply. Republic filed a motion to strike the reply and TMCC responded. On March 9,
17 2017, the Court held oral argument on the Motion for Supplemental Briefing and the MSJ.
18 After that hearing, on March 27, 2017, TMCC filed a *Sur-Response in Opposition to*
19 *Defendant's Motion for Summary Judgment* (the "Sur-Response"), asserting, for the first
20 time, unilateral mistake and fraud with respect to the Consent. On June 15, 20, and 26,
21 2017, the Court held telephonic status conferences/oral argument regarding TMCC's
22 unilateral mistake theory and fraud defense. After oral argument, Republic was allowed
23 to respond to the Sur Response by July 6, 2017. The Court then held another status
24 conference/oral argument regarding the MSJ and supplemental briefing on July 10, 2017.
25 Had TMCC simply filed a timely and appropriate response to the MSJ pursuant to Rule
26

1 56(d), Ariz. R. Civ. P., there would have been no need for Republic to expend resources
2 upon an objection, Motion to Strike, oral argument, and sur-response in relation to the
3 Motion for Supplemental Briefing

4 TMCC Walked Out of Mediation.

5 On June 7, 2017, the parties submitted mediation briefs to the mediator. On June
6 13, 2017, the parties attended mediation. At the mediation, Republic again reiterated that
7 TMCC released its claims in the Consent, and should never have initiated this litigation,
8 but still offered a substantial sum to TMCC to settle. Without responding to Republic's
9 offer, TMCC abruptly walked out of the mediation at that point and did not return or
10 subsequently respond to Republic's offer.

11 TMCC Takes a Deposition While a Summary Judgment Ruling is Imminent.

12 After numerous supplemental briefings and oral arguments relating to the MSJ, and
13 while a final summary judgment ruling was pending, TMCC took the deposition of
14 Michael Harris on August 16, 2017. TMCC also initially refused to continue the
15 deposition for a mere two days after Mr. Harris's wife was in a car accident out of state,
16 causing the parties to have to bring the discovery dispute before this Court.

17 Based upon the extensive litigation and discovery, it is undisputed that TMCC's
18 actions needlessly caused Republic to incur more attorneys' fees and costs. Notably,
19 TMCC twice refused to settle this matter - once in response to Republic's Settlement
20 Letter and well before the filing of Republic's MSJ, and once more at mediation.
21 Specifically, TMCC refused to engage in any real settlement negotiations which could
22 certainly have rendered a less expensive outcome for both parties than having to continue
23 discovery and litigation related to the MSJ. Indeed, TMCC blatantly ignored and never
24 responded to Republic's Settlement Letter, which, if accepted, would have saved both
25 parties substantial sums of money, and then later abandoned the scheduled day-long
26

1 mediation (paid for by the parties) with mediator Shawn Aiken of Aiken Schenk Hawkins
2 & Ricciardi, P.C.

3 In light of the foregoing, the fees incurred are reasonable in light of TMCC's
4 litigious behavior. Indeed, due to TMCC's action, the fees incurred were essentially
5 unavoidable, as Republic had to defend against claims that should never have been
6 asserted in the first place, and which TMCC refused to dismiss or settle.

7 **II. THE ATTORNEYS' FEES REQUESTED BY REPUBLIC SHOULD BE**
8 **AWARDED UNDER CONTRACT, ARIZONA LAW, AND ARE**
9 **REASONABLE.**

10 **A. The Loan Purchase Agreement Provides for the Recovery of Republic's**
11 **Fees and Costs**

12 The Loan Purchase Agreement specifically provides for attorneys' fees to the
13 prevailing party in Section 5.4:

14 5.4 Attorneys' Fees. In the event of a lawsuit or arbitration
15 proceeding under this Agreement or any of the Assignment
16 Documents, the prevailing party shall be entitled to recover
17 costs and reasonable attorneys' fees incurred in connection
18 with the lawsuit or arbitration proceeding, as determined by
19 the court or arbitrator (and not by a jury).

20 This Court has previously ruled that the Consent by which TMCC is bound, is part
21 of the Loan Purchase Agreement, which is an enforceable contract that provided the basis
22 for the Court's granting of summary judgment in favor of Republic (" . . . that [TMCC] as
23 not formally identified as a 'party' to the LPSA [Loan Purchase Agreement] is immaterial
24 to whether it is legally bound by the Consent/Release." [June 1, 2017 Under Advisement
25 Ruling at ¶ 4] The Consent is undeniably part of the Loan Purchase Agreement, and
26 TMCC is further bound by Section 5.4 therein, which is both applicable and determinative
for purposes of this Application. ["The Court rejects [TMCC's] argument that the Consent

1 is not part of the LPSA because the LPSA: (1) explicitly references the Consent and notes
2 that the Consent is attached to the LPSA; (2) cites the Release as a benefit accruing to
3 Republic; (3) is specifically referenced in the Consent; (4) is entitled 'Loan Purchase and
4 Sale Agreement (*With Consent of Obligors and Pledgors*) (emphasis added) . . ." *Id.* at
5 Paragraph 3] Thus, under Section 5.4 of the Loan Purchase Agreement, Republic is
6 "entitled to recover costs and reasonable attorneys' fees incurred in connection with the
7 lawsuit" because this instant case was (i) "the event of a lawsuit under this [Loan
8 Purchase] Agreement," and (ii) Republic was "the prevailing party."

9 **B. Alternatively, This Case Arises Out of Contract Under A.R.S. § 12-**
10 **341.01.**

11 The pivotal contract at issue here was the parties' Loan Purchase Agreement,
12 including the Consent, and TMCC's breach thereof by bringing claims against Republic.
13 It is undisputed that in its *Under Advisement Ruling* entered on June 1, 2017, this Court
14 firmly ruled that the Consent was a binding contract between the parties, part of the Loan
15 Purchase Agreement, and thereby enforceable (absent unilateral mistake/fraud). Thus,
16 there can be no dispute that this matter was a contested action based upon defenses arising
17 out of contract. Put another way, this case arises out of contract because the Court has
18 held that the Consent is a release, that this particular Consent is part of a larger contract -
19 the Loan Purchase Agreement - and that Arizona law establishes that a release, in and of
20 itself, is a contract (which is a point that was specifically raised in TMCC's own MSJ
21 Response). *Parrish v. United Bank of Ariz.*, 164 Ariz. 18, 20, 790 P.2d 304, 306 (App.
22 1990); see MSJ Response at pg. 5, line 2; see also *Spain v. General Motors Corp.*,
23 *Chevrolet Motor Div.*, 171 Ariz. 226, 227, 829 P.2d 1272, 1273 (App. 1992), citing
24 *Parrish*, *supra*, 164 Ariz. 18, 790 P.2d 304.

1 A.R.S. § 12-341.01(A) provides that in any contested action arising out of a
2 contract, the Court may award the successful party its attorneys' fees. *See Berthot v.*
3 *Security Pac. Bank of Ariz.*, 170 Ariz. 318, 823 P.2d 1326 (App. 1991). The "arising out
4 of contract" language is to be construed broadly. *See Marcus v. Fox*, 150 Ariz. 333, 723
5 P.2d 682 (1986). Under Arizona law, this case arises out of contract, as there is no doubt
6 that the Consent is a release voluntarily executed by TMCC, and TMCC breached the
7 Consent in bringing claims against Republic.

8 Furthermore, even assuming, *arguendo*, that this matter was strictly grounded in
9 tort, it is well settled in Arizona that when tort claims are brought that would not exist *but*
10 *for* the existence of a contract, Arizona courts have ruled that the contested action arises
11 out of a contract. Specifically,

12
13 . . . a tort claim will "arise out of a contract" only when the
14 tort could not exist "but for" the breach or avoidance of
15 contract. When the duty breached is one implied by law based
16 on the relationship of the parties, that claim sounds
17 fundamentally in tort, not contract. In such cases, it cannot be
18 said that the plaintiff's claim would not exist "but for" the
contract. The test is whether the defendant would have a duty
of care under the circumstances even in the absence of a
contract.

19 *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 15–16, 6 P.3d 315, 320–
20 21 (Ct. App. 2000).

21 Here, although TMCC's claims against Republic sound in tort, they arise out of
22 contract, as they would not exist *but for* the existence of the original loan agreements
23 between the parties. Moreover, because the alleged "duty breached" by Republic is *not* a
24 duty that was implied by law, such claims are not based "fundamentally in tort" but rather
25 in contract. Therefore, since TMCC's tort claims would not exist but for the contracts
26

1 between TMCC and Republic, Republic is entitled to attorneys' fees as the successful
2 party. Indeed, Arizona courts have awarded attorneys' fees on non-contractual claims as
3 long as a contract served as the basis, source, or origin of the dispute. *See McKesson*
4 *Chem. Co. v. Van Waters & Rogers*, 153 Ariz. 557, 739 P.2d 211 (App. 1987); *Lewin v.*
5 *Miller Wagner & Co.*, 151 Ariz. 29, 725 P.2d 736 (App. 1986)(holding that A.R.S. § 12-
6 341.01 applies where a contract "was the factor" giving rise to the litigation, clarifying
7 *ASH, Inc. v. Mesa Unified School District No. 4*, Ariz. 190, 673 P2d 934 (App. 1983),
8 where the court had held that the statute applied in an action in which a contract was "a
9 factor" causing the dispute.)

10 Finally, A.R.S. § 12-341.01(A) provides that, "[i]f a written settlement offer is
11 rejected and the judgment finally obtained is equal to or more favorable to the offeror than
12 an offer made in writing to settle any contested action arising out of a contract, the offeror
13 is deemed to be the successful party from the date of the offer and the court may award
14 the successful party reasonable attorney fees." Here, Republic offered TMCC its
15 Settlement Letter on November 14, 2016, which offered a complete "walk away"
16 settlement, with each party to bear its own attorney's fees and costs. In response, TMCC's
17 counsel assured Republic's counsel (both over the phone and in an email) that TMCC
18 would respond to the Settlement Letter. On December, 2, 2016, having heard nothing
19 from TMCC, Republic filed its MSJ and should be awarded its requested fees and costs
20 under A.R.S. § 12-341.01(A), as the anticipated "judgment obtained" will be "equal to or
21 more favorable than" the Settlement Letter.

22 C. **An Award of Fees is Warranted under A.R.S. § 12-349 As the Majority**
23 **of the Fees and Costs Relate to TMCC's Needless Motions and**
24 **Discovery.**

25 Republic is also entitled to fees pursuant to A.R.S. § 12-349 for TMCC's
26 unjustified actions. A.R.S. § 12-349 provides in relevant part:

1 A. Except as otherwise provided by and not inconsistent with
2 another statute, in any civil action commenced or appealed in
3 a court of record in this state, **the court shall assess**
4 **reasonable attorney fees, expenses** and, at the court's
5 discretion, double damages of not to exceed five thousand
6 dollars against an attorney or party, including this state and
7 political subdivisions of this state, if the attorney or party does
8 any of the following:

9 **1. Brings or defends a claim without substantial**
10 **justification.**

11 2. Brings or defends a claim solely or primarily for delay
12 or harassment.

13 **3. Unreasonably expands or delays the proceeding.**

14 4. Engages in abuse of discovery.

15
16 F. For the purposes of this section, "without substantial
17 justification" means that the claim or defense is groundless
18 and is not made in good faith.

19 (Emphasis added).

20 TMCC brought claims against Republic without substantial justification and
21 unreasonably expanded and delayed the proceedings. When TMCC signed the Consent in
22 September 2013, presumably, it was provided with a copy by Mutual of Omaha.
23 Therefore, TMCC had (or should have had) a copy of the Loan Purchase Agreement and
24 Consent prior to filing its original Complaint in December 2014. Even if we assume, for
25 the sake of argument, that TMCC was not provided with a copy of the Loan Purchase
26 Agreement and Consent at the time the Loans¹ were sold and transferred, TMCC
irrefutably received a copy of the Loan Purchase Agreement and Consent on June 4,
2015.² [E-mail and attachments from Jeffrey Wentzel to Buzz Slavin dated June 4, 2015,
bates labeled MB006327 - MB006409.] Republic's Answer was filed on May 11, 2015.
This means that within two months after litigation effectively commenced,³ and less than

¹ All capitalized terms which are undefined herein shall retain the same meaning as set forth in Republic's MSJ.

² A copy of the Loan Purchase Agreement (including the Consent) was also produced to TMCC as early as July 2, 2015 by Republic.

³ Although TMCC first filed a complaint on December 4, 2014, it did not serve Republic until after it filed its

1 a month after the Answer was filed, TMCC received a copy of the Loan Purchase
2 Agreement and Consent. At worst, TMCC was aware prior to the filing of the original
3 Complaint that it had no justification to bring any claims against Republic. At best,
4 TMCC was aware two months after serving its Complaint on Republic that it had no
5 grounds for its claims therein and could not, in good faith, bring any causes of action
6 against Republic. TMCC could have (and should have) shortly thereafter dismissed the
7 case, before discovery was very far underway. But instead, TMCC elected to litigate this
8 matter for another two and half years, causing Republic to incur the significant fees and
9 costs stated herein.

10 **D. An Award of Fees is Authorized and Warranted in This Case.**

11 Where the parties have agreed by contract that the prevailing party shall be entitled
12 to recover reasonable fees, the court must award all reasonable fees and costs incurred.
13 As discussed in Paragraph II(A), *supra*, Republic is the prevailing party in this matter.
14 Moreover, under Arizona law, Republic is entitled to seek its costs for mediation and for
15 expert fees. *Reyes v. Frank's Service & Trucking, LLC*, 235 Ariz. 605 (App. 2014)
16 (Superior Court allowed to award share of private mediation to prevailing party as part of
17 costs under A.R.S. § 12-332(A)(6)); *Lohmeier v. Hammer*, 214 Ariz. 57 (App. 2006) ("a
18 trial court is given wide latitude in assessing an award of expert witness fees"). In fact,
19 the *Reyes* Court held that the trial court had properly awarded Mr. Reyes mediation costs
20 under A.R.S. § 12-332(A)(6) because the parties had previously reached an agreement
21 with regard to incurring the very mediation costs in question by virtue of the parties joint
22 pretrial memorandum. *Id.*, 235 Ariz. at 612, 334 P.3d at 1271. Similarly, the parties in
23 the instant case agreed to private mediation in the Joint Report and Proposed Scheduling
24 Order on August 31, 2015, and further agreed to split the cost of mediation. Thus, there

25
26 Amended Complaint on April 3, 2015.

1 can be no dispute as to the fact that like *Reyes*, Republic and TMCC reached an agreement
2 in connection with incurring the parties' mediation costs, and Republic should be awarded
3 said costs pursuant to the Court of Appeals' decision in *Reyes* and A.R.S. § 12-332(A)(6).
4 Here, the costs the incurred as a result of the mediation and expert fees is \$98,732.70.

5 **E. The Amount of Fees and Costs Requested Is Reasonable.**

6 As reflected in the Jenkins Affidavit attached hereto as **Exhibit “1”**, the fees
7 incurred in connection with this litigation were fair and reasonable. The Arizona Court of
8 Appeals has discussed at length the standards which a trial court should apply in
9 determining the reasonableness of an application for attorneys’ fees. *See e.g., Schweiger*
10 *v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927 (Ct. App. 1983). In *China*
11 *Doll*, the Court of Appeals focused on two key factors in the review of the applications:
12 reasonable billing rates and reasonable hours expended. *See id.*, 138 Ariz. at 187-89, 673
13 P.2d at 931-33.

14 The *China Doll* court held that in commercial litigation, there is no need to
15 determine the prevailing reasonable rate in the community “because the rate charged by
16 the lawyer to the client is the best indicator of what is reasonable under the circumstances
17 of the particular case.” 138 Ariz. at 187-88, 673 P.2d at 931-32. And, as the Jenkins
18 Affidavit reveals, the billing rates utilized in this case are lower than, rather than merely
19 comparable to, those charged by attorneys in the Phoenix metropolitan area with similar
20 experience at similar firms (due to Republic's insurance provider requiring discounted
21 rates). Thus, there is no question that the billing rates are “reasonable” in this case.

22 The second focus is the amount of time devoted to the case by Republic's attorneys.
23 In *China Doll*, the court described the information necessary to demonstrate the
24 reasonableness of the time devoted to a case:

25 The affidavit of counsel should indicate the type of legal services
26 provided, the date the service was provided, the attorney

providing the service (if more than one attorney was involved in the appeal) and the time spent in providing the service.

138 Ariz. at 188, 673 P.2d at 932.

Again, the Jenkins Affidavit meets these requirements, and confirms that all of the legal services performed for Republic are of the type properly included in the fee application. In addition, the Jenkins Affidavit reveals that this case was appropriately staffed.

The amount of time that Republic's attorneys expended during the course of this extensive litigation is reasonable in light of the extensive motion practice, discovery, TMCC's delay tactics, and discovery disputes (particularly in regard to TMCC's deposition of Michael Harris) as discussed in Paragraph II(C). All in all, the litigation has lasted two and a half years, throughout which Republic's counsel, Quarles & Brady, applied reduced billing rates, as follows:

Attorney	Actual Billing Rate Per Hour (and Average Rate Per Hour)	Reduced Billing Rate Per Hour
W. Scott Jenkins, Jr.	\$395.00 - \$440.00 (\$416.67)	\$285.00
Andrea H. Landeen	\$325.00- \$335.00 (\$330.00)	\$245.00
Alissa Brice Castañeda	\$300.00 - \$350.00 (\$325.00)	\$245.00
Hannah R. Torres	\$255.00	\$245.00

And in addition to the rate reduction, Quarles & Brady also applied discounts and write offs along the way which reduced Republic's fees by an additional aggregate discount of \$5,603.00. *See* Jenkins Affidavit at ¶ 5. In light of these factors, an award of attorneys' fees and expenses to Republic of \$402,835.50 is reasonable.

F. Republic's Other Fees and Costs.

As reflected in the Jenkins Affidavit, Republic's other fees and expenses were

1 generally incurred in connection with the following:

- 2 • Written discovery (including third-party subpoenas), document review of
- 3 thousands of pages of bank records and other documents, and supplemental
- 4 demands and production
- 5 • Consultations with client and related third-parties
- 6 • Deposition preparation and taking of deposition
- 7 • mediation briefing and participation in private mediation
- 8 • Scheduling/administrative matters
- 9 • Commencing trial preparation

10 Republic's fees and costs incurred in connection with the foregoing are reasonable
11 in light of the quality of the work performed, the expansion of the litigation caused by
12 TMCC, TMCC's refusal to respond to settlement offers and conclude mediation, and the
13 result obtained by Republic on summary judgment.

14 **III. CONCLUSION.**

15 TMCC has been unnecessarily litigious since the very start of this case. Most
16 importantly, TMCC had two opportunities - after the Settlement Letter and at mediation -
17 to settle this case for equal to or better terms than the ultimate MSJ ruling. However,
18 instead of engaging in settlement discussions and mediating in good faith, TMCC simply
19 refused to respond to settlement offers and walked out of mediation. TMCC ignored the
20 Consent at first, and when forced to deal with it later, still failed to acknowledge its
21 significance. If it had done so, both parties would have been spared significant legal fees
22 and expenses. Additionally, TMCC's unjustifiable actions which delayed and extended
23 this proceeding caused substantial additional legal fees and costs to Republic that could
24 have been avoided. Therefore, Republic is entitled to legal fees under the Loan Purchase
25 Agreement, A.R.S. § 12-341.01(A), and A.R.S. § 12-349. Finally, Republic's fees are
26

1 reasonable and well under the amount they would be for other similar counsel. For all of
2 these reasons, Republic respectfully requests the Court to enter an award of attorneys' fees
3 and expenses in favor of Republic and against TMCC in the amount of \$402,835.50, and
4 any additional fees incurred after this Application is submitted.

5 DATED this 2nd day of October, 2017.

6 QUARLES & BRADY LLP

7
8 By /s/ W. Scott Jenkins, Jr.
9 W. Scott Jenkins, Jr.
10 Andrea H. Landeen
Alissa Brice Castañeda

Attorneys for Defendant

11 ORIGINAL e-filed and COPY emailed
12 this 2nd day of October, 2017 to:

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19 /s/ Cecily N. Benson

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THOMPSON/McCARTHY COFFEE CO., an
Arizona corporation,

Plaintiff,

vs.

REPUBLICBANKAZ, N.A.,
Defendant.

Case No. CV2014-014647

STATEMENT OF COSTS

(Assigned to the Hon. Dawn Bergin)

**TO: THE CLERK OF THE COURT AND THE PARTIES AGAINST WHOM
COSTS ARE CLAIMED:**

1. The undersigned is the attorney for the party in whose favor Judgment in this action has been rendered, and has personal knowledge that the following costs have been incurred and expended by that party in this action.

Description	Amount
AZ Turbo Court filing fees	\$349.40
Mediation Cost	\$1,925.00
Expert Witness Reports (Peter Davis and Lisa Lerner)	\$96,807.70
TOTAL COSTS:	\$99,082.10

1 2. This party claims these costs against the opposing parties against
2 whom the Judgment was rendered. A.R.S. §§12-332 and 12-341.

3 3. COPIES mailed pursuant to Rule 5, Arizona Rules of Civil
4 Procedure, this date to the following:

5
6 Francis J. Slavin, Esq.
7 Daniel J. Slavin, Esq.
8 FRANCIS J. SLAVIN, P.C
 2198 East Camelback Road, Ste. 285
 Phoenix, Arizona 85016
 Attorneys for Plaintiff

9 4. I have read the foregoing document and know of my own personal
10 and actual knowledge that the facts stated herein are true and correct.

11 DATED this 2nd day of October, 2017.

12
13 QUARLES & BRADY LLP
14 Two North Central Avenue
 Phoenix, Arizona 85004
 Attorneys for Defendant

15
16 By /s/ W. Scott Jenkins, Jr.
17 W. Scott Jenkins, Jr.
 Andrea H. Landeen
 Alissa Brice Castañeda

18 Attorneys for Defendant
19
20
21
22
23
24
25
26

1 **STATE OF ARIZONA)**
2 **) ss.**
3 **COUNTY OF MARICOPA)**

4 This *Statement of Costs* (including all signature pages, exhibits, schedules and
5 other pages appended or attached to the aforesaid document), was acknowledged before me
6 this 2nd day of October 2017, by W. Scott Jenkins, Jr., as the attorney of record for
7 RepublicBankAZ, N.A. on behalf of such party.

8 Additional signers of this document are: NONE.

9 IN WITNESS WHEREOF, I hereunto set my hand and official seal.

10 
11 Notary Public



1 FRANCIS J. SLAVIN, P.C.
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Telephone (602) 381-8700
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5 d.slavin@fjslegal.com
6 Attorneys for Plaintiff Thompson/McCarthy Coffee Co.

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF MARICOPA**

9 THOMPSON/McCARTHY COFFEE CO.,
10 an Arizona corporation,

11 Plaintiff,

12 v.

13 REPUBLICBANKAZ, N.A.,

14 Defendant.
15

Case No. CV2014-014647

**RESPONSE AND OPPOSITION TO
REPUBLICBANKAZ'S STATEMENT OF
COSTS**

(Standard Case)

(Assigned to the Honorable Dawn Bergin)

16 Plaintiff hereby provides its response and opposition to Defendant RepublicBankAZ,
17 N.A. ("Republic") Statement of Costs which it filed on October 2, 2017, pursuant to "A.R.S.
18 §§ 12-332 and 12-341." See Statement of Costs, p.2.

19 Plaintiff Thompson/McCarthy Coffee Co. ("TMCC") does not object to the filing
20 costs in the amount of \$349.40. TMCC does not object to the \$1,925.00 of costs for the ½
21 day of mediation that took place, as being permissible under A.R.S. §12-332(A)(6). See
22 *Reyes v. Frank's Service and Trucking, LLC*, 235 Ariz. 605 at ¶29 (App. 2014). However,
23 TMCC does object to the \$96,807.70 Republic requested for "Expert Witness Reports."

24 "Under Arizona law, 'costs' is a term of art with specific legal meaning. The items
25 that constitute taxable costs in the superior court are limited in number and are enumerated in
26 A.R.S. § 12-332 [2017]." *Thiele v. City of Phoenix*, 232 Ariz. 40, 44, 301 P.3d 206, 210
27 (App. 2013) (Emphasis added). Expert witness reports are not enumerated as taxable costs
28 under A.R.S. § 12-332. The Arizona Supreme Court has held that fees of an expert witness

are not capable of being interpreted as taxable costs under A.R.S. § 12-332. *See State v. McDonald*, 88 Ariz. 1, 13-14, 352 P.2d 343, 350-51 (1960) (“We hold that the word ‘cost’ has been limited in its meaning by A.R.S. § 12-332, wherein no provision was made for the allowance of expert witness fees.”); *RS Indus., Inc. v. Candrian*, 240 Ariz. 132, 137, 377 P.3d 329, 334 (App. 2016) (the fees a party pays for “its own expert witness are not recoverable”).

Therefore, since the award of costs is a matter limited by statute to costs enumerated by A.R.S. § 12-332, and since expert witness fees are not enumerated or otherwise provided therein, Republic’s request for \$96,807.70 should be denied.

RESPECTFULLY SUBMITTED this 16th day of October, 2017.

FRANCIS J. SLAVIN, P.C.

By: /s/ Daniel J. Slavin

Francis J. Slavin
Daniel J. Slavin
2198 East Camelback Road, Ste. 285
Phoenix, Arizona 85016
Attorneys for Plaintiff

ORIGINAL of the foregoing electronically
filed with the Clerk of the Maricopa County
Superior Court this 16th day of October, 2017.

COPY of the foregoing e-served
this 16th day of October, 2017 to:

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14 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
15 **IN AND FOR THE COUNTY OF MARICOPA**

16 THOMPSON/McCARTHY COFFEE CO., an
17 Arizona corporation,

18 Plaintiff,

19 vs.

20 REPUBLICBANKAZ, N.A.,

21 Defendant.

Case No. CV2014-014647

**REPLY TO PLAINTIFF'S
RESPONSE AND OPPOSITION
TO REPUBLICBANKAZ'S
STATEMENT OF COSTS**

(Assigned to the Hon. Dawn Bergin)

22 RepublicBankAZ, N.A. ("Republic") hereby replies to the *Response and*
23 *Opposition to RepublicBankAZ's Statement of Costs* (the "Response") filed
24 Thompson/McCarthy Coffee Co. ("TMCC") on October 16, 2017. TMCC's Response
25 asserts that Republic is not entitled to the costs in connection with Republic's expert
26 witness reports because they do not fall within the purview of costs contemplated by
AR.S. § 12-332. TMCC's argument fails as a matter of law in that AR.S. § 12-332(A)(6)
includes those costs "that are made or incurred pursuant to an order or agreement of the
parties." The *Loan Purchase and Sale Agreement (With Consent of Obligors and*

1 *Pledgors*) (hereafter the "Loan Purchase Agreement"), executed by TMCC, provides in
2 the event of a lawsuit thereunder, that the prevailing party "shall be entitled to recover
3 costs and reasonable attorneys' fees . . ." [Section 5.4] As Republic is the prevailing
4 party, it is entitled to its costs pursuant to the parties' contractual agreement.

5 Further, pursuant to the original Loan Documents¹, which were incorporated by
6 reference into the Loan Purchase Agreement, TMCC agreed "to indemnify ... and to save
7 and hold [Republic] harmless from *any and all claims*, suits, obligations, damages, losses,
8 costs and expenses ... *of any nature whatsoever* that may be asserted against or incurred
9 by [Republic], ... arising out of, relating to, or in any manner occasioned by this
10 Agreement ..."

11 Accordingly, whether this Court relies on Section 5.4 of the Loan Purchase
12 Agreement or the indemnification provision in the Loan Documents, it is beyond dispute
13 an agreement between the parties exists, as contemplated by A.R.S. § 12-332(A)(6), with
14 regard to the allocation of costs. Accordingly, Republic has rightfully sought to recover its
15 expert costs incurred in the defense of the instant lawsuit. This Reply is supported by the
16 following Memorandum of Points and Authorities, the pleadings, and evidence already on
17 file with the court.

18 MEMORANDUM OF POINTS AND AUTHORITIES

19 **I. LEGAL ARGUMENT**

20 **A. Republic is entitled to its expert witness fees under A.R.S. § 12-332**
21 **because they are costs incurred by Republic which TMCC is**
22 **contractually obligated to pay under the Loan Purchase Agreement.**

23 A.R.S. § 12-332(A)(6) states as follows:

24 **A.** Costs in the superior court include:

25 . . .

26 ¹ For purposes of this Reply, the term "Loan Documents" shall be limited to: 1) the Construction Loan Agreement dated October 24, 2011, and 2) the Construction Loan Agreement dated May 9, 2012, attached hereto as Exhibit "A."

6. Other disbursements that are made or incurred pursuant to an order or agreement of the parties.

(Emphasis added).

The Arizona Supreme Court has affirmed that in Arizona, the trial court has the discretion to award nontaxable costs such as expert fees, if they are allowed by the parties' contract. *See Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Bach*, 193 Ariz. 401 (1999) (holding that an award of a management association's nontaxable costs in a dispute over homeowners' erection of fence under covenants, conditions and restrictions (CC & Rs), which provided for the nonprevailing party's payment of reasonable attorneys' fees in addition to "any relief or judgment" ordered by court, was not an abuse of discretion); *see also Schritter v. State Farm Mut. Auto Ins. Co.*, 201 Ariz. 391, 394 fn. 5, 36 P.3d 739, 742 (2001) (noting that "under section 12-332.A.6, the parties may agree to share [otherwise nontaxable] costs or impose them on the losing party."); *see also Keg Restaurants Arizona, Inc. v. Jones*, 240 Ariz. 64, 79, 375 P.3d 1173, 1188 (App. 2016), review denied (Jan. 10, 2017) (holding that the parties' lease - which provided that if lessor or lessee filed suit against the other in any way connected with the lease, prevailing party could recover "costs and disbursements, including the fees, costs, and disbursements of consultants [and] professionals" - supported an award of expert witness fees to lessee after it prevailed at trial of parties' claims.)

As recognized by the Arizona Supreme Court in *Schritter*, "[u]nder section 12-332.A.6, the parties may agree to share [expert] costs or impose them on the losing party." 201 Ariz. at 394 fn. 5, 36 P.3d 739, 742 (2001). Here, that is precisely what the parties did - under the **Loan Purchase Agreement**, they expressly agreed to impose costs on the losing party, or more specifically,

5.4 Attorneys' Fees. In the event of a lawsuit or arbitration proceeding under this Agreement or any of the Assignment Documents, the prevailing party shall be entitled to recover costs and reasonable attorneys' fees incurred in connection

1 **with the lawsuit** or arbitration proceeding, as determined by
2 the court or arbitrator (and not by a jury).

3 There is no doubt that:

4 1. This case is an "event of a lawsuit" under the Loan Purchase Agreement and
5 the Consent thereto;

6 2. Republic is the prevailing party;

7 3. As the prevailing party, Republic "shall be entitled to recover costs . . .
8 incurred in connection with the lawsuit . . ."; and

9 4. Republic's expert witness fees in the sum of \$96,807.70 were "incurred in
10 connection with the lawsuit."

11 Having satisfied the conditions for recovering costs as agreed to in Section 5.4 of
12 the Loan Purchase Agreement, Republic should be awarded its requested costs in the sum
13 of \$99,082.10 (which includes the amount of \$96,807.70 for expert witness reports), as
14 they were incurred in defense of the lawsuit initiated by TMCC.

15 **B. Republic is entitled to costs under the parties' original Loan Documents.**

16 In addition to the agreement contained in Section 5.4, the parties further agreed in
17 the underlying Loan Documents how to allocate costs should Republic be required to
18 defend itself in an action related to or arising from the loans. In the below paragraph,
19 entitled "Indemnification of Lender" TMCC agreed as follows:

20 **Indemnification of lender.** *Borrower agrees to indemnify, to*
21 *defend and to save and hold Lender harmless from any and*
22 *all claims, suits, obligations, damages, losses, costs and*
23 *expenses (including, without limitation, lender's attorneys'*
24 *fees, as well as lender's architect's end engineering fees),*
25 *demands, liabilities, penalties, fines and forfeitures of any*
26 *nature whatsoever that may be asserted against or incurred*
 by Lender, its officers, directors, employees, and agents
 arising out of, relating to, or in any manner occasioned by
 this Agreement and the exercise of the rights and remedies

1 granted Lender under this. The foregoing indemnity
2 provisions shall survive the cancellation of this Agreement as
3 to all matters arising or accruing prior to such cancellation
4 and the foregoing indemnity shall survive in the event that
5 Lender elects to exercise any of the remedies as provided
6 under this Agreement following default hereunder.

[See Exhibit A at page 9 (emphasis added).]

7 While indemnification generally refers to third party claims, “this general rule does
8 not apply if the parties to a contract use the term ‘indemnity’ to include direct liability as
9 well as third party liability.” (*Dream Theater Inc. v. Dream Theater*, 124 Cal. App. 4th
10 547, 556 (2004).) Persuasively, the California Court of Appeal in *Zalkind v. Ceradyne,*
11 *Inc.*, 194 Cal. App. 4th 1010, 1024 (2011) has expressly addressed this issue. The contract
12 in *Zalkind* stated the “Buyer shall indemnify, hold harmless and defend the Selling Parties
13 ... from and against any and all Damages that arise from or are in connection with: [¶] ...
14 [¶] ... Any breach or default by the Buyer of its covenants or agreements contained in this
15 Agreement.” (*Zalkind, supra*, 194 Cal.App.4th at p. 1022.) There, the court determined
16 the provision was “broadly worded” and “does not limit indemnification to third party
17 claims and extends indemnification to ‘any and all’ damages incurred by [the plaintiffs]
18 arising out of [the defendant’s] breach of the Asset Purchase Agreement. Read in ...
19 context of ... the word ‘indemnify’ makes better sense when read to mean ‘make good,’
20 ‘reimburse,’ or ‘compensate.’” *Zalkind, supra*, 194 Cal.App.4th at 1027.

21 Here, TMCC agreed to indemnify and to save and hold Republic harmless “from
22 any and all claims, suits, obligations, damages, losses, costs and expenses... of any nature
23 whatsoever that may be asserted against or incurred by [Republic] ... arising out of,
24 relating to, or in any manner occasioned by this Agreement” As in *Zalkind*, the instant
25 indemnification provision is broadly worded. Indemnification is not limited to third
26 parties, but rather extends indemnification to “any and all claims, suits, obligations,
damages, loss, costs and expenses ...of any nature whatsoever...” The provision’s trigger

1 is similarly broad, and applies to any and all claims “arising out of, relating to, *or in any*
2 *manner* occasioned by this Agreement.” TMCC cannot dispute that it is the underlying
3 Loan Documents which gave rise to the instant lawsuit in that “but for” said Loan
4 Documents, the lawsuit would not exist.

5 The indemnification agreement in the Loan Documents was expressly incorporated
6 by reference into the Consent as follows:

7 (a) Each Obligor Pledgor acknowledges the accuracy of
8 the recitals in Article 1 of the Agreement, and reaffirms to
9 Lender each of the representations, warranties, covenants and
10 agreements of such Obligor and Pledgor set forth in the Loan
11 Documents with the same force and effect as if each were
12 separately stated in this Consent and made as of the date
hereof. Capitalized terms that are used but not otherwise
defined herein shall have the meanings provided in the
Agreement.

13 (b) Each Obligor and Pledgor ratifies, reaffirms and
14 acknowledges that the Notes, Guarantees and other Loan
15 Documents that were signed by such Obligor or Pledgor
16 represent its valid and enforceable and collectible obligations
17 and it has no existing claims, defenses (personal or otherwise)
or rights of setoff with respect thereto. (Page 13, Consent of
Obligors and Pledgors, Loan Purchase Agreement.)

18 [See Consent attached as Exhibit "N" to Republic's SOF (emphasis added).]

19 By virtue of fact that TMCC executed the Consent, TMCC acknowledged its
20 agreement to pay Republic’s costs as “set forth in the Loan Documents with the same
21 force and effect as if each were separately stated in this Consent.” Thus, the Consent in
22 and of itself provides for Republic’s recovery of costs by incorporating the
23 indemnification provision to which TMCC agreed when it signed the Loan Documents.
24 And as the indemnification provision in the Loan Documents provides another written
25 “agreement of the parties” as defined by A.R.S. § 12-332(A)(6), TMCC is obligated to
26

1 pay the costs of Republic's expert witness reports arising out of its defense of the instant
2 litigation.

3 **II. CONCLUSION**

4 A.R.S. § 12-332(A)(6) defines "[c]osts in the superior court include . . .[o]ther
5 disbursements that are made or incurred pursuant to an order or agreement of the parties."
6 By "agreement of the parties" - the Loan Purchase Agreement - TMCC agreed that that
7 prevailing party *shall* be entitled to recover costs incurred in connection "[i]n the event of
8 a lawsuit ... under [the] Agreement." [Section 5.4.] TMCC also agreed "to indemnify...
9 and to save and hold [Republic] harmless from *any and all claims*, suits, obligations,
10 damages, losses, *costs and expenses ... of any nature whatsoever* that may be asserted
11 against or incurred by [Republic], ... arising out of, relating to, or in any manner
12 occasioned by this Agreement ..." [See Exhibit A.]

13 Thus, Republic respectfully requests that that the Court overrule TMCC's objection
14 and award Republic its requested costs in the sum of \$99,082.10, all of which were
15 incurred in defense of this lawsuit.

16 DATED this 27th day of October, 2017.

17 QUARLES & BRADY LLP
18 Two North Central Avenue
19 Phoenix, Arizona 85004
20 Attorneys for Defendant

21 By /s/ W. Scott Jenkins, Jr.
22 W. Scott Jenkins, Jr.
23 Andrea H. Landeen
24 Alissa Brice Castañeda

25 Attorneys for Defendant
26

1 ORIGINAL e-filed and COPY emailed
2 this 27th day of October, 2017 to:

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4 Daniel Slavin, Esq.
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7 Phoenix, Arizona 85016
8 Email: b.slavin@fjslegal.com
9 Email: d.slavin@fjslegal.com
10 Attorneys for Plaintiff

11
12 /s/ Denise M. Cockrell
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Exhibit "A"

CONSTRUCTION LOAN AGREEMENT

Principal	Loan Date	Maturity	Loan No	Call / Coll	Account	Officer	Initials
\$597,100.00	05-09-2012	05-09-2037	826007200	0013 / 0120	***	MH	
References in the boxes above are for Lender's use only and do not limit the applicability of this document to any particular loan or item. Any item above containing "****" has been omitted due to text length limitations.							

Borrower: Thompson/McCarthy DB LLC DBA Glendale
Ave./12th Street DB LLC
27915 N. 100th Pl.
Scottsdale, AZ 85262

Lender: RepublicBankAz, N.A.
909 E. Missouri Avenue
Phoenix, AZ 85014

THIS CONSTRUCTION LOAN AGREEMENT dated May 9, 2012, is made and executed between Thompson/McCarthy DB LLC DBA Glendale Ave./12th Street DB LLC ("Borrower") and RepublicBankAz, N.A. ("Lender") on the following terms and conditions. Borrower has applied to Lender for one or more loans for purposes of constructing the improvements on the Real Property described below. Lender is willing to lend the loan amount to Borrower solely under the terms and conditions specified in this Agreement and in the Related Documents, to each of which Borrower agrees. Borrower understands and agrees that: (A) in granting, renewing, or extending any Loan, Lender is relying upon Borrower's representations, warranties, and agreements as set forth in this Agreement, and (B) all such Loans shall be and remain subject to the terms and conditions of this Agreement.

TERM. This Agreement shall be effective as of May 9, 2012, and shall continue in full force and effect until such time as all of Borrower's Loans in favor of Lender have been paid in full, including principal, interest, costs, expenses, attorneys' fees, and other fees and charges, or until such time as the parties may agree in writing to terminate this Agreement.

LOAN. The Loan shall be in an amount not to exceed the principal sum of U.S. \$597,100.00 and shall bear interest on so much of the principal sum as shall be advanced pursuant to the terms of this Agreement and the Related Documents. The Loan shall bear interest on each Advance from the date of the Advance in accordance with the terms of the Note. Borrower shall use the Loan Funds solely for the payment of: (A) the costs of constructing the improvements and equipping the Project in accordance with the Construction Contract; (B) other costs and expenses incurred or to be incurred in connection with the construction of the improvements as Lender in its sole discretion shall approve; and (C) if permitted by Lender, interest due under the Note, including all expenses and all loan and commitment fees described in this Agreement. The Loan amount shall be subject at all times to all maximum limits and conditions set forth in this Agreement or in any of the Related Documents, including without limitation, any limits relating to loan to value ratios and acquisition and Project costs.

PROJECT DESCRIPTION. The word "Project" as used in this Agreement means the construction and completion of all improvements contemplated by this Agreement, including without limitation the erection of the building or structure on the Real Property identified to this Agreement by Borrower and Lender, installation of equipment and fixtures, landscaping, and all other work necessary to make the Project usable and complete for the intended purposes. The Project includes the following work:

Tenant Improvements on property located at 1201 E. Glendale Ave., Phoenix, AZ.

The word "Property" as used in this Agreement means the Real Property together with all improvements, all equipment, fixtures, and other articles of personal property now or subsequently attached or affixed to the Real Property, together with all accessions, parts, and additions to, all replacements of, and all substitutions for any of such property, and all proceeds (including insurance proceeds and refunds of premiums) from any sale or other disposition of such property. The real estate described below constitutes the Real Property as used in this Agreement.

The real estate legally described as:

See Exhibit "C" attached hereto and made a part hereof.

Property is in reference to that certain Commercial Lease Agreement dated December 30, 2011, between Kelley Clark as Landlord, for The Clark Family Trust, Dated July 25, 1990, and Thompson/McCarthy DB LLC as Tenant; for an initial period of 16 years, with an option to renew 3 successive terms of 5 years each; on property located at 1201 E. Glendale Ave., Phoenix, AZ 85020; of which a Dutch Bros. Coffee outlet shall be constructed upon.

Its address is commonly known as:

Real Property located at 1201 E. Glendale Ave., Phoenix, AZ 85020.

FEES AND EXPENSES. Whether or not the Project shall be consummated, Borrower shall assume and pay upon demand all out-of-pocket expenses incurred by Lender in connection with the preparation of loan documents and the making of the Loan, including without limitation the following: (A) all closing costs, loan fees, and disbursements; (B) all expenses of Lender's legal counsel; and (C) all title examination fees, title insurance premiums, appraisal fees, survey costs, required fees, and filing and recording fees.

NO CONSTRUCTION PRIOR TO RECORDING OF SECURITY DOCUMENT. Borrower will not permit any work or materials to be furnished in connection with the Project until (A) Borrower has signed the Related Documents; (B) Lender's mortgage or deed of trust and other Security Interests in the Property have been duly recorded and perfected; (C) Lender has been provided evidence, satisfactory to Lender, that Borrower has obtained all insurance required under this Agreement or any Related Documents and that Lender's liens on the Property and Improvements are valid perfected first liens, subject only to such exceptions, if any, acceptable to Lender.

REPRESENTATIONS AND WARRANTIES. Borrower represents and warrants to Lender, as of the date of this Agreement, as of the date of each disbursement of loan proceeds, as of the date of any renewal, extension or modification of any Loan, and at all times any indebtedness exists:

Organization. Borrower is a limited liability company which is, and at all times shall be, duly organized, validly existing, and in good standing under and by virtue of the laws of the State of Oregon. Borrower is duly authorized to transact business in the State of Arizona and all other states in which Borrower is doing business, having obtained all necessary filings, governmental licenses and approvals for each state in which Borrower is doing business. Specifically, Borrower is, and at all times shall be, duly qualified as a foreign limited liability company in all states in which the failure to so qualify would have a material adverse effect on its business or financial condition. Borrower has the full power and authority to own its properties and to transact the business in which it is presently engaged or presently proposes to engage. Borrower maintains an office at 27915 N. 100th Pl., Scottsdale, AZ 85262. Unless Borrower has designated otherwise in writing, the principal office is the office at which Borrower keeps its books and records including its records concerning the Collateral. Borrower will notify Lender prior to any change in the location of Borrower's state of organization or any change in Borrower's name. Borrower shall do all things necessary to preserve and to keep in full force and effect its existence, rights and privileges, and shall comply with all regulations, rules, ordinances, statutes, orders and decrees of any governmental or quasi-governmental authority or court applicable to Borrower and Borrower's business activities.

Assumed Business Names. Borrower has filed or recorded all documents or filings required by law relating to all assumed business names used by Borrower. Excluding the name of Borrower, the following is a complete list of all assumed business names under which Borrower does business: None.

CONSTRUCTION LOAN AGREEMENT (Continued)

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Authorization. Borrower's execution, delivery, and performance of this Agreement and all the Related Documents have been duly authorized by all necessary action by Borrower and do not conflict with, result in a violation of, or constitute a default under (1) any provision of (a) Borrower's articles of organization or membership agreements, or (b) any agreement or other instrument binding upon Borrower or (2) any law, governmental regulation, court decree, or order applicable to Borrower or to Borrower's properties.

Financial Information. Each of Borrower's financial statements supplied to Lender truly and completely disclosed Borrower's financial condition as of the date of the statement, and there has been no material adverse change in Borrower's financial condition subsequent to the date of the most recent financial statement supplied to Lender. Borrower has no material contingent obligations except as disclosed in such financial statements.

Legal Effect. This Agreement constitutes, and any instrument or agreement Borrower is required to give under this Agreement when delivered will constitute legal, valid, and binding obligations of Borrower enforceable against Borrower in accordance with their respective terms.

Properties. Except as contemplated by this Agreement or as previously disclosed in Borrower's financial statements or in writing to Lender and as accepted by Lender, and except for property tax liens for taxes not presently due and payable, Borrower owns and has good title to all of Borrower's properties free and clear of all Security Interests, and has not executed any security documents or financing statements relating to such properties. All of Borrower's properties are titled in Borrower's legal name, and Borrower has not used or filed a financing statement under any other name for at least the last five (5) years.

Hazardous Substances. Except as disclosed to and acknowledged by Lender in writing, Borrower represents and warrants that: (1) During the period of Borrower's ownership of the Collateral, there has been no use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance by any person on, under, about or from any of the Collateral. (2) Borrower has no knowledge of, or reason to believe that there has been (a) any breach or violation of any Environmental Laws; (b) any use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance on, under, about or from the Collateral by any prior owners or occupants of any of the Collateral; or (c) any actual or threatened litigation or claims of any kind by any person relating to such matters. (3) Neither Borrower nor any tenant, contractor, agent or other authorized user of any of the Collateral shall use, generate, manufacture, store, treat, dispose of or release any Hazardous Substance on, under, about or from any of the Collateral; and any such activity shall be conducted in compliance with all applicable federal, state, and local laws, regulations, and ordinances, including without limitation all Environmental Laws. Borrower authorizes Lender and its agents to enter upon the Collateral to make such inspections and tests as Lender may deem appropriate to determine compliance of the Collateral with this section of the Agreement. Any inspections or tests made by Lender shall be at Borrower's expense and for Lender's purposes only and shall not be construed to create any responsibility or liability on the part of Lender to Borrower or to any other person. The representations and warranties contained herein are based on Borrower's due diligence in investigating the Collateral for hazardous waste and Hazardous Substances. Borrower hereby (1) releases and waives any future claims against Lender for indemnity or contribution in the event Borrower becomes liable for cleanup or other costs under any such laws, and (2) agrees to indemnify, defend, and hold harmless Lender against any and all claims, losses, liabilities, damages, penalties, and expenses which Lender may directly or indirectly sustain or suffer resulting from a breach of this section of the Agreement or as a consequence of any use, generation, manufacture, storage, disposal, release or threatened release of a hazardous waste or substance on the Collateral. The provisions of this section of the Agreement, including the obligation to indemnify and defend, shall survive the payment of the indebtedness and the termination, expiration or satisfaction of this Agreement and shall not be affected by Lender's acquisition of any interest in any of the Collateral, whether by foreclosure or otherwise.

Litigation and Claims. No litigation, claim, investigation, administrative proceeding or similar action (including those for unpaid taxes) against Borrower is pending or threatened, and no other event has occurred which may materially adversely affect Borrower's financial condition or properties, other than litigation, claims, or other events, if any, that have been disclosed to and acknowledged by Lender in writing.

Taxes. To the best of Borrower's knowledge, all of Borrower's tax returns and reports that are or were required to be filed, have been filed, and all taxes, assessments and other governmental charges have been paid in full, except those presently being or to be contested by Borrower in good faith in the ordinary course of business and for which adequate reserves have been provided.

Lien Priority. Unless otherwise previously disclosed to Lender in writing, Borrower has not entered into or granted any Security Agreements, or permitted the filing or attachment of any Security Interests on or affecting any of the Collateral directly or indirectly securing repayment of Borrower's Loan and Note, that would be prior or that may in any way be superior to Lender's Security Interests and rights in and to such Collateral.

Binding Effect. This Agreement, the Note, all Security Agreements (if any), and all Related Documents are binding upon the signers thereof, as well as upon their successors, representatives and assigns, and are legally enforceable in accordance with their respective terms.

Title to Property. Borrower has, or on the date of first disbursement of Loan proceeds will have, good and marketable title to the Collateral free and clear of all defects, liens, and encumbrances, excepting only liens for taxes, assessments, or governmental charges or levies not yet delinquent or payable without penalty or interest, and such liens and encumbrances as may be approved in writing by the Lender. The Collateral is contiguous to publicly dedicated streets, roads, or highways providing access to the Collateral.

Project Costs. The Project costs are true and accurate estimates of the costs necessary to complete the Improvements in a good and workmanlike manner according to the Plans and Specifications presented by Borrower to Lender, and Borrower shall take all steps necessary to prevent the actual cost of the Improvements from exceeding the Project costs.

Utility Services. All utility services appropriate to the use of the Project after completion of construction are available at the boundaries of the Collateral.

Assessment of Property. The Collateral is and will continue to be assessed and taxed as an independent parcel by all governmental authorities.

Compliance with Governing Authorities. Borrower has examined and is familiar with all the easements, covenants, conditions, restrictions, reservations, building laws, regulations, zoning ordinances, and federal, state, and local requirements affecting the Project. The Project will at all times and in all respects conform to and comply with the requirements of such easements, covenants, conditions, restrictions, reservations, building laws, regulations, zoning ordinances, and federal, state, and local requirements.

Survival of Representations and Warranties. Borrower understands and agrees that in making the Loan, Lender is relying on all representations, warranties, and covenants made by Borrower in this Agreement or in any certificate or other instrument delivered by Borrower to Lender under this Agreement or the Related Documents. Borrower further agrees that regardless of any investigation made by Lender, all such representations, warranties and covenants will survive the making of the Loan and delivery to Lender of the Related

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Documents, shall be continuing in nature, and shall remain in full force and effect until such time as Borrower's indebtedness shall be paid in full, or until this Agreement shall be terminated in the manner provided above, whichever is the last to occur.

CONDITIONS PRECEDENT TO EACH ADVANCE. Lender's obligation to make the initial Advance and each subsequent Advance under this Agreement shall be subject to the fulfillment to Lender's satisfaction of all of the conditions set forth in this Agreement and in the Related Documents.

Approval of Contractors, Subcontractors, and Materialmen. Lender shall have approved a list of all contractors employed in connection with the construction of the improvements, showing the name, address, and telephone number of each contractor, a general description of the nature of the work to be done, the labor and materials to be supplied, the names of materialmen, if known, and the approximate dollar value of the labor, work, or materials with respect to each contractor or materialman. Lender shall have the right to communicate with any person to verify the facts disclosed by the list or by any application for any Advance, or for any other purpose.

Plans, Specifications, and Permits. Lender shall have received and accepted a complete set of written Plans and Specifications setting forth all improvements for the Project, and Borrower shall have furnished to Lender copies of all permits and requisite approvals of any governmental body necessary for the construction and use of the Project.

Architect's and Construction Contracts. Borrower shall have furnished in form and substance satisfactory to Lender an executed copy of the Architect's Contract and an executed copy of the Construction Contract.

Related and Support Documents. Borrower shall provide to Lender in form satisfactory to Lender the following support documents for the Loan: **Lien and Completion Bond, Assignment of Architect's Contract, Architect's Certificate, Assignment of Construction Contract and Completion Guaranty.**

Budget and Schedule of Estimated Advances. Lender shall have approved detailed budget and cash flow projections of total Project costs and a schedule of the estimated amount and time of disbursements of each Advance.

Borrower's Authorization. Borrower shall have provided in form and substance satisfactory to Lender properly certified resolutions, duly authorizing the consummation of the Project and duly authorizing the execution and delivery of this Agreement, the Note and the Related Documents. In addition, Borrower shall have provided such other resolutions, authorizations, documents and instruments as Lender or its counsel, in their sole discretion, may require.

Bond. If requested by Lender, Borrower shall have furnished a performance and payment bond in an amount equal to 100% of the amount of the Construction Contract, as well as a materialmen's and mechanics' payment bond, with such riders and supplements as Lender may require, each in form and substance satisfactory to Lender, naming the General Contractor as principal and Lender as an additional obligee.

Appraisal. If required by Lender, an appraisal shall be prepared for the Property, at Borrower's expense, which in form and substance shall be satisfactory to Lender, in Lender's sole discretion, including applicable regulatory requirements.

Plans and Specifications. If requested by Lender, Borrower shall have assigned to Lender on Lender's forms the Plans and Specifications for the Project.

Environmental Report. If requested by Lender, Borrower shall have furnished to Lender, at Borrower's expense, an environmental report and certificate on the Property in form and substance satisfactory to Lender, prepared by an engineer or other expert satisfactory to Lender stating that the Property complies with all applicable provisions and requirements of the "Hazardous Substances" paragraph set forth in this Agreement.

Soil Report. If requested by Lender, Borrower shall have furnished to Lender, at Borrower's expense, a soil report for the Property in form and substance satisfactory to Lender, prepared by a registered engineer satisfactory to Lender stating that the Property is free from soil or other geological conditions that would preclude its use or development as contemplated without extra expense for precautionary, corrective or remedial measures.

Survey. If requested by Lender, Borrower shall have furnished to Lender a survey of recent date, prepared and certified by a qualified surveyor and providing that the improvements, if constructed in accordance with the Plans and Specifications, shall lie wholly within the boundaries of the Collateral without encroachment or violation of any zoning ordinances, building codes or regulations, or setback requirements, together with such other information as Lender in its sole discretion may require.

Zoning. Borrower shall have furnished evidence satisfactory to Lender that the Collateral is duly and validly zoned for the construction, maintenance, and operation of the Project.

Title Insurance. Borrower shall have provided to Lender an ALTA Lender's extended coverage policy of title insurance with such endorsements as Lender may require, issued by a title insurance company acceptable to Lender and in a form, amount, and content satisfactory to Lender, insuring or agreeing to insure that Lender's security agreement or other security document on the Property is or will be upon recordation a valid first lien on the Property free and clear of all defects, liens, encumbrances, and exceptions except those as specifically accepted by Lender in writing. If requested by Lender, Borrower shall provide to Lender, at Borrower's expense, a foundation endorsement to the title policy upon the completion of each foundation for the improvements, showing no encroachments, and upon completion an endorsement which insures the lien-free completion of the improvements.

Insurance. Unless waived by Lender in writing, Borrower shall have delivered to Lender the following insurance policies or evidence thereof: (a) an all risks course of construction insurance policy (builder's risk), with extended coverage covering the improvements issued in an amount and by a company acceptable to Lender, containing a loss payable or other endorsement satisfactory to Lender insuring Lender as mortgagee, together with such other endorsements as may be required by Lender, including stipulations that coverages will not be cancelled or diminished without at least thirty (30) days prior written notice to Lender; (b) owners and General Contractor general liability insurance, public liability and workmen's compensation insurance; (c) flood insurance if required by Lender or applicable law; and (d) all other insurance required by this Agreement or by the Related Documents.

Workers' Compensation Coverage. Provide to Lender proof of the General Contractor's compliance with all applicable workers' compensation laws and regulations with regard to all work performed on the Project.

Payment of Fees and Expenses. Borrower shall have paid to Lender all fees, charges, and other expenses which are then due and payable as specified in this Agreement or any Related Document.

Satisfactory Construction. All work usually done at the stage of construction for which disbursement is requested shall have been done in a good and workmanlike manner and all materials and fixtures usually furnished and installed at that stage of construction shall have been furnished and installed, all in compliance with the Plans and Specifications. Borrower shall also have furnished to Lender such proofs as Lender may require to establish the progress of the work, compliance with applicable laws, freedom of the Property from liens, and the basis for the requested disbursement.

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Certification. Borrower shall have furnished to Lender a certification by an engineer, architect, or other qualified inspector acceptable to Lender that the construction of the Improvements has complied and will continue to comply with all applicable statutes, ordinances, codes, regulations, and similar requirements.

Lien Waivers. Borrower shall have obtained and attached to each application for an Advance, including the Advance to cover final payment to the General Contractor, executed acknowledgments of payments of all sums due and releases of mechanic's and materialmen's liens, satisfactory to Lender, from any party having lien rights, which acknowledgments of payment and releases of liens shall cover all work, labor, equipment, materials done, supplied, performed, or furnished prior to such application for an Advance.

No Event of Default. There shall not exist at the time of any Advance a condition which would constitute an Event of Default under this Agreement or under any Related Document.

LOAN AGREEMENT EXHIBIT. See Exhibits "A" and "B" attached hereto and made a part hereof for additional covenants, provisions, and conditions of disbursements.

Initials


DISBURSEMENT OF LOAN FUNDS. The following provisions relate to the disbursement of funds from the Loan Fund.

Application for Advances. Each application shall be stated on a standard AIA payment request form or other form approved by Lender, executed by Borrower, and supported by such evidence as Lender shall reasonably require. Borrower shall apply only for disbursement with respect to work actually done by the General Contractor and for materials and equipment actually incorporated into the Project. Each application for an Advance shall be deemed a certification of Borrower that as of the date of such application, all representations and warranties contained in the Agreement are true and correct, and that Borrower is in compliance with all of the provisions of this Agreement.

Payments. At the sole option of Lender, Advances may be paid in the joint names of Borrower and the General Contractor, subcontractor(s), or supplier(s) in payment of sums due under the Construction Contract. At its sole option, Lender may directly pay the General Contractor and any subcontractors or other parties the sums due under the Construction Contract. Borrower appoints Lender as its attorney-in-fact to make such payments. This power shall be deemed coupled with an interest, shall be irrevocable, and shall survive an Event of Default under this Agreement.

Projected Cost Overruns. If Lender at any time determines in its sole discretion that the amount in the Loan Fund is insufficient, or will be insufficient, to complete fully and to pay for the Project, then within ten (10) days after receipt of a written request from Lender, Borrower shall deposit in the Loan Fund an amount equal to the deficiency as determined by Lender. The judgment and determination of Lender under this section shall be final and conclusive. Any such amounts deposited by Borrower shall be disbursed prior to any Loan proceeds.

Final Payment to General Contractor. Upon completion of the Project and fulfillment of the Construction Contract to the satisfaction of Lender and provided sufficient Loan Funds are available, Lender shall make an Advance to cover the final payment due to the General Contractor upon delivery to Lender of endorsements to the ALTA title insurance policy following the posting of the completion notice, as provided under applicable law. Construction shall not be deemed complete for purposes of final disbursement unless and until Lender shall have received all of the following:

- (1) Evidence satisfactory to Lender that all work under the Construction Contract requiring inspection by any governmental authority with jurisdiction has been duly inspected and approved by such authority, that a certificate of occupancy has been issued, and that all parties performing work have been paid, or will be paid, for such work;
- (2) A certification by an engineer, architect, or other qualified inspector acceptable to Lender that the Improvements have been completed substantially in accordance with the Plans and Specifications and the Construction Contract, that direct connection has been made to all utilities set forth in the Plans and Specifications, and that the Project is ready for occupancy; and
- (3) Acceptance of the completed Improvements by Lender and Borrower.

Construction Default. If Borrower fails in any respect to comply with the provisions of this Agreement or if construction ceases before completion regardless of the reason, Lender, at its option, may refuse to make further Advances, may accelerate the indebtedness under the terms of the Note, and without thereby impairing any of its rights, powers, or privileges, may enter into possession of the construction site and perform or cause to be performed any and all work and labor necessary to complete the improvements, substantially in accordance with the Plans and Specifications.

Damage or Destruction. If any of the Collateral or Improvements is damaged or destroyed by casualty of any nature, within sixty (60) days thereafter Borrower shall restore the Collateral and Improvements to the condition in which they were before such damage or destruction with funds other than those in the Loan Fund. Lender shall not be obligated to make disbursements under this Agreement until such restoration has been accomplished.

Adequate Security. When any event occurs that Lender determines may endanger completion of the Project or the fulfillment of any condition or covenant in this Agreement, Lender may require Borrower to furnish, within ten (10) days after delivery of a written request, adequate security to eliminate, reduce, or indemnify Lender against, such danger. In addition, upon such occurrence, Lender in its sole discretion may advance funds or agree to undertake to advance funds to any party to eliminate, reduce, or indemnify Lender against, such danger or to complete the Project. All sums paid by Lender pursuant to such agreements or undertakings shall be for Borrower's account and shall be without prejudice to Borrower's rights, if any, to receive such funds from the party to whom paid. All sums expended by Lender in the exercise of its option to complete the Project or protect Lender's interests shall be payable to Lender on demand together with interest from the date of the Advance at the rate applicable to the Loan. In addition, any Advance of funds under this Agreement, including without limitation direct disbursements to the General Contractor or other parties in payment of sums due under the Construction Contract, shall be deemed to have been expended by or on behalf of Borrower and to have been secured by Lender's mortgage or deed of trust, if any, on the Collateral.

CESSATION OF ADVANCES. If Lender has made any commitment to make any Loan to Borrower, whether under this Agreement or under any other agreement, Lender shall have no obligation to make Loan Advances or to disburse Loan proceeds if: (A) Borrower or any Guarantor is in default under the terms of this Agreement or any of the Related Documents or any other agreement that Borrower or any Guarantor has with Lender; (B) Borrower or any Guarantor dies, becomes incompetent or becomes insolvent; files a petition in bankruptcy or similar proceedings, or is adjudged a bankrupt; (C) there occurs a material adverse change in Borrower's financial condition, in the financial condition of any Guarantor, or in the value of any Collateral securing any Loan; or (D) any Guarantor seeks, claims or otherwise attempts to limit, modify or revoke such Guarantor's guaranty of the Loan or any other loan with Lender; or (E) Lender in good faith deems itself insecure, even though no Event of Default shall have occurred.

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LIMITATION OF RESPONSIBILITY. The making of any Advance by Lender shall not constitute or be interpreted as either (A) an approval or acceptance by Lender of the work done through the date of the Advance, or (B) a representation or indemnity by Lender to any party against any deficiency or defect in the work or against any breach of any contract. Inspections and approvals of the Plans and Specifications, the Improvements, the workmanship and materials used in the Improvements, and the exercise of any other right of inspection, approval, or inquiry granted to Lender in this Agreement are acknowledged to be solely for the protection of Lender's interests, and under no circumstances shall they be construed to impose any responsibility or liability of any nature whatsoever on Lender to any party. Neither Borrower nor any contractor, subcontractor, materialman, laborer, or any other person shall rely, or have any right to rely, upon Lender's determination of the appropriateness of any Advance. No disbursement or approval by Lender shall constitute a representation by Lender as to the nature of the Project, its construction, or its intended use for Borrower or for any other person, nor shall it constitute an indemnity by Lender to Borrower or to any other person against any deficiency or defects in the Project or against any breach of any contract.

AFFIRMATIVE COVENANTS. Borrower covenants and agrees with Lender that, so long as this Agreement remains in effect, Borrower will:

Notices of Claims and Litigation. Promptly inform Lender in writing of (1) all material adverse changes in Borrower's financial condition, and (2) all existing and all threatened litigation, claims, investigations, administrative proceedings or similar actions affecting Borrower or any Guarantor which could materially affect the financial condition of Borrower or the financial condition of any Guarantor.

Financial Records. Maintain its books and records in accordance with GAAP, applied on a consistent basis, and permit Lender to examine and audit Borrower's books and records at all reasonable times.

Financial Statements. Furnish Lender with the following:

Interim Statements. As soon as available, but in no event later than thirty (30) days after the end of each fiscal quarter, Borrower's balance sheet and profit and loss statement for the period ended, prepared by Borrower.

Tax Returns. As soon as available, but in no event later than thirty (30) days after the applicable filing date for the tax reporting period ended, Borrower's Federal and other governmental tax returns, prepared by Borrower.

All financial reports required to be provided under this Agreement shall be prepared in accordance with GAAP, applied on a consistent basis, and certified by Borrower as being true and correct.

Additional Information. Furnish such additional information and statements, lists of assets and liabilities, agings of receivables and payables, inventory schedules, budgets, forecasts, tax returns, and other reports with respect to Borrower's financial condition and business operations as Lender may request from time to time.

Other Agreements. Comply with all terms and conditions of all other agreements, whether now or hereafter existing, between Borrower and any other party and notify Lender immediately in writing of any default in connection with any other such agreements.

Insurance. Maintain fire and other risk insurance, hail, federal crop insurance, public liability insurance, and such other insurance as Lender may require with respect to Borrower's properties and operations, in form, amounts, coverages and with insurance companies acceptable to Lender. Borrower, upon request of Lender, will deliver to Lender from time to time the policies or certificates of insurance in form satisfactory to Lender, including stipulations that coverages will not be cancelled or diminished without at least thirty (30) days prior written notice to Lender. Each insurance policy also shall include an endorsement providing that coverage in favor of Lender will not be impaired in any way by any act, omission or default of Borrower or any other person. In connection with all policies covering assets in which Lender holds or is offered a security interest for the Loans, Borrower will provide Lender with such lender's loss payable or other endorsements as Lender may require.

Insurance Reports. Furnish to Lender, upon request of Lender, reports on each existing insurance policy showing such information as Lender may reasonably request, including without limitation the following: (1) the name of the insurer; (2) the risks insured; (3) the amount of the policy; (4) the properties insured; (5) the then current property values on the basis of which insurance has been obtained, and the manner of determining those values; and (6) the expiration date of the policy. In addition, upon request of Lender (however not more often than annually), Borrower will have an independent appraiser satisfactory to Lender determine, as applicable, the actual cash value or replacement cost of any Collateral. The cost of such appraisal shall be paid by Borrower.

Guaranties. Prior to disbursement of any Loan proceeds, furnish executed guaranties of the Loans in favor of Lender, executed by the guarantors named below, on Lender's forms, and in the amounts and under the conditions set forth in those guaranties.

<u>Names of Guarantors</u>	<u>Amounts</u>
Thompson/McCarthy Coffee Co.	Unlimited
James L. Thompson	Unlimited
Janice L. McCarthy	Unlimited
James L. Thompson Living Trust Dated June 16, 1997	Unlimited
Janice L. McCarthy Trust Dated September 28, 2005	Unlimited

Loan Fees, Charges and Expenses. Whether or not the Project is completed, Borrower also shall pay upon demand all out-of-pocket expenses incurred by Lender in connection with the preparation of loan documents and the making of the Loan, including, without limitation, all closing costs, fees, and disbursements, all expenses of Lender's legal counsel, and all title examination fees, title insurance premiums, appraisal fees, survey costs, required fees, and filing and recording fees.

Loan Proceeds. Use the Loan Funds solely for payment of bills and expenses directly related to the Project.

Taxes, Charges and Liens. Pay and discharge when due all of its indebtedness and obligations, including without limitation all assessments, taxes, governmental charges, levies and liens, of every kind and nature, imposed upon Borrower or its properties, income, or profits, prior to the date on which penalties would attach, and all lawful claims that, if unpaid, might become a lien or charge upon any of Borrower's properties, income, or profits. Provided however, Borrower will not be required to pay and discharge any such assessment, tax, charge, levy, lien or claim so long as (1) the legality of the same shall be contested in good faith by appropriate proceedings, and (2) Borrower shall have established on Borrower's books adequate reserves with respect to such contested assessment, tax, charge, levy, lien, or claim in accordance with GAAP.

Performance. Perform and comply, in a timely manner, with all terms, conditions, and provisions set forth in this Agreement, in the Related Documents, and in all other instruments and agreements between Borrower and Lender. Borrower shall notify Lender immediately in writing of any default in connection with any agreement.

Inspection. Permit employees or agents of Lender at any reasonable time to inspect any and all Collateral for the Loan or Loans and Borrower's other properties and to examine or audit Borrower's books, accounts, and records and to make copies and memoranda of

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Borrower's books, accounts, and records. If Borrower now or at any time hereafter maintains any records (including without limitation computer generated records and computer software programs for the generation of such records) in the possession of a third party, Borrower, upon request of Lender, shall notify such party to permit Lender free access to such records at all reasonable times and to provide Lender with copies of any records it may request, all at Borrower's expense.

Construction of the Project. Commence construction of the Project no later than June 1, 2012, and cause the Improvements to be constructed and equipped in a diligent and orderly manner and in strict accordance with the Plans and Specifications approved by Lender, the Construction Contract, and all applicable laws, ordinances, codes, regulations, and rights of adjoining or concurrent property owners. Borrower agrees to complete the Project for purposes of final payment to the General Contractor on or before December 1, 2012, regardless of the reason for any delay.

Defects. Upon demand of Lender, promptly correct any defect in the Improvements or any departure from the Plans and Specifications not approved by Lender in writing before further work shall be done upon the portion of the Improvements affected.

Project Claims and Litigation. Promptly inform Lender of (1) all material adverse changes in the financial condition of the General Contractor; (2) any litigation and claims, actual or threatened, affecting the Project or the General Contractor, which could materially affect the successful completion of the Project or the ability of the General Contractor to complete the Project as agreed; and (3) any condition or event which constitutes a breach or default under any of the Related Documents or any contract related to the Project.

Payment of Claims and Removal of Liens. (1) Cause all claims for labor done and materials and services furnished in connection with the Improvements to be fully paid and discharged in a timely manner, (2) diligently file or procure the filing of a valid notice of completion of the Improvements, or such comparable document as may be permitted under applicable lien laws, (3) diligently file or procure the filing of a notice of cessation, or such comparable document as may be permitted under applicable lien laws, upon the happening of cessation of labor on the Improvements for a continuous period of thirty (30) days or more, and (4) take all reasonable steps necessary to remove all claims of liens against the Collateral, the Improvements or any part of the Collateral or Improvements, or any rights or interests appurtenant to the Collateral or Improvements. Upon Lender's request, Borrower shall make such demands or claims upon or against laborers, materialmen, subcontractors, or other persons who have furnished or claim to have furnished labor, services, or materials in connection with the Improvements, which demands or claims shall under the laws of the State of Arizona require diligent assertions of lien claims upon penalty of loss or waiver thereof. Borrower shall, within ten (10) days after the filing of any claim of lien that is disputed or contested by Borrower, provide Lender with a surety bond issued by a surety acceptable to Lender sufficient to release the claim of lien or deposit with Lender an amount satisfactory to Lender for the possibility that the contest will be unsuccessful. If Borrower fails to remove any lien on the Collateral or Improvements or provide a bond or deposit pursuant to this provision, Lender may pay such lien, or may contest the validity of the lien, and Borrower shall pay all costs and expenses of such contest, including Lender's reasonable attorneys' fees.

Taxes and Claims. Pay and discharge when due all of Borrower's indebtedness, obligations, and claims that, if unpaid, might become a lien or charge upon the Collateral or Improvements; provided, however, that Borrower shall not be required to pay and discharge any such indebtedness, obligation, or claim so long as (1) its legality shall be contested in good faith by appropriate proceedings, (2) the indebtedness, obligation, or claim does not become a lien or charge upon the Collateral or Improvements, and (3) Borrower shall have established on its books adequate reserves with respect to the amount contested in accordance with GAAP. If the indebtedness, obligation, or claim does become a lien or charge upon the Collateral or Improvements, Borrower shall remove the lien or charge as provided in the preceding paragraph.

Environmental Studies. Promptly conduct and complete, at Borrower's expense, all such investigations, studies, samplings and testings as may be requested by Lender or any governmental authority relative to any substance, or any waste or by-product of any substance defined as toxic or a hazardous substance under applicable federal, state, or local law, rule, regulation, order or directive, at or affecting any property or any facility owned, leased or used by Borrower.

Additional Assurances. Make, execute and deliver to Lender such promissory notes, mortgages, deeds of trust, security agreements, assignments, financing statements, instruments, documents and other agreements as Lender or its attorneys may reasonably request to evidence and secure the Loans and to perfect all Security Interests in the Collateral and Improvements.

RECOVERY OF ADDITIONAL COSTS. If the imposition of or any change in any law, rule, regulation or guideline, or the interpretation or application of any thereof by any court or administrative or governmental authority (including any request or policy not having the force of law) shall impose, modify or make applicable any taxes (except federal, state or local income or franchise taxes imposed on Lender), reserve requirements, capital adequacy requirements or other obligations which would (A) increase the cost to Lender for extending or maintaining the credit facilities to which this Agreement relates, (B) reduce the amounts payable to Lender under this Agreement or the Related Documents, or (C) reduce the rate of return on Lender's capital as a consequence of Lender's obligations with respect to the credit facilities to which this Agreement relates, then Borrower agrees to pay Lender such additional amounts as will compensate Lender therefor, within five (5) days after Lender's written demand for such payment, which demand shall be accompanied by an explanation of such imposition or charge and a calculation in reasonable detail of the additional amounts payable by Borrower, which explanation and calculations shall be conclusive in the absence of manifest error.

LENDER'S EXPENDITURES. If any action or proceeding is commenced that would materially affect Lender's interest in the Collateral or if Borrower fails to comply with any provision of this Agreement or any Related Documents, including but not limited to Borrower's failure to discharge or pay when due any amounts Borrower is required to discharge or pay under this Agreement or any Related Documents, Lender on Borrower's behalf may (but shall not be obligated to) take any action that Lender deems appropriate, to the extent permitted by applicable law, including but not limited to discharging or paying all taxes, liens, security interests, encumbrances and other claims, at any time levied or placed on any Collateral and paying all costs for insuring, maintaining and preserving any Collateral. All such expenditures incurred or paid by Lender for such purposes will then bear interest at the rate charged under the Note from the date incurred or paid by Lender to the date of repayment by Borrower. All such expenses will become a part of the indebtedness and, at Lender's option, will (A) be payable on demand; (B) be added to the balance of the Note and be apportioned among and be payable with any installment payments to become due during either (1) the term of any applicable insurance policy; or (2) the remaining term of the Note; or (C) be treated as a balloon payment which will be due and payable at the Note's maturity.

GENERAL PROJECT PROVISIONS. The following provisions relate to the construction and completion of the Project:

Change Orders. All requests for changes in the Plans and Specifications, other than minor changes involving no extra cost, must be in writing, signed by Borrower and the architect, and delivered to Lender for its approval. Borrower will not permit the performance of any work pursuant to any change order or modification of the Construction Contract or any subcontract without the written approval of Lender. Borrower will obtain any required permits or authorizations from governmental authorities having jurisdiction before approving or requesting a new change order.

Purchase of Materials; Conditional Sales Contracts. No materials, equipment, fixtures, or articles of personal property placed in or incorporated into the Project shall be purchased or installed under any Security Agreement or other agreement whereby the seller reserves

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or purports to reserve title or the right of removal or repossession, or the right to consider such items as personal property after their incorporation into the Project, unless otherwise authorized by Lender in writing.

Lender's Right of Entry and Inspection. Lender and its agents shall have at all times the right of entry and free access to the Property and the right to inspect all work done, labor performed, and materials furnished with respect to the Project. Lender shall have unrestricted access to and the right to copy all records, accounting books, contracts, subcontracts, bills, statements, vouchers, and supporting documents of Borrower relating in any way to the Project.

Lender's Right to Stop Work. If Lender in good faith determines that any work or materials do not conform to the approved Plans and Specifications or sound building practices, or otherwise depart from any of the requirements of this Agreement, Lender may require the work to be stopped and withhold disbursements until the matter is corrected. In such event, Borrower will promptly correct the work to Lender's satisfaction. No such action by Lender will affect Borrower's obligation to complete the improvements on or before the Completion Date. Lender is under no duty to supervise or inspect the construction or examine any books and records. Any inspection or examination by Lender is for the sole purpose of protecting Lender's security and preserving Lender's rights under this Agreement. No default of Borrower will be waived by any inspection by Lender. In no event will any inspection by Lender be a representation that there has been or will be compliance with the Plans and Specifications or that the construction is free from defective materials or workmanship.

Indemnity. Borrower shall indemnify, defend, and hold Lender harmless from any and all claims asserted against Lender or the Property by any person, entity, or governmental body, or arising out of or in connection with the Property, Improvements, or Project. Lender shall be entitled to appear in any proceedings to defend itself against such claims, and all costs and expenses attorneys' fees incurred by Lender in connection with such defense shall be paid by Borrower to Lender. Lender shall, in its sole discretion, be entitled to settle or compromise any asserted claims against it, and such settlement shall be binding upon Borrower for purposes of this indemnification. All amounts paid by Lender under this paragraph shall be secured by Lender's security agreement or mortgage or deed of trust, if any, on the Property, shall be deemed an additional principal Advance under the Loan, payable upon demand, and shall bear interest at the rate applicable to the Loan.

Publicity. Lender may display a sign at the construction site informing the public that Lender is the construction lender for the Project. Lender may obtain other publicity in connection with the Project through press releases and participation in ground-breaking and opening ceremonies and similar events.

Actions. Lender shall have the right to commence, appear in, or defend any action or proceeding purporting to affect the rights, duties, or liabilities of the parties to this Agreement, or the disbursement of funds from the Loan Fund. In connection with this right, Lender may incur and pay reasonable costs, expenses and attorneys' fees. Borrower covenants to pay to Lender on demand all such expenses, together with interest from the date Lender incurs the expense at the rate specified in the Note, and Lender is authorized to disburse funds from the Loan Fund for such purposes.

RIGHT OF SETOFF. To the extent permitted by applicable law, Lender reserves a right of setoff in all Borrower's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Borrower holds jointly with someone else and all accounts Borrower may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. Borrower authorizes Lender, to the extent permitted by applicable law, to charge or setoff all sums owing on the indebtedness against any and all such accounts.

DEFAULT. Each of the following shall constitute an Event of Default under this Agreement:

Payment Default. Borrower fails to make any payment when due under the Loan.

Other Defaults. Borrower fails to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Borrower.

Default in Favor of Third Parties. Borrower or any Grantor defaults under any loan, extension of credit, security agreement, purchase or sales agreement, or any other agreement, in favor of any other creditor or person that may materially affect any of Borrower's or any Grantor's property or Borrower's or any Grantor's ability to repay the Loans or perform their respective obligations under this Agreement or any of the Related Documents.

False Statements. Any warranty, representation or statement made or furnished to Lender by Borrower or on Borrower's behalf under this Agreement or the Related Documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

Death or Insolvency. The dissolution of Borrower (regardless of whether election to continue is made), any member withdraws from Borrower, or any other termination of Borrower's existence as a going business or the death of any member, the insolvency of Borrower, the appointment of a receiver for any part of Borrower's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Borrower.

Defective Collateralization. This Agreement or any of the Related Documents ceases to be in full force and effect (including failure of any collateral document to create a valid and perfected security interest or lien) at any time and for any reason.

Creditor or Forfeiture Proceedings. Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Borrower or by any governmental agency against any collateral securing the Loan. This includes a garnishment of any of Borrower's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Borrower as to the validity or reasonableness of the claim which is the basis of the creditor or forfeiture proceeding and if Borrower gives Lender written notice of the creditor or forfeiture proceeding and deposits with Lender monies or a surety bond for the creditor or forfeiture proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

Breach of Construction Contract. The Improvements are not constructed in accordance with the Plans and Specifications or in accordance with the terms of the Construction Contract.

Cessation of Construction. Prior to the completion of construction of the Improvements and equipping of the Project, the construction of the Improvements or the equipping of the Project is abandoned or work thereon ceases for a period of more than ten (10) days for any reason, or the Improvements are not completed for purposes of final payment to the General Contractor prior to December 1, 2012, regardless of the reason for the delay.

Transfer of Property. Sale, transfer, hypothecation, assignment, or conveyance of the Property or the Improvements or any portion thereof or interest therein by Borrower or any Borrower without Lender's prior written consent.

Condemnation. All or any material portion of the Collateral is condemned, seized, or appropriated without compensation, and Borrower does not within thirty (30) days after such condemnation, seizure, or appropriation, initiate and diligently prosecute appropriate action to

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contest in good faith the validity of such condemnation, seizure, or appropriation.

Events Affecting Guarantor. Any of the preceding events occurs with respect to any Guarantor of any of the indebtedness or any Guarantor dies or becomes incompetent, or revokes or disputes the validity of, or liability under, any Guaranty of the indebtedness.

Adverse Change. A material adverse change occurs in Borrower's financial condition, or Lender believes the prospect of payment or performance of the Loan is impaired.

Insecurity. Lender in good faith believes itself insecure.

Right to Cure. If any default, other than a default on indebtedness, is curable and if Borrower or Grantor, as the case may be, has not been given a notice of a similar default within the preceding twelve (12) months, it may be cured if Borrower or Grantor, as the case may be, after Lender sends written notice to Borrower or Grantor, as the case may be, demanding cure of such default: (1) cure the default within thirty (30) days; or (2) if the cure requires more than thirty (30) days, immediately initiate steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continue and complete all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

EFFECT OF AN EVENT OF DEFAULT; REMEDIES. Upon the occurrence of any Event of Default and at any time thereafter, Lender may, at its option, but without any obligation to do so, and in addition to any other right Lender without notice to Borrower may have, do any one or more of the following without notice to Borrower: (a) Cancel this Agreement; (b) Institute appropriate proceedings to enforce the performance of this Agreement; (c) Withhold further disbursement of Loan Funds; (d) Expend funds necessary to remedy the default; (e) Take possession of the Property and continue construction of the Project; (f) Accelerate maturity of the Note and/or indebtedness and demand payment of all sums due under the Note and/or indebtedness; (g) Bring an action on the Note and/or indebtedness; (h) Foreclose Lender's security agreement or mortgage or deed of trust, if any, on the Property in any manner available under law; and (i) Exercise any other right or remedy which it has under the Note or Related Documents, or which is otherwise available at law or in equity or by statute.

COMPLETION OF IMPROVEMENTS BY LENDER. If Lender takes possession of the Collateral, it may take any and all actions necessary in its judgment to complete construction of the Improvements, including but not limited to making changes in the Plans and Specifications, work, or materials and entering into, modifying or terminating any contractual arrangements, subject to Lender's right at any time to discontinue any work without liability. If Lender elects to complete the Improvements, it will not assume any liability to Borrower or to any other person for completing the Improvements or for the manner or quality of construction of the Improvements, and Borrower expressly waives any such liability. Borrower irrevocably appoints Lender as its attorney-in-fact, with full power of substitution, to complete the Improvements, at Lender's option, either in Borrower's name or in its own name. In any event, all sums expended by Lender in completing the construction of the Improvements will be considered to have been disbursed to Borrower and will be secured by the Collateral for the Loan. Any such sums that cause the principal amount of the Loan to exceed the face amount of the Note will be considered to be an additional Loan to Borrower, bearing interest at the Note rate and being secured by the Collateral. For these purposes, Borrower assigns to Lender all of its right, title and interest in and to the Project Documents; however Lender will not have any obligation under the Project Documents unless Lender expressly hereafter agrees to assume such obligations in writing. Lender will have the right to exercise any rights of Borrower under the Project Documents upon the occurrence of an Event of Default. Except as may be prohibited by applicable law, all of Lender's rights and remedies, whether evidenced by this Agreement or by any other writing, shall be cumulative and may be exercised singularly or concurrently.

ADDITIONAL DOCUMENTS. Borrower shall provide Lender with the following additional documents:

Articles of Organization and Company Resolutions. Borrower has provided or will provide Lender with a certified copy of Borrower's Articles of Organization, together with a certified copy of resolutions properly adopted by the members of the company, under which the members authorized one or more designated members or employees to execute this Agreement, the Note and any and all Security Agreements directly or indirectly securing repayment of the same, and to consummate the borrowings and other transactions as contemplated under this Agreement, and to consent to the remedies following any default by Borrower as provided in this Agreement and in any Security Agreements.

Opinion of Counsel. When required by Lender, Borrower has provided or will provide Lender with an opinion of Borrower's counsel certifying to and that: (1) Borrower's Note, any Security Agreements and this Agreement constitute valid and binding obligations on Borrower's part that are enforceable in accordance with their respective terms; (2) Borrower is validly existing and in good standing; (3) Borrower has authority to enter into this Agreement and to consummate the transactions contemplated under this Agreement; and (4) such other matters as may have been requested by Lender or by Lender's counsel.

MISCELLANEOUS PROVISIONS. The following miscellaneous provisions are a part of this Agreement:

Amendments. This Agreement, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

Attorneys' Fees; Expenses. Borrower agrees to pay upon demand all of Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Agreement. Lender may hire or pay someone else to help enforce this Agreement, and Borrower shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's attorneys' fees and legal expenses whether or not there is a lawsuit, including attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services. However, Borrower will only pay attorneys' fees of an attorney not Lender's salaried employee, to whom the matter is referred after Borrower's default. Borrower also shall pay all court costs and such additional fees as may be directed by the court.

Authority to File Notices. Borrower appoints and designates Lender as its attorney-in-fact to file for the record any notice that Lender deems necessary to protect its interest under this Agreement. This power shall be deemed coupled with an interest and shall be irrevocable while any sum or performance remains due and owing under any of the Related Documents.

Caption Headings. Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of this Agreement.

Applicable Law. The Loan secured by this lien was made under a United States Small Business Administration (SBA) nationwide program which uses tax dollars to assist small business owners. If the United States is seeking to enforce this document, then under SBA regulations: (a) When SBA is the holder of the Note, this document and all documents evidencing or securing this Loan will be construed in accordance with federal law. (b) Lender or SBA may use local or state procedures for purposes such as filing papers, recording documents, giving notice, foreclosing liens, and other purposes. By using these procedures, SBA does not waive any federal immunity from local or state control, penalty, tax or liability. No Borrower or Guarantor may claim or assert against SBA any local or state law to deny any obligation of Borrower, or defeat any claim of SBA with respect to this Loan. Any clause in this document requiring arbitration is not enforceable when SBA is the holder of the Note secured by this Instrument.

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Indemnification of Lender. Borrower agrees to indemnify, to defend and to save and hold Lender harmless from any and all claims, suits, obligations, damages, losses, costs and expenses (including, without limitation, Lender's attorneys' fees, as well as Lender's architect's and engineering fees), demands, liabilities, penalties, fines and forfeitures of any nature whatsoever that may be asserted against or incurred by Lender, its officers, directors, employees, and agents arising out of, relating to, or in any manner occasioned by this Agreement and the exercise of the rights and remedies granted Lender under this. The foregoing indemnity provisions shall survive the cancellation of this Agreement as to all matters arising or accruing prior to such cancellation and the foregoing indemnity shall survive in the event that Lender elects to exercise any of the remedies as provided under this Agreement following default hereunder.

Consent to Loan Participation. Borrower agrees and consents to Lender's sale or transfer, whether now or later, of one or more participation interests in the Loan to one or more purchasers, whether related or unrelated to Lender. Lender may provide, without any limitation whatsoever, to any one or more purchasers, or potential purchasers, any information or knowledge Lender may have about Borrower or about any other matter relating to the Loan, and Borrower hereby waives any rights to privacy Borrower may have with respect to such matters. Borrower additionally waives any and all notices of sale of participation interests, as well as all notices of any repurchase of such participation interests. Borrower also agrees that the purchasers of any such participation interests will be considered as the absolute owners of such interests in the Loan and will have all the rights granted under the participation agreement or agreements governing the sale of such participation interests. Borrower further waives all rights of offset or counterclaim that it may have now or later against Lender or against any purchaser of such a participation interest and unconditionally agrees that either Lender or such purchaser may enforce Borrower's obligation under the Loan irrespective of the failure or insolvency of any holder of any interest in the Loan. Borrower further agrees that the purchaser of any such participation interests may enforce its interests irrespective of any personal claims or defenses that Borrower may have against Lender.

No Waiver by Lender. Lender shall not be deemed to have waived any rights under this Agreement unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by Lender of a provision of this Agreement shall not prejudice or constitute a waiver of Lender's right otherwise to demand strict compliance with that provision or any other provision of this Agreement. No prior waiver by Lender, nor any course of dealing between Lender and Borrower, or between Lender and any Grantor, shall constitute a waiver of any of Lender's rights or of any of Borrower's or any Grantor's obligations as to any future transactions. Whenever the consent of Lender is required under this Agreement, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the sole discretion of Lender.

Severability. If a court of competent jurisdiction finds any provision of this Agreement to be illegal, invalid, or unenforceable as to any circumstance, that finding shall not make the offending provision illegal, invalid, or unenforceable as to any other circumstance. If feasible, the offending provision shall be considered modified so that it becomes legal, valid and enforceable. If the offending provision cannot be so modified, it shall be considered deleted from this Agreement. Unless otherwise required by law, the illegality, invalidity, or unenforceability of any provision of this Agreement shall not affect the legality, validity or enforceability of any other provision of this Agreement.

Successors and Assigns. All covenants and agreements by or on behalf of Borrower contained in this Agreement or any Related Documents shall bind Borrower's successors and assigns and shall inure to the benefit of Lender and its successors and assigns. Borrower shall not, however, have the right to assign Borrower's rights under this Agreement or any interest therein, without the prior written consent of Lender.

Survival of Representations and Warranties. Borrower understands and agrees that in making the Loan, Lender is relying on all representations, warranties, and covenants made by Borrower in this Agreement or in any certificate or other instrument delivered by Borrower to Lender under this Agreement or the Related Documents. Borrower further agrees that regardless of any investigation made by Lender, all such representations, warranties and covenants will survive the making of the Loan and delivery to Lender of the Related Documents, shall be continuing in nature, and shall remain in full force and effect until such time as Borrower's indebtedness shall be paid in full, or until this Agreement shall be terminated in the manner provided above, whichever is the last to occur.

Time is of the Essence. Time is of the essence in the performance of this Agreement.

Waive Jury. All parties to this Agreement hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by any party against any other party.

DEFINITIONS. The following capitalized words and terms shall have the following meanings when used in this Agreement. Unless specifically stated to the contrary, all references to dollar amounts shall mean amounts in lawful money of the United States of America. Words and terms used in the singular shall include the plural, and the plural shall include the singular, as the context may require. Words and terms not otherwise defined in this Agreement shall have the meanings attributed to such terms in the Uniform Commercial Code. Accounting words and terms not otherwise defined in this Agreement shall have the meanings assigned to them in accordance with generally accepted accounting principles as in effect on the date of this Agreement:

Advance. The word "Advance" means a disbursement of Loan funds made, or to be made, to Borrower or on Borrower's behalf on a line of credit or multiple advance basis under the terms and conditions of this Agreement.

Agreement. The word "Agreement" means this Construction Loan Agreement, as this Construction Loan Agreement may be amended or modified from time to time, together with all exhibits and schedules attached to this Construction Loan Agreement from time to time.

Architect's Contract. The words "Architect's Contract" mean the architect's contract between Borrower and the architect for the Project.

Borrower. The word "Borrower" means Thompson/McCarthy DB LLC Glendale Ave./12th Street DB LLC and includes all co-signers and co-makers signing the Note and all their successors and assigns.

Collateral. The word "Collateral" means all property and assets granted as collateral security for a Loan, whether real or personal property, whether granted directly or indirectly, whether granted now or in the future, and whether granted in the form of a security interest, mortgage, collateral mortgage, deed of trust, assignment, pledge, crop pledge, chattel mortgage, collateral chattel mortgage, chattel trust, factor's lien, equipment trust, conditional sale, trust receipt, lien, charge, lien or title retention contract, lease or consignment intended as a security device, or any other security or lien interest whatsoever, whether created by law, contract, or otherwise.

Completion Date. The words "Completion Date" mean December 1, 2012.

Construction Contract. The words "Construction Contract" mean the contract between Borrower and the general contractor for the Project, and any subcontracts with subcontractors, materialmen, laborers, or any other person or entity for performance of work on the Project or the delivery of materials to the Project.

Environmental Laws. The words "Environmental Laws" mean any and all state, federal and local statutes, regulations and ordinances relating to the protection of human health or the environment, including without limitation the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq. ("CERCLA"), the Superfund Amendments and

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Reauthorization Act of 1986, Pub. L. No. 99-499 ("SARA"), the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq., the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, et seq., or other applicable state or federal laws, rules, or regulations adopted pursuant thereto or intended to protect human health or the environment.

Event of Default. The words "Event of Default" mean any of the events of default set forth in this Agreement in the default section of this Agreement.

GAAP. The word "GAAP" means generally accepted accounting principles.

Grantor. The word "Grantor" means each and all of the persons or entities granting a Security Interest in any Collateral for the Loan, including without limitation all Borrowers granting such a Security Interest.

Guarantor. The word "Guarantor" means any guarantor, surety, or accommodation party of any or all of the Loan and any guarantor under a completion guaranty agreement.

Guaranty. The word "Guaranty" means the guaranty from Guarantor to Lender, including without limitation a guaranty of all or part of the Note.

Hazardous Substances. The words "Hazardous Substances" mean materials that, because of their quantity, concentration or physical, chemical or infectious characteristics, may cause or pose a present or potential hazard to human health or the environment when improperly used, treated, stored, disposed of, generated, manufactured, transported or otherwise handled. The words "Hazardous Substances" are used in their very broadest sense and include without limitation any and all hazardous or toxic substances, materials or waste as defined by or listed under the Environmental Laws. The term "Hazardous Substances" also includes, without limitation, petroleum and petroleum by-products or any fraction thereof and asbestos.

Improvements. The word "Improvements" means all existing and future buildings, structures, facilities, fixtures, additions, and similar construction on the Collateral.

Indebtedness. The word "Indebtedness" means the indebtedness evidenced by the Note or Related Documents, including all principal and interest together with all other indebtedness and costs and expenses for which Borrower is responsible under this Agreement or under any of the Related Documents.

Lender. The word "Lender" means RepublicBankAz, N.A., its successors and assigns.

Loan. The word "Loan" means the loan or loans made to Borrower under this Agreement and the Related Documents as described.

Loan Fund. The words "Loan Fund" mean the undisbursed proceeds of the Loan under this Agreement together with any equity funds or other deposits required from Borrower under this Agreement.

Note. The word "Note" means the promissory note dated May 9, 2012, in the original principal amount of \$597,100.00 from Borrower to Lender, together with all renewals of, extensions of, modifications of, refinancings of, consolidations of, and substitutions for the promissory note or agreement.

Plans and Specifications. The words "Plans and Specifications" mean the plans and specifications for the Project which have been submitted to and initialed by Lender, together with such changes and additions as may be approved by Lender in writing.

Project. The word "Project" means the construction project as described in the "Project Description" section of this Agreement.

Project Documents. The words "Project Documents" mean the Plans and Specifications, all studies, data and drawings relating to the Project, whether prepared by or for Borrower, the Construction Contract, the Architect's Contract, and all other contracts and agreements relating to the Project or the construction of the Improvements.

Property. The word "Property" means the property as described in the "Project Description" section of this Agreement.

Real Property. The words "Real Property" mean the real property, interests and rights, as further described in the "Project Description" section of this Agreement.

Related Documents. The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, environmental agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Loan.


Security Agreement. The words "Security Agreement" mean and include without limitation any agreements, promises, covenants, arrangements, understandings or other agreements, whether created by law, contract, or otherwise, evidencing, governing, representing, or creating a Security Interest.

Security Interest. The words "Security Interest" mean, without limitation, any and all types of collateral security, present and future, whether in the form of a lien, charge, encumbrance, mortgage, deed of trust, security deed, assignment, pledge, crop pledge, chattel mortgage, collateral chattel mortgage, chattel trust, factor's lien, equipment trust, conditional sale, trust receipt, lien or title retention contract, lease or consignment intended as a security device, or any other security or lien interest whatsoever whether created by law, contract, or otherwise.

BORROWER ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS CONSTRUCTION LOAN AGREEMENT AND BORROWER AGREES TO ITS TERMS. THIS CONSTRUCTION LOAN AGREEMENT IS DATED MAY 9, 2012.

BORROWER:

THOMPSON/MCCARTHY DB LLC DBA GLENDALE AVE./12TH STREET DB LLC

By: 
James L. Thompson, Manager of
Thompson/McCarthy DB LLC DBA Glendale
Ave./12th Street DB LLC

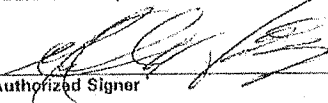
Loan No: 826007200

**CONSTRUCTION LOAN AGREEMENT
(Continued)**

Page 11

LENDER:

REPUBLICBANKAZ, N.A.

By: 
Authorized Signer

LASER PRO Lending, Ver. B.00.00.006 Copr. Herland Financial Solutions, Inc. 1997, 2012. All Rights Reserved. - AZ 01PROSUTICRILPUC41 FC TR-898 PA-18

RBAZ 06306

XAPP167

EXHIBIT "A"
TO LOAN AGREEMENT DATED MAY 9, 2012

Additional Conditions of Disbursements, Covenants, and Provisions:

1. Upon time of loan funding, Borrower understands and agrees that all loan funds shall be deposited into a Bank Control Deposit Account with Lender, and interest shall accrue on the total loan principal balance. In addition, the Deposit Account that said loan funds are deposited into shall earn interest at a rate of 5.50%.
2. Borrower agrees to execute any documentation Lender deems necessary to perfect Lender's Lien and to complete loan.
3. Borrower agrees to provide invoices to Bank for equipment and fixtures purchased before any equipment proceeds can be disbursed. In addition, any items valued at \$5,000.00 and above must include a full description and serial number.
4. Borrower is allowed a total of four (4) draws per month.
5. Borrower agrees to provide Bank with certain information and documentation pertaining to 1201 E. Glendale Ave., Phoenix, AZ before any disbursements held for construction of the location, with the exception of soft costs, can be disbursed. Said information and documents must be received and reviewed by Bank and executed by Borrower, Grantor, Guarantor, and Lender where applicable. Said information and documents includes but is not limited to the following:
 - a. Executed Construction Contract
 - b. Executed Architect Contract
 - c. Executed Assignment of Construction Contract Document
 - d. Executed Assignment of Architect's Contract Document
 - e. Executed Agreement of Compliance
 - f. Execute any other documents the Bank deems necessary to perfect the Bank's Lien.
 - g. Plans and Specifications
 - h. Survey
 - i. Building Permit
 - j. Evidence that the Contractor has furnished a 100% performance bond and labor and materials payment bond. Only a corporate surety approved by the Treasury Department using an American Institute of Architect's form or comparable coverage may issue these bonds. Only Borrower may be named as obligee on the bonds.
 - k. The construction must conform to the "National Earthquake Hazards Reduction Program Recommended Provision for the Development of Seismic Regulations for New Buildings" (NEHRP). In addition, an opinion letter addressing this must be obtained.

6. Borrower agrees to provide Bank with the following upon the completion and opening of subject property:
- a. Copies of all Licenses and Permits to operate each business.
 - b. Property Hazard Insurance, Business Personal Property Insurance, and Workman's Compensation Insurance.
7. If applicable, Borrower agrees to execute an Indemnification Agreement and comply with all other necessary requirements to resolve any issues with the Title Company, of construction already in progress at subject property. Borrower further understands that no loan proceeds can be disbursed until this issue has been resolved to the satisfaction of Thomas Title & Escrow, LLC and RepublicBankAz, N.A.

Borrower hereby agrees to provide and/or comply with all of the aforementioned Conditions of Disbursements, Covenants, and Provisions.

Executed this 9th day of May, 2012

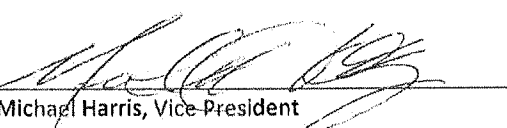
Borrower:

Thompson/McCarthy DB LLC DBA Glendale Ave./12th Street DB LLC

By: 
James L. Thompson, Manager

Lender:

RepublicBankAz, N.A.

By: 
Michael Harris, Vice President

BORROWER NAME: Thompson/McCarthy Coffee Co. DATE: EXHIBIT "B"

GLENDAL/12th STREET PROPERTY

Loan No.

Draw #

CONSTRUCTION PROGRESS REPORT

Line Item No.	Budget Description	Total Project Budget	Equity	Loan Budget	Previous Budget Transfers	This Period Budget Transfer	Revised Loan Budget	Previous Disbursements \$ Amount	Request This Period \$ Amount	Total Disbursed		Remaining Funds	
										Incl. Req. This Period \$ Amount	%	\$ Amount	%
	Purchase Equipment	\$ 40,209.70	\$ -	\$ 40,209.70	\$ -	\$ -	\$ 40,209.70	\$ -	\$ -	\$ -	0.00%	\$ 40,209.70	100.00%
	Construction Funds	\$ 343,056.84	\$ -	\$ 343,056.84	\$ -	\$ -	\$ 343,056.84	\$ -	\$ -	\$ -	0.00%	\$ 343,056.84	100.00%
	Working Capital	\$ 56,560.87	\$ -	\$ 56,560.87	\$ -	\$ -	\$ 56,560.87	\$ -	\$ -	\$ -	0.00%	\$ 56,560.87	100.00%
	TOTAL HARD COSTS:	\$ 439,827.41	\$ -	\$ 439,827.41	\$ -	\$ -	\$ 439,827.41	\$ -	\$ -	\$ -	0.00%	\$ 439,827.41	100.00%
SOFT COSTS													
	Contingency	\$ 12,652.84	\$ -	\$ 12,652.84	\$ -	\$ -	\$ 12,652.84	\$ -	\$ -	\$ -	0.00%	\$ 12,652.84	100.00%
	City of Phoenix	\$ 19,630.00	\$ -	\$ 19,630.00	\$ -	\$ -	\$ 19,630.00	\$ -	\$ -	\$ -	0.00%	\$ 19,630.00	100.00%
	Consultant Fees	\$ 45,890.00	\$ -	\$ 45,890.00	\$ -	\$ -	\$ 45,890.00	\$ -	\$ -	\$ -	0.00%	\$ 45,890.00	100.00%
	Utilities	\$ 18,088.00	\$ -	\$ 18,088.00	\$ -	\$ -	\$ 18,088.00	\$ -	\$ -	\$ -	0.00%	\$ 18,088.00	100.00%
	Franchise Fee	\$ 30,000.00	\$ -	\$ 30,000.00	\$ -	\$ -	\$ 30,000.00	\$ -	\$ -	\$ -	0.00%	\$ 30,000.00	100.00%
	Signage	\$ 11,800.00	\$ -	\$ 11,800.00	\$ -	\$ -	\$ 11,800.00	\$ -	\$ -	\$ -	0.00%	\$ 11,800.00	100.00%
	SBA Guaranty Fee	\$ 13,434.75	\$ -	\$ 13,434.75	\$ -	\$ -	\$ 13,434.75	\$ -	\$ -	\$ -	0.00%	\$ 13,434.75	100.00%
	Tax Service Fee	\$ 59.00	\$ -	\$ 59.00	\$ -	\$ -	\$ 59.00	\$ -	\$ -	\$ -	0.00%	\$ 59.00	100.00%
	Flood Cert Fee	\$ 7.00	\$ -	\$ 7.00	\$ -	\$ -	\$ 7.00	\$ -	\$ -	\$ -	0.00%	\$ 7.00	100.00%
	Title Fees	\$ 1,200.00	\$ -	\$ 1,200.00	\$ -	\$ -	\$ 1,200.00	\$ -	\$ -	\$ -	0.00%	\$ 1,200.00	100.00%
	UCC Fee	\$ 11.00	\$ -	\$ 11.00	\$ -	\$ -	\$ 11.00	\$ -	\$ -	\$ -	0.00%	\$ 11.00	100.00%
	Inspection Fees	\$ 2,000.00	\$ -	\$ 2,000.00	\$ -	\$ -	\$ 2,000.00	\$ -	\$ -	\$ -	0.00%	\$ 2,000.00	100.00%
	Accounting	\$ 2,500.00	\$ -	\$ 2,500.00	\$ -	\$ -	\$ 2,500.00	\$ -	\$ -	\$ -	0.00%	\$ 2,500.00	100.00%
	TOTAL SOFT COSTS:	\$ 157,272.59	\$ -	\$ 157,272.59	\$ -	\$ -	\$ 157,272.59	\$ -	\$ -	\$ -	0.00%	\$ 157,272.59	100.00%
	GRAND TOTALS:	\$ 597,100.00	\$ -	\$ 597,100.00	\$ -	\$ -	\$ 597,100.00	\$ -	\$ -	\$ -	0.00%	\$ 597,100.00	100.00%

1-2-12

DUTCH BROS. COFFEE

Glendale & 12th Street

PHOENIX, AZ

SITE COSTS

Estimate

1000 Gen Cond	Project Management	\$	5,500.00
	Supervision	\$	15,600.00
	Labor	\$	1,864.00
	Dumpster	\$	1,650.00
	Cleaning	\$	750.00
	Temp Utilities	\$	980.00
	Rental Equipment & Fer	\$	2,250.00
	Insurance & Miscellanec	\$	5,145.00
	Builders Risk Insurance	\$	2,800.00
	Dust/Demo Permit	\$	350.00
	Portable Toilet	\$	450.00
	Office---Print/Copies/Ma	\$	350.00
	GENERAL CONDITONS SUBTOTAL:	\$	37,689.00
2000 Site Work	Site Survey/Staking	\$	5,100.00
	Site Clearing & Demoliti	\$	2,430.00
	Dust Control	\$	2,620.00
	Grading, Excavation & E	\$	13,984.00
	Termite Control	\$	350.00
	Fire Line	\$	4,940.00
	Fire Hydrant	\$	-
	Water	\$	4,368.00
	Water meter assembly, testing, chlorination	\$	1,200.00
	Sanitary Sewer 6"	\$	3,840.00
	Soil Stabilization/Underc	\$	-
	Asphalt Paving	\$	29,069.55
	Asphalt Striping	\$	750.00
	Site Concrete - Flatwork	\$	8,592.00
	Site Concrete--Paving/D	\$	-
	Site Concrete---Approac	\$	9,600.00
	Site Concrete - Curb & C	\$	11,136.00
	Pattern Concrete	\$	720.00
	Light Pole Bases	\$	1,200.00
	Site Masonry-Screen wa	\$	4,195.20
	Site Masonry--Dumpster	\$	-
	Site Metal---Bollards	\$	1,075.00
	Dumpster Gates	\$	-
	Bicycle Rack	\$	610.00
	Electric to Transformer	\$	9,120.00
	Site Electric--Conduit, P.	\$	4,192.00
	Pole Mounted Site Light	\$	9,000.00
	Landscape	\$	7,950.00
	Irrigation	\$	5,073.00
	SITE TOTAL	\$	141,114.75

BUILDING COST**Estimate**

3000 Concrete	Concrete Slab & Foundation	\$	7,287.00
4000 Masonry	Block Wainscot and Columns	\$	6,245.00
5000 Metals	Simpson Bolts and Anchors	n/a	
6000 Wood & Pl	Rough Carpentry M&L	\$	15,390.00
	Trusses	incl	
	Plywood Interior Sheathing	Incl	
	Corian Countertops	\$	4,388.00
	Cabinets	\$	4,260.00
7000 Thermal &	Insulation-Wall & Ceiling	\$	780.00
	Stucco	\$	7,613.00
	Standing Seam Roofing	\$	8,120.00
	Foam roofing	\$	2,965.00
	Roof Copings & Caps	incl	
	Sealants & Caulking	incl	
8000 Doors & W	Doors, Frames & Hardware	\$	1,839.00
	Mirrors	Incl	
	Glass/Glazing/Storefront	\$	5,860.00
	Drive Thru Window closers-Klozit	\$	520.00
9000 Finishes	Suspended Ceiling	\$	980.00
	Drywall	\$	1,690.00
	Vinyl Flooring & Base	\$	1,939.00
	Epoxy Cooler Floor	\$	250.00
	Painting-Exterior	\$	1,780.00
	FRP	\$	1,990.00
10000 Specialties	Toilet Accessories	\$	712.00
	Fire Extinguisher	\$	68.00
11000 Equipment	Kitchen Equipment Install	\$	1,200.00
15000 Mechanical	Plumbing	\$	12,590.00
	Fire Sprinkler System	\$	4,200.00
	HVAC Unit	\$	4,865.00
	Ductwork	\$	2,700.00
	Balancing	\$	400.00
16000 Electrical	Electric - Building	\$	13,575.00
	Lighting Building--materials	\$	5,470.00
	Fire alarm system	\$	1,500.00
	Camera Wiring	incl	
	Phone Conduit & Computer Cabling	incl	
	BUILDING SUBTOTAL	\$	121,176.00
	GENERAL CONDITIONS	\$	37,689.00
	SITE SUBTOTAL	\$	141,114.75
	SUBTOTAL	\$	299,979.75
	Construction 1#	\$	19,078.71
	Overhead & P	\$	23,998.38
	O&P Percentage		8%
	CONSTRUCTION TOTAL	\$	343,056.84

City of Phoenix Permits & Fees

Preapplication Meeting Fee		\$	1,200.00
Site Plan Conceptual Review		\$	630.00
Site Plan Review Fee		\$	1,668.00
Use Permit	dt lane and patio seating	\$	1,380.00
Variance---	Landscape setback	\$	1,380.00
Landscape Plan Review		\$	1,620.00
Fire Alarm System Permit		\$	350.00
Fire Sprinkler Permit		\$	150.00
Connection Fee (to existing Fire Line on Site)		\$	375.00
Fire Sprinkler Plan Review Fee		\$	375.00
Building Plan Review Fee		\$	582.00
Building Permit		\$	727.00
Analysis of Grading & Drainage Report		\$	540.00
Grading & Drainage Permit		\$	280.00
Civil Engineering Permit		\$	5,560.00
Civil Engineering Plan Review	3 per she	540 \$	1,620.00
Sewer Plan Review	1 per she	324 \$	324.00
Water Plan Review	1 per she	324 \$	324.00
Maricopa County Health Dept Plan Review		\$	545.00

✓ **CITY & COUNTY FEES** \$ 19,630.00

Utilities: Electric, Water, Sewer, Phone and DSL

Phoenix Water Resources Acquisition Fee	\$	130.00
1" Meter without paving	\$	1,821.00
4" Fireline Wet Tap	\$	510.00
Shut down fee for new water service	\$	263.00
Water & Wastewater Development Fee for 1" meter	\$	1,500.00
6" Sanitary Sewer Tap	\$	95.00
Qwest Phone & Cable	\$	169.00
APS New Transformer	\$	9,800.00
APS Surveying Crew	\$	3,800.00

✓ **WET & DRY UTILITIES** \$ 18,088.00

CONSULTANT FEES:

Architectural: SRA Architects	\$	7,000.00
Elevations & Color Renderings: KSA Architect	\$	1,200.00
Landscape Designer: New Leaf	\$	1,500.00
Survey and Topo: O'Neil Engineering	\$	1,700.00
Civil Engineering: O'Neil Engineering	\$	6,650.00
Electrical Engineering/Photometrics: MWE Design	\$	800.00
Geotechnical Phase 1 and Phase 2 Investigation	\$	4,400.00
Site Investigation Report:	\$	2,460.00
Prelim Site Plan, Design Review, Variances	\$	6,980.00
Utility Coordination and Permitting	\$	4,700.00
Bidding and Const Mgmt: Piazza	\$	8,500.00

✓ **CONSULTANTS TOTAL:** \$ 45,890.00

OWNER PROVIDED ITEMS

Kitchen Equipment Package: Boersma Bro	\$	26,550.00	
Walk-in Cooler: American Refrigeration	\$	12,600.00	
Music & Camera Systems	\$	3,611.00	
ADT Security	\$	548.00	
Water Filtrations System & Start-ups	\$	2,100.00	
✓ Signage: AZ Commercial Signs	\$	11,800.00	* Estimate

✓

OWNER PROVIDED ITEMS:	\$	52,009.70
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CATEGORY TOTALS:

BUILDING & SITE ESTIMATE	\$	343,056.84
✓ PERMIT & PLAN REVIEW FEES	\$	19,630.00
✓ UTILITIES: Electric, Phone, Water, Sanitary	\$	18,088.00
✓ CONSULTANTS & DRAWINGS	\$	45,890.00
✓ OWNER PROVIDED ITEMS	\$	52,009.70
✓ GRAND OPENING DEPOSIT	\$	30,000.00
TOTAL		\$ 508,674.54

DISCLAIMER: The numbers above are an estimate only based on preliminary drawings, city websites and interviews with City employees and are for preliminary budgeting purposes only. We make no guarantee that the building and site can be built for these costs nor that any individual line item or city fee will not be increased before construction begins. We recommend that the project be bid from city approved construction documents before seeking final construction financing or determining the economic viability of this or any site.

*McKling?
Attorneys fees?*

EXHIBIT "C"

THE NORTH 158 FEET OF THE WEST 183 FEET OF THE WEST HALF OF THE NORTHWEST QUARTER OF THE NORTHEAST QUARTER OF SECTION NINE (9), TOWNSHIP TWO (2) NORTH, RANGE THREE (3) EAST OF THE GILA AND SALT RIVER BASE AND MERIDIAN, MARICOPA COUNTY, ARIZONA:

EXCEPT THE NORTH 40 FEET ROAD, AND

EXCEPT THE WEST 33 FEET ROAD AND A 10 FOOT BY 10 FOOT TRIANGLE IN THE NORTHWEST CORNER.

CONSTRUCTION LOAN AGREEMENT

Principal	Loan Date	Maturity	Loan No.	Call / Coll	Account	Officer	Initials
\$1,026,300.00	10-24-2011	10-24-2036	826005400	0021 / 0120		MH	
References in the boxes above are for Lender's use only and do not limit the applicability of this document to any particular loan or item. Any item above containing "****" has been omitted due to text length limitations.							

Borrower: THOMPSON/MCCARTHY DB LLC, JAMES L. THOMPSON and JANICE L. MCCARTHY
27915 N. 100TH PL.
SCOTTSDALE, AZ 85262

Lender: RepublicBankAz, N.A.
909 E. Missouri Avenue
Phoenix, AZ 85014

THIS CONSTRUCTION LOAN AGREEMENT dated October 24, 2011, is made and executed between THOMPSON/MCCARTHY DB LLC, JAMES L. THOMPSON and JANICE L. MCCARTHY ("Borrower") and RepublicBankAz, N.A. ("Lender") on the following terms and conditions. Borrower has applied to Lender for one or more loans for purposes of constructing the Improvements on the Real Property described below. Lender is willing to lend the loan amount to Borrower solely under the terms and conditions specified in this Agreement and in the Related Documents, to each of which Borrower agrees. Borrower understands and agrees that: (A) in granting, renewing, or extending any Loan, Lender is relying upon Borrower's representations, warranties, and agreements as set forth in this Agreement, and (B) all such Loans shall be and remain subject to the terms and conditions of this Agreement.

TERM. This Agreement shall be effective as of October 24, 2011, and shall continue in full force and effect until such time as all of Borrower's Loans in favor of Lender have been paid in full, including principal, interest, costs, expenses, attorneys' fees, and other fees and charges, or until such time as the parties may agree in writing to terminate this Agreement.

LOAN. The Loan shall be in an amount not to exceed the principal sum of U.S. \$1,026,300.00 and shall bear interest on so much of the principal sum as shall be advanced pursuant to the terms of this Agreement and the Related Documents. The Loan shall bear interest on each Advance from the date of the Advance in accordance with the terms of the Note. Borrower shall use the Loan Funds solely for the payment of: (A) the costs of constructing the Improvements and equipping the Project in accordance with the Construction Contract; (B) other costs and expenses incurred or to be incurred in connection with the construction of the Improvements as Lender in its sole discretion shall approve; and (C) if permitted by Lender, interest due under the Note, including all expenses and all loan and commitment fees described in this Agreement. The Loan amount shall be subject at all times to all maximum limits and conditions set forth in this Agreement or in any of the Related Documents, including without limitation, any limits relating to loan to value ratios and acquisition and Project costs.

PROJECT DESCRIPTION. The word "Project" as used in this Agreement means the construction and completion of all Improvements contemplated by this Agreement, including without limitation the erection of the building or structure on the Real Property identified to this Agreement by Borrower and Lender, installation of equipment and fixtures, landscaping, and all other work necessary to make the Project usable and complete for the intended purposes. The Project includes the following work:

TWO (2) RETAIL STORES LOCATED AT 6461 S. RURAL RD., TEMPE, AZ AND 1122 S. GREENFIELD RD., MESA, AZ.

The word "Property" as used in this Agreement means the Real Property together with all Improvements, all equipment, fixtures, and other articles of personal property now or subsequently attached or affixed to the Real Property, together with all accessions, parts, and additions to, all replacements of, and all substitutions for any of such property, and all proceeds (including insurance proceeds and refunds of premiums) from any sale or other disposition of such property. The real estate described below constitutes the Real Property as used in this Agreement.

The real estate or its address is commonly known as:
Real Property located at 6461 S. RURAL RD., TEMPE, AZ 85283.

The real estate or its address is commonly known as:
Real Property located at 1122 S. GREENFIELD RD., MESA, AZ 85206.

FEES AND EXPENSES. Whether or not the Project shall be consummated, Borrower shall assume and pay upon demand all out-of-pocket expenses incurred by Lender in connection with the preparation of loan documents and the making of the Loan, including without limitation the following: (A) all closing costs, loan fees, and disbursements; (B) all expenses of Lender's legal counsel; and (C) all title examination fees, title insurance premiums, appraisal fees, survey costs, required fees, and filing and recording fees.

NO CONSTRUCTION PRIOR TO RECORDING OF SECURITY DOCUMENT. Borrower will not permit any work or materials to be furnished in connection with the Project until (A) Borrower has signed the Related Documents; (B) Lender's mortgage or deed of trust and other Security Interests in the Property have been duly recorded and perfected; (C) Lender has been provided evidence, satisfactory to Lender, that Borrower has obtained all insurance required under this Agreement or any Related Documents and that Lender's liens on the Property and Improvements are valid perfected first liens, subject only to such exceptions, if any, acceptable to Lender.

MULTIPLE BORROWERS. This Agreement has been executed by multiple obligors who are referred to in this Agreement individually, collectively and interchangeably as "Borrower." Unless specifically stated to the contrary, the word "Borrower" as used in this Agreement, including without limitation all representations, warranties and covenants, shall include all Borrowers. Borrower understands and agrees that, with or without notice to any one Borrower, Lender may (A) make one or more additional secured or unsecured loans or otherwise extend additional credit with respect to any other Borrower; (B) with respect to any other Borrower alter, compromise, renew, extend, accelerate, or otherwise change one or more times the time for payment or other terms of any indebtedness, including increases and decreases of the rate of interest on the indebtedness; (C) exchange, enforce, waive, subordinate, fall or decide not to perfect, and release any security, with or without the substitution of new collateral; (D) release, substitute, agree not to sue, or deal with any one or more of Borrower's or any other Borrower's sureties, endorsers, or other guarantors on any terms or in any manner Lender may choose; (E) determine how, when and what application of payments and credits shall be made on any indebtedness; (F) apply such security and direct the order or manner of sale of any Collateral, including without limitation, any non-judicial sale permitted by the terms of the controlling security agreement or deed of trust, as Lender in its discretion may determine; (G) sell, transfer, assign or grant participations in all or any part of the Loan; (H) exercise or refrain from exercising any rights against Borrower or others, or otherwise act or refrain from acting; (I) settle or compromise any indebtedness; and (J) subordinate the payment of all or any part of any of Borrower's indebtedness to Lender to the payment of any liabilities which may be due Lender or others.

REPRESENTATIONS AND WARRANTIES. Borrower represents and warrants to Lender, as of the date of this Agreement, as of the date of each disbursement of loan proceeds, as of the date of any renewal, extension or modification of any Loan, and at all times any indebtedness exists:

Organization. THOMPSON/MCCARTHY DB LLC is a limited liability company which is, and at all times shall be, duly organized, validly existing, and in good standing under and by virtue of the laws of the State of Oregon. THOMPSON/MCCARTHY DB LLC is duly authorized to transact business in the State of Arizona and all other states in which THOMPSON/MCCARTHY DB LLC is doing business, having obtained all necessary filings, governmental licenses and approvals for each state in which THOMPSON/MCCARTHY DB LLC is doing business. Specifically, THOMPSON/MCCARTHY DB LLC is, and at all times shall be, duly qualified as a foreign limited liability company in

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all states in which the failure to so qualify would have a material adverse effect on its business or financial condition. THOMPSON/MCCARTHY DB LLC has the full power and authority to own its properties and to transact the business in which it is presently engaged or presently proposes to engage. THOMPSON/MCCARTHY DB LLC maintains an office at 27915 N. 100TH PL., SCOTTSDALE, AZ 85262. Unless THOMPSON/MCCARTHY DB LLC has designated otherwise in writing, the principal office is the office at which THOMPSON/MCCARTHY DB LLC keeps its books and records including its records concerning the Collateral. THOMPSON/MCCARTHY DB LLC will notify Lender prior to any change in the location of THOMPSON/MCCARTHY DB LLC's state of organization or any change in THOMPSON/MCCARTHY DB LLC's name. THOMPSON/MCCARTHY DB LLC shall do all things necessary to preserve and to keep in full force and effect its existence, rights and privileges, and shall comply with all regulations, rules, ordinances, statutes, orders and decrees of any governmental or quasi-governmental authority or court applicable to THOMPSON/MCCARTHY DB LLC and THOMPSON/MCCARTHY DB LLC's business activities.

JAMES L. THOMPSON maintains an office at 27915 N. 100TH PL., SCOTTSDALE, AZ 85262. Unless JAMES L. THOMPSON has designated otherwise in writing, the principal office is the office at which JAMES L. THOMPSON keeps its books and records including its records concerning the Collateral. JAMES L. THOMPSON will notify Lender prior to any change in the location of JAMES L. THOMPSON's principal office address or any change in JAMES L. THOMPSON's name. JAMES L. THOMPSON shall do all things necessary to comply with all regulations, rules, ordinances, statutes, orders and decrees of any governmental or quasi-governmental authority or court applicable to JAMES L. THOMPSON and JAMES L. THOMPSON's business activities.

JANICE L. MCCARTHY maintains an office at 27915 N. 100TH PL., SCOTTSDALE, AZ 85262. Unless JANICE L. MCCARTHY has designated otherwise in writing, the principal office is the office at which JANICE L. MCCARTHY keeps its books and records including its records concerning the Collateral. JANICE L. MCCARTHY will notify Lender prior to any change in the location of JANICE L. MCCARTHY's principal office address or any change in JANICE L. MCCARTHY's name. JANICE L. MCCARTHY shall do all things necessary to comply with all regulations, rules, ordinances, statutes, orders and decrees of any governmental or quasi-governmental authority or court applicable to JANICE L. MCCARTHY and JANICE L. MCCARTHY's business activities.

Assumed Business Names. Borrower has filed or recorded all documents or filings required by law relating to all assumed business names used by Borrower. Excluding the name of Borrower, the following is a complete list of all assumed business names under which Borrower does business: **None.**

Authorization. Borrower's execution, delivery, and performance of this Agreement and all the Related Documents do not conflict with, result in a violation of, or constitute a default under (1) any provision of (a) Borrower's articles of organization or membership agreements, or (b) any agreement or other instrument binding upon Borrower or (2) any law, governmental regulation, court decree, or order applicable to Borrower or to Borrower's properties.

Financial Information. Each of Borrower's financial statements supplied to Lender truly and completely disclosed Borrower's financial condition as of the date of the statement, and there has been no material adverse change in Borrower's financial condition subsequent to the date of the most recent financial statement supplied to Lender. Borrower has no material contingent obligations except as disclosed in such financial statements.

Legal Effect. This Agreement constitutes, and any instrument or agreement Borrower is required to give under this Agreement when delivered will constitute legal, valid, and binding obligations of Borrower enforceable against Borrower in accordance with their respective terms.

Properties. Except as contemplated by this Agreement or as previously disclosed in Borrower's financial statements or in writing to Lender and as accepted by Lender, and except for property tax liens for taxes not presently due and payable, Borrower owns and has good title to all of Borrower's properties free and clear of all Security Interests, and has not executed any security documents or financing statements relating to such properties. All of Borrower's properties are titled in Borrower's legal name, and Borrower has not used or filed a financing statement under any other name for at least the last five (5) years.

Hazardous Substances. Except as disclosed to and acknowledged by Lender in writing, Borrower represents and warrants that: (1) During the period of Borrower's ownership of the Collateral, there has been no use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance by any person on, under, about or from any of the Collateral; (2) Borrower has no knowledge of, or reason to believe that there has been (a) any breach or violation of any Environmental Laws; (b) any use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance on, under, about or from the Collateral by any prior owners or occupants of any of the Collateral; or (c) any actual or threatened litigation or claims of any kind by any person relating to such matters. (3) Neither Borrower nor any tenant, contractor, agent or other authorized user of any of the Collateral shall use, generate, manufacture, store, treat, dispose of or release any Hazardous Substance on, under, about or from any of the Collateral; and any such activity shall be conducted in compliance with all applicable federal, state, and local laws, regulations, and ordinances, including without limitation all Environmental Laws. Borrower authorizes Lender and its agents to enter upon the Collateral to make such inspections and tests as Lender may deem appropriate to determine compliance of the Collateral with this section of the Agreement. Any inspections or tests made by Lender shall be at Borrower's expense and for Lender's purposes only and shall not be construed to create any responsibility or liability on the part of Lender to Borrower or to any other person. The representations and warranties contained herein are based on Borrower's due diligence in investigating the Collateral for hazardous waste and Hazardous Substances. Borrower hereby (1) releases and waives any future claims against Lender for indemnity or contribution in the event Borrower becomes liable for cleanup or other costs under any such laws, and (2) agrees to indemnify, defend, and hold harmless Lender against any and all claims, losses, liabilities, damages, penalties, and expenses which Lender may directly or indirectly sustain or suffer resulting from a breach of this section of the Agreement or as a consequence of any use, generation, manufacture, storage, disposal, release or threatened release of a hazardous waste or substance on the Collateral. The provisions of this section of the Agreement, including the obligation to indemnify and defend, shall survive the payment of the indebtedness and the termination, expiration or satisfaction of this Agreement and shall not be affected by Lender's acquisition of any interest in any of the Collateral, whether by foreclosure or otherwise.

Litigation and Claims. No litigation, claim, investigation, administrative proceeding or similar action (including those for unpaid taxes) against Borrower is pending or threatened, and no other event has occurred which may materially adversely affect Borrower's financial condition or properties, other than litigation, claims, or other events, if any, that have been disclosed to and acknowledged by Lender in writing.

Taxes. To the best of Borrower's knowledge, all of Borrower's tax returns and reports that are or were required to be filed, have been filed, and all taxes, assessments and other governmental charges have been paid in full, except those presently being or to be contested by Borrower in good faith in the ordinary course of business and for which adequate reserves have been provided.

Lien Priority. Unless otherwise previously disclosed to Lender in writing, Borrower has not entered into or granted any Security Agreements, or permitted the filing or attachment of any Security Interests on or affecting any of the Collateral directly or indirectly securing repayment of Borrower's Loan and Note, that would be prior or that may in any way be superior to Lender's Security Interests and

**CONSTRUCTION LOAN AGREEMENT
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rights in and to such Collateral.

Binding Effect. This Agreement, the Note, all Security Agreements (if any), and all Related Documents are binding upon the signers thereof, as well as upon their successors, representatives and assigns, and are legally enforceable in accordance with their respective terms.

Title to Property. Borrower has, or on the date of first disbursement of Loan proceeds will have, good and marketable title to the Collateral free and clear of all defects, liens, and encumbrances, excepting only liens for taxes, assessments, or governmental charges or levies not yet delinquent or payable without penalty or interest, and such liens and encumbrances as may be approved in writing by the Lender. The Collateral is contiguous to publicly dedicated streets, roads, or highways providing access to the Collateral.

Project Costs. The Project costs are true and accurate estimates of the costs necessary to complete the Improvements in a good and workmanlike manner according to the Plans and Specifications presented by Borrower to Lender, and Borrower shall take all steps necessary to prevent the actual cost of the Improvements from exceeding the Project costs.

Utility Services. All utility services appropriate to the use of the Project after completion of construction are available at the boundaries of the Collateral.

Assessment of Property. The Collateral is and will continue to be assessed and taxed as an independent parcel by all governmental authorities.

Compliance with Governing Authorities. Borrower has examined and is familiar with all the easements, covenants, conditions, restrictions, reservations, building laws, regulations, zoning ordinances, and federal, state, and local requirements affecting the Project. The Project will at all times and in all respects conform to and comply with the requirements of such easements, covenants, conditions, restrictions, reservations, building laws, regulations, zoning ordinances, and federal, state, and local requirements.

Survival of Representations and Warranties. Borrower understands and agrees that in making the Loan, Lender is relying on all representations, warranties, and covenants made by Borrower in this Agreement or in any certificate or other instrument delivered by Borrower to Lender under this Agreement or the Related Documents. Borrower further agrees that regardless of any investigation made by Lender, all such representations, warranties and covenants will survive the making of the Loan and delivery to Lender of the Related Documents, shall be continuing in nature, and shall remain in full force and effect until such time as Borrower's Indebtedness shall be paid in full, or until this Agreement shall be terminated in the manner provided above, whichever is the last to occur.

CONDITIONS PRECEDENT TO EACH ADVANCE. Lender's obligation to make the initial Advance and each subsequent Advance under this Agreement shall be subject to the fulfillment to Lender's satisfaction of all of the conditions set forth in this Agreement and in the Related Documents.

Approval of Contractors, Subcontractors, and Materialmen. Lender shall have approved a list of all contractors employed in connection with the construction of the Improvements, showing the name, address, and telephone number of each contractor, a general description of the nature of the work to be done, the labor and materials to be supplied, the names of materialmen, if known, and the approximate dollar value of the labor, work, or materials with respect to each contractor or materialman. Lender shall have the right to communicate with any person to verify the facts disclosed by the list or by any application for any Advance, or for any other purpose.

Plans, Specifications, and Permits. Lender shall have received and accepted a complete set of written Plans and Specifications setting forth all Improvements for the Project, and Borrower shall have furnished to Lender copies of all permits and requisite approvals of any governmental body necessary for the construction and use of the Project.

Architect's and Construction Contracts. Borrower shall have furnished in form and substance satisfactory to Lender an executed copy of the Architect's Contract and an executed copy of the Construction Contract.

Related and Support Documents. Borrower shall provide to Lender in form satisfactory to Lender the following support documents for the Loan: **Assignment of Architect's Contract, Assignment of Construction Contract and Completion Guaranty.**

Budget and Schedule of Estimated Advances. Lender shall have approved detailed budget and cash flow projections of total Project costs and a schedule of the estimated amount and time of disbursements of each Advance.

Borrower's Authorization. Borrower shall have provided in form and substance satisfactory to Lender properly certified resolutions, duly authorizing the consummation of the Project and duly authorizing the execution and delivery of this Agreement, the Note and the Related Documents. In addition, Borrower shall have provided such other resolutions, authorizations, documents and instruments as Lender or its counsel, in their sole discretion, may require.

Bond. If requested by Lender, Borrower shall have furnished a performance and payment bond in an amount equal to 100% of the amount of the Construction Contract, as well as a materialmen's and mechanics' payment bond, with such riders and supplements as Lender may require, each in form and substance satisfactory to Lender, naming the General Contractor as principal and Lender as an additional obligee.

Appraisal. If required by Lender, an appraisal shall be prepared for the Property, at Borrower's expense, which in form and substance shall be satisfactory to Lender, in Lender's sole discretion, including applicable regulatory requirements.

Plans and Specifications. If requested by Lender, Borrower shall have assigned to Lender on Lender's forms the Plans and Specifications for the Project.

Environmental Report. If requested by Lender, Borrower shall have furnished to Lender, at Borrower's expense, an environmental report and certificate on the Property in form and substance satisfactory to Lender, prepared by an engineer or other expert satisfactory to Lender stating that the Property complies with all applicable provisions and requirements of the "Hazardous Substances" paragraph set forth in this Agreement.

Soil Report. If requested by Lender, Borrower shall have furnished to Lender, at Borrower's expenses, a soil report for the Property in form and substance satisfactory to Lender, prepared by a registered engineer satisfactory to Lender stating that the Property is free from soil or other geological conditions that would preclude its use or development as contemplated without extra expense for precautionary, corrective or remedial measures.

Survey. If requested by Lender, Borrower shall have furnished to Lender a survey of recent date, prepared and certified by a qualified surveyor and providing that the Improvements, if constructed in accordance with the Plans and Specifications, shall lie wholly within the boundaries of the Collateral without encroachment or violation of any zoning ordinances, building codes or regulations, or setback requirements, together with such other information as Lender in its sole discretion may require.

Zoning. Borrower shall have furnished evidence satisfactory to Lender that the Collateral is duly and validly zoned for the construction, maintenance, and operation of the Project.

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Title Insurance. Borrower shall have provided to Lender an ALTA Lender's extended coverage policy of title insurance with such endorsements as Lender may require, issued by a title insurance company acceptable to Lender and in a form, amount, and content satisfactory to Lender, insuring or agreeing to insure that Lender's security agreement or other security document on the Property is or will be upon recordation a valid first lien on the Property free and clear of all defects, liens, encumbrances, and exceptions except those as specifically accepted by Lender in writing. If requested by Lender, Borrower shall provide to Lender, at Borrower's expense, a foundation endorsement to the title policy upon the completion of each foundation for the Improvements, showing no encroachments, and upon completion an endorsement which insures the lien-free completion of the Improvements.

Insurance. Unless waived by Lender in writing, Borrower shall have delivered to Lender the following insurance policies or evidence thereof: (a) an all risks course of construction insurance policy (builder's risk), with extended coverage covering the Improvements issued in an amount and by a company acceptable to Lender, containing a loss payable or other endorsement satisfactory to Lender insuring Lender as mortgagee, together with such other endorsements as may be required by Lender, including stipulations that coverages will not be cancelled or diminished without at least thirty (30) days prior written notice to Lender; (b) owners and General Contractor general liability insurance, public liability and workmen's compensation insurance; (c) flood insurance if required by Lender or applicable law; and (d) all other insurance required by this Agreement or by the Related Documents.

Workers' Compensation Coverage. Provide to Lender proof of the General Contractor's compliance with all applicable workers' compensation laws and regulations with regard to all work performed on the Project.

Payment of Fees and Expenses. Borrower shall have paid to Lender all fees, charges, and other expenses which are then due and payable as specified in this Agreement or any Related Document.

Satisfactory Construction. All work usually done at the stage of construction for which disbursement is requested shall have been done in a good and workmanlike manner and all materials and fixtures usually furnished and installed at that stage of construction shall have been furnished and installed, all in compliance with the Plans and Specifications. Borrower shall also have furnished to Lender such proofs as Lender may require to establish the progress of the work, compliance with applicable laws, freedom of the Property from liens, and the basis for the requested disbursement.

Certification. Borrower shall have furnished to Lender a certification by an engineer, architect, or other qualified inspector acceptable to Lender that the construction of the Improvements has complied and will continue to comply with all applicable statutes, ordinances, codes, regulations, and similar requirements.

Lien Waivers. Borrower shall have obtained and attached to each application for an Advance, including the Advance to cover final payment to the General Contractor, executed acknowledgments of payments of all sums due and releases of mechanic's and materialmen's liens, satisfactory to Lender, from any party having lien rights, which acknowledgments of payment and releases of liens shall cover all work, labor, equipment, materials done, supplied, performed, or furnished prior to such application for an Advance.

No Event of Default. There shall not exist at the time of any Advance a condition which would constitute an Event of Default under this Agreement or under any Related Document.

ADDITIONAL COVENANTS, PROVISIONS, CONDITIONS FOR DISBURSEMENTS. SEE EXHIBITS "A" AND "B" ATTACHED HERETO AND MADE A PART HEREOF FOR ADDITIONAL COVENANTS, PROVISIONS, AND CONDITIONS OF DISBURSEMENTS.

INITIALS.

DISBURSEMENT OF LOAN FUNDS. The following provisions relate to the disbursement of funds from the Loan Fund.

Application for Advances. Each application shall be stated on a standard AIA payment request form or other form approved by Lender, executed by Borrower, and supported by such evidence as Lender shall reasonably require. Borrower shall apply only for disbursement with respect to work actually done by the General Contractor and for materials and equipment actually incorporated into the Project. Each application for an Advance shall be deemed a certification of Borrower that as of the date of such application, all representations and warranties contained in the Agreement are true and correct, and that Borrower is in compliance with all of the provisions of this Agreement.

Payments. At the sole option of Lender, Advances may be paid in the joint names of Borrower and the General Contractor, subcontractor(s), or supplier(s) in payment of sums due under the Construction Contract. At its sole option, Lender may directly pay the General Contractor and any subcontractors or other parties the sums due under the Construction Contract. Borrower appoints Lender as its attorney-in-fact to make such payments. This power shall be deemed coupled with an interest, shall be irrevocable, and shall survive an Event of Default under this Agreement.

Projected Cost Overruns. If Lender at any time determines in its sole discretion that the amount in the Loan Fund is insufficient, or will be insufficient, to complete fully and to pay for the Project, then within ten (10) days after receipt of a written request from Lender, Borrower shall deposit in the Loan Fund an amount equal to the deficiency as determined by Lender. The judgment and determination of Lender under this section shall be final and conclusive. Any such amounts deposited by Borrower shall be disbursed prior to any Loan proceeds.

Final Payment to General Contractor. Upon completion of the Project and fulfillment of the Construction Contract to the satisfaction of Lender and provided sufficient Loan Funds are available, Lender shall make an Advance to cover the final payment due to the General Contractor upon delivery to Lender of endorsements to the ALTA title insurance policy following the posting of the completion notice, as provided under applicable law. Construction shall not be deemed complete for purposes of final disbursement unless and until Lender shall have received all of the following:

- (1) Evidence satisfactory to Lender that all work under the Construction Contract requiring inspection by any governmental authority with jurisdiction has been duly inspected and approved by such authority, that a certificate of occupancy has been issued, and that all parties performing work have been paid, or will be paid, for such work;
- (2) A certification by an engineer, architect, or other qualified inspector acceptable to Lender that the Improvements have been completed substantially in accordance with the Plans and Specifications and the Construction Contract, that direct connection has been made to all utilities set forth in the Plans and Specifications, and that the Project is ready for occupancy; and
- (3) Acceptance of the completed Improvements by Lender and Borrower.

Construction Default. If Borrower fails in any respect to comply with the provisions of this Agreement or if construction ceases before completion regardless of the reason, Lender, at its option, may refuse to make further Advances, may accelerate the indebtedness under the terms of the Note, and without thereby impairing any of its rights, powers, or privileges, may enter into possession of the construction site and perform or cause to be performed any and all work and labor necessary to complete the improvements, substantially in accordance with the Plans and Specifications.

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Damage or Destruction. If any of the Collateral or Improvements is damaged or destroyed by casualty of any nature, within sixty (60) days thereafter Borrower shall restore the Collateral and Improvements to the condition in which they were before such damage or destruction with funds other than those in the Loan Fund. Lender shall not be obligated to make disbursements under this Agreement until such restoration has been accomplished.

Adequate Security. When any event occurs that Lender determines may endanger completion of the Project or the fulfillment of any condition or covenant in this Agreement, Lender may require Borrower to furnish, within ten (10) days after delivery of a written request, adequate security to eliminate, reduce, or indemnify Lender against, such danger. In addition, upon such occurrence, Lender in its sole discretion may advance funds or agree to undertake to advance funds to any party to eliminate, reduce, or indemnify Lender against, such danger or to complete the Project. All sums paid by Lender pursuant to such agreements or undertakings shall be for Borrower's account and shall be without prejudice to Borrower's rights, if any, to receive such funds from the party to whom paid. All sums expended by Lender in the exercise of its option to complete the Project or protect Lender's interests shall be payable to Lender on demand together with interest from the date of the Advance at the rate applicable to the Loan. In addition, any Advance of funds under this Agreement, including without limitation direct disbursements to the General Contractor or other parties in payment of sums due under the Construction Contract, shall be deemed to have been expended by or on behalf of Borrower and to have been secured by Lender's Deeds of Trust, if any, on the Collateral.

CESSATION OF ADVANCES. If Lender has made any commitment to make any Loan to Borrower, whether under this Agreement or under any other agreement, Lender shall have no obligation to make Loan Advances or to disburse Loan proceeds if: (A) Borrower or any Guarantor is in default under the terms of this Agreement or any of the Related Documents or any other agreement that Borrower or any Guarantor has with Lender; (B) Borrower or any Guarantor dies, becomes incompetent or becomes insolvent, files a petition in bankruptcy or similar proceedings, or is adjudged a bankrupt; (C) there occurs a material adverse change in Borrower's financial condition, in the financial condition of any Guarantor, or in the value of any Collateral securing any Loan; or (D) any Guarantor seeks, claims or otherwise attempts to limit, modify or revoke such Guarantor's guaranty of the Loan or any other loan with Lender; or (E) Lender in good faith deems itself insecure, even though no Event of Default shall have occurred.

LIMITATION OF RESPONSIBILITY. The making of any Advance by Lender shall not constitute or be interpreted as either (A) an approval or acceptance by Lender of the work done through the date of the Advance, or (B) a representation or indemnity by Lender to any party against any deficiency or defect in the work or against any breach of any contract. Inspections and approvals of the Plans and Specifications, the Improvements, the workmanship and materials used in the Improvements, and the exercise of any other right of inspection, approval, or inquiry granted to Lender in this Agreement are acknowledged to be solely for the protection of Lender's interests, and under no circumstances shall they be construed to impose any responsibility or liability of any nature whatsoever on Lender to any party. Neither Borrower nor any contractor, subcontractor, materialman, laborer, or any other person shall rely, or have any right to rely, upon Lender's determination of the appropriateness of any Advance. No disbursement or approval by Lender shall constitute a representation by Lender as to the nature of the Project, its construction, or its intended use for Borrower or for any other person, nor shall it constitute an indemnity by Lender to Borrower or to any other person against any deficiency or defects in the Project or against any breach of any contract.

AFFIRMATIVE COVENANTS. Borrower covenants and agrees with Lender that, so long as this Agreement remains in effect, Borrower will:

Notices of Claims and Litigation. Promptly inform Lender in writing of (1) all material adverse changes in Borrower's financial condition, and (2) all existing and all threatened litigation, claims, investigations, administrative proceedings or similar actions affecting Borrower or any Guarantor which could materially affect the financial condition of Borrower or the financial condition of any Guarantor.

Financial Records. Maintain its books and records in accordance with GAAP, applied on a consistent basis, and permit Lender to examine and audit Borrower's books and records at all reasonable times.

Financial Statements. Furnish Lender with the following:

Annual Statements. As soon as available, but in no event later than one-hundred-twenty (120) days after the end of each fiscal year, Borrower's balance sheet and income statement for the year ended, prepared by Borrower.

Tax Returns. As soon as available, but in no event later than thirty (30) days after the applicable filing date for the tax reporting period ended, Federal and other governmental tax returns, prepared by Borrower.

All financial reports required to be provided under this Agreement shall be prepared in accordance with GAAP, applied on a consistent basis, and certified by Borrower as being true and correct.

Additional Information. Furnish such additional information and statements, lists of assets and liabilities, agings of receivables and payables, inventory schedules, budgets, forecasts, tax returns, and other reports with respect to Borrower's financial condition and business operations as Lender may request from time to time.

Other Agreements. Comply with all terms and conditions of all other agreements, whether now or hereafter existing, between Borrower and any other party and notify Lender immediately in writing of any default in connection with any other such agreements.

Insurance. Maintain fire and other risk insurance, hail, federal crop insurance, public liability insurance, and such other insurance as Lender may require with respect to Borrower's properties and operations, in form, amounts, coverages and with insurance companies acceptable to Lender. Borrower, upon request of Lender, will deliver to Lender from time to time the policies or certificates of insurance in form satisfactory to Lender, including stipulations that coverages will not be cancelled or diminished without at least thirty (30) days prior written notice to Lender. Each insurance policy also shall include an endorsement providing that coverage in favor of Lender will not be impaired in any way by any act, omission or default of Borrower or any other person. In connection with all policies covering assets in which Lender holds or is offered a security interest for the Loans, Borrower will provide Lender with such lender's loss payable or other endorsements as Lender may require.

Insurance Reports. Furnish to Lender, upon request of Lender, reports on each existing insurance policy showing such information as Lender may reasonably request, including without limitation the following: (1) the name of the insurer; (2) the risks insured; (3) the amount of the policy; (4) the properties insured; (5) the then current property values on the basis of which insurance has been obtained, and the manner of determining those values; and (6) the expiration date of the policy. In addition, upon request of Lender (however not more often than annually), Borrower will have an independent appraiser satisfactory to Lender determine, as applicable, the actual cash value or replacement cost of any Collateral. The cost of such appraisal shall be paid by Borrower.

Guaranties. Prior to disbursement of any Loan proceeds, furnish executed guaranties of the Loans in favor of Lender, executed by the guarantors named below, on Lender's forms, and in the amounts and under the conditions set forth in those guaranties.

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<u>Names of Guarantors</u>	<u>Amounts</u>
JAMES L. THOMPSON LIVING TRUST DATED JUNE 16, 1997	Unlimited
JANICE L. MCCARTHY TRUST DATED SEPTEMBER 28, 2005	Unlimited

Loan Fees, Charges and Expenses. Whether or not the Project is completed, Borrower also shall pay upon demand all out-of-pocket expenses incurred by Lender in connection with the preparation of loan documents and the making of the Loan, including, without limitation, all closing costs, fees, and disbursements, all expenses of Lender's legal counsel, and all title examination fees, title insurance premiums, appraisal fees, survey costs, required fees, and filing and recording fees.

Loan Proceeds. Use the Loan Funds solely for payment of bills and expenses directly related to the Project.

Taxes, Charges and Liens. Pay and discharge when due all of its indebtedness and obligations, including without limitation all assessments, taxes, governmental charges, levies and liens, of every kind and nature, imposed upon Borrower or its properties, income, or profits, prior to the date on which penalties would attach, and all lawful claims that, if unpaid, might become a lien or charge upon any of Borrower's properties, income, or profits. Provided however, Borrower will not be required to pay and discharge any such assessment, tax, charge, levy, lien or claim so long as (1) the legality of the same shall be contested in good faith by appropriate proceedings, and (2) Borrower shall have established on Borrower's books adequate reserves with respect to such contested assessment, tax, charge, levy, lien, or claim in accordance with GAAP.

Performance. Perform and comply, in a timely manner, with all terms, conditions, and provisions set forth in this Agreement, in the Related Documents, and in all other instruments and agreements between Borrower and Lender. Borrower shall notify Lender immediately in writing of any default in connection with any agreement.

Inspection. Permit employees or agents of Lender at any reasonable time to inspect any and all Collateral for the Loan or Loans and Borrower's other properties and to examine or audit Borrower's books, accounts, and records and to make copies and memoranda of Borrower's books, accounts, and records. If Borrower now or at any time hereafter maintains any records (including without limitation computer generated records and computer software programs for the generation of such records) in the possession of a third party, Borrower, upon request of Lender, shall notify such party to permit Lender free access to such records at all reasonable times and to provide Lender with copies of any records it may request, all at Borrower's expense.

Construction of the Project. Commence construction of the Project no later than October 24, 2011, and cause the Improvements to be constructed and equipped in a diligent and orderly manner and in strict accordance with the Plans and Specifications approved by Lender, the Construction Contract, and all applicable laws, ordinances, codes, regulations, and rights of adjoining or concurrent property owners. Borrower agrees to complete the Project for purposes of final payment to the General Contractor on or before December 18, 2011, regardless of the reason for any delay.

Defects. Upon demand of Lender, promptly correct any defect in the Improvements or any departure from the Plans and Specifications not approved by Lender in writing before further work shall be done upon the portion of the Improvements affected.

Project Claims and Litigation. Promptly inform Lender of (1) all material adverse changes in the financial condition of the General Contractor; (2) any litigation and claims, actual or threatened, affecting the Project or the General Contractor, which could materially affect the successful completion of the Project or the ability of the General Contractor to complete the Project as agreed; and (3) any condition or event which constitutes a breach or default under any of the Related Documents or any contract related to the Project.

Payment of Claims and Removal of Liens. (1) Cause all claims for labor done and materials and services furnished in connection with the Improvements to be fully paid and discharged in a timely manner, (2) diligently file or procure the filing of a valid notice of completion of the Improvements, or such comparable document as may be permitted under applicable lien laws, (3) diligently file or procure the filing of a notice of cessation, or such comparable document as may be permitted under applicable lien laws, upon the happening of cessation of labor on the Improvements for a continuous period of thirty (30) days or more, and (4) take all reasonable steps necessary to remove all claims of liens against the Collateral, the Improvements or any part of the Collateral or Improvements, or any rights or interests appurtenant to the Collateral or Improvements. Upon Lender's request, Borrower shall make such demands or claims upon or against laborers, materialmen, subcontractors, or other persons who have furnished or claim to have furnished labor, services, or materials in connection with the Improvements, which demands or claims shall under the laws of the State of Arizona require diligent assertions of lien claims upon penalty of loss or waiver thereof. Borrower shall, within ten (10) days after the filing of any claim of lien that is disputed or contested by Borrower, provide Lender with a surety bond issued by a surety acceptable to Lender sufficient to release the claim of lien or deposit with Lender an amount satisfactory to Lender for the possibility that the contest will be unsuccessful. If Borrower fails to remove any lien on the Collateral or Improvements or provide a bond or deposit pursuant to this provision, Lender may pay such lien, or may contest the validity of the lien, and Borrower shall pay all costs and expenses of such contest, including Lender's reasonable attorneys' fees.

Taxes and Claims. Pay and discharge when due all of Borrower's indebtedness, obligations, and claims that, if unpaid, might become a lien or charge upon the Collateral or Improvements; provided, however, that Borrower shall not be required to pay and discharge any such indebtedness, obligation, or claim so long as (1) its legality shall be contested in good faith by appropriate proceedings, (2) the indebtedness, obligation, or claim does not become a lien or charge upon the Collateral or Improvements, and (3) Borrower shall have established on its books adequate reserves with respect to the amount contested in accordance with GAAP. If the indebtedness, obligation, or claim does become a lien or charge upon the Collateral or Improvements, Borrower shall remove the lien or charge as provided in the preceding paragraph.

Environmental Studies. Promptly conduct and complete, at Borrower's expense, all such investigations, studies, samplings and testings as may be requested by Lender or any governmental authority relative to any substance, or any waste or by-product of any substance defined as toxic or a hazardous substance under applicable federal, state, or local law, rule, regulation, order or directive, at or affecting any property or any facility owned, leased or used by Borrower.

Additional Assurances. Make, execute and deliver to Lender such promissory notes, mortgages, deeds of trust, security agreements, assignments, financing statements, instruments, documents and other agreements as Lender or its attorneys may reasonably request to evidence and secure the Loans and to perfect all Security Interests in the Collateral and Improvements.

RECOVERY OF ADDITIONAL COSTS. If the imposition of or any change in any law, rule, regulation or guideline, or the interpretation or application of any thereof by any court or administrative or governmental authority (including any request or policy not having the force of law) shall impose, modify or make applicable any taxes (except federal, state or local income or franchise taxes imposed on Lender), reserve requirements, capital adequacy requirements or other obligations which would (A) increase the cost to Lender for extending or maintaining the credit facilities to which this Agreement relates, (B) reduce the amounts payable to Lender under this Agreement or the Related Documents, or (C) reduce the rate of return on Lender's capital as a consequence of Lender's obligations with respect to the credit facilities to which this

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Agreement relates, then Borrower agrees to pay Lender such additional amounts as will compensate Lender therefor, within five (5) days after Lender's written demand for such payment, which demand shall be accompanied by an explanation of such imposition or charge and a calculation in reasonable detail of the additional amounts payable by Borrower, which explanation and calculations shall be conclusive in the absence of manifest error.

LENDER'S EXPENDITURES. If any action or proceeding is commenced that would materially affect Lender's interest in the Collateral or if Borrower fails to comply with any provision of this Agreement or any Related Documents, including but not limited to Borrower's failure to discharge or pay when due any amounts Borrower is required to discharge or pay under this Agreement or any Related Documents, Lender on Borrower's behalf may (but shall not be obligated to) take any action that Lender deems appropriate, to the extent permitted by applicable law, including but not limited to discharging or paying all taxes, liens, security interests, encumbrances and other claims, at any time levied or placed on any Collateral and paying all costs for insuring, maintaining and preserving any Collateral. All such expenditures incurred or paid by Lender for such purposes will then bear interest at the rate charged under the Note from the date incurred or paid by Lender to the date of repayment by Borrower. All such expenses will become a part of the indebtedness and, at Lender's option, will (A) be payable on demand; (B) be added to the balance of the Note and be apportioned among and be payable with any installment payments to become due during either (1) the term of any applicable insurance policy; or (2) the remaining term of the Note; or (C) be treated as a balloon payment which will be due and payable at the Note's maturity.

NEGATIVE COVENANTS. Borrower covenants and agrees with Lender that while this Agreement is in effect, Borrower shall not, without the prior written consent of Lender:

Indebtedness and Liens. (1) Except for trade debt incurred in the normal course of business and indebtedness to Lender contemplated by this Agreement, create, incur or assume indebtedness for borrowed money, including capital leases, (2) sell, transfer, mortgage, assign, pledge, lease, grant a security interest in, or encumber any of Borrower's assets (except as allowed as Permitted Liens), or (3) sell with recourse any of Borrower's accounts, except to Lender.

Continuity of Operations. (1) Engage in any business activities substantially different than those in which Borrower is presently engaged, (2) cease operations, liquidate, merge, transfer, acquire or consolidate with any other entity, change its name, dissolve or transfer or sell Collateral out of the ordinary course of business, or (3) make any distribution with respect to any capital account, whether by reduction of capital or otherwise.

Loans, Acquisitions and Guaranties. (1) Loan, invest in or advance money or assets to any other person, enterprise or entity, (2) purchase, create or acquire any interest in any other enterprise or entity, or (3) incur any obligation as surety or guarantor other than in the ordinary course of business.

Modification of Contract. Make or permit to be made any modification of the Construction Contract.

Liens. Create or allow to be created any lien or charge upon the Collateral or the Improvements.

Agreements. Enter into any agreement containing any provisions which would be violated or breached by the performance of Borrower's obligations under this Agreement or in connection herewith.

GENERAL PROJECT PROVISIONS. The following provisions relate to the construction and completion of the Project:

Change Orders. All requests for changes in the Plans and Specifications, other than minor changes involving no extra cost, must be in writing, signed by Borrower and the architect, and delivered to Lender for its approval. Borrower will not permit the performance of any work pursuant to any change order or modification of the Construction Contract or any subcontract without the written approval of Lender. Borrower will obtain any required permits or authorizations from governmental authorities having jurisdiction before approving or requesting a new change order.

Purchase of Materials; Conditional Sales Contracts. No materials, equipment, fixtures, or articles of personal property placed in or incorporated into the Project shall be purchased or installed under any Security Agreement or other agreement whereby the seller reserves or purports to reserve title or the right of removal or repossession, or the right to consider such items as personal property after their incorporation into the Project, unless otherwise authorized by Lender in writing.

Lender's Right of Entry and Inspection. Lender and its agents shall have at all times the right of entry and free access to the Property and the right to inspect all work done, labor performed, and materials furnished with respect to the Project. Lender shall have unrestricted access to and the right to copy all records, accounting books, contracts, subcontracts, bills, statements, vouchers, and supporting documents of Borrower relating in any way to the Project.

Lender's Right to Stop Work. If Lender in good faith determines that any work or materials do not conform to the approved Plans and Specifications or sound building practices, or otherwise depart from any of the requirements of this Agreement, Lender may require the work to be stopped and withhold disbursements until the matter is corrected. In such event, Borrower will promptly correct the work to Lender's satisfaction. No such action by Lender will affect Borrower's obligation to complete the Improvements on or before the Completion Date. Lender is under no duty to supervise or inspect the construction or examine any books and records. Any inspection or examination by Lender is for the sole purpose of protecting Lender's security and preserving Lender's rights under this Agreement. No default of Borrower will be waived by any inspection by Lender. In no event will any inspection by Lender be a representation that there has been or will be compliance with the Plans and Specifications or that the construction is free from defective materials or workmanship.

Indemnity. Borrower shall indemnify, defend, and hold Lender harmless from any and all claims asserted against Lender or the Property by any person, entity, or governmental body, or arising out of or in connection with the Property, Improvements, or Project. Lender shall be entitled to appear in any proceedings to defend itself against such claims, and all costs and expenses attorneys' fees incurred by Lender in connection with such defense shall be paid by Borrower to Lender. Lender shall, in its sole discretion, be entitled to settle or compromise any asserted claims against it, and such settlement shall be binding upon Borrower for purposes of this indemnification. All amounts paid by Lender under this paragraph shall be secured by Lender's security agreement or Deeds of Trust, if any, on the Property, shall be deemed an additional principal advance under the Loan, payable upon demand, and shall bear interest at the rate applicable to the Loan.

Publicity. Lender may display a sign at the construction site informing the public that Lender is the construction lender for the Project. Lender may obtain other publicity in connection with the Project through press releases and participation in ground-breaking and opening ceremonies and similar events.

Actions. Lender shall have the right to commence, appear in, or defend any action or proceeding purporting to affect the rights, duties, or liabilities of the parties to this Agreement, or the disbursement of funds from the Loan Fund. In connection with this right, Lender may incur and pay reasonable costs, expenses and attorneys' fees. Borrower covenants to pay to Lender on demand all such expenses, together with interest from the date Lender incurs the expense at the rate specified in the Note, and Lender is authorized to disburse funds from the Loan Fund for such purposes.

RIGHT OF SETOFF. To the extent permitted by applicable law, Lender reserves a right of setoff in all Borrower's accounts with Lender (whether

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checking, savings, or some other account). This includes all accounts Borrower holds jointly with someone else and all accounts Borrower may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. Borrower authorizes Lender, to the extent permitted by applicable law, to charge or setoff all sums owing on the indebtedness against any and all such accounts.

DEFAULT. Each of the following shall constitute an Event of Default under this Agreement:

Payment Default. Borrower fails to make any payment when due under the Loan.

Other Defaults. Borrower fails to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Borrower.

Default in Favor of Third Parties. Borrower or any Grantor defaults under any loan, extension of credit, security agreement, purchase or sales agreement, or any other agreement, in favor of any other creditor or person that may materially affect any of Borrower's or any Grantor's property or Borrower's or any Grantor's ability to repay the Loans or perform their respective obligations under this Agreement or any of the Related Documents.

False Statements. Any warranty, representation or statement made or furnished to Lender by Borrower or on Borrower's behalf under this Agreement or the Related Documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

Death or Insolvency. The dissolution of Borrower (regardless of whether election to continue is made), any member withdraws from Borrower, or any other termination of Borrower's existence as a going business or the death of any member, the insolvency of Borrower, the appointment of a receiver for any part of Borrower's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Borrower.

Defective Collateralization. This Agreement or any of the Related Documents ceases to be in full force and effect (including failure of any collateral document to create a valid and perfected security interest or lien) at any time and for any reason.

Creditor or Forfeiture Proceedings. Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Borrower or by any governmental agency against any collateral securing the Loan. This includes a garnishment of any of Borrower's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Borrower as to the validity or reasonableness of the claim which is the basis of the creditor or forfeiture proceeding and if Borrower gives Lender written notice of the creditor or forfeiture proceeding and deposits with Lender monies or a surety bond for the creditor or forfeiture proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

Breach of Construction Contract. The Improvements are not constructed in accordance with the Plans and Specifications or in accordance with the terms of the Construction Contract.

Cessation of Construction. Prior to the completion of construction of the Improvements and equipping of the Project, the construction of the Improvements or the equipping of the Project is abandoned or work thereon ceases for a period of more than ten (10) days for any reason, or the Improvements are not completed for purposes of final payment to the General Contractor prior to December 18, 2011, regardless of the reason for the delay.

Transfer of Property. Sale, transfer, hypothecation, assignment, or conveyance of the Property or the Improvements or any portion thereof or interest therein by Borrower or any Borrower without Lender's prior written consent.

Condemnation. All or any material portion of the Collateral is condemned, seized, or appropriated without compensation, and Borrower does not within thirty (30) days after such condemnation, seizure, or appropriation, initiate and diligently prosecute appropriate action to contest in good faith the validity of such condemnation, seizure, or appropriation.

Events Affecting Guarantor. Any of the preceding events occurs with respect to any Guarantor of any of the Indebtedness or any Guarantor dies or becomes incompetent, or revokes or disputes the validity of, or liability under, any Guaranty of the Indebtedness.

Adverse Change. A material adverse change occurs in Borrower's financial condition, or Lender believes the prospect of payment or performance of the Loan is impaired.

Insecurity. Lender in good faith believes itself insecure.

Right to Cure. If any default, other than a default on Indebtedness, is curable and if Borrower or Grantor, as the case may be, has not been given a notice of a similar default within the preceding twelve (12) months, it may be cured if Borrower or Grantor, as the case may be, after Lender sends written notice to Borrower or Grantor, as the case may be, demanding cure of such default: (1) cure the default within thirty (30) days; or (2) if the cure requires more than thirty (30) days, immediately initiate steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continue and complete all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

EFFECT OF AN EVENT OF DEFAULT; REMEDIES. Upon the occurrence of any Event of Default and at any time thereafter, Lender may, at its option, but without any obligation to do so, and in addition to any other right Lender without notice to Borrower may have, do any one or more of the following without notice to Borrower: (a) Cancel this Agreement; (b) Institute appropriate proceedings to enforce the performance of this Agreement; (c) Withhold further disbursement of Loan Funds; (d) Expend funds necessary to remedy the default; (e) Take possession of the Property and continue construction of the Project; (f) Accelerate maturity of the Note and/or Indebtedness and demand payment of all sums due under the Note and/or Indebtedness; (g) Bring an action on the Note and/or Indebtedness; (h) Foreclose Lender's security agreement or Deeds of Trust, if any, on the Property in any manner available under law; and (i) Exercise any other right or remedy which it has under the Note or Related Documents, or which is otherwise available at law or in equity or by statute.

COMPLETION OF IMPROVEMENTS BY LENDER. If Lender takes possession of the Collateral, it may take any and all actions necessary in its judgment to complete construction of the Improvements, including but not limited to making changes in the Plans and Specifications, work, or materials and entering into, modifying or terminating any contractual arrangements, subject to Lender's right at any time to discontinue any work without liability. If Lender elects to complete the Improvements, it will not assume any liability to Borrower or to any other person for completing the Improvements or for the manner or quality of construction of the Improvements, and Borrower expressly waives any such liability. Borrower irrevocably appoints Lender as its attorney-in-fact, with full power of substitution, to complete the Improvements, at Lender's option, either in Borrower's name or in its own name. In any event, all sums expended by Lender in completing the construction of the Improvements will be considered to have been disbursed to Borrower and will be secured by the Collateral for the Loan. Any such sums that cause the principal amount of the Loan to exceed the face amount of the Note will be considered to be an additional Loan to Borrower, bearing interest at the Note rate and being secured by the Collateral. For these purposes, Borrower assigns to Lender all of its right, title and interest in

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and to the Project Documents; however Lender will not have any obligation under the Project Documents unless Lender expressly hereafter agrees to assume such obligations in writing. Lender will have the right to exercise any rights of Borrower under the Project Documents upon the occurrence of an Event of Default. Except as may be prohibited by applicable law, all of Lender's rights and remedies, whether evidenced by this Agreement or by any other writing, shall be cumulative and may be exercised singularly or concurrently.

ADDITIONAL DOCUMENTS. Borrower shall provide Lender with the following additional documents:

Articles of Organization and Company Resolutions. THOMPSON/MCCARTHY DB LLC has provided or will provide Lender with a certified copy of THOMPSON/MCCARTHY DB LLC's Articles of Organization, together with a certified copy of resolutions properly adopted by the members of the company, under which the members authorized one or more designated members or employees to execute this Agreement, the Note and any and all Security Agreements directly or indirectly securing repayment of the same, and to consummate the borrowings and other transactions as contemplated under this Agreement, and to consent to the remedies following any default by THOMPSON/MCCARTHY DB LLC as provided in this Agreement and in any Security Agreements to execute this Agreement, the Note and any and all Security Agreements directly or indirectly securing repayment of the same, and to consummate the borrowings and other transactions as contemplated under this Agreement, and to consent to the remedies following any default by JAMES L. THOMPSON as provided in this Agreement and in any Security Agreements to execute this Agreement, the Note and any and all Security Agreements directly or indirectly securing repayment of the same, and to consummate the borrowings and other transactions as contemplated under this Agreement, and to consent to the remedies following any default by JANICE L. MCCARTHY as provided in this Agreement and in any Security Agreements.

Opinion of Counsel. When required by Lender, Borrower has provided or will provide Lender with an opinion of Borrower's counsel certifying to and that: (1) Borrower's Note, any Security Agreements and this Agreement constitute valid and binding obligations on Borrower's part that are enforceable in accordance with their respective terms; (2) Borrower is validly existing and in good standing; (3) such other matters as may have been requested by Lender or by Lender's counsel.

MISCELLANEOUS PROVISIONS. The following miscellaneous provisions are a part of this Agreement:

Amendments. This Agreement, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

Attorneys' Fees; Expenses. Borrower agrees to pay upon demand all of Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Agreement. Lender may hire or pay someone else to help enforce this Agreement, and Borrower shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's attorneys' fees and legal expenses whether or not there is a lawsuit, including attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services. However, Borrower will only pay attorneys' fees of an attorney not Lender's salaried employee, to whom the matter is referred after Borrower's default. Borrower also shall pay all court costs and such additional fees as may be directed by the court.

Authority to File Notices. Borrower appoints and designates Lender as its attorney-in-fact to file for the record any notice that Lender deems necessary to protect its interest under this Agreement. This power shall be deemed coupled with an interest and shall be irrevocable while any sum or performance remains due and owing under any of the Related Documents.

Caption Headings. Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of this Agreement.

Applicable Law. The Loan secured by this lien was made under a United States Small Business Administration (SBA) nationwide program which uses tax dollars to assist small business owners. If the United States is seeking to enforce this document, then under SBA regulations: (a) When SBA is the holder of the Note, this document and all documents evidencing or securing this Loan will be construed in accordance with federal law. (b) Lender or SBA may use local or state procedures for purposes such as filing papers, recording documents, giving notice, foreclosing liens, and other purposes. By using these procedures, SBA does not waive any federal immunity from local or state control, penalty, tax or liability. No Borrower or Guarantor may claim or assert against SBA any local or state law to deny any obligation of Borrower, or defeat any claim of SBA with respect to this Loan. Any clause in this document requiring arbitration is not enforceable when SBA is the holder of the Note secured by this instrument.

Indemnification of Lender. Borrower agrees to indemnify, to defend and to save and hold Lender harmless from any and all claims, suits, obligations, damages, losses, costs and expenses (including, without limitation, Lender's attorneys' fees, as well as Lender's architect's and engineering fees), demands, liabilities, penalties, fines and forfeitures of any nature whatsoever that may be asserted against or incurred by Lender, its officers, directors, employees, and agents arising out of, relating to, or in any manner occasioned by this Agreement and the exercise of the rights and remedies granted Lender under this. The foregoing indemnity provisions shall survive the cancellation of this Agreement as to all matters arising or accruing prior to such cancellation and the foregoing indemnity shall survive in the event that Lender elects to exercise any of the remedies as provided under this Agreement following default hereunder.

Joint and Several Liability. All obligations of Borrower under this Agreement shall be joint and several, and all references to Borrower shall mean each and every Borrower. This means that each Borrower signing below is responsible for all obligations in this Agreement. Where any one or more of the parties is a corporation, partnership, limited liability company or similar entity, it is not necessary for Lender to inquire into the powers of any of the officers, directors, partners, members, or other agents acting or purporting to act on the entity's behalf, and any obligations made or created in reliance upon the professed exercise of such powers shall be guaranteed under this Agreement.

Consent to Loan Participation. Borrower agrees and consents to Lender's sale or transfer, whether now or later, of one or more participation interests in the Loan to one or more purchasers, whether related or unrelated to Lender. Lender may provide, without any limitation whatsoever, to any one or more purchasers, or potential purchasers, any information or knowledge Lender may have about Borrower or about any other matter relating to the Loan, and Borrower hereby waives any rights to privacy Borrower may have with respect to such matters. Borrower additionally waives any and all notices of sale of participation interests, as well as all notices of any repurchase of such participation interests. Borrower also agrees that the purchasers of any such participation interests will be considered as the absolute owners of such interests in the Loan and will have all the rights granted under the participation agreement or agreements governing the sale of such participation interests. Borrower further waives all rights of offset or counterclaim that it may have now or later against Lender or against any purchaser of such a participation interest and unconditionally agrees that either Lender or such purchaser may enforce Borrower's obligation under the Loan irrespective of the failure or insolvency of any holder of any interest in the Loan. Borrower further agrees that the purchaser of any such participation interests may enforce its interests irrespective of any personal claims or defenses that Borrower may have against Lender.

No Waiver by Lender. Lender shall not be deemed to have waived any rights under this Agreement unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any

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other right. A waiver by Lender of a provision of this Agreement shall not prejudice or constitute a waiver of Lender's right otherwise to demand strict compliance with that provision or any other provision of this Agreement. No prior waiver by Lender, nor any course of dealing between Lender and Borrower, or between Lender and any Grantor, shall constitute a waiver of any of Lender's rights or of any of Borrower's or any Grantor's obligations as to any future transactions. Whenever the consent of Lender is required under this Agreement, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the sole discretion of Lender.

Severability. If a court of competent jurisdiction finds any provision of this Agreement to be illegal, invalid, or unenforceable as to any person or circumstance, that finding shall not make the offending provision illegal, invalid, or unenforceable as to any other person or circumstance. If feasible, the offending provision shall be considered modified so that it becomes legal, valid and enforceable. If the offending provision cannot be so modified, it shall be considered deleted from this Agreement. Unless otherwise required by law, the illegality, invalidity, or unenforceability of any provision of this Agreement shall not affect the legality, validity or enforceability of any other provision of this Agreement.

Successors and Assigns. All covenants and agreements by or on behalf of Borrower contained in this Agreement or any Related Documents shall bind Borrower's successors and assigns and shall inure to the benefit of Lender and its successors and assigns. Borrower shall not, however, have the right to assign Borrower's rights under this Agreement or any interest therein, without the prior written consent of Lender.

Survival of Representations and Warranties. Borrower understands and agrees that in making the Loan, Lender is relying on all representations, warranties, and covenants made by Borrower in this Agreement or in any certificate or other instrument delivered by Borrower to Lender under this Agreement or the Related Documents. Borrower further agrees that regardless of any investigation made by Lender, all such representations, warranties and covenants will survive the making of the Loan and delivery to Lender of the Related Documents, shall be continuing in nature, and shall remain in full force and effect until such time as Borrower's Indebtedness shall be paid in full, or until this Agreement shall be terminated in the manner provided above, whichever is the last to occur.

Time is of the Essence. Time is of the essence in the performance of this Agreement.

Waive Jury. All parties to this Agreement hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by any party against any other party.

DEFINITIONS. The following capitalized words and terms shall have the following meanings when used in this Agreement. Unless specifically stated to the contrary, all references to dollar amounts shall mean amounts in lawful money of the United States of America. Words and terms used in the singular shall include the plural, and the plural shall include the singular, as the context may require. Words and terms not otherwise defined in this Agreement shall have the meanings attributed to such terms in the Uniform Commercial Code. Accounting words and terms not otherwise defined in this Agreement shall have the meanings assigned to them in accordance with generally accepted accounting principles as in effect on the date of this Agreement:

Advance. The word "Advance" means a disbursement of Loan funds made, or to be made, to Borrower or on Borrower's behalf on a line of credit or multiple advance basis under the terms and conditions of this Agreement.

Agreement. The word "Agreement" means this Construction Loan Agreement, as this Construction Loan Agreement may be amended or modified from time to time, together with all exhibits and schedules attached to this Construction Loan Agreement from time to time.

Architect's Contract. The words "Architect's Contract" mean the architect's contract dated August 22, 2011 between Borrower and KISTLER + SMALL + WHITE ARCHITECTS, the architect for the Project.

Borrower. The word "Borrower" means THOMPSON/MCCARTHY DB LLC, JAMES L. THOMPSON and JANICE L. MCCARTHY and includes all co-signers and co-makers signing the Note and all their successors and assigns.

Collateral. The word "Collateral" means all property and assets granted as collateral security for a Loan, whether real or personal property, whether granted directly or indirectly, whether granted now or in the future, and whether granted in the form of a security interest, mortgage, collateral mortgage, deed of trust, assignment, pledge, crop pledge, chattel mortgage, collateral chattel mortgage, chattel trust, factor's lien, equipment trust, conditional sale, trust receipt, lien, charge, lien or title retention contract, lease or consignment intended as a security device, or any other security or lien interest whatsoever, whether created by law, contract, or otherwise.

Completion Date. The words "Completion Date" mean December 18, 2011.

Construction Contract. The words "Construction Contract" mean the contract dated August 4, 2011 between Borrower and LAURSHAN, INC., the general contractor for the Project, and any subcontracts with subcontractors, materialmen, laborers, or any other person or entity for performance of work on the Project or the delivery of materials to the Project.

Contractor. The word "Contractor" means LAURSHAN, INC., the general contractor for the Project.

Environmental Laws. The words "Environmental Laws" mean any and all state, federal and local statutes, regulations and ordinances relating to the protection of human health or the environment, including without limitation the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq. ("CERCLA"), the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 ("SARA"), the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq., the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, et seq., or other applicable state or federal laws, rules, or regulations adopted pursuant thereto.

Event of Default. The words "Event of Default" mean any of the events of default set forth in this Agreement in the default section of this Agreement.

GAAP. The word "GAAP" means generally accepted accounting principles.

Grantor. The word "Grantor" means each and all of the persons or entities granting a Security Interest in any Collateral for the Loan, including without limitation all Borrowers granting such a Security Interest.

Guarantor. The word "Guarantor" means any guarantor, surety, or accommodation party of any or all of the Loan and any guarantor under a completion guaranty agreement.

Guaranty. The word "Guaranty" means the guaranty from Guarantor to Lender, including without limitation a guaranty of all or part of the Note.

Hazardous Substances. The words "Hazardous Substances" mean materials that, because of their quantity, concentration or physical, chemical or infectious characteristics, may cause or pose a present or potential hazard to human health or the environment when improperly used, treated, stored, disposed of, generated, manufactured, transported or otherwise handled. The words "Hazardous Substances" are used in their very broadest sense and include without limitation any and all hazardous or toxic substances, materials or

**CONSTRUCTION LOAN AGREEMENT
(Continued)**

Loan No: 826005400

Page 11

waste as defined by or listed under the Environmental Laws. The term "Hazardous Substances" also includes, without limitation, petroleum and petroleum by-products or any fraction thereof and asbestos.

Improvements. The word "Improvements" means all existing and future buildings, structures, facilities, fixtures, additions, and similar construction on the Collateral.

Indebtedness. The word "Indebtedness" means the indebtedness evidenced by the Note or Related Documents, including all principal and interest together with all other indebtedness and costs and expenses for which Borrower is responsible under this Agreement or under any of the Related Documents.

Lender. The word "Lender" means RepublicBankAz, N.A., its successors and assigns.

Loan. The word "Loan" means the loan or loans made to Borrower under this Agreement and the Related Documents as described.

Loan Fund. The words "Loan Fund" mean the undisbursed proceeds of the Loan under this Agreement together with any equity funds or other deposits required from Borrower under this Agreement.

Note. The word "Note" means the promissory note dated October 24, 2011, in the original principal amount of \$1,026,300.00 from Borrower to Lender, together with all renewals of, extensions of, modifications of, refinancings of, consolidations of, and substitutions for the promissory note or agreement.

Permitted Liens. The words "Permitted Liens" mean (1) liens and security interests securing indebtedness owed by Borrower to Lender; (2) liens for taxes, assessments, or similar charges either not yet due or being contested in good faith; (3) liens of materialmen, mechanics, warehousemen, or carriers, or other like liens arising in the ordinary course of business and securing obligations which are not yet delinquent; (4) purchase money liens or purchase money security interests upon or in any property acquired or held by Borrower in the ordinary course of business to secure indebtedness outstanding on the date of this Agreement or permitted to be incurred under the paragraph of this Agreement titled "Indebtedness and Liens"; (5) liens and security interests which, as of the date of this Agreement, have been disclosed to and approved by the Lender in writing; and (6) those liens and security interests which in the aggregate constitute an immaterial and insignificant monetary amount with respect to the net value of Borrower's assets.

Plans and Specifications. The words "Plans and Specifications" mean the plans and specifications for the Project which have been submitted to and initialed by Lender, together with such changes and additions as may be approved by Lender in writing.

Project. The word "Project" means the construction project as described in the "Project Description" section of this Agreement.

Project Documents. The words "Project Documents" mean the Plans and Specifications, all studies, data and drawings relating to the Project, whether prepared by or for Borrower, the Construction Contract, the Architect's Contract, and all other contracts and agreements relating to the Project or the construction of the Improvements.

Property. The word "Property" means the property as described in the "Project Description" section of this Agreement.

Real Property. The words "Real Property" mean the real property, interests and rights, as further described in the "Project Description" section of this Agreement.

Related Documents. The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, environmental agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other Instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Loan.


Security Agreement. The words "Security Agreement" mean and include without limitation any agreements, promises, covenants, arrangements, understandings or other agreements, whether created by law, contract, or otherwise, evidencing, governing, representing, or creating a Security Interest.


Security Interest. The words "Security Interest" mean, without limitation, any and all types of collateral security, present and future, whether in the form of a lien, charge, encumbrance, mortgage, deed of trust, security deed, assignment, pledge, crop pledge, chattel mortgage, collateral chattel mortgage, chattel trust, factor's lien, equipment trust, conditional sale, trust receipt, lien or title retention contract, lease or consignment intended as a security device, or any other security or lien interest whatsoever whether created by law, contract, or otherwise.

BORROWER ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS CONSTRUCTION LOAN AGREEMENT AND BORROWER AGREES TO ITS TERMS. THIS CONSTRUCTION LOAN AGREEMENT IS DATED OCTOBER 24, 2011.

BORROWER:

THOMPSON/MCCARTHY DB LLC

By: 
JAMES L. THOMPSON, Manager of
THOMPSON/MCCARTHY DB LLC

X 
JAMES L. THOMPSON, Individually

X 
JANICE L. MCCARTHY, Individually

**CONSTRUCTION LOAN AGREEMENT
(Continued)**

waste as defined by or listed under the Environmental Laws. The term "Hazardous Substances" also includes, without limitation, petroleum and petroleum by-products or any fraction thereof and asbestos.

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Security Interest. The words "Security Interest" mean, without limitation, any and all types of collateral security, present and future, whether in the form of a lien, charge, encumbrance, mortgage, deed of trust, security deed, assignment, pledge, crop pledge, chattel mortgage, collateral chattel mortgage, chattel trust, factor's lien, equipment trust, conditional sale, trust receipt, lien or title retention contract, lease or consignment intended as a security device, or any other security or lien interest whatsoever whether created by law, contract, or otherwise.

BORROWER ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS CONSTRUCTION LOAN AGREEMENT AND BORROWER AGREES TO ITS TERMS. THIS CONSTRUCTION LOAN AGREEMENT IS DATED OCTOBER 24, 2011.

BORROWER:

THOMPSON/MCCARTHY DB LLC

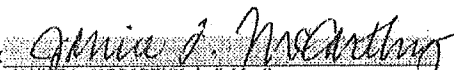
By:


JAMES L. THOMPSON, Manager of
THOMPSON/MCCARTHY DB LLC

X


JAMES L. THOMPSON, Individually

X


JANICE L. MCCARTHY, Individually

Loan No: 826005400

**CONSTRUCTION LOAN AGREEMENT
(Continued)**

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LENDER:

REPUBLICBANKAZ, N.A.

By: 
Authorized Signer

LASER PRO Lending, Ver. 5.97.10.001 Copr. Harland Financial Solutions, Inc. 1997, 2011. All Rights Reserved. - AZ G:\PROGUITEN\CFIL\PLC41.PC TR 607 PM-16

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EXHIBIT "A"
TO LOAN AGREEMENT DATED OCTOBER 24, 2011

Additional Conditions of Disbursements, Covenants, and Provisions:

1. In lieu of charging the Borrower a 2% fee to monitor loan disbursements, Borrower has agreed that all loan funds will be deposited into a bank control deposit account with RepublicBankAz, N.A. (Bank) and subsequently disbursed from said account. Borrower understands that the loan shall be fully disbursed at closing, and interest shall accrue on the total principal balance.
2. Borrower agrees to provide invoices for equipment and/or inventory purchased to Bank before any Equipment proceeds can be disbursed. In addition, any items valued at \$5,000.00 and above must include a full description and a serial number.
3. For the 1122 S. Greenfield Rd., Mesa, AZ construction location, Borrower agrees to provide Bank with certain Information and Documents pertaining to said location before any disbursements held for construction of the location can be disbursed. Said information and Documents must be received and reviewed by Bank and/or executed by Borrower, Grantor, Guarantor, and Lender where applicable. Said Information and Documents includes but is not limited to the following:
 - a. Executed Construction Contract
 - b. Executed Architect Contract
 - c. Execute Assignment of Construction Contract Document
 - d. Execute Assignment of Architect's Contract Document
 - e. Executed and recorded Leasehold Deed of Trust Document
 - f. Executed Lease between Landlord and Tenant, with options to renew for at least the term of the loan.
 - g. Execute Landlord's Consent to Assignment
 - h. Execute any other documents the Bank deems necessary to perfect the Bank's Lien.
 - i. Plans and Specifications
 - j. Survey
 - k. The construction must conform with the "National Earthquake Hazards Reduction Program Recommended Provisions for the Development of Seismic Regulations for New Buildings" (NEHRP), and an opinion letter addressing this must be obtained.
 - l. Builder's Risk Insurance and Liability Insurance from Contractor and Tenant.
 - m. Building Permit
 - n. Executed Franchise Agreement
 - o. Articles of Organization for Greenfield Southern DB LLC
 - p. Operating Agreement for Greenfield Southern DB LLC
 - q. Tax Identification Number for Greenfield Southern DB LLC
 - r. Execute Borrowing Resolution Document for Greenfield Southern DB LLC

Exhibit "A" continued

4. The following headings in the Loan Agreement shall also pertain to the 1122 S. Greenfield Rd., Mesa, AZ location when the applicable documentation and information is received: "Construction Contract", "Architect Contract", "Contractor", "Commencement Date" and "Completion Date".
5. Borrower agrees to provide Bank with the following upon the completion and opening of each location – 6461 S. Rural Rd., Tempe, AZ, and 1122 S. Greenfield Rd., Mesa, AZ:
 - a. Copies of all Licenses and Permits to operate each business.
 - b. Property Hazard Insurance, Business Personal Property Insurance, Commercial Liability Insurance, Product Liability Insurance, and Workman's Compensation Insurance.
 - c. Certificate of Occupancy
6. Borrower agrees to execute an Indemnification Agreement and comply with all other necessary requirements to resolve the issue, with the First Arizona Title Agency, of construction already in progress at 6461 S. Rural Rd., Tempe, AZ. Borrower further understands that no loan proceeds can be disbursed until this issue has been resolved to the satisfaction of First Arizona Title Agency and RepublicBankAz, N.A.
7. Borrower understands that there will be additional fees added by the Title Company in the form of a Settlement Statement for both properties. The Settlement Statement will not be made available for the 6461 S. Rural Rd., Tempe, AZ property until #6 above is complete, and until all conditions are met for the 1122 S. Greenfield Rd., Mesa, AZ property. Borrower further agrees that they will execute Settlement Statement(s) when it available.
8. Borrower agrees to provide insurance to RepublicBankAz, N.A. as Loss Payee on all Business Personal Property at the following locations: 3213 S. Mill Ave., Tempe AZ; 1960 E. McKellips Rd., Mesa, AZ; 4 W. Camelback Rd., Phoenix, AZ; 2961 E. Bell Rd., Phoenix, AZ; 722 N. McQueen Rd., Gilbert AZ; 1037 S. Rural Rd., Tempe, AZ; 1422 N. Scottsdale Rd., Scottsdale, AZ.
9. Borrower agrees that no loan funds shall be disbursed for the 6461 S. Rural Rd., Tempe, AZ property until the following documents are executed by the applicable party:
 - a. Assignment of Construction Contract – executed by Contractor
 - b. Assignment of Architect Contract – executed by Architect
 - c. Landlord's Consent to Assignment – executed by Landlord
 - d. Memorandum of Lease – executed by Landlord
 - e. Agreement of Compliance – executed by Contractor

10. Borrower and/or related entities agree to open operating accounts with RepublicBankAz, N.A. within 60 days of loan closing.

Borrower hereby agrees to provide and/or comply with all of the aforementioned Conditions of Disbursements, Covenants, and Provisions.

Executed this 24th day October, 2011.

BORROWER:

Thompson/McCarthy DB LLC

By: James L. Thompson
James L. Thompson, Manager

James L. Thompson
James L. Thompson, Individually

Janice L. McCarthy, Individually

LENDER:

RepublicBankAz, N.A.

By: Michael Harris
Michael Harris, Vice President

10. Borrower and/or related entities agree to open operating accounts with RepublicBankAz, N.A. within 60 days of loan closing.

Borrower hereby agrees to provide and/or comply with all of the aforementioned Conditions of Disbursements, Covenants, and Provisions.

Executed this 24th day October, 2011.

BORROWER:

Thompson/McCarthy DB LLC

By: James L. Thompson
James L. Thompson, Manager

James L. Thompson
James L. Thompson, Individually

Janice L. McCarthy
Janice L. McCarthy, Individually

LENDER:

RepublicBankAz, N.A.

By: Michael Harris
Michael Harris, Vice President

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6 j.dorvinen@fjslegal.com
7 *Attorneys for Plaintiff Thompson/McCarthy Coffee Co.*

8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
9 **IN AND FOR THE COUNTY OF MARICOPA**

10 THOMPSON/McCARTHY COFFEE CO.,
11 an Arizona corporation,

12 Plaintiff,

13 v.

14 REPUBLICBANKAZ, N.A.,
15 Defendant.

Case No. CV2014-014647

**RESPONSE TO REPUBLICBANKAZ'S
APPLICATION FOR AWARD OF
ATTORNEYS' FEES AND COSTS
(Oral Argument Requested)**

(Standard Case)

(Assigned to the Honorable Dawn Bergin)

16 Republic asserted in its Motion for Summary Judgment ("MSJ") that it would not
17 have sold Republic's loans to Mutual of Omaha Bank ("MOH") if Republic were "subject to
18 potential claims" of TMCC, emphasizing that TMCC's execution of the Release was "a
19 condition of the loan sale." *See* MSJ filed December 2, 2016, 2:21-24, 7:12-14. In other
20 words, the non-execution of the Release was of such critical importance, it was a deal
21 breaker for Republic going through with the sale of TMCC's loans. Upon receipt of
22 TMCC's execution of the Release, Republic believed at that moment that it was no longer
23 subject to legal claims made by TMCC. On that basis, Republic closed the sale to MOH. *Id.*
24 At the time TMCC signed the Release in September 2013, Republic believed "TMCC was
25 barred from bringing any claims against Republic." *See* MSJ at 2:21-24.

26 Republic filed its Answer to TMCC's Second Amended Complaint ("Complaint") on
27 May 11, 2015. Although Republic believed TMCC was barred from bringing its claims,
28

1 Republic did not assert the Release as a defense to TMCC's lawsuit *until 17 months later*,
2 after the parties collectively expended substantial sums of money on both legal and expert
3 fees. Prior to Republic preparing its MSJ on the basis that TMCC's claims were barred,
4 Republic spent \$284,939—TMCC spent \$271,149. *See Exhibits A and B.* In total the
5 parties spent \$556,088.00 prior to November 1, 2016, when Republic mailed TMCC its
6 Third Supplemental Disclosure Statement asserting for the first time the Release as to barring
7 all claims. Republic's delay was unreasonable, its expenditure of legal fees and costs on
8 experts was unreasonable, and no good causes exists to justify why it intentionally waited 17
9 months to assert the Release as a bar to TMCC's claims.

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. Defendant does not meet the statutory requirements of A.R.S. § 12-341.01 and** 12 **therefore is not eligible to seek an award of its attorneys' fees.**

13 It is a generally accepted rule, that the award of attorney's fees, when not provided for
14 by contract, is purely statutory, and neither party, by statement or omission in court, can
15 confer authority on a court to make such an award." *Bouldin v. Tourek*, 125 Ariz. 77, 79,
16 607 P.2d 954, 956 (1979); *see also DVM Co. v. Stag Tobacconist, Ltd.* 137 Ariz. 466, 468,
17 671 P.2d 907, 909 (1983); *Taylor v. Southern Pac. Transp. Co.*, 130 Ariz. 516, 523, 637 P.2d
18 726, 733 (1981). There is no statutory authority for the Court to award Republic its requested
19 attorneys' fees because Plaintiff's tort claims do not arise out of contract. *See* A.R.S. § 12-
20 341.01 ("In any contested action arising out of a contract, express or implied, the court may
21 award the successful party reasonable attorney fees.") Plaintiff filed two claims against
22 Republic: (1) Negligent Misrepresentation (Count 1); and (2) Fraudulent Inducement (Count
23 2). Both arise out of tort, not contract.

24 There are instances when a Court could award fees where a tort claim arises out of a
25 contract. "An action in tort may give rise to an award of attorneys' fees if the tort action
26 could not exist but for the breach of the contract." *Morris v. Achen Constr. Co.*, 155 Ariz.
27 512, 514, 747 P.2d 1211, 1213 (1987) *citing to Sparks v. Republic National Life Ins. Co.*,
28 132 Ariz. 529, 647 P.2d 1127 (1982). But here, the tort claims do not arise out of a breach of

1 contract, rather, they arise out of Republic's misrepresentations regarding both its experience
2 and abilities to provide the SBA funding to TMCC in the amount of \$5 million, and its
3 repeated misrepresentations during the loan application process. The *Ramsey Air Meds,*
4 *L.L.C. v. Cutter Aviation, Inc.* case analyzes this issue:

5 The existence of a contract that merely puts the parties within tortious striking range
6 of each other does not convert ensuing torts into contract claims. Rather, a tort claim
7 will "arise out of a contract" only when the tort could not exist "but for" the breach or
8 avoidance of contract. When the duty breached is one implied by law based on the
relationship of the parties, that claim sounds fundamentally in tort, not contract. In
such cases, it cannot be said that the plaintiff's claim would not exist "but for" the
**321 *16 contract.

9 *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 16, 6 P.3d 315, 321
10 (App.Div. 1, 2000).

11 The torts of negligent misrepresentations and fraudulent inducement certainly do not
12 arise out of any contract. See *Morris v. Achen Constr. Co.*, 155 Ariz. 512, 514, 747 P.2d
13 1211, 1213 (1987) ("The duty not to commit fraud is obviously not created by a contractual
14 relationship and exists [] even when there is no contractual relationship between the parties
15 at all."). The duty not to commit negligent misrepresentation also does not depend upon a
16 contractual relationship:

17 One who, in the course of his business, profession or employment, or in any other
18 transaction in which he has a pecuniary interest, supplies false information for the
19 guidance of others in their business transactions, is subject to liability for pecuniary
loss caused to them by their justifiable reliance upon the information, if he fails to
exercise reasonable care or competence in obtaining or communicating the
information.

20 Restatement (Second) of Torts § 552 (1977); see also *Standard Chartered PLC v. Price*
21 *Waterhouse*, 190 Ariz. 6, 29, 945 P.2d 317, 340 (App. 1996).

22 As repeatedly admitted and asserted by Republic throughout the lawsuit, there is no
23 express or implied contract forming the basis of either TMCC's Counts 1 or 2, and there is
24 no written or actionable oral contract (A.R.S. 44-101(9)) guaranteeing TMCC would receive
25 \$5 million of SBA loans or guaranteeing TMCC would have SBA approval of loans by a
26 certain date. Plaintiff's claims do not rely upon the breach of any contract, do not arise out
27
28

1 of contract within the meaning of A.R.S. § 12-341.01 and, therefore, Defendant is not
2 permitted to an award for its attorneys' fees.

3 Republic's Answer to the Complaint, alleges "no evidence of a written contract,
4 promise, undertaking or commitment from the Bank to TMC exists regarding certain
5 allegations of TMC." *See* Answer, 3:19-25. Consistent with Republic's Answer, all of
6 Republic's disclosure statements repeat its A.R.S. § 44-101(9) Statute of Frauds defense,
7 asserting in conjunction therewith as follows:

8 Here, there is nothing in writing to evidence that Republic promised or guaranteed
9 that TMCC would receive SBA approval for \$5 million of loans, or promised it would
10 have SBA approval for any loans by a certain date, and in the absence of such a
11 writing between the parties, TMCC's claims must fail. Republic could not and did
12 not promise anything other than its willingness to work with TMCC to try to obtain
13 SBA loans up to the \$5 million limit.

14 All of Republic's disclosure statements also repeatedly disclosed:

15 TMCC also fails to state a claim against the Bank upon which an award of attorneys'
16 fees may be granted. TMCC has alleged negligent misrepresentation and fraudulent
17 inducement, both of which are tort claims. There is no contractual basis for either of
18 TMCC's claim[s]. A.R.S. §§ 12-341 and 12-341.01 provide that the successful party
19 in any action arising out of a contract may be awarded attorney's fees and costs.
20 Here, there was no express or implied contract that was the basis for either of
21 TMCC's claims, and therefore, TMCC has failed to state a claim upon which an
22 award of attorneys' fees can be granted.

23 *See* Republic's Initial (7:19-8:5, 8:27-9:6), First (7:22-8:8, 9:3-10), Second (8:2-15, 9:10-17),
24 Third (8:16-9:2, 12:1-8), Fourth (8:14-28, 11:25-12:4) and Fifth (8:14-28, 11:18-25)
25 Supplemental Disclosure Statements at **Exhibit C**.

26 Plaintiff did not seek attorneys' fees in its Complaint. Republic's legal analysis is
27 correct: "there was no express or implied contract that was the basis for either of TMCC's
28 claims...." Republic continually maintained this fact throughout litigation up through its
Fifth and final Supplemental Disclosure Statement which it disclosed on January 18, 2017,
after filing its MSJ, that there was no basis for awarding attorneys' fees under A.R.S. 12-
341.01. *See id.*

The disclosure statement "is the primary vehicle by which the parties are informed of
their opponent's case." *Bryan v. Riddel*, 178 Ariz. 472, 477, 875 P.2d 131, 136 (1994). The

1 purpose of the disclosure requirements is to ensure that all parties are fairly informed of the
2 facts and the party's legal theories. *See* Ariz.R.Civ.P. 26.1; *see also Clark Equipment Co. v.*
3 *Arizona Property and Cas. Ins. Guar. Fund*, 189 Ariz. 433, 440, 943 P.2d 793, 800 (App.
4 Div.1 1997) (The purpose of the disclosure is to "give each party adequate notice of what
5 arguments will be made.") It is abundantly clear by Republic's disclosure statements that its
6 defense legal theory throughout the case has been that the absence of any written promise
7 and lack of an express or implied contract rendered TMCC unable to prove Republic owed
8 any performance to TMCC. Republic made it abundantly clear in its disclosure statements
9 that attorneys' fees under A.R.S. § 12-341.01 were unavailable in this lawsuit.

10 The purpose of the fee shifting under A.R.S. § 12-341.01(A) is to promote settlement
11 of disagreements out of court. *Wagenseller v. Scottsdale*, 147 Ariz. 370, 391, 710 P.2d 1025,
12 1046 (1985); *see also Halt v. Gama ex rel. County of Maricopa*, 238 Ariz. 352, 356, 360
13 P.3d 148, 152 (App.Div. 1, 2015). "Unless each party is on notice before each stage of the
14 lawsuit that its opponent intends to ask for attorney's fees, it cannot properly evaluate
15 whether and when to settle." *Id.* By Defendant providing Plaintiff with 6 consecutive
16 disclosure statements all of which stated that Defendant was taking the position that no
17 attorneys' fees could be awardable under A.R.S. 12-341.01, Defendant's conduct did not
18 promote settlement and thus did not fall within the purpose of the fee shifting A.R.S. §12-
19 341.01. Although it has been held that a party is not required to identify the statutory basis
20 of its claim for attorneys' fees, Republic's repeated and consistent disclosure to TMCC
21 maintaining that it was not seeking fees under A.R.S. § 12-341.01 on the unrelenting position
22 that they were legally unavailable, should equitably estop Republic from now claiming fees
23 under that statute.

24 **II. Plaintiff Was Not a Party to the Loan Purchase and Sale Agreement. Thus No**
25 **Factual Basis for Republic to Claim TMCC Agreed to its Terms.**

26 Under the plain terms of the Loan Purchase and Sale Agreement (the "Agreement"),
27 there were 2 named parties, Defendant, referred to therein as "Lender" and MOH, referred to
28 therein as "Assignee," and Thomas Title & Escrow, LLC, designed as "Escrow Agent."

Paragraphs 2, 3 and 4 comprise the substantive understanding of Lender, Assignee and Escrow Agent under the Agreement. Paragraph 3 sets forth the remedies available to the Lender and the Assignee in the event of a default by either of them. Paragraph 5.1 states that the Agreement and the Assignment Documents constitute the entire understanding and agreement of the Lender and the Assignee. Paragraph 5.8 states that the Agreement is binding upon and inures to the benefit of the Lender and the Assignee and that there are no third-party beneficiaries to the Agreement. Paragraph 5.10 provides for notices to be given to the parties and specifies the addresses appearing opposite the signature blocks of the Lender and the Assignee on page 8 of the Agreement. On page 8, there is no signature block for TMCC as a party to the Agreement.

It is clearly obvious that neither the Lender nor the Assignee intended for the Pledgors and Obligors who were to execute the Consent to become or be made parties to the Agreement. Inasmuch as the Pledgors/Obligors were given no right to enforce the Agreement against the Lender or Assignee for the default of either of them, the Pledgors/Obligors would have no standing to commence a lawsuit or to benefit from or be bound by the Paragraph 5.4 attorneys' fees provision.

III. Arguments Raised for the First Time in Republic's Reply to its Statement of Costs.

A. A.R.S. § 12-332(A)(6) Does Not Form Basis for an Award of Non-Taxable Costs Because Plaintiff Not a Party to Loan Purchase and Sale Agreement.

TMCC is not contractually obligated under the terms of the Loan Purchase and Sale Agreement. Therefore, Republic is not entitled to enforce terms of the Agreement between Republic and MOH against TMCC. *See supra.*

B. Case law Cited by Republic Does Not Support its Argument for Costs.

In its Reply to Plaintiff's Response and Opposition to RepublicBankAZ, N.A.'s Statement of Costs, Republic cites Arizona cases for the proposition that Arizona courts may award under A.R.S. § 12-332 (A)(6) disbursements that are made and incurred pursuant to an agreement of the parties. For instance, in *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v.*

1 *Bach*, 193 Ariz. 401, 973 P.2d 106 (1999), the main issue was whether a trial court could
2 award the planned community's homeowner's association nontaxable costs under the
3 community's declaration of covenants, conditions and restrictions ("CC&Rs"). The CC&Rs
4 contained a specific provision requiring the non-prevailing party to pay the prevailing party's
5 reasonable attorneys' fees "in addition to any relief or judgment awarded by the Court."
6 *Id.* at 404, 109. First, the Court held that nontaxable costs would not be recovered under the
7 guise of attorneys' fees because it would undermine the legislative intent as expressed in
8 A.R.S. § 12-332. *Id.* at 402, 107. However, relying on the language of the CC&Rs, the
9 Court allowed the trial court to interpret the language "in addition to any relief or judgment
10 by the Court" to sustain an award of non-taxable costs totaling \$1,813.27, consisting of
11 delivery and messenger costs, telecopier and fax charges, postage and long-distance
12 telephone charges.

13 Similarly, in *Keg Restaurants Arizona, Inc. v. Jones*, 240 Ariz. 64, 375 P.3d 1173
14 (App. 2016), the Arizona Court of Appeals upheld a trial court's award of expert witness
15 fees to the tenant under a ground lease after it prevailed at trial. The lease contained a
16 mandatory provision providing for reimbursement of the prevailing party's costs of
17 consultants.

18 Assuming arguendo that Plaintiff were a party to the Loan Purchase and Sale
19 Agreement, nevertheless, Paragraph 5.4 Attorneys Fees does not provide for reimbursement
20 of expert fees. The language limits any award to the prevailing party to recovery of "costs
21 and reasonable attorneys' fees incurred in connection with the lawsuit." The costs and
22 attorneys' fees are to be determined by the "Court...(and not by a jury)." There is no
23 language similar to the *Ahwatukee Custom Estates* case which gave the trial court discretion
24 to award additional relief.

25 So, absent a written agreement between the contracting parties which grants discretion
26 to the Court or allows recovery specifically of consultants or expert witness fees, under
27
28

1 Arizona law, non-taxable costs such as expert witness fees are not awardable under A.R.S.
2 Section 12-322.

3 **C. Republic Not Entitled to Be Indemnified by TMCC in This Lawsuit.**

4 Under Arizona law, an indemnitee may not be indemnified against its own wrong
5 unless the indemnity agreement expresses such intention in clear and unambiguous language.
6 *See Washington Elementary School Dist. No. 6 v. Baglino Corp.*, 169 Ariz. 58 (1991); *Royal*
7 *Properties, Inc. v. Arizona Title Ins. & Trust Co.*, 13 Ariz.App. 376 (1970).

8 The Indemnification of Lender clause contained on pages 4 and 5 of Defendant's
9 Reply and on page 9 of Construction Loan Agreement attached thereto as Exhibit "A"
10 contains no express language which indemnifies Republic against its own acts of negligence.
11 TMCC has sued Republic for negligent misrepresentation. Absent the exculpatory language
12 required by Arizona courts, Republic has no valid claim which can be asserted against
13 TMCC for indemnification. Moreover, TMCC has sued Republic in fraud. There is no
14 reported Arizona case allowing an indemnitee to be indemnified against its own fraud
15 perpetrated on the indemnitor.

16 In citing to 2 California appellate court decisions, it would appear that Republic is
17 contending that the indemnification clause in the Construction Loan Agreement may be used
18 to defeat any claim which TMCC may bring against Republic based on Republic's
19 fraudulent or negligent acts. In other words, TMCC would not be allowed to sue Republic
20 no matter how heinous the conduct of Republic towards TMCC.

21 **IV. Unreasonable For Republic To Seek Attorneys' Fees After It Consciously Waited**
22 **17 Months to Assert The Release It Had Been Sitting On.**

23 Republic sat on its hands and waited until the last minute to raise the Release as a
24 defense. Republic's delay in asserting Release as a defense caused TMCC to expend
25 substantial resources in the pursuit of a legal remedy from the Court based on Republic's
26 wrongdoing. TMCC's and Republic's substantial legal expenses were entirely avoidable
27 because, when Republic finally decided to file a motion regarding the release defense, it was
28 dispositive of the entire lawsuit. In other words, Republic could have avoided extensive

1 litigation for both parties had it only acted reasonably by promptly disclosing and asserting
2 its release defense and filing its motion at the outset of the case.

3 Where A.R.S. § 12-341.01 does apply, one of the factors courts use to determine
4 whether attorneys' fees should be awarded is whether the "litigation could have been
5 avoided or settled and [whether] the successful party's efforts were completely superfluous
6 in achieving the result." *Associated Indem. Corp. v. Warner*, 143 Ariz. 567 (1985). Republic
7 delayed disclosure of its release defense and filing of a dispositive motion on that defense for
8 17 months while actively participating in a myriad of litigation activities which would have
9 been moot had Republic timely raised its release defense instead of racking up its legal fees
10 and then abruptly claiming it is entitled to fees.

11 Release is an affirmative defense which must be specifically pled as an affirmative
12 defense in a responsive pleading to a complaint or it is waived. *See* Ariz.R.Civ.P. 8(c). "An
13 answer to a complaint must set forth "any ... matter constituting an avoidance or affirmative
14 defense." Ariz. R. Civ. P. 8(c). Defenses omitted from an answer or Rule 12 motion are
15 therefore waived." *City of Phoenix v. Fields*, 219 Ariz. 568, Ariz.574, 201 P.3d 529, 535
16 (2009). "Even when a party preserves an affirmative defense in an answer or a Rule 12(b)
17 motion, however, it may waive that defense by its subsequent conduct in the litigation." *Id.*
18 "Failure to plead an affirmative defense results in the waiver of that defense and it is
19 excluded as an issue in the case. *City of Phoenix v. Linsenmeyer*, 86 Ariz. 328, 333, 346 P.2d
20 140, 143 (1959). Republic did not assert "release" as an affirmative defense. *See* Answer
21 filed May 14, 2015. Good reason underscores the requirement of 8(c)—it prevents parties
22 from needlessly expending attorneys' fees and precious judicial resources when a dispositive
23 defense to the lawsuit exists from the outset of the case.

24 Republic should not be awarded fees for engaging extensively in conduct which
25 warranted waiver of its release defense and which did not follow Ariz.R.Civ.P. Rule 8(c).
26 The *Russo v. Barger* case chastises delay, such as Republic's delay, in filing of a motion on
27 an issue which was dispositive of the entire case. *Russo v. Barger*, 239 Ariz. 100, 366 P.3d
28

1 577 (App. 2016). The *Russo* court stated that, if defendants had “timely sought dismissal
2 based on the forum selection clause, years of litigation and expense could have been avoided,
3 as well as the expenditure of significant judicial resources.” *Id.*, 239 Ariz. at 105, 366 P.3d at
4 582.

5 Similarly, in *Ponce v. Parker Fire Dist.*, 234 Ariz. 380, 322 P.3d 197 (App. 2014), the
6 court found that a fire district had waived its notice of claim defense because, as a defendant,
7 it actively litigated the merits of the case and failed to seek a prompt resolution of that
8 defense. Even though the fire district had raised the defense in its answer, it waived the
9 defense by engaging in “substantial conduct to litigate the merits that would not have been
10 necessary had the defendant not delayed in asserting the defense.” *Id.* at 383, 322 P.3d at 200
11 (internal citation omitted).

12 In *Ponce*, the court noted that the defendant had, inter alia, made disclosures,
13 participated in discovery, and filed a pretrial statement – all of which were unnecessary to
14 the defense which it waived. *Id.* The court summarized its disapproval of the defendant’s
15 delay by stating that had a “prompt motion to dismiss or for summary judgment on the notice
16 of claim been successful, all the resources used to litigate the merits would not have been
17 necessary.” *Id.*, 234 Ariz. at 383-84, 322 P.3d at 200-201 (emphasis added). *See also Jones*
18 *v. Cochise County*, 218 Ariz. 372, 380, 187 P.3d 97, 105 (App. 2008) (recognizing that
19 waiver can be found where there is substantial action to litigate the merits which “would not
20 have been necessary had the entity promptly raised the defense”); *see also State, ex rel.*
21 *Horne v. Campos*, 226 Ariz. 424, 429-30, 250 P.3d 201, 206-07 (App. 2011) (finding that
22 “[a]s a general matter, any litigant...can waive by conduct its right to object to an adverse
23 party’s failure to comply with statutory, constitutional, contractual, and procedural
24 requirements” where defendant waived a defense by conduct which included participation in
25 discovery for over 17 months and the attempt to set a settlement conference – all actions
26 inconsistent with an intention to raise its defense).

1 Republic acted in a manner entirely inconsistent with an intention to raise the release
2 as a defense: Republic spent \$284,939.00 in attorneys' fees and costs before asserting
3 Release in its Third Supplemental Disclosure Statement dated November 1, 2016. By that
4 time, TMCC had spent \$271,149.00. Though the Court did not find that Republic's conduct
5 warranted a waiver of its release defense, the above cases demonstrate that delay must not be
6 taken lightly. They also demonstrate that a court has the authority to sanction a party for its
7 delay. If Republic had simply acted as a reasonable person would have acted in this case, it
8 would have filed a timely dispositive motion instead of allowing a financial hemorrhage to
9 take place for both parties. Here, Republic's conduct was more than unreasonable.

10 On April 3, 2015, TMCC served Republic with its Second Amended Complaint. In
11 its Answer filed on May 14, 2015, Republic pled at least 10 affirmative defenses, one of
12 which was "waiver" with no detail as to what type of waiver. Republic did not plead
13 "release" as an affirmative defense. It took no affirmative steps to assert its waiver defense.
14 TMCC propounded its first set of requests for production on Republic to which Republic
15 objected and responded on July 2, 2015. Republic stipulated to extend the deadline to
16 exchange initial disclosures and file a proposed scheduling order on July 21, 2015 and again
17 on August 11, 2015. When Republic served its initial disclosure statement on August 26,
18 2015, it disclosed over 8,000 pages of discovery which was only identified as 5 separate
19 categories, none of which were labeled Consent, Release, or Loan Purchase and Sale
20 Agreement.

21 Republic's initial disclosure statement listed several facts in support of its defense of
22 the lawsuit, none of which related to TMCC signing a Consent or release. Republic's initial
23 disclosure statement listed its "affirmative defenses" on approximately 2 pages, only one
24 sentence of which mentioned "waiver", none of which mentioned "release". The parties filed
25 their joint report on August 31, 2015 which did not mention waiver, release or Consent.
26 Defendant disclosed its first supplemental disclosure statement on November 2, 2015, which
27 contained no new information in its affirmative defense section. Republic had a subpoena
28

1 issued to TMCC on April 21, 2016 for all of Mutual of Omaha Bank documents causing
2 TMCC to produce over 9,400 pages of documents. Republic joined in a motion to vacate and
3 continue the mediation deadline and trial setting conference as well as continue the deadline
4 for filing a scheduling order and status report in June 2016. On July 22, 2016, the parties
5 filed a joint motion to amend the scheduling order including expert disclosure dates and final
6 supplemental disclosure. Republic's second supplemental disclosure statement dated October
7 10, 2016 did not list any new information in its affirmative defenses section or add any
8 factual background regarding any waiver or release or refer to the Consent document.

9 The parties retained and disclosed experts and their reports pursuant to the Court's
10 scheduling orders and disclosed (i) expert testimony areas on November 2, 2015, (ii)
11 Plaintiff's damages expert's identity and opinion on March 7, 2016, (iii) Plaintiff's loan
12 expert's identity and opinion on September 20, 2016, and (iv) Defendant's damages and loan
13 experts' identity and opinion on November 1, 2016. This involved TMCC incurring
14 significant fees to retain experts LeRoy Gaintner and Doug Haman. The parties also
15 corresponded throughout October 2016 regarding preferred mediators and dates for the
16 parties to mediate the case, agreeing it would occur during the month of December 2016.

17 Finally, in its third supplemental disclosure statement dated November 1, 2016,
18 Republic disclosed, for the first time in the case, its release defense stating TMCC signed a
19 consent. It also, for the first time in the case, amended the affirmative defenses section in its
20 disclosure statement, but not in an Amended Answer, to state that TMCC's claims were
21 barred by the doctrine of release. It quoted, for the first time, the Consent language and
22 asserted that TMCC was "under a contractual obligation to 'fully and forever release'"
23 Republic from any claims, thus rendering TMCC's entire claims unenforceable.

24 After months of discovery and expert disclosure, Republic filed a motion for
25 summary judgment on December 2, 2016. At that point, TMCC had incurred over \$270,000
26 in fees litigating its claim against Republic for the lost profits which Republic had caused.
27 Republic had the Consent in its possession since September 2013, prior to the date on which
28

1 this lawsuit was filed. Nevertheless, it engaged in extensive litigation practice, massive
2 document discovery, retaining multiple experts to prepare reports and rebuttal reports, and
3 began scheduling mediation, before changing course and filing a dispositive motion based on
4 a document it possessed before it was even sued.

5 Republic's conduct, similar to the conduct in the cases cited herein, is egregious. To
6 reward its delay would flout the *Warner* factor regarding a party's ability to avoid litigation.

7 **V. The Reference To Settlement Offers in A.R.S. 12-341.01(A) Limited to**
8 **Determining Prevailing Party.**

9 Republic's reference to A.R.S. § 12-341.01(A) in regard to its claim that there was a
10 rejected settlement offer is of no moment here. The language regarding "written settlement
11 offer" only goes to the determination of who is the successful party for purposes of awarding
12 attorneys' fees under claims arising out of contract. In no way could A.R.S. § 12-341.01 be
13 interpreted to act akin to an Ariz.R.Civ.P. Rule 68 Offer of Judgment, but as to a party's
14 legal fees. The November 14, 2016 letter from Republic's counsel which "requests that
15 [TMCC] dismiss the Second Amended Complaint..." could only be interpreted in the
16 analysis of determining the successful party, which is not at issue here because the Court has
17 already granted Republic's MSJ.

18 **VI. Conclusion**

19 For the reasons set forth herein and as contained in the record before the Court,
20 Republic's requests for fees and costs are unreasonable, unjustified and unwarranted by law.

21 RESPECTFULLY SUBMITTED this 3rd day of November, 2017.

22 FRANCIS J. SLAVIN, P.C.

23
24 By: /s/ Daniel J. Slavin

25 Francis J. Slavin
26 Daniel J. Slavin
27 Jessica L. Dorvinen
28 2198 East Camelback Road, Ste. 285
Phoenix, Arizona 85016
Attorneys for Plaintiff

1 **ORIGINAL** of the foregoing electronically
2 filed with the Clerk of the Maricopa County
3 Superior Court this 3rd day of November, 2017.

4 **COPY** of the foregoing e-served
5 this 3rd day of November, 2017 and
6 mailed this 4th day of November to:

7 **QUARLES & BRADY, LLP**
8 W. Scott Jenkins, Jr., Esq.
9 Alissa A. Castaneda
10 Andrea Landeen
11 Two North Central Avenue
12 Phoenix, Arizona 85004
13 *Attorneys for Defendant*

14 /s/ Daniel J. Slavin

EXHIBIT “B”

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7 *Attorneys for Plaintiff Thompson/McCarthy Coffee Co.*

8
9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
10 **IN AND FOR THE COUNTY OF MARICOPA**

11 THOMPSON/McCARTHY COFFEE CO.,
an Arizona corporation,

12 Plaintiff,

13
14 v.

15 REPUBLICBANKAZ, N.A.,
16 Defendant.

Case No. CV2014-014647

DECLARATION OF FRANCIS J. SLAVIN

(Standard Case)

(Assigned to the Honorable Dawn Bergin)

17 I, Francis J. Slavin, counsel for Plaintiff Thompson/McCarthy Coffee Co., hereby
18 declare under penalty of perjury as follows:

- 19 1. I am the President of the law firm of Francis J. Slavin, P.C.
20 2. I have reviewed the time entries of firm employees for legal services rendered
21 by Francis J. Slavin, P.C., on behalf of the plaintiff, Thompson/McCarthy Coffee Co., in the
22 above action.
23 3. Legal services rendered from the outset of this matter through November 1,
24 2016, the date Defendant RepublicBankAZ, N.A. raised the affirmative defense of Release,
25 are \$241,845.80.
26 4. I have also reviewed the entries for costs incurred by Francis J. Slavin, P.C. on
27 behalf of the plaintiff Thompson/McCarthy Coffee Co. in the above action.
28

1 5. Costs incurred by Francis J. Slavin, P.C., including expert witness costs from
2 the outset of this matter through November 1, 2016, the date Defendant RepublicBankAZ,
3 N.A. raised the affirmative defense of Release, are \$29,304.19.

4 DATED this 3rd day of November, 2017.

5 FRANCIS J. SLAVIN P.C.

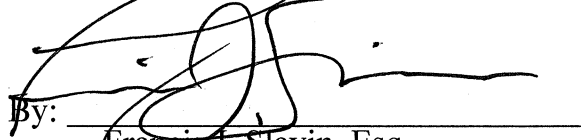
6
7 
8 By: _____
9 Francis J. Slavin, Esq.
10 Daniel J. Slavin, Esq.
11 Jessica L. Dorvinen, Esq.
12 Attorneys for Plaintiff
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12 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
13 **IN AND FOR THE COUNTY OF MARICOPA**

14 THOMPSON/McCARTHY COFFEE CO.,
15 an Arizona corporation,

16 Plaintiff,

17 vs.

18 REPUBLICBANKAZ, N.A.,

19 Defendant.

Case No. CV2014-014647

**INITIAL DISCLOSURE
STATEMENT PURSUANT TO
RULE 26.1**

(Assigned to the Honorable
Dawn Bergin)

20 RepublicBankAZ, N.A. ("Republic") hereby discloses the following information to
21 Thompson/McCarthy Coffee Co. ("TMCC"). Republic reserves the right to supplement
22 and amend this Initial Disclosure Statement as appropriate during the course of discovery
23 should further research or investigation reveal the existence of other facts, legal theories,
24 witnesses, documents, or other information subject to disclosure.

25 **I. FACTUAL BACKGROUND**

26 1. On or about December 23, 2010, TMCC executed a U.S. Small Business
27 Administration ("SBA") Application for Business Loan, requesting funds for construction
28 of and acquisition of equipment for a coffee/convenience store.

2. On or about July 12, 2011, TMCC executed a U.S. Small Business
Administration ("SBA") Application for Business Loan, requesting funds for construction

1 of and acquisition of equipment for a coffee/convenience store.

2 3. On or about July 13, 2011, Republic submitted, and the SBA received, an
3 application for the SBA to guarantee a loan in the amount of \$1,026,300.00 ("2011 SBA
4 Application") to Thompson/McCarthy DB LLC ("TMDB," now TMCC¹), James L.
5 Thompson ("Thompson") and Janice L. McCarthy ("McCarthy") (collectively, the "2011
6 Loan Borrowers").

7 4. On or about August 3, 2011, the SBA approved the 2011 SBA Application,
8 evidenced by a U.S. Small Business Administration Authorization (SBA 7(A) Guaranteed
9 Loan) dated August 3, 2011 (the "2011 Authorization").²

10 5. After receiving and signing the 2011 Authorization, Republic continued
11 working with the 2011 Loan Borrowers to close the 2011 Loan (defined below).

12 6. On or about October 24, 2011, TMDB, Thompson, and McCarthy entered
13 into a Construction Loan Agreement (the "2011 Loan Agreement") with Republic for a
14 loan in the maximum principal amount of \$1,026,300.00 (the "2011 Loan"). The purpose
15 of the 2011 Loan was to construct Dutch Brothers coffee shops on real property located at
16 6461 South Rural Road, Tempe, Arizona 85283 (the "Rural Property"), and 1122 South
17 Greenfield Road, Mesa, Arizona 85208 (the "Greenfield Property").

18 7. In connection with the 2011 Loan Agreement, TMDB, Thompson, and
19 McCarthy executed and delivered a U.S. Small Business Administration Note (the "2011
20 Note"), dated October 24, 2011, in the maximum principal amount of \$1,026,300.00 in
21 favor of Republic.

22 8. The 2011 Loan was also secured by, among other things, a Construction
23 Deed of Trust granted by TMDB in favor of Republic, and recorded on November 4,
24 2011, at Recorder's No. 20110918231, records of Maricopa County, Arizona, related to
25 the Rural Property (the "Rural Deed of Trust").

26 9. The 2011 Loan was secured by, among other things, a Construction Deed of

27 ¹ Upon information and belief, Thompson/McCarthy Coffee Co. is the successor in interest of
28 Thompson/McCarthy DB LLC.

² All documents defined in this Initial Disclosure Statement were previously produced on July 2, 2015.

1 Trust granted by Greenfield Southern DB LLC, TMDB, Thompson and McCarthy in
2 favor of Republic, and recorded on July 17, 2012, at Recorder's No. 20120626574,
3 records of Maricopa County, Arizona (the "Greenfield Deed of Trust") related to the
4 Greenfield Property. (Hereinafter, the 2011 SBA Application, 2011 Authorization, 2011
5 Loan Agreement, 2011 Note, Rural Deed of Trust, Greenfield Deed of Trust and any other
6 documents executed and delivered in connection with the 2011 Loan are called the "Loan
7 Documents.")

8 10. On or about November 4, 2011, the 2011 Loan was fully funded.

9 11. On or about January 23, 2012, TMDB executed a U.S. Small Business
10 Administration Application for Small Business Loan, requesting funds for construction of
11 and acquisition of equipment for a coffee/convenience store.

12 12. On or about March 9, 2012, Republic submitted, and the SBA received, an
13 application for the SBA to guarantee a loan in the amount of \$597,100.00 (the "2012 SBA
14 Application") to TMDB.

15 13. On or about March 14, 2012, the SBA approved the 2012 SBA Application,
16 evidenced by a U.S. Small Business Administration Authorization (SBA 7(A) Guaranteed
17 Loan) dated March 14, 2012 ("the 2012 Authorization").

18 14. After receiving and signing the 2012 Authorization, Republic continued
19 working with TMDB to close the 2012 Loan (defined below).

20 15. On or about May 9, 2012, TMDB dba Glendale Ave./12 Street DB LLC
21 entered into a Construction Loan Agreement (the "2012 Loan Agreement") with Republic
22 for a loan in the maximum principal amount of \$597,100.00 (the "2012 Loan"). The
23 purpose of the 2012 Loan was to construct a Dutch Brothers coffee shop on real property
24 located at 1201 East Glendale Avenue, Phoenix, Arizona 85020 ("Glendale Property").

25 16. In connection with the 2012 Loan Agreement, TMCC executed and
26 delivered a U.S. Small Business Administration Note (the "2012 Note"), dated May 9,
27 2012, in the maximum principal amount of \$597,100.00 in favor of Republic.

28 17. In connection with the 2012 Loan, Thompson, McCarthy, TMCC, James L.

1 Living Trust Dated June 16, 1997, and Janice L. McCarthy Trust dated September 28,
2 2005 (collectively, "Guarantors") executed and delivered to Republic a Guaranty of
3 Completion and Performance ("2012 Guaranty"), whereby the Guarantors unconditionally
4 guaranteed that the construction of the Glendale Project would be completed and to pay
5 such amounts as necessary to complete it.

6 18. The 2012 Loan was secured by, among other things, a Construction
7 Leasehold Deed of Trust granted by TMCC in favor of Republic, and recorded on June 6,
8 2012, at Recorder's No. 20120489027, records of Maricopa County, Arizona (the
9 "Glendale Deed of Trust") related to the Glendale Property. (Hereinafter, the 2012 SBA
10 Application, 2012 Authorization, 2012 Loan Agreement, 2012 Note, 2012 Guaranty,
11 Glendale Deed of Trust and any other documents executed and delivered in connection
12 with the 2012 Loan are called the "2012 Loan Documents." The 2011 Loan and the 2012
13 Loan are collectively, the "Loans." The 2011 Loan Documents and the 2012 Loan
14 Documents are collectively, the "Loan Documents.")

15 19. On or around May 14, 2012, the 2012 Loan was fully funded.

16 20. In or around mid June 2012, Republic submitted, and the SBA received, an
17 application for an SBA loan to construct a Dutch Brothers in Paradise Valley, Arizona
18 ("PV Loan Application").

19 21. On December 20, 2012, Thompson met with several Bank employees,
20 including Michael Harris, Emily Chedister and Stuart Olson. The parties agreed that they
21 no longer had a working relationship and Thompson would look for another bank.

22 22. In or around January 2013, Republic offered Thompson a personal line of
23 credit to assist with cash flow and provide access to working capital.

24 23. In or around late January 2013, the SBA denied approval of the PV Loan
25 Application because the construction costs for the Dutch Brothers store in Paradise Valley
26 had already been paid.

27 24. In or around early February 2013, Republic was contacted by Mutual of
28 Omaha regarding purchasing the Loans from Republic.

1 25. In or around May 2013, Mutual of Omaha approved the purchase of the
2 Loans from Republic.

3 26. In or around August 2013, Mutual of Omaha finally obtained SBA approval
4 for the purchase and assignment of the Loans.

5 27. On or about September 20, 2013, the purchase of the Loans closed.

6 28. In 2011, Republic closed 27 SBA loans in the total amount of \$26.12
7 million.

8 29. In 2012, Republic closed 30 SBA loans in the total amount of \$42.38
9 million.

10 30. The approval process for an SBA loan takes longer than the approval
11 process for a standard loan due to SBA requirements.

12 31. The Loans were more complex than the typical or standard SBA loan. The
13 Loans, along with the contemplated future loans of TMCC, were unusual because there
14 were multiple real properties as collateral, all of which had complex title issues. Each
15 TMCC loan grew more complex as additional collateral was required. Due to the
16 complexity of the Loans, the amount of time required to obtain SBA approval was
17 increased.

18 **II. LEGAL THEORIES**

19 **A. Negligent Misrepresentation**

20 Plaintiff's first cause of action is for negligent misrepresentation. Arizona follows
21 the Restatement (Second) of Torts § 552 for claims of negligent misrepresentation:

22 (1) One who, in the course of his business, profession or
23 employment, or in any other transaction in which he has a
24 pecuniary interest, supplies false information for the guidance
25 of others in their business transactions, is subject to liability
26 for pecuniary loss caused to them by their justifiable reliance
27 upon the information, if he fails to exercise reasonable care or
28 competence in obtaining or communicating the information.

 (2) Except as stated in Subsection (3), the liability stated in
Subsection (1) is limited to loss suffered

 (a) by the person or one of a limited group of persons
for whose benefit and guidance he intends to supply the
information or knows that the recipient intends to

1 supply it; and

2 (b) through reliance upon it in a transaction that he
3 intends the information to influence or knows that the
4 recipient so intends or in a substantially similar
5 transaction.

6 ...

7 Restatement (Second) of Torts, § 552.

8 The Arizona Supreme Court has held that negligent misrepresentation requires a
9 misrepresentation or omission of a fact. However, "[a] promise of future conduct is not a
10 statement of fact capable of supporting a claim of negligent misrepresentation." *McAlister*
11 *v. Citibank*, 171 Ariz. 207, 215 (1992).

12 Because a claim for negligent misrepresentation is governed by the principles of
13 negligence, there must be a duty owed and a breach of that duty in order to be charged
14 with the negligent violation of that duty. *KB Home Tucson, Inc. v. Charter Oak Fire Ins.*
15 *Co.*, 236 Ariz. 326, 332 (2014).

16 Arizona case law holds that a relationship between a Bank and an ordinary
17 depositor, absent a special agreement, is that of creditor and debtor, and there is no
18 fiduciary duty in a debtor/creditor relationship. *Gould v. M & I Marshall & Isley Bank*,
19 860 F.Supp.2d 985, 989 (2012). Thus, there is no special duty of care here other than the
20 standard debtor/creditor relationship.

21 Here, TMCC has failed to satisfy the elements of negligent misrepresentation in
22 that it has failed to provide any evidence of a duty of care other than the standard
23 debtor/creditor relationship; therefore there can be no breach. Additionally, although the
24 Bank denies that it made a promise or guaranteed that TMCC would receive \$5 million in
25 SBA approved loans, even if such a promise were made, it would be a promise of future
26 conduct, which is not a statement of fact capable of supporting a claim of negligent
27 misrepresentation.

28 **B. Fraudulent Inducement**

TMCC's second cause of action is a claim for fraudulent inducement. The
elements of a claim for fraud are: (1) A representation; (2) its falsity; (3) its materiality;

1 (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent
2 that it should be acted upon by the person and in the manner reasonably contemplated; (6)
3 the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely
4 thereon; and (9) his consequent and proximate injury. *Nielson v. Flashberg*, 101 Ariz.
5 335, 338-39 (1966).

6 TMCC has failed to satisfy the elements of fraud in that it has failed to provide any
7 evidence that it promised it would make SBA-guaranteed loans up to the SBA maximum
8 of \$5.0 million between 2011 and 2014. There is no evidence of any promises by
9 Republic to complete any loans within a certain timeframe, or that Republic promised the
10 SBA would approve every loan for which TMCC applied. Furthermore, TMCC has failed
11 to provide any evidence that any representations made by Republic were false, or that
12 Republic knew such representations were false at the time they were made. Even if such
13 statements were made, TMCC had no right to rely on them, as it was aware that SBA
14 approval was also required for any SBA loan. Finally, TMCC has failed to prove any
15 damages and therefore cannot demonstrate a proximate injury.

16 **C. Affirmative Defenses**

17 TMCC's claims against Republic may be barred in whole or in part by the negligent
18 and/or intentional acts of other parties.

19 TMCC's claims are barred by the Statute of Frauds. Arizona's Statute of Frauds,
20 A.R.S. § 44-101(9), states:

21 No action shall be brought in any court in the following
22 cases unless the promise or agreement upon which the
23 action is brought, or some memorandum thereof, is in
writing and signed by the party to be charged, or by
some person by him thereunto lawfully authorized:

24 Upon a contract, promise, undertaking or commitment
25 to loan money or to grant or extend credit, or a contract,
26 promise, undertaking or commitment to extend, renew
27 or modify a loan or other extension of credit involving
both an amount greater than two hundred fifty thousand
dollars and not made or extended primarily for
personal, family or household purposes.

28 Here, there is nothing in writing to evidence that Republic promised or guaranteed

1 that TMCC would receive SBA approval for \$5 million of loans, or promised it would
2 have SBA approval for any loans by a certain date, and in the absence of such a writing
3 between the parties, TMCC's claims must fail. Republic could not and did not promise
4 anything other than its willingness to work with TMCC to try to obtain SBA loans up to
5 the \$5 million limit.

6 Republic alleges that its conduct did not cause or substantially contribute to
7 TMCC's alleged loss. TMCC has not alleged losses with any particularity at this time and
8 Republic is unaware of the amount of damages that TMCC believes are attributed to
9 Republic's conduct. There were many other factors which may have caused or
10 contributed to any losses sustained by TMCC, if any losses are actually proven.

11 Republic alleges that TMCC's claims are barred by the statute of limitation,
12 estoppels, unclean hands, and/or waiver.

13 Republic alleges that TMCC's claims are barred by failure to mitigate damages. A
14 party's failure to mitigate damages may negate and reduce damages where the party,
15 through its own voluntary activity, has unreasonably exposed itself to damage or
16 increased its injury. *See Life Investors Ins. Co v. Horizon Resources Bethany, Ltd.*, 182
17 Ariz. 529, 534, 898 P.2d 478, 483 (Ct. App. 1995). TMCC's own conduct may have
18 unreasonably exposed TMCC to damage or increased its damages (assuming any damages
19 are actually proven by TMCC). First, TMCC was well aware of the timeline for SBA
20 approval, having applied for and received approval for two other SBA loans with
21 Republic. If TMCC believed that the amount of time it took to obtain SBA approval with
22 Republic was inadequate and could cause TMCC to sustain damage, then TMCC should
23 have used a different lender to apply for the SBA loan for construction of the Paradise
24 Valley store. Furthermore, after approval of the Paradise Valley loan was denied by the
25 SBA, Republic offered Thompson a personal line of credit to assist with finances, and
26 Thompson's failure to pursue such line of credit was further failure to mitigate damages.

27 TMCC also fails to state a claim against the Bank upon which an award of
28 attorneys' fees may be granted. TMCC has alleged negligent misrepresentation and

1 fraudulent inducement, both of which are tort claims. There is no contractual basis for
2 either of TMCC's claim. A.R.S. §§ 12-341 and 12-341.01 provide that the successful
3 party in any action arising out of a contract may be awarded attorney's fees and costs.
4 Here, there was no express or implied contract that was the basis for either of TMCC's
5 claims, and therefore, TMCC has failed to state a claim upon which an award of attorneys'
6 fees can be granted.

7 Also, as discussed in subsections A. and B. above, TMCC fails to set forth the
8 prima facie elements to establish a claim for negligent misrepresentation and/or a claim or
9 fraudulent inducement.

10 **D. Attorneys' Fees**

11 Republic alleges that this action is frivolous, and therefore, Republic is entitled to
12 attorneys' fees for defense of this action pursuant to A.R.S. § 12-349 or as otherwise
13 provided by law.

14 **III. WITNESSES EXPECTED TO TESTIFY AT TRIAL**

15 Republic is unable to determine yet all of the persons it may call to testify at trial.
16 In addition to any witnesses identified in Section II and IV, Plaintiff may call as a witness
17 any individual identified in any Disclosure Statement of any other party now or
18 subsequently named in this action. Republic may also call as a witness any and all
19 persons necessary to authenticate or lay sufficient foundation for documentary evidence.
20 Republic reserves the right to supplement this list of witnesses.

21 **IV. PERSONS WHO MAY HAVE RECENT KNOWLEDGE OR** 22 **INFORMATION**

- 23 1. **Michael Harris**
24 **c/o W. Scott Jenkins, Jr.**
25 **Two North Central Avenue**
Phoenix, Arizona 85004
Telephone: (602) 229-5200

26 Mr. Harris was formerly a Vice President at Republic and was a Business
27 Relationship Manager and the loan officer for TMCC's two loans. Mr. Harris was in
28

1 frequent communication with Mr. Thompson and his accountant/bookkeeper Kathye
2 Pease ("Pease") regarding the Loans. Mr. Harris attended a meeting with Ms. Pease and
3 Mr. Thompson on December 20, 2012, at which the parties agreed they no longer had a
4 working relationship. As a result, Mr. Harris may have information, related to, among
5 other things, the facts and circumstances pertaining to TMCC's claims for negligent
6 misrepresentation and fraudulent inducement, including what representations were or
7 were not made to TMCC relating to the Loans.

8 **2. Emily Chedister**
9 **RepublicBankAZ, N.A.**
10 **c/o W. Scott Jenkins, Jr.**
11 **Two North Central Avenue**
12 **Phoenix, Arizona 85004**
13 **Telephone: (602) 229-5200**

14 Ms. Chedister is a Vice President at Republic and was a Loan Administrator and
15 then Loan Operations Manager during the relevant period. Ms. Chedister worked on both
16 of the Loans, was in frequent communication with Ms. Pease and Mr. Thompson, and
17 attended a meeting with Ms. Pease and Mr. Thompson on December 20, 2012 at which
18 the parties agreed they no longer had a working relationship. As a result, Ms. Chedister
19 may have information, related to, among other things, the facts and circumstances
20 pertaining to TMCC's claims for negligent misrepresentation and fraudulent inducement,
21 including what representations were or were not made to TMCC relating to the Loans.

22 **3. Stuart Olson**
23 **c/o W. Scott Jenkins, Jr.**
24 **Two North Central Avenue**
25 **Phoenix, Arizona 85004**
26 **Telephone: (602) 229-5200**

27 Mr. Olson was a Executive Vice President at Republic and was the Chief Credit
28 Officer during the relevant time period. Mr. Olson attended the December 20, 2012
meeting with Mr. Thompson and Ms. Pease at which the parties agreed they no longer had
a working relationship. As a result, Mr. Olson may have information, related to, among
other things, the facts and circumstances pertaining to TMCC's claims for negligent

1 misrepresentation and fraudulent inducement, including what representations were or
2 were not made to TMCC relating to the Loans.

3 **4. Marla Woods**
4 **c/o W. Scott Jenkins, Jr.**
5 **Two North Central Avenue**
6 **Phoenix, Arizona 85004**
7 **Telephone: (602) 229-5200**

8 Ms. Woods was a Loan Document Specialist at Republic during the relevant time
9 period. Ms. Woods assisted with the loan application and SBA approval process on the
10 Loans, and was in frequent communication with Mr. Harris regarding the status of the
11 Loans and additional documentation. Ms. Woods was in frequent communication with
12 the title companies relating to the Loans. Ms. Woods also e-mailed frequently with Mr.
13 Thompson and Ms. Pease regarding information and documents Republic needed. As a
14 result, Ms. Woods may have information, related to, among other things, the facts and
15 circumstances pertaining to TMCC's claims for negligent misrepresentation and
16 fraudulent inducement, including what representations were or were not made to TMCC
17 relating to relating to the Loans, and the particular circumstances regarding the approval
18 of the Loans.

19 **5. Kimberly Pappas**
20 **c/o W. Scott Jenkins, Jr.**
21 **Two North Central Avenue**
22 **Phoenix, Arizona 85004**
23 **Telephone: (602) 229-5200**

24 Ms. Pappas was a Vice President at Republic and was the Loan Operations
25 Manager during part of the relevant time period. As a result, Ms. Pappas may have
26 information, related to, among other things, the facts and circumstances pertaining to
27 TMCC's claims for negligent misrepresentation and fraudulent inducement, including
28 what representations were or were not made to TMCC relating to the Loans.

6 **6. James Thompson**
7 **c/o Francis J. Slavin, Esq.**
8 **Francis J. Slavin, P.C.**
9 **2198 East Camelback Road, Suite 285**
10 **Phoenix, Arizona 85016**

1 **Telephone: (602) 381-8700**

2 Mr. Thompson is the principal and owner of TMCC. As a borrower and guarantor
3 of the Loans, Mr. Thompson was involved in the application and approval process and
4 communicated frequently with Mr. Harris and other Republic employees. As a result, Mr.
5 Thompson may have information, related to, among other things, the facts and
6 circumstances pertaining to TMCC's claims for negligent misrepresentation and
7 fraudulent inducement.

8 **7. Kathye Pease**
9 **EQ8, LLC**
10 **P.O. Box 7433**
11 **Chandler, Arizona 85246**
12 **Telephone: (480) 359-4883**

13 Ms. Pease is a manager of EQ8 A&B, LLC, and was/is Mr. Thompson's
14 accountant/bookkeeper. Ms. Pease provided and discussed financials documents and
15 information with Republic, had frequent communications with multiple employees of
16 Republic during the entire loan application, Republic approval, SBA approval, and
17 funding process, and was in attendance at the December 20, 2012 meeting with Mr.
18 Thompson, Mr. Harris, Mr. Olson and Ms. Chedister. As a result, Ms. Pease may have
19 information, related to, among other things, the facts and circumstances pertaining to
20 TMCC's claims for negligent misrepresentation and fraudulent inducement.

21 **V. IDENTITY OF PERSONS WHO HAVE GIVEN STATEMENTS**

22 No statements have been given yet in this matter.

23 **VI. EXPERT WITNESSES EXPECTED TO TESTIFY**

24 Republic has not yet identified its expert witnesses. The areas of expert testimony that
25 Republic expect to provide an opinion, if necessary, include expert testimony related to
26 SBA procedures and policies relating to the loan application and approval process,
27 TMCC's damages (or lack thereof), and rebuttal expert testimony in response to any and
28 all opinions, facts and data contained in expert testimony provided by TMCC. Republic

reserves its right to supplement this Initial Disclosure Statement to identify expert witnesses and matters upon which such expert witnesses are expected to testify.

VII. COMPUTATION AND MEASURE OF DAMAGES

TMCC has not provided any computation or measure of damages. Republic asserts that TMCC has not suffered any damages.

VIII. TANGIBLE EVIDENCE AND RELEVANT DOCUMENTS THAT MAY BE USED AT TRIAL

Republic is unaware at this time which documents it intends to use at trial, but may use the following documents at trial. Republic reserves its right to further timely supplement this list as discovery proceeds.

DOCUMENT DESCRIPTION	DATE	BATES NUMBERS
E-mail correspondence relating to loans-internal, with Thompson, Kathy Pease, SBA, and Mutual of Omaha	02/2008 – 12/2008	RBAZ 000001 - RBAZ 004890.011
Organizational Documents of TMCC and related entities	01/2009 – 12/2009	RBAZ 04891 - RBAZ 05649
Loan File for Loan No. 826005400 in the amount of \$1,026,300.00 (October 24, 2011 Loan)	2010-2012	RBAZ 05650 - RBAZ 06619
Loan File for Loan No. 826007200 in the amount of \$597,100.00 (May 9, 2012 Loan)	2011-2012	RBAZ 06620 - RBAZ 08351
Additional e-mails, SBA correspondence, and memoranda	2011 - 2013	RBAZ 08352 - RBAZ 08428

IX. OTHER RELEVANT DOCUMENTS

1. All documents disclosed pursuant to any subpoena issued in this case.
2. All documents attached to or referenced in TMCC's Second Amended Complaint, Republic's Answer to the Second Amended Complaint, and any other pleadings filed by the parties in this case.

1 3. All documents attached to or referenced in the parties' disclosure
2 statements.

3 4. All deposition transcripts from any deposition taken in this case.

4 5. All exhibits to any deposition taken in this case, or documents
5 referred to during any deposition taken in this case.

6 6. All documents or information produced in response to any discovery
7 response in this case.

8 7. All documents or information produced by any third party in
9 response to a subpoena in this case.

10 8. All documents informally exchanged between the parties' attorneys
11 in this case.

12 DATED this 26th day of August, 2015.

13 QUARLES & BRADY LLP
14 Renaissance One
15 Two North Central Avenue
16 Phoenix, AZ 85004-2391

17 By Alissa A. Brice
18 W. Scott Jenkins, Jr.
19 Alissa A. Brice

Attorneys for Defendant RepublicBankAZ, N.A.

20 ORIGINAL mailed this and COPY emailed
21 this 26th day of August, 2015 to:

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Attorneys for Thompson/McCarthy Coffee Co.

Nenne O'Connell

RepublicBankAZ, N.A.'s
Second Supplemental Disclosure Statement

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13 Alissa.Castaneda@quarles.com

14
15 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
16 **IN AND FOR THE COUNTY OF MARICOPA**
17

18 THOMPSON/McCARTHY COFFEE CO.,
19 an Arizona corporation,

20 Plaintiff,

21 vs.

22 REPUBLICBANKAZ, N.A.,

23 Defendant.

Case No. CV2014-014647

**SECOND SUPPLEMENTAL
DISCLOSURE STATEMENT**

(Assigned to the Honorable
Dawn Bergin)

24 RepublicBankAZ, N.A. ("Republic") hereby discloses the following information to
25 Thompson/McCarthy Coffee Co. ("TMCC"). Republic reserves the right to supplement
26 and amend this **Second** Supplemental Disclosure Statement as appropriate during the
27 course of discovery should further research or investigation reveal the existence of other
28 facts, legal theories, witnesses, documents, or other information subject to disclosure.

I. FACTUAL BACKGROUND

1. On or about December 23, 2010, TMCC **submitted to Republic** a U.S.
Small Business Administration ("SBA") Application for Business Loan, requesting funds
for construction of and acquisition of equipment for a coffee/convenience store.

2. On or about July 12, 2011, TMCC **submitted to Republic** a U.S. Small

1 Business Administration ("SBA") Application for Business Loan, requesting funds for
2 construction of and acquisition of equipment for a coffee/convenience store.

3 3. On or about July 13, 2011, Republic submitted **to the SBA**, and the SBA
4 received, an application for the SBA to guarantee a loan in the amount of \$1,026,300.00
5 ("2011 SBA Application") to Thompson/McCarthy DB LLC ("TMDB," now TMCC¹),
6 James L. Thompson ("Thompson") and Janice L. McCarthy ("McCarthy") (collectively,
7 the "2011 Loan Borrowers").

8 4. **On or about July 27, 2011, the SBA sent a "screen out" letter to**
9 **Republic relating to the 2011 SBA Application.**

10 5. On or about August 3, 2011, the SBA approved the 2011 SBA Application,
11 evidenced by a U.S. Small Business Administration Authorization (SBA 7(A) Guaranteed
12 Loan) dated August 3, 2011 (the "2011 Authorization").²

13 6. After receiving and signing the 2011 Authorization, Republic continued
14 working with the 2011 Loan Borrowers to close the 2011 Loan (defined below).

15 7. On or about October 24, 2011, TMDB, Thompson, and McCarthy entered
16 into a Construction Loan Agreement (the "2011 Loan Agreement") with Republic for a
17 loan in the maximum principal amount of \$1,026,300.00 (the "2011 Loan"). The purpose
18 of the 2011 Loan was to construct Dutch Brothers coffee shops on real property located at
19 6461 South Rural Road, Tempe, Arizona 85283 (the "Rural Property"), and 1122 South
20 Greenfield Road, Mesa, Arizona 85208 (the "Greenfield Property").

21 8. In connection with the 2011 Loan Agreement, TMDB, Thompson, and
22 McCarthy executed and delivered a U.S. Small Business Administration Note (the "2011
23 Note"), dated October 24, 2011, in the maximum principal amount of \$1,026,300.00 in
24 favor of Republic.

25 9. The 2011 Loan was also secured by, among other things, a Construction
26 Deed of Trust granted by TMDB in favor of Republic, and recorded on November 4,

27 ¹ Upon information and belief, Thompson/McCarthy Coffee Co. is the successor in interest of
28 Thompson/McCarthy DB LLC.

² All documents defined in this Initial Disclosure Statement were previously produced on July 2, 2015.

1 2011, at Recorder's No. 20110918231, records of Maricopa County, Arizona, related to
2 the Rural Property (the "Rural Deed of Trust").

3 10. The 2011 Loan was secured by, among other things, a Construction Deed of
4 Trust granted by Greenfield Southern DB LLC, TMDB, Thompson and McCarthy in
5 favor of Republic, and recorded on July 17, 2012, at Recorder's No. 20120626574,
6 records of Maricopa County, Arizona (the "Greenfield Deed of Trust") related to the
7 Greenfield Property. (Hereinafter, the 2011 SBA Application, 2011 Authorization, 2011
8 Loan Agreement, 2011 Note, Rural Deed of Trust, Greenfield Deed of Trust and any other
9 documents executed and delivered in connection with the 2011 Loan are called the "Loan
10 Documents.")

11 11. On or about November 4, 2011, the 2011 Loan was fully funded.

12 12. On or about January 23, 2012, TMDB **submitted to Republic** a U.S. Small
13 Business Administration Application for Small Business Loan, requesting funds for
14 construction of and acquisition of equipment for a coffee/convenience store.

15 13. **In or about February 2012, Republic submitted to the SBA**, and the SBA
16 received, an application for the SBA to guarantee a loan in the amount of \$597,100.00
17 (the "2012 SBA Application") to TMDB.

18 14. **On or about February 29, 2012, the SBA sent a "screen out" letter to**
19 **Republic relating to the 2012 SBA Application.**

20 15. On or about March 14, 2012, the SBA approved the 2012 SBA Application,
21 evidenced by a U.S. Small Business Administration Authorization (SBA 7(A) Guaranteed
22 Loan) dated March 14, 2012 ("the 2012 Authorization").

23 16. After receiving and signing the 2012 Authorization, Republic continued
24 working with TMDB to close the 2012 Loan (defined below).

25 17. On or about May 9, 2012, TMDB dba Glendale Ave./12 Street DB LLC
26 entered into a Construction Loan Agreement (the "2012 Loan Agreement") with Republic
27 for a loan in the maximum principal amount of \$597,100.00 (the "2012 Loan"). The
28 purpose of the 2012 Loan was to construct a Dutch Brothers coffee shop on real property

1 located at 1201 East Glendale Avenue, Phoenix, Arizona 85020 ("Glendale Property").

2 18. In connection with the 2012 Loan Agreement, TMCC executed and
3 delivered a U.S. Small Business Administration Note (the "2012 Note"), dated May 9,
4 2012, in the maximum principal amount of \$597,100.00 in favor of Republic.

5 19. In connection with the 2012 Loan, Thompson, McCarthy, TMCC, James L.
6 Living Trust Dated June 16, 1997, and Janice L. McCarthy Trust dated September 28,
7 2005 (collectively, "Guarantors") executed and delivered to Republic a Guaranty of
8 Completion and Performance ("2012 Guaranty"), whereby the Guarantors unconditionally
9 guarantied that the construction of the Glendale Project would be completed and to pay
10 such amounts as necessary to complete it.

11 20. The 2012 Loan was secured by, among other things, a Construction
12 Leasehold Deed of Trust granted by TMCC in favor of Republic, and recorded on June 6,
13 2012, at Recorder's No. 20120489027, records of Maricopa County, Arizona (the
14 "Glendale Deed of Trust") related to the Glendale Property. (Hereinafter, the 2012 SBA
15 Application, 2012 Authorization, 2012 Loan Agreement, 2012 Note, 2012 Guaranty,
16 Glendale Deed of Trust and any other documents executed and delivered in connection
17 with the 2012 Loan are called the "2012 Loan Documents." The 2011 Loan and the 2012
18 Loan are collectively, the "Loans." The 2011 Loan Documents and the 2012 Loan
19 Documents are collectively, the "Loan Documents.")

20 21. On or around May 14, 2012, the 2012 Loan was fully funded.

21 22. In or around mid June 2012, Republic submitted, and the SBA received, an
22 application for an SBA loan to construct a Dutch Brothers in Paradise Valley, Arizona
23 ("PV Loan Application").

24 23. **On or about July 5, 2012, the SBA sent a "screen out" letter to Republic**
25 **relating to the PV Loan Application.**

26 24. The SBA had multiple additional requests for documentation and
27 information **relating to the PV Loan Application**, which were timely relayed to TMCC.
28 The SBA was still requesting additional information as late as December 20, 2012.

1 25. On December 20, 2012, Thompson met with several Bank employees,
2 including Michael Harris, Emily Chedister and Stuart Olson. The parties agreed that they
3 no longer had a working relationship. Thompson told Republic he had decided to use
4 another lender going forward.

5 26. In or around January 2013, Republic offered Thompson a personal line of
6 credit to assist with cash flow and provide access to working capital.

7 27. Ultimately the PV Loan "timed out" of the SBA's system because the SBA
8 did not receive the additional information or documents it had requested.

9 28. In or around early February 2013, Republic was contacted by Mutual of
10 Omaha regarding purchasing the Loans from Republic.

11 29. In or around May 2013, Mutual of Omaha approved the purchase of the
12 Loans from Republic.

13 30. In or around August 2013, Mutual of Omaha finally obtained SBA approval
14 for the purchase and assignment of the Loans.

15 31. On or about September 20, 2013, the purchase of the Loans closed.

16 32. In 2011, Republic closed 27 SBA loans in the total amount of \$26.12
17 million.

18 33. In 2012, Republic closed 30 SBA loans in the total amount of \$42.38
19 million.

20 34. The approval process for an SBA loan takes longer than the approval
21 process for a standard loan due to SBA requirements.

22 35. The Loans were more complex than the typical or standard SBA loan. The
23 Loans, along with the contemplated future loans of TMCC, were unusual because there
24 were multiple real properties as collateral, all of which had complex title issues. Each
25 TMCC loan grew more complex as additional collateral was required. Due to the
26 complexity of the Loans, the amount of time required to obtain SBA approval was
27 increased.
28

II. LEGAL THEORIES

A. Negligent Misrepresentation

Plaintiff's first cause of action is for negligent misrepresentation. Arizona follows the Restatement (Second) of Torts § 552 for claims of negligent misrepresentation:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

...

Restatement (Second) of Torts, § 552.

The Arizona Supreme Court has held that negligent misrepresentation requires a misrepresentation or omission of a fact. However, "[a] promise of future conduct is not a statement of fact capable of supporting a claim of negligent misrepresentation." *McAlister v. Citibank*, 171 Ariz. 207, 215 (1992).

Because a claim for negligent misrepresentation is governed by the principles of negligence, there must be a duty owed and a breach of that duty in order to be charged with the negligent violation of that duty. *KB Home Tucson, Inc. v. Charter Oak Fire Ins. Co.*, 236 Ariz. 326, 332 (2014).

Arizona case law holds that a relationship between a Bank and an ordinary depositor, absent a special agreement, is that of creditor and debtor, and there is no fiduciary duty in a debtor/creditor relationship. *Gould v. M & I Marshall & Isley Bank*, 860 F.Supp.2d 985, 989 (2012). Thus, there is no special duty of care here other than the standard debtor/creditor relationship.

1 Here, TMCC has failed to satisfy the elements of negligent misrepresentation in
2 that it has failed to provide any evidence of a duty of care other than the standard
3 debtor/creditor relationship; therefore there can be no breach. Additionally, although the
4 Bank denies that it made a promise or guaranteed that TMCC would receive \$5 million in
5 SBA approved loans, even if such a promise were made, it would be a promise of future
6 conduct, which is not a statement of fact capable of supporting a claim of negligent
7 misrepresentation.

8 **B. Fraudulent Inducement**

9 TMCC's second cause of action is a claim for fraudulent inducement. The
10 elements of a claim for fraud are: (1) A representation; (2) its falsity; (3) its materiality;
11 (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent
12 that it should be acted upon by the person and in the manner reasonably contemplated; (6)
13 the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely
14 thereon; and (9) his consequent and proximate injury. *Nielson v. Flashberg*, 101 Ariz.
15 335, 338-39 (1966).

16 TMCC has failed to satisfy the elements of fraud in that it has failed to provide any
17 evidence that it promised it would make SBA-guaranteed loans up to the SBA maximum
18 of \$5.0 million between 2011 and 2014. There is no evidence of any promises by
19 Republic to complete any loans within a certain timeframe, or that Republic promised the
20 SBA would approve every loan for which TMCC applied. Furthermore, TMCC has failed
21 to provide any evidence that any representations made by Republic were false, or that
22 Republic knew such representations were false at the time they were made. Even if such
23 statements were made, TMCC had no right to rely on them, as it was aware that SBA
24 approval was also required for any SBA loan. Finally, TMCC has failed to prove any
25 damages and therefore cannot demonstrate a proximate injury.

26 **C. Affirmative Defenses**

27 TMCC's claims against Republic may be barred in whole or in part by the negligent
28

1 and/or intentional acts of other parties.

2 TMCC's claims are barred by the Statute of Frauds. Arizona's Statute of Frauds,
3 A.R.S. § 44-101(9), states:

4 No action shall be brought in any court in the following
5 cases unless the promise or agreement upon which the
6 action is brought, or some memorandum thereof, is in
7 writing and signed by the party to be charged, or by
8 some person by him thereunto lawfully authorized:

9 Upon a contract, promise, undertaking or commitment
10 to loan money or to grant or extend credit, or a contract,
11 promise, undertaking or commitment to extend, renew
12 or modify a loan or other extension of credit involving
13 both an amount greater than two hundred fifty thousand
14 dollars and not made or extended primarily for
15 personal, family or household purposes.

16 Here, there is nothing in writing to evidence that Republic promised or guaranteed
17 that TMCC would receive SBA approval for \$5 million of loans, or promised it would
18 have SBA approval for any loans by a certain date, and in the absence of such a writing
19 between the parties, TMCC's claims must fail. Republic could not and did not promise
20 anything other than its willingness to work with TMCC to try to obtain SBA loans up to
21 the \$5 million limit.

22 Republic alleges that its conduct did not cause or substantially contribute to
23 TMCC's alleged loss. TMCC has not alleged losses with any particularity at this time and
24 Republic is unaware of the amount of damages that TMCC believes are attributed to
25 Republic's conduct. There were many other factors which may have caused or
26 contributed to any losses sustained by TMCC, if any losses are actually proven.

27 Republic alleges that TMCC's claims are barred by the statute of limitation,
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Republic alleges that TMCC's claims are barred by failure to mitigate damages. A
party's failure to mitigate damages may negate and reduce damages where the party,
through its own voluntary activity, has unreasonably exposed itself to damage or
increased its injury. *See Life Investors Ins. Co v. Horizon Resources Bethany, Ltd.*, 182
Ariz. 529, 534, 898 P.2d 478, 483 (Ct. App. 1995). TMCC's own conduct may have

1 unreasonably exposed TMCC to damage or increased its damages (assuming any damages
2 are actually proven by TMCC). First, TMCC was well aware of the timeline for SBA
3 approval, having applied for and received approval for two other SBA loans with
4 Republic. If TMCC believed that the amount of time it took to obtain SBA approval with
5 Republic was inadequate and could cause TMCC to sustain damage, then TMCC should
6 have used a different lender to apply for the SBA loan for construction of the Paradise
7 Valley store. Furthermore, after approval of the Paradise Valley loan was denied by the
8 SBA, Republic offered Thompson a personal line of credit to assist with finances, and
9 Thompson's failure to pursue such line of credit was further failure to mitigate damages.

10 TMCC also fails to state a claim against the Bank upon which an award of
11 attorneys' fees may be granted. TMCC has alleged negligent misrepresentation and
12 fraudulent inducement, both of which are tort claims. There is no contractual basis for
13 either of TMCC's claim. A.R.S. §§ 12-341 and 12-341.01 provide that the successful
14 party in any action arising out of a contract may be awarded attorney's fees and costs.
15 Here, there was no express or implied contract that was the basis for either of TMCC's
16 claims, and therefore, TMCC has failed to state a claim upon which an award of attorneys'
17 fees can be granted.

18 Also, as discussed in subsections A. and B. above, TMCC fails to set forth the
19 prima facie elements to establish a claim for negligent misrepresentation and/or a claim or
20 fraudulent inducement.

21 **D. Attorneys' Fees**

22 Republic alleges that this action is frivolous, and therefore, Republic is entitled to
23 attorneys' fees for defense of this action pursuant to A.R.S. § 12-349 or as otherwise
24 provided by law.

25 **III. WITNESSES EXPECTED TO TESTIFY AT TRIAL**

26 Republic is unable to determine yet all of the persons it may call to testify at trial.
27 In addition to any witnesses identified in Section II and IV, TMCC may call as a witness
28

1 any individual identified in any Disclosure Statement of any other party now or
2 subsequently named in this action. Republic may also call as a witness any and all
3 persons necessary to authenticate or lay sufficient foundation for documentary evidence.
4 Republic reserves the right to supplement this list of witnesses.

5 **IV. PERSONS WHO MAY HAVE RECENT KNOWLEDGE OR**
6 **INFORMATION**

- 7 1. Michael Harris
8 c/o W. Scott Jenkins, Jr.
9 Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

10 Mr. Harris was formerly a Vice President at Republic and was a Business
11 Relationship Manager and the loan officer for TMCC's two loans. Mr. Harris was in
12 frequent communication with Mr. Thompson and his accountant/bookkeeper Kathye
13 Pease ("Pease") regarding the Loans. Mr. Harris attended a meeting with Ms. Pease and
14 Mr. Thompson on December 20, 2012, at which the parties agreed they no longer had a
15 working relationship. As a result, Mr. Harris may have information, related to, among
16 other things, the facts and circumstances pertaining to TMCC's claims for negligent
17 misrepresentation and fraudulent inducement, including what representations were or
18 were not made to TMCC relating to the Loans.

- 19 2. Emily Chedister
20 RepublicBankAZ, N.A.
21 c/o W. Scott Jenkins, Jr.
22 Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

23 Ms. Chedister is a Vice President at Republic and was a Loan Administrator and
24 then Loan Operations Manager during the relevant period. Ms. Chedister worked on both
25 of the Loans, was in frequent communication with Ms. Pease and Mr. Thompson, and
26 attended a meeting with Ms. Pease and Mr. Thompson on December 20, 2012 at which
27 the parties agreed they no longer had a working relationship. As a result, Ms. Chedister
28 may have information, related to, among other things, the facts and circumstances

1 pertaining to TMCC's claims for negligent misrepresentation and fraudulent inducement,
2 including what representations were or were not made to TMCC relating to the Loans.

3 3. Stuart Olson
4 c/o W. Scott Jenkins, Jr.
5 Two North Central Avenue
6 Phoenix, Arizona 85004
7 Telephone: (602) 229-5200

8 Mr. Olson was a Executive Vice President at Republic and was the Chief Credit
9 Officer during the relevant time period. Mr. Olson attended the December 20, 2012
10 meeting with Mr. Thompson and Ms. Pease at which the parties agreed they no longer had
11 a working relationship. As a result, Mr. Olson may have information, related to, among
12 other things, the facts and circumstances pertaining to TMCC's claims for negligent
13 misrepresentation and fraudulent inducement, including what representations were or
14 were not made to TMCC relating to the Loans.

15 4. Marla Woods
16 c/o W. Scott Jenkins, Jr.
17 Two North Central Avenue
18 Phoenix, Arizona 85004
19 Telephone: (602) 229-5200

20 Ms. Woods was a Loan Document Specialist at Republic during the relevant time
21 period. Ms. Woods assisted with the loan application and SBA approval process on the
22 Loans, and was in frequent communication with Mr. Harris regarding the status of the
23 Loans and additional documentation. Ms. Woods was in frequent communication with
24 the title companies relating to the Loans. Ms. Woods also e-mailed frequently with Mr.
25 Thompson and Ms. Pease regarding information and documents Republic needed. As a
26 result, Ms. Woods may have information, related to, among other things, the facts and
27 circumstances pertaining to TMCC's claims for negligent misrepresentation and
28 fraudulent inducement, including what representations were or were not made to TMCC
relating to relating to the Loans, and the particular circumstances regarding the
documentation and closing of the Loans.

1
2 5. Kimberly Pappas
3 c/o W. Scott Jenkins, Jr.
4 Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

5 Ms. Pappas was a Vice President at Republic and was the Loan Operations
6 Manager during part of the relevant time period. As a result, Ms. Pappas may have
7 information, related to, among other things, the facts and circumstances pertaining to
8 TMCC's claims for negligent misrepresentation and fraudulent inducement, including
9 what representations were or were not made to TMCC relating to the Loans, and the
10 particular circumstances surrounding the documentation and closing of the Loans.

11 6. Anthony Bodnar
12 c/o W. Scott Jenkins, Jr.
13 Two North Central Avenue
Phoenix, Arizona 85004
14 Telephone: (602) 229-5200

15 Mr. Bodnar was an Assistant Vice President at Republic and was a Loan
16 Administrator during the relevant time period. As a result, Mr. Bodnar may have
17 information, related to, among other things, the facts and circumstances pertaining
18 to TMCC's claims for negligent misrepresentation and fraudulent inducement,
19 including what representations were or were not made to TMCC relating to relating
20 to the Loans, and the particular circumstances regarding the approval of the Loans.

21 7. James Thompson
22 c/o Francis J. Slavin, Esq.
Francis J. Slavin, P.C.
2198 East Camelback Road, Suite 285
23 Phoenix, Arizona 85016
Telephone: (602) 381-8700

24 Mr. Thompson is the principal and owner of TMCC. As a borrower and guarantor
25 of the Loans, Mr. Thompson was involved in the application and approval process and
26 communicated frequently with Mr. Harris and other Republic employees. As a result, Mr.
27 Thompson may have information, related to, among other things, the facts and
28

1 circumstances pertaining to TMCC's claims for negligent misrepresentation and
2 fraudulent inducement.

3 8. Kathy Pease
4 EQ8 A&B, LLC
5 P.O. Box 7433
6 Chandler, Arizona 85246
7 Telephone: (480) 359-4883

8 Ms. Pease is a manager of EQ8 A&B, LLC, and was Mr. Thompson's
9 accountant/bookkeeper. Ms. Pease provided and discussed financials documents and
10 information with Republic, had frequent communications with multiple employees of
11 Republic during the entire loan application, Republic approval, SBA approval, and
12 funding process, and was in attendance at the December 20, 2012 meeting with Mr.
13 Thompson, Mr. Harris, Mr. Olson and Ms. Chedister. As a result, Ms. Pease may have
14 information, related to, among other things, the facts and circumstances pertaining to
15 TMCC's claims for negligent misrepresentation and fraudulent inducement.

16 9. Corey Schimmel
17 Mutual of Omaha Bank
18 c/o Janet Ryan, Esq.
19 Janet.Ryan@mutualofomaha.com

20 Mr. Schimmel was a Vice President in Business Banking at Mutual of Omaha
21 and was the loan officer for the two loans acquired by Mutual of Omaha from
22 Republic. As a result, Mr. Schimmel may have information related to, among other
23 things, the facts and circumstances pertaining to the acquisition of the loans by
24 Mutual of Omaha, including the process and timeframe.

25 10. Any persons disclosed by TMCC as persons who may be called as witnesses at
26 trial.

27 V. IDENTITY OF PERSONS WHO HAVE GIVEN STATEMENTS

28 No statements have been given yet in this matter.

VI. EXPERT WITNESSES EXPECTED TO TESTIFY

The areas of expert testimony that Republic expects to provide an opinion include

1 expert testimony related to SBA procedures and policies relating to the loan application
2 and approval process, TMCC's damages (or lack thereof), and rebuttal expert testimony in
3 response to any and all opinions, facts and data contained in expert testimony provided by
4 TMCC.

5 **1. SBA Loans, Procedures, Policies, and Approval Process**

6 Republic intends to call an expert who is qualified to testify SBA loans in general,
7 policies and procedures for SBA loans, the different types of SBA-qualified lenders, the
8 SBA application process, the SBA approval process, and Republic's handling of the SBA
9 loan applications of TMCC. Republic may also call an expert for rebuttal testimony in
10 response to any SBA loan testimony by any expert called by TMCC.

11 **2. Lost Profits and Other Damages**

12 Republic intends to call an expert who is qualified to testify to the standards for
13 determining whether there were lost profits, how to calculate lost profits, whether TMCC
14 suffered any lost profits, whether Republic's representations or actions were the proximate
15 cause of such lost profits (if there were any), and the amount of any lost profits and/or
16 other damages of TMCC. Republic may also call an expert for rebuttal testimony in
17 response to any lost profits/damages testimony by any expert called by TMCC.

18 Republic reserves its right to supplement this **Second** Supplemental Disclosure
19 Statement to identify expert witnesses and matters upon which such expert witnesses are
20 expected to testify.

21 **VII. COMPUTATION AND MEASURE OF DAMAGES**

22 **TMCC claims damages of between \$1,583,000 to \$5,672,000 based upon three**
23 **different scenarios.** Republic asserts that TMCC has not suffered any damages.

24 **VIII. TANGIBLE EVIDENCE AND RELEVANT DOCUMENTS THAT MAY BE**
25 **USED AT TRIAL**

26 Republic is unaware at this time which documents it intends to use at trial, but may use
27
28

the following documents at trial. Republic reserves its right to further timely supplement this list as discovery proceeds.

DOCUMENT DESCRIPTION	DATE	BATES NUMBERS
E-mail correspondence relating to loans-internal, with Thompson, Kathy Pease, SBA, and Mutual of Omaha	02/2008 – 12/2008	RBAZ 000001 - RBAZ 004890.011
Later supplemented e-mails with redactions removed	Various	RBAZ 002980 - 2981 and RBAZ 002984
Documents with redactions removed produced by Republic on September 9, 2016 subject to Stipulated Protective Order filed September 9, 2016	2011 - 2012	RBAZ 00163, 00164, 00165 - 00170, 00260-00261, 00262 - 00263, 00268 - 00271, 00272 - 00275, 00285, 00754 - 00755, 00766 - 00768, 01223, 01224, 01225 - 01226, 01504, 01833, 01853 - 01854, 01858, 01859 - 01860, 02171, 02978, 02980 - 02981, 02982, 02984, 02996, 03035, 03088, 03089, 03361, 03394, 03925, 03928
Organizational Documents of TMCC and related entities	01/2009 – 12/2009	RBAZ 04891 - RBAZ 05649
Loan File for Loan No. 826005400 in the amount of \$1,026,300.00 (October 24, 2011 Loan)	2010-2012	RBAZ 05650 - RBAZ 06619
Loan File for Loan No. 826007200 in the amount of \$597,100.00 (May 9, 2012 Loan)	2011-2012	RBAZ 06620 - RBAZ 08351
Additional e-mails, SBA correspondence, and memoranda	2011 - 2013	RBAZ 08352 - RBAZ 08428
Documents produced by TMCC with Initial Disclosure Statement and as later supplemented with redactions removed		TMCC00001 - TMCC02848
Documents produced by TMCC with Fourth Supplemental Disclosure Statement		TMCC002849 - TMCC006375

Documents provided by the SBA to Republic	2011 - 2013	SBA 00001 - 00969
Documents provided by the SBA to Republic	2012	SBA2 00001 - 00194
Documents provided by the SBA to TMCC	Various	SBA000001 - SBA000029
Documents produced by Mutual of Omaha in response to TMCC's subpoena		MB000102 - 009483
TMCC's expert report dated March 5, 2016 prepared by Leroy M. Gaintner, CPA, PLC and schedules, exhibits, and addenda	3/5/2016	n/a
File of Leroy M. Gaintner, CPA, PLC	Various	GA000001 - GA000437 and other documents without bates labels
TMCC's expert report dated September 20, 2016 prepared by Douglas T. Haman and addendum	Various	n/a
Documents produced by Nationwide Valuations in response to TMCC's subpoena	Various	NV000001 - 001197
Documents produced by First Arizona Title Agency in response to TMCC's subpoena	Various	FAZT000001 - 000167
Documents produced by Thomas Title & Escrow in response to TMCC's subpoena	Various	TT000001 - 000578

IX. OTHER RELEVANT DOCUMENTS

1. All documents listed above in Section VIII.
2. All documents disclosed pursuant to any subpoena issued in this case.
3. All documents attached to or referenced in TMCC's Second Amended Complaint, Republic's Answer to the Second Amended Complaint, and any other pleadings filed by the parties in this case.
4. All documents attached to or referenced in the parties' disclosure statements.
5. All deposition transcripts from any deposition taken in this case.
6. All exhibits to any deposition taken in this case, or documents referred to during any deposition taken in this case.

1 7. All documents or information produced in response to any discovery
2 response in this case.

3 8. All documents or information produced by any third party in
4 response to a subpoena in this case.

5 9. All documents informally exchanged between the parties' attorneys
6 in this case.

7 DATED this 10th day of October, 2016.

8 QUARLES & BRADY LLP
9 Renaissance One
10 Two North Central Avenue
11 Phoenix, AZ 85004-2391

12 By Alissa Brice Castañeda
13 W. Scott Jenkins, Jr.
14 Andrea H. Landeen
15 Alissa Brice Castañeda

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17 ORIGINAL mailed this and COPY emailed
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RepublicBankAZ, N.A.'s
Third Supplemental Disclosure Statement

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9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
10 **IN AND FOR THE COUNTY OF MARICOPA**
11

12 THOMPSON/McCARTHY COFFEE CO.,
13 an Arizona corporation,

14 Plaintiff,

15 vs.

16 REPUBLICBANKAZ, N.A.,

17 Defendant.

Case No. CV2014-014647

**THIRD SUPPLEMENTAL
DISCLOSURE STATEMENT**

(Assigned to the Honorable
Dawn Bergin)

18 RepublicBankAZ, N.A. ("Republic") hereby discloses the following information to
19 Thompson/McCarthy Coffee Co. ("TMCC"). Republic reserves the right to supplement
20 and amend this **Third** Supplemental Disclosure Statement as appropriate during the
21 course of discovery should further research or investigation reveal the existence of other
22 facts, legal theories, witnesses, documents, or other information subject to disclosure.

23 **I. FACTUAL BACKGROUND.**

24 1. On or about December 23, 2010, TMCC submitted to Republic a U.S. Small
25 Business Administration ("SBA") Application for Business Loan, requesting funds for
26 construction of and acquisition of equipment for a coffee/convenience store.
27
28

2. On or about July 12, 2011, TMCC submitted to Republic a U.S. Small Business Administration Application for Business Loan, requesting funds for construction of and acquisition of equipment for a coffee/convenience store.

3. On or about July 13, 2011, Republic submitted to the SBA, and the SBA received, an application for the SBA to guarantee a loan in the amount of \$1,026,300.00 (the "2011 SBA Application") to Thompson/McCarthy DB LLC ("TMDB," now TMCC¹), James L. Thompson ("Thompson") and Janice L. McCarthy ("McCarthy") (collectively, the "2011 Loan Borrowers").

4. On or about July 27, 2011, the SBA sent a "screen out" letter to Republic relating to the 2011 SBA Application.

5. On or about August 3, 2011, the SBA approved the 2011 SBA Application, evidenced by a U.S. Small Business Administration Authorization (SBA 7(A) Guaranteed Loan) dated August 3, 2011 (the "2011 Authorization").²

6. After receiving and signing the 2011 Authorization, Republic continued working with the 2011 Loan Borrowers to close the 2011 Loan (defined below).

7. On or about October 24, 2011, TMDB, Thompson, and McCarthy entered into a Construction Loan Agreement (the "2011 Loan Agreement") with Republic for a loan in the maximum principal amount of \$1,026,300.00 (the "2011 Loan"). The purpose of the 2011 Loan was to construct Dutch Brothers coffee shops on real property located at 6461 South Rural Road, Tempe, Arizona 85283 (the "Rural Property"), and 1122 South Greenfield Road, Mesa, Arizona 85208 (the "Greenfield Property").

8. In connection with the 2011 Loan Agreement, TMDB, Thompson, and McCarthy executed and delivered a U.S. Small Business Administration Note (the "2011 Note"), dated October 24, 2011, in the maximum principal amount of \$1,026,300.00 in favor of Republic.

¹ Upon information and belief, Thompson/McCarthy Coffee Co. is the successor in interest of Thompson/McCarthy DB LLC.

² All documents defined in this Initial Disclosure Statement were previously produced on July 2, 2015.

1 9. The 2011 Loan was also secured by, among other things, a Construction
2 Deed of Trust granted by TMDB in favor of Republic, and recorded on November 4,
3 2011, at Recorder's No. 20110918231, records of Maricopa County, Arizona, related to
4 the Rural Property (the "Rural Deed of Trust").

5 10. The 2011 Loan was secured by, among other things, a Construction Deed of
6 Trust granted by Greenfield Southern DB LLC, TMDB, Thompson and McCarthy in
7 favor of Republic, and recorded on July 17, 2012, at Recorder's No. 20120626574,
8 records of Maricopa County, Arizona (the "Greenfield Deed of Trust") related to the
9 Greenfield Property. (Hereinafter, the 2011 SBA Application, 2011 Authorization, 2011
10 Loan Agreement, 2011 Note, Rural Deed of Trust, Greenfield Deed of Trust and any other
11 documents executed and delivered in connection with the 2011 Loan are called the "Loan
12 Documents.")

13 11. On or about November 4, 2011, the 2011 Loan **closed and** was fully funded
14 **on that same day.**

15 12. On or about January 23, 2012, TMDB submitted to Republic a U.S. Small
16 Business Administration Application for Small Business Loan, requesting funds for
17 construction of and acquisition of equipment for a coffee/convenience store.

18 13. In or about February 2012, Republic submitted to the SBA, and the SBA
19 received, an application for the SBA to guarantee a loan in the amount of \$597,100.00
20 (the "2012 SBA Application") to TMDB.

21 14. On or about February 29, 2012, the SBA sent a "screen out" letter to
22 Republic relating to the 2012 SBA Application.

23 15. On or about March 14, 2012, the SBA approved the 2012 SBA Application,
24 evidenced by a U.S. Small Business Administration Authorization (SBA 7(A) Guaranteed
25 Loan) dated March 14, 2012 (the "2012 Authorization").

26 16. After receiving and signing the 2012 Authorization, Republic continued
27 working with TMDB to close the 2012 Loan (defined below).
28

1 17. On or about May 9, 2012, TMDB dba Glendale Ave./12 Street DB LLC
2 entered into a Construction Loan Agreement (the "2012 Loan Agreement") with Republic
3 for a loan in the maximum principal amount of \$597,100.00 (the "2012 Loan"). The
4 purpose of the 2012 Loan was to construct a Dutch Brothers coffee shop on real property
5 located at 1201 East Glendale Avenue, Phoenix, Arizona 85020 (the "Glendale
6 Property").

7 18. In connection with the 2012 Loan Agreement, TMCC executed and
8 delivered a U.S. Small Business Administration Note (the "2012 Note"), dated May 9,
9 2012, in the maximum principal amount of \$597,100.00 in favor of Republic.

10 19. In connection with the 2012 Loan, Thompson, McCarthy, TMCC, James L.
11 Living Trust Dated June 16, 1997, and Janice L. McCarthy Trust dated September 28,
12 2005 (collectively, the "Guarantors") executed and delivered to Republic a Guaranty of
13 Completion and Performance (the "2012 Guaranty"), whereby Guarantors unconditionally
14 guaranteed that the construction of the Glendale Project would be completed and to pay
15 such amounts as necessary to complete it.

16 20. The 2012 Loan was secured by, among other things, a Construction
17 Leasehold Deed of Trust granted by TMCC in favor of Republic, and recorded on June 6,
18 2012, at Recorder's No. 20120489027, records of Maricopa County, Arizona (the
19 "Glendale Deed of Trust") related to the Glendale Property. (Hereinafter, the 2012 SBA
20 Application, 2012 Authorization, 2012 Loan Agreement, 2012 Note, 2012 Guaranty,
21 Glendale Deed of Trust and any other documents executed and delivered in connection
22 with the 2012 Loan are called the "2012 Loan Documents." The 2011 Loan and the 2012
23 Loan are collectively, the "Loans." The 2011 Loan Documents and the 2012 Loan
24 Documents are collectively, the "Loan Documents.")

25 21. On or around **May 11, 2012, the 2012 Loan closed and** was fully funded
26 **on May 14, 2012.**

1 22. In or around mid-June 2012, Republic submitted, and the SBA received, an
2 application for an SBA loan to construct a Dutch Brothers in Paradise Valley, Arizona
3 (**the "PV Loan Application"**).

4 23. On or about July 5, 2012, the SBA sent a "screen out" letter to Republic
5 relating to the PV Loan Application.

6 24. The SBA had multiple additional requests for documentation and
7 information relating to the PV Loan Application, which were timely relayed to TMCC.
8 The SBA was still requesting additional information as late as December 27, 2012.

9 25. On December 20, 2012, Thompson met with several Bank employees,
10 including Michael Harris, Emily Chedister and Stuart Olson. The parties agreed that they
11 no longer had a working relationship. Thompson told Republic he had decided to use
12 another lender going forward.

13 26. In or around January 2013, Republic offered Thompson a personal line of
14 credit to assist with cash flow and provide access to working capital.

15 27. Ultimately the PV Loan "timed out" of the SBA's system because the SBA
16 did not receive the additional information or documents it had requested.

17 28. In or around early February 2013, Republic was contacted by Mutual of
18 Omaha **Bank ("Mutual of Omaha")** regarding purchasing the Loans from Republic.

19 29. In or around May 2013, Mutual of Omaha approved the purchase of the
20 Loans from Republic.

21 30. In or around August 2013, Mutual of Omaha finally obtained SBA approval
22 for the purchase and assignment of the Loans.

23 31. **On or about September 19, 2013, Republic and Mutual of Omaha**
24 **entered into and executed a Loan Purchase and Sale Agreement (With Consent of**
25 **Obligors and Pledgors) (hereafter the "Loan Purchase Agreement") for the sale and**
26 **assignment of the Loans by Republic to Mutual of Omaha. As part of the Loan**
27 **Purchase Agreement, a Consent of Obligors and Pledgors (as defined therein) was**
28 **executed.**

1 32. On or about September 23, 2013, the purchase of the Loans closed.

2 33. In 2011, Republic closed 27 SBA loans in the total amount of \$26.12
3 million.

4 34. In 2012, Republic closed 30 SBA loans in the total amount of \$42.38
5 million.

6 35. The approval process for an SBA loan takes longer than the approval
7 process for a standard loan due to SBA requirements.

8 36. The Loans were more complex than the typical or standard SBA loan. The
9 Loans, along with the contemplated future loans of TMCC, were unusual because there
10 were multiple real properties as collateral, all of which had complex title issues. Each
11 TMCC loan grew more complex as additional collateral was required. Due to the
12 complexity of the Loans, the amount of time required to obtain SBA approval was
13 increased.

14 **II. LEGAL THEORIES.**

15 **A. Negligent Misrepresentation.**

16 Plaintiff's first cause of action is for negligent misrepresentation. Arizona follows
17 the Restatement (Second) of Torts § 552 for claims of negligent misrepresentation:

18 (1) One who, in the course of his business, profession or
19 employment, or in any other transaction in which he has a
20 pecuniary interest, supplies false information for the guidance
21 of others in their business transactions, is subject to liability
22 for pecuniary loss caused to them by their justifiable reliance
23 upon the information, if he fails to exercise reasonable care or
24 competence in obtaining or communicating the information.

25 (2) Except as stated in Subsection (3), the liability stated in
26 Subsection (1) is limited to loss suffered

27 (a) by the person or one of a limited group of persons
28 for whose benefit and guidance he intends to supply the
information or knows that the recipient intends to
supply it; and

 (b) through reliance upon it in a transaction that he
intends the information to influence or knows that the
recipient so intends or in a substantially similar
transaction.

...

1 Restatement (Second) of Torts, § 552.

2 The Arizona Supreme Court has held that negligent misrepresentation requires a
3 misrepresentation or omission of a fact. However, "[a] promise of future conduct is not a
4 statement of fact capable of supporting a claim of negligent misrepresentation." *McAlister*
5 *v. Citibank*, 171 Ariz. 207, 215 (1992).

6 Because a claim for negligent misrepresentation is governed by the principles of
7 negligence, there must be a duty owed and a breach of that duty in order to be charged
8 with the negligent violation of that duty. *KB Home Tucson, Inc. v. Charter Oak Fire Ins.*
9 *Co.*, 236 Ariz. 326, 332 (2014).

10 Arizona case law holds that a relationship between a Bank and an ordinary
11 depositor, absent a special agreement, is that of creditor and debtor, and there is no
12 fiduciary duty in a debtor/creditor relationship. *Gould v. M & I Marshall & Isley Bank*,
13 860 F.Supp.2d 985, 989 (2012). Thus, there is no special duty of care here other than the
14 standard debtor/creditor relationship.

15 Here, TMCC has failed to satisfy the elements of negligent misrepresentation in
16 that it has failed to provide any evidence of a duty of care other than the standard
17 debtor/creditor relationship; therefore there can be no breach. Additionally, although the
18 Bank denies that it made a promise or guaranteed that TMCC would receive \$5 million in
19 SBA approved loans, even if such a promise were made, it would be a promise of future
20 conduct, which is not a statement of fact capable of supporting a claim of negligent
21 misrepresentation.

22 **B. Fraudulent Inducement.**

23 TMCC's second cause of action is a claim for fraudulent inducement. The
24 elements of a claim for fraud are: (1) A representation; (2) its falsity; (3) its materiality;
25 (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent
26 that it should be acted upon by the person and in the manner reasonably contemplated; (6)
27 the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely
28

1 thereon; and (9) his consequent and proximate injury. *Nielson v. Flashberg*, 101 Ariz.
2 335, 338-39 (1966).

3 TMCC has failed to satisfy the elements of fraud in that it has failed to provide any
4 evidence that it promised it would make SBA-guaranteed loans up to the SBA maximum
5 of \$5.0 million between 2011 and 2014. There is no evidence of any promises by
6 Republic to complete any loans within a certain timeframe, or that Republic promised the
7 SBA would approve every loan for which TMCC applied. Furthermore, TMCC has failed
8 to provide any evidence that any representations made by Republic were false, or that
9 Republic knew such representations were false at the time they were made. Even if such
10 statements were made, TMCC had no right to rely on them, as it was aware that SBA
11 approval was also required for any SBA loan. Finally, TMCC has failed to prove any
12 damages and therefore cannot demonstrate a proximate injury.

13 **C. Affirmative Defenses.**

14 TMCC's claims against Republic may be barred in whole or in part by the negligent
15 and/or intentional acts of other parties.

16 TMCC's claims are barred by the Statute of Frauds. Arizona's Statute of Frauds,
17 A.R.S. § 44-101(9), states:

18 No action shall be brought in any court in the following cases
19 unless the promise or agreement upon which the action is
20 brought, or some memorandum thereof, is in writing and
signed by the party to be charged, or by some person by him
thereunto lawfully authorized:

21 Upon a contract, promise, undertaking or commitment to loan
22 money or to grant or extend credit, or a contract, promise,
23 undertaking or commitment to extend, renew or modify a loan
24 or other extension of credit involving both an amount greater
than two hundred fifty thousand dollars and not made or
extended primarily for personal, family or household
purposes.

25 Here, there is nothing in writing to evidence that Republic promised or guaranteed
26 that TMCC would receive SBA approval for \$5 million of loans, or promised it would
27 have SBA approval for any loans by a certain date, and in the absence of such a writing
28 between the parties, TMCC's claims must fail. Republic could not and did not promise

1 anything other than its willingness to work with TMCC to try to obtain SBA loans up to
2 the \$5 million limit.

3 Republic alleges that its conduct did not cause or substantially contribute to
4 TMCC's alleged loss. TMCC has not alleged losses with any particularity at this time and
5 Republic is unaware of the amount of damages that TMCC believes are attributed to
6 Republic's conduct. There were many other factors which may have caused or
7 contributed to any losses sustained by TMCC, if any losses are actually proven.

8 Republic alleges that TMCC's claims are barred by the statute of limitations,
9 estoppel, unclean hands, and waiver.

10 TMCC's claims against Republic are barred in whole by the doctrines of
11 **waiver/release**. Specifically, the Consent of Obligors and Pledgors (the "**Consent**"),
12 executed on or about September 19, 2013 as part of the Loan Purchase Agreement
13 by TMCC as an Obligor, expressly states:

14 (e) As a material inducement to Lender to agree to sell
15 the Loans to Assignee, *each Obligor and Pledgor*, on behalf
16 of itself and its past and present officers, directors,
17 shareholders, agents, employees, attorneys, affiliates,
18 subsidiaries and parents, and their respective heirs,
19 successors and assigns (individually and collectively, the
20 "Obligor/Pledgor Parties"), *hereby fully and forever*
21 *release and discharge Lender and all of Lender's past,*
22 *present and future officers, directors, shareholders,*
23 *agents, employees, attorneys, affiliates, predecessors in*
24 *interest, successors in interest, the parent corporations of*
25 *Lender or its predecessors in interest, and all of their*
26 *respective heirs, personal representatives, successors and*
27 *assigns (individually and collectively, the "Lender*
28 *Parties") from any and all claims, liabilities, demands,*
damages, liens, causes of action, and rights of recoupment,
offset and/or reimbursement of any kind or nature
whatsoever, whether known or unknown, liquidated or
unliquidated, asserted or unasserted, matured or
unmatured, and whether based on any contractual, tort,
equitable, common law, restitution, statutory or other
ground or theory of any nature whatsoever, including,
without limitation, any and all claims which in any way

1 *directly or indirectly rise out of, relate to, result from or are*
2 *connected to: (i) the Loans, (ii) any and all acts, omissions*
3 *or events relating to the Loans, (iii) the sale of Lender's*
4 *right, title and interest in the Loans to Assignee, and (iv)*
5 *the Collateral. In this connection, the Obligor/Pledgor*
6 *Parties represent and warrant that they realize and*
7 *acknowledge that factual matters now unknown to them*
8 *may have given or may hereafter give rise to causes of*
9 *action, claims, demands, debts, controversies, damages,*
10 *costs, losses and expenses that are presently unknown,*
11 *undisclosed, unanticipated and unsuspected, and further*
12 *agree, represent and warrant that this release has been*
13 *negotiated and agreed upon in light of that realization and*
14 *that the Obligor/Pledgor Parties nonetheless intend to*
15 *release the Lender Parties from any such unknown claims*
16 *that would be among the matters described if known on*
17 *the date hereof. The Obligor/Pledgor Parties hereby*
18 *acknowledge that they are signing this Consent with full*
19 *knowledge of any and all rights they may have and that*
20 *they are not relying upon any representations made by*
21 *Lender or any other party other than those set forth in the*
22 *Agreement, and the Obligor/Pledgor Parties hereby*
23 *assume the risk of any mistake of facts now known or*
24 *unknown to them. The Obligor/Pledgor Parties further*
25 *acknowledge that they have conducted whatever*
26 *investigation they deemed necessary to ascertain all facts*
27 *and matters related to the Agreement and thus Consent.*
28 *The Obligor/Pledgor Parties represent that they have had*
the opportunity to consult with legal counsel concerning
the legal consequences of this release.

(Emphasis added).

In the instant case, TMCC executed a waiver/release in signing the Consent. As such, in executing and delivering the Consent to Republic, TMCC was and is under a contractual obligation to "fully and forever release and discharge [Republic] . . . from any and all claims, liabilities, demands, damages, liens, [and] causes of action," among other things, thus rendering TMCC's Second Amended Complaint and all claims therein, unenforceable. See Consent at Paragraph (e).

1 Under Arizona law, TMCC waived any all claims against Republic by virtue
2 of executing the Consent.

3 Generally, "[w]aiver is either the express, voluntary,
4 intentional relinquishment of a known right or such
5 conduct as warrants an inference of such an intentional
6 relinquishment." *Russo v. Barger*, 239 Ariz. 100, 103 ¶ 12,
366 P.3d 577, 580 (App. 2016) (citing *Am. Cont'l Life Ins.*
Co. v. Ranier Constr. Co. Inc., 125 Ariz. 53, 55, 607 P.2d
372, 374 (1980)).

7 *Compass Bank v. Bennett*, 240 Ariz. 58, 375 P.3d 950, 3–953 (Ct. App. 2016), review
8 denied (Sept. 20, 2016).

9 Here, TMCC expressly, voluntarily, and intentionally relinquished its known
10 right to bring "any and all claims, liabilities, demands, damages, liens, [and] causes
11 of action," against Republic once it executed and delivered the Consent to Republic,
12 thus rendering TMCC's Second Amended Complaint and all claims therein,
13 unenforceable. *See* Consent at Paragraph (e).

14 Republic alleges that TMCC's claims are barred by failure to mitigate damages. A
15 party's failure to mitigate damages may negate and reduce damages where the party,
16 through its own voluntary activity, has unreasonably exposed itself to damage or
17 increased its injury. *See Life Investors Ins. Co v. Horizon Resources Bethany, Ltd.*, 182
18 Ariz. 529, 534, 898 P.2d 478, 483 (Ct. App. 1995). TMCC's own conduct may have
19 unreasonably exposed TMCC to damage or increased its damages (assuming any damages
20 are actually proven by TMCC). First, TMCC was well aware of the timeline for SBA
21 approval, having applied for and received approval for two other SBA loans with
22 Republic. If TMCC believed that the amount of time it took to obtain SBA approval with
23 Republic was inadequate and could cause TMCC to sustain damage, then TMCC should
24 have used a different lender to apply for the SBA loan for construction of the Paradise
25 Valley store. Furthermore, **even after Thompson informed Republic that TMCC was**
26 **going to use another lender going forward**, Republic offered Thompson a personal line
27 of credit to assist with finances **during the transition to another lender**, and Thompson's
28 failure to pursue such line of credit was further failure to mitigate damages.

1 TMCC also fails to state a claim against the Bank upon which an award of
2 attorneys' fees may be granted. TMCC has alleged negligent misrepresentation and
3 fraudulent inducement, both of which are tort claims. There is no contractual basis for
4 either of TMCC's claim. A.R.S. §§ 12-341 and 12-341.01 provide that the successful
5 party in any action arising out of a contract may be awarded attorney's fees and costs.
6 Here, there was no express or implied contract that was the basis for either of TMCC's
7 claims, and therefore, TMCC has failed to state a claim upon which an award of attorneys'
8 fees can be granted.

9 Also, as discussed in subsections A. and B. above, TMCC fails to set forth the
10 prima facie elements to establish a claim for negligent misrepresentation and/or a claim or
11 fraudulent inducement.

12 **D. TMCC's Damages.**

13 TMCC is not entitled to recover those damages, if any, that are remote,
14 speculative, or uncertain. TMCC's own damage expert, Leroy M. Gaintner
15 ("Gaintner"), was unable to determine any sum certain damage amount allegedly
16 suffered by TMCC as a result of Republic's actions. Instead, Gaintner's expert
17 report as to TMCC's claimed damages, dated March 5, 2016, presents three different
18 *hypothetical* situations and corresponding conjectural damage amounts.
19 Furthermore, TMCC's alleged damages are based upon delays purported to be
20 caused by Republic for which no evidence exists. However, Republic's SBA lending
21 expert, Lisa G. Lerner, has determined that in light of the complex nature of the
22 Loans and collateral securing the Loans, Republic's actions were reasonable and
23 there were no delays. As such, without any delays suffered by TMCC, Republic's
24 damage expert, Peter S. Davis, asserts that there can be no damages accrued to
25 TMCC, and that Gaintner's damage calculations are entirely speculative,
26 unsupported, and baseless.

27 Furthermore, TMCC seeks damages that allegedly arise from consequential
28 lost profits. *See Flagstaff Affordable Housing Ltd. Partnership v. Design Alliance,*

1 *Inc.*, 223 Ariz. 320, 323, 223 P.3d 664, 667 (2010) (holding that lost profits are a type
2 of consequential damages.) However, the measure of damages for breach of contract
3 to loan money limited to "the difference between the contracted for interest rate and
4 the interest rate at the time of breach," and it is impermissible for a plaintiff to
5 recover consequential damages where alternative financing is available or where the
6 loan could be obtained from another source. *McAlister v. Citibank*, 171 Ariz. 207,
7 212, 829 P.2d 1253, 1258 (Ariz. Ct. App. 1992). Here, as TMCC could have and in
8 fact, did, obtain financing through another source - Mutual of Omaha - it is not
9 entitled to recover any damages resulting from lost profits.

10 E. Attorneys' Fees.

11 Republic alleges that this action is frivolous and in violation of the contractual
12 obligations pursuant to the Consent, and therefore, Republic is entitled to attorneys'
13 fees for defense of this action pursuant to the Consent, A.R.S. §§ 12-341, 12-341.01, and
14 12-349 or as otherwise provided by law.

15 III. WITNESSES EXPECTED TO TESTIFY AT TRIAL.

16 Republic is unable to determine yet all of the persons it may call to testify at trial.
17 In addition to any witnesses identified in Section II and IV, TMCC may call as a witness
18 any individual identified in any Disclosure Statement of any other party now or
19 subsequently named in this action. Republic may also call as a witness any and all
20 persons necessary to authenticate or lay sufficient foundation for documentary evidence.
21 Republic reserves the right to supplement this list of witnesses.

22 IV. PERSONS WHO MAY HAVE RECENT KNOWLEDGE OR
23 INFORMATION.

- 24 1. Michael Harris
25 c/o W. Scott Jenkins, Jr.
26 **Quarles & Brady, LLP**
27 **Renaissance One**
28 Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

1 Mr. Harris was formerly a Vice President at Republic and was a Business
2 Relationship Manager and the loan officer for TMCC's two loans. Mr. Harris was in
3 frequent communication with Mr. Thompson and his accountant/bookkeeper Kathye
4 Pease ("Pease") regarding the Loans. Mr. Harris attended a meeting with Ms. Pease and
5 Mr. Thompson on December 20, 2012, at which the parties agreed they no longer had a
6 working relationship. As a result, Mr. Harris may have information, related to, among
7 other things, the facts and circumstances pertaining to TMCC's claims for negligent
8 misrepresentation and fraudulent inducement, including what representations were or
9 were not made to TMCC relating to the Loans.

10 2. Emily Chedister
11 RepublicBankAZ, N.A.
12 c/o W. Scott Jenkins, Jr.
13 **Quarles & Brady, LLP**
14 **Renaissance One**
Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

15 Ms. Chedister is a Vice President at Republic and was a Loan Administrator and
16 then Loan Operations Manager during the relevant period. Ms. Chedister worked on both
17 of the Loans, was in frequent communication with Ms. Pease and Mr. Thompson, and
18 attended a meeting with Ms. Pease and Mr. Thompson on December 20, 2012 at which
19 the parties agreed they no longer had a working relationship. As a result, Ms. Chedister
20 may have information, related to, among other things, the facts and circumstances
21 pertaining to TMCC's claims for negligent misrepresentation and fraudulent inducement,
22 including what representations were or were not made to TMCC relating to the Loans.

23 3. Stuart Olson
24 c/o W. Scott Jenkins, Jr.
25 **Quarles & Brady, LLP**
26 **Renaissance One**
Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200
27
28

1 Mr. Olson was an Executive Vice President at Republic and was the Chief Credit
2 Officer during the relevant time period. Mr. Olson attended the December 20, 2012
3 meeting with Mr. Thompson and Ms. Pease at which the parties agreed they no longer had
4 a working relationship. As a result, Mr. Olson may have information, related to, among
5 other things, the facts and circumstances pertaining to TMCC's claims for negligent
6 misrepresentation and fraudulent inducement, including what representations were or
7 were not made to TMCC relating to the Loans.

8 4. Marla Woods
9 c/o W. Scott Jenkins, Jr.
10 **Quarles & Brady, LLP**
11 **Renaissance One**
12 Two North Central Avenue
13 Phoenix, Arizona 85004
14 Telephone: (602) 229-5200

15 Ms. Woods was a Loan Document Specialist at Republic during the relevant time
16 period. Ms. Woods assisted with the loan application and SBA approval process on the
17 Loans, and was in frequent communication with Mr. Harris regarding the status of the
18 Loans and additional documentation. Ms. Woods was in frequent communication with
19 the title companies relating to the Loans. Ms. Woods also e-mailed frequently with Mr.
20 Thompson and Ms. Pease regarding information and documents Republic needed. As a
21 result, Ms. Woods may have information, related to, among other things, the facts and
22 circumstances pertaining to TMCC's claims for negligent misrepresentation and
23 fraudulent inducement, including what representations were or were not made to TMCC
24 relating to relating to the Loans, and the particular circumstances regarding the
25 documentation and closing of the Loans.

26 5. Kimberly Pappas
27 c/o W. Scott Jenkins, Jr.
28 **Quarles & Brady, LLP**
Renaissance One
Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

1 Ms. Pappas was a Vice President at Republic and was the Loan Operations
2 Manager during part of the relevant time period. As a result, Ms. Pappas may have
3 information, related to, among other things, the facts and circumstances pertaining to
4 TMCC's claims for negligent misrepresentation and fraudulent inducement, including
5 what representations were or were not made to TMCC relating to the Loans, and the
6 particular circumstances surrounding the documentation and closing of the Loans.

7 6. Anthony Bodnar
8 c/o W. Scott Jenkins, Jr.
9 **Quarles and Brady, LLP**
10 **Renaissance One**
11 Two North Central Avenue
12 Phoenix, Arizona 85004
13 Telephone: (602) 229-5200

11 Mr. Bodnar was an Assistant Vice President at Republic and was a Loan
12 Administrator during the relevant time period. As a result, Mr. Bodnar may have
13 information, related to, among other things, the facts and circumstances pertaining to
14 TMCC's claims for negligent misrepresentation and fraudulent inducement, including
15 what representations were or were not made to TMCC relating to relating to the Loans,
16 and the particular circumstances regarding the approval of the Loans.

17 7. James Thompson
18 c/o Francis J. Slavin, Esq.
19 Francis J. Slavin, P.C.
20 2198 East Camelback Road, Suite 285
21 Phoenix, Arizona 85016
22 Telephone: (602) 381-8700

21 Mr. Thompson is the principal and owner of TMCC. As a borrower and guarantor
22 of the Loans, Mr. Thompson was involved in the application and approval process and
23 communicated frequently with Mr. Harris and other Republic employees. As a result, Mr.
24 Thompson may have information, related to, among other things, the facts and
25 circumstances pertaining to TMCC's claims for negligent misrepresentation and
26 fraudulent inducement.

1 8. Kathye Pease
2 EQ8 A&B, LLC
3 P.O. Box 7433
4 Chandler, Arizona 85246
5 Telephone: (480) 359-4883

6 Ms. Pease is a manager of EQ8 A&B, LLC, and was Mr. Thompson's
7 accountant/bookkeeper. Ms. Pease provided and discussed financials documents and
8 information with Republic, had frequent communications with multiple employees of
9 Republic during the entire loan application, Republic approval, SBA approval, and
10 funding process, and was in attendance at the December 20, 2012 meeting with Mr.
11 Thompson, Mr. Harris, Mr. Olson and Ms. Chedister. As a result, Ms. Pease may have
12 information, related to, among other things, the facts and circumstances pertaining to
13 TMCC's claims for negligent misrepresentation and fraudulent inducement.

14 9. Corey Schimmel
15 Mutual of Omaha Bank
16 c/o Janet Ryan, Esq.
17 Janet.Ryan@mutualofomaha.com

18 Mr. Schimmel was a Vice President in Business Banking at Mutual of Omaha and
19 was the loan officer for the two loans acquired by Mutual of Omaha from Republic. As a
20 result, Mr. Schimmel may have information related to, among other things, the facts and
21 circumstances pertaining to the acquisition of the loans by Mutual of Omaha, including
22 the process and timeframe.

23 10. Any persons disclosed by TMCC as persons who may be called as
24 witnesses at trial.

25 **V. IDENTITY OF PERSONS WHO HAVE GIVEN STATEMENTS.**

26 No statements have been given yet in this matter.

27 **VI. EXPERT WITNESSES EXPECTED TO TESTIFY.**

28 The areas of expert testimony that Republic expects to provide an opinion include
expert testimony related to SBA procedures and policies relating to the loan application
and approval process, TMCC's damages (or lack thereof), and rebuttal expert testimony in

1 response to any and all opinions, facts and data contained in expert testimony provided by
2 TMCC.

3 1. SBA Loans, Procedures, Policies, and Approval Process.

4 Republic **will** call **Lisa G. Lerner as an expert witness**, who is qualified to testify
5 **as to** SBA loans in general, policies and procedures for SBA loans, the different types of
6 SBA-qualified lenders, the SBA application process, the SBA approval process, and
7 Republic's handling of the SBA loan applications of TMCC. Republic may also call an
8 expert for rebuttal testimony in response to any SBA loan testimony by any expert called
9 by TMCC.

10 **Lisa G. Lerner**
11 **Enhanced Consultive Solutions, LLC**
12 **c/o W. Scott Jenkins, Jr.**
13 **Quarles & Brady, LLP**
14 **Renaissance One**
15 **Two North Central Avenue**
16 **Phoenix, Arizona 85004**
17 **Telephone: (602) 229-5200**

18 **Ms. Lerner is an expert in the area of SBA lending procedures and processes.**
19 **Ms. Lerner is expected to testify regarding: the overall procedures as between the**
20 **SBA and lenders like Republic who participate in SBA loan programs; the SBA 7a**
21 **loan program that provides an SBA guaranty to a lender like Republic; the various**
22 **programs for which various lenders qualify, such as the General Lenders Program,**
23 **the Preferred Lenders Program, or the Certified Lenders Program; and the**
24 **variables and complexities that affect the closing and funding of a loan. Ms.**
25 **Lerner's opinion is that due to the complex nature of the Loans and the related**
26 **Collateral, Republic acted within normal and reasonable timeframes to close and**
27 **fund the Loans, thus there was no improper delay on the part of Republic. Ms.**
28 **Lerner's opinion is based upon her professional training, practice, and experience, as**
well as her review, analysis, and comparison of documents as set forth in her expert
report disclosed contemporaneously herewith and dated November 1, 2016.

1 2. Lost Profits and Other Damages.

2 Republic **will** call **Peter S. Davis as an expert witness**, who is qualified to testify
3 **as** to the standards for determining whether there were lost profits, how to calculate lost
4 profits, whether TMCC suffered any lost profits, whether Republic's representations or
5 actions were the proximate cause of such lost profits (if there were any), and the amount
6 of any lost profits and/or other damages of TMCC. Republic may also call an expert for
7 rebuttal testimony in response to any lost profits/damages testimony by any expert called
8 by TMCC.

9 **Peter S. Davis**
10 **Simon Consulting, LLC**
11 **c/o W. Scott Jenkins, Jr.**
12 **Quarles & Brady, LLP**
13 **Renaissance One**
14 **Two North Central Avenue**
15 **Phoenix, Arizona 85004**
16 **Telephone: (602) 229-5200**

17 **Mr. Davis is an expert in the area of forensic accounting, commercial damages**
18 **and valuations in connection with complex litigation, and forensic economics,**
19 **including analyses and determinations of loss profits and lost earnings related to tort**
20 **and contract matters. Mr. Davis is expected to testify regarding: the assumptions**
21 **and analyses presented in the Gaintner Report; the methodology relied upon in the**
22 **Gaintner Report and related damage calculations asserted therein; the conflicting**
23 **and irreconcilable assertions set forth in the Gaintner Report; the absence of**
24 **proximate cause to the damages asserted by TMCC; and the absence of actual**
25 **damages incurred by TMCC. Mr. Davis' opinion is based upon his professional**
26 **training, practice, and experience, as well as his review, analysis, and comparison of**
27 **documents as set forth in his expert report disclosed contemporaneously herewith**
28 **and dated November 1, 2016.**

29 **Republic reserves the right to call the following witnesses designated as**
30 **experts by TMCC:**

- 1 1. **Leroy M. Gaintner**
2 **c/o Francis J. Slavin, Esq.**
3 **Francis J. Slavin, P.C.**
4 **2198 East Camelback Road, Suite 285**
 Phoenix, Arizona 85016
 Telephone: (602) 381-8700

5 Mr. Gaintner is a certified public accountant and the expert retained by
6 TMCC to provide an analysis of TMCC's claimed damages (e.g. the Gaintner
7 Report). Mr. Gaintner is expected to testify regarding the substance and contents of
8 his report, including but not limited to his opinion that "RBA approvals/funding
9 were not timely forthcoming,"; that Republic "require[d] TMC to delay
10 completing/opening certain Stores and completely delay[ed] or stop[ed] several other
11 planned stores,"; and the assumptions and analyses asserted in the Gaintner Report;
12 and the various damage calculations set forth under Scenario 1, Scenario 2, and
13 Scenario 3 as defined within the Gaintner Report. Mr. Gaintner is also expected to
14 testify regarding his professional training, practice, and experience, as well as his
15 review, analysis, and comparison of documents as set forth in the Gaintner Report.

- 16 2. **Douglas T. Haman**
17 **c/o Francis J. Slavin, Esq.**
18 **Francis J. Slavin, P.C.**
19 **2198 East Camelback Road, Suite 285**
 Phoenix, Arizona 85016
 Telephone: (602) 381-8700

20 Mr. Haman is a Senior Vice President of Seacoast Commerce Bank and the
21 expert retained by TMCC to provide an analysis of SBA lending procedures and
22 processes (hereafter, the "Haman Report"). Mr. Haman is expected to testify
23 regarding the substance and contents of his report, including but not limited to his
24 opinion that "RBA/approvals/funding were not timely forthcoming, thus requiring
25 TMC to delay completing/opening certain stores." Mr. Haman is also expected to
26 testify regarding his professional training, practice, and experience, as well as his
27 review, analysis, and comparison of documents as set forth in the Haman Report.
28

1 Republic reserves its right to supplement this **Third** Supplemental Disclosure
2 Statement to identify expert witnesses and matters upon which such expert witnesses are
3 expected to testify.

4 **VII. COMPUTATION AND MEASURE OF DAMAGES.**

5 TMCC claims damages of between \$1,583,000 to \$5,672,000 based upon three
6 different scenarios. Republic asserts that TMCC has not suffered any damages, **and that**
7 **TMCC fully waived and released Republic from any and all claims, liabilities, and**
8 **damages by virtue of executing the Consent in favor of Republic.**

9 **VIII. TANGIBLE EVIDENCE AND RELEVANT DOCUMENTS THAT MAY BE**
10 **USED AT TRIAL.**

11 Republic is unaware at this time which documents it intends to use at trial, but may
12 use the following documents at trial. Republic reserves its right to further timely
13 supplement this list as discovery proceeds.

14	DOCUMENT DESCRIPTION	DATE	BATES NUMBERS
15	E-mail correspondence relating to loans-	02/2008 –	RBAZ 000001 - RBAZ
16	internal, with Thompson, Kathy Pease, SBA,	12/2008	004890.011
17	Later supplemented e-mails with redactions	Various	RBAZ 002980 - 2981
18	removed		and RBAZ 002984
19	Documents with redactions removed produced	2011 - 2012	RBAZ 00163, 00164,
20	by Republic on September 9, 2016 subject to		00165 - 00170, 00260-
21	Stipulated Protective Order filed September 9,		00261, 00262 - 00263,
22	2016		00268 - 00271, 00272 -
23			00275, 00285, 00754 -
24			00755, 00766 - 00768,
25			01223, 01224, 01225 -
26			01226, 01504, 01833,
27			01853 - 01854, 01858,
28			01859 - 01860, 02171,
			02978, 02980 - 02981,
			02982, 02984, 02996,
			03035, 03088, 03089,
			03361, 03394, 03925,
			03928
	Organizational Documents of TMCC and	01/2009 –	RBAZ 04891 - RBAZ
	related entities	12/2009	05649

1	Loan File for Loan No. 826005400 in the	2010-2012	RBAZ 05650 - RBAZ
2	amount of \$1,026,300.00 (October 24, 2011		06619
3	Loan)		
4	Loan File for Loan No. 826007200 in the	2011-2012	RBAZ 06620 - RBAZ
5	amount of \$597,100.00_(May 9, 2012 Loan)		08351
6	Additional e-mails, SBA correspondence, and	2011 - 2013	RBAZ 08352 - RBAZ
7	memoranda		08428
8	Documents produced by TMCC with Initial		TMCC00001 -
9	Disclosure Statement and as later		TMCC02848
10	supplemented with redactions removed		
11	Documents produced by TMCC with Fourth		TMCC002849 -
12	Supplemental Disclosure Statement		TMCC006375
13	Documents provided by the SBA to Republic	2011 - 2013	SBA 00001 - 00969
14	Documents provided by the SBA to Republic	2012	SBA2 00001 - 00194
15	Documents provided by the SBA to TMCC	Various	SBA000001 -
16			SBA000029
17	Documents produced by Mutual of Omaha in	2012-2015	MB000102 - 009483
18	response to TMCC's subpoena		
19	TMCC's expert report dated March 5, 2016	3/5/2016	n/a
20	prepared by Leroy M. Gaintner, CPA, PLC		
21	and schedules, exhibits, and addenda		
22	File of Leroy M. Gaintner, CPA, PLC	Various	GA000001 -
23			GA000437 and other
24			documents without
25			bates labels
26	TMCC's expert report dated September 20,	9/20/2016	n/a
27	2016 prepared by Douglas T. Haman and		
28	addendum		
	Documents produced by Nationwide	Various	NV000001 - 001197
	Valuations in response to TMCC's subpoena		
	Documents produced by First Arizona Title	Various	FAZT000001 - 000167
	Agency in response to TMCC's subpoena		
	Documents produced by Thomas Title &	Various	TT000001 - 000578
	Escrow in response to TMCC's subpoena		
	Expert Report of Peter S. Davis of Simon	11/1/2016	n/a
	Consulting, LLC, dated November 1, 2016		
	Expert Report of Lisa G. Lerner of	11/1/2016	n/a
	Enhanced Consultive Solutions, LLC, dated		
	November 1, 2016		

1 **IX. OTHER RELEVANT DOCUMENTS.**

- 2 1. All documents listed above in Section VIII.
- 3 2. All documents disclosed pursuant to any subpoena issued in this case.
- 4 3. All documents attached to or referenced in TMCC's Second
- 5 Amended Complaint, Republic's Answer to the Second Amended Complaint, and any
- 6 other pleadings filed by the parties in this case.
- 7 4. All documents attached to or referenced in the parties' disclosure
- 8 statements.
- 9 5. All deposition transcripts from any deposition taken in this case.
- 10 6. All exhibits to any deposition taken in this case, or documents
- 11 referred to during any deposition taken in this case.
- 12 7. All documents or information produced in response to any discovery
- 13 response in this case.
- 14 8. All documents or information produced by any third party in
- 15 response to a subpoena in this case.
- 16 9. All documents informally exchanged between the parties' attorneys
- 17 in this case.

18 DATED this 1st day of November, 2016.

19 QUARLES & BRADY LLP
20 Renaissance One
21 Two North Central Avenue
Phoenix, AZ 85004-2391

22 By Andrea Landeen

23 W. Scott Jenkins, Jr.
24 Andrea H. Landeen
Alissa Brice Castañeda

25 Attorneys for Defendant RepublicBankAZ, N.A.

26

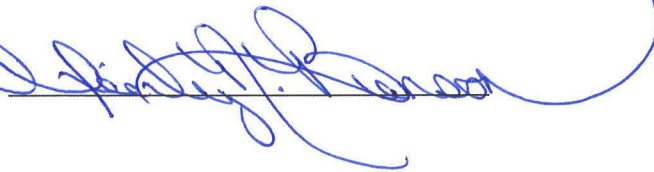
27

28

1 ORIGINAL mailed and COPY emailed
2 this 1st day of November, 2016 to:

3 Francis J. Slavin, Esq.
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RepublicBankAZ, N.A.'s
Fourth Supplemental Disclosure Statement

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14 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

15 **IN AND FOR THE COUNTY OF MARICOPA**

16 THOMPSON/McCARTHY COFFEE CO.,
17 an Arizona corporation,

18 Plaintiff,

19 vs.

20 REPUBLICBANKAZ, N.A.,

21 Defendant.

Case No. CV2014-014647

**FOURTH SUPPLEMENTAL
DISCLOSURE STATEMENT**

(Assigned to the Honorable
Dawn Bergin)

22 RepublicBankAZ, N.A. ("Republic") hereby discloses the following information to
23 Thompson/McCarthy Coffee Co. ("TMCC"). Republic reserves the right to supplement
24 and amend this **Fourth** Supplemental Disclosure Statement as appropriate during the
25 course of discovery should further research or investigation reveal the existence of other
26 facts, legal theories, witnesses, documents, or other information subject to disclosure.

27 **I. FACTUAL BACKGROUND.**

28 1. On or about December 23, 2010, TMCC submitted to Republic a U.S. Small
Business Administration ("SBA") Application for Business Loan, requesting funds for
construction of and acquisition of equipment for a coffee/convenience store.

1 2. On or about July 12, 2011, TMCC submitted to Republic a U.S. Small
2 Business Administration Application for Business Loan, requesting funds for construction
3 of and acquisition of equipment for a coffee/convenience store.

4 3. On or about July 13, 2011, Republic submitted to the SBA, and the SBA
5 received, an application for the SBA to guarantee a loan in the amount of \$1,026,300.00
6 (the "2011 SBA Application") to Thompson/McCarthy DB LLC ("TMDB," now TMCC'),
7 James L. Thompson ("Thompson") and Janice L. McCarthy ("McCarthy") (collectively,
8 the "2011 Loan Borrowers").

9 4. On or about July 27, 2011, the SBA sent a "screen out" letter to Republic
10 relating to the 2011 SBA Application.

11 5. On or about August 3, 2011, the SBA approved the 2011 SBA Application,
12 evidenced by a U.S. Small Business Administration Authorization (SBA 7(A) Guaranteed
13 Loan) dated August 3, 2011 (the "2011 Authorization").²

14 6. After receiving and signing the 2011 Authorization, Republic continued
15 working with the 2011 Loan Borrowers to close the 2011 Loan (defined below).

16 7. On or about October 24, 2011, TMDB, Thompson, and McCarthy entered
17 into a Construction Loan Agreement (the "2011 Loan Agreement") with Republic for a
18 loan in the maximum principal amount of \$1,026,300.00 (the "2011 Loan"). The purpose
19 of the 2011 Loan was to construct Dutch Brothers coffee shops on real property located at
20 6461 South Rural Road, Tempe, Arizona 85283 (the "Rural Property"), and 1122 South
21 Greenfield Road, Mesa, Arizona 85208 (the "Greenfield Property").

22 8. In connection with the 2011 Loan Agreement, TMDB, Thompson, and
23 McCarthy executed and delivered a U.S. Small Business Administration Note (the "2011
24 Note"), dated October 24, 2011, in the maximum principal amount of \$1,026,300.00 in
25 favor of Republic.

26 _____
27 ¹ Upon information and belief, Thompson/McCarthy Coffee Co. is the successor in interest of
Thompson/McCarthy DB LLC.

28 ² All documents defined in this Initial Disclosure Statement were previously produced on July 2,
2015.

1 9. The 2011 Loan was also secured by, among other things, a Construction
2 Deed of Trust granted by TMDB in favor of Republic, and recorded on November 4,
3 2011, at Recorder's No. 20110918231, records of Maricopa County, Arizona, related to
4 the Rural Property (the "Rural Deed of Trust").

5 10. The 2011 Loan was secured by, among other things, a Construction Deed of
6 Trust granted by Greenfield Southern DB LLC, TMDB, Thompson and McCarthy in
7 favor of Republic, and recorded on July 17, 2012, at Recorder's No. 20120626574,
8 records of Maricopa County, Arizona (the "Greenfield Deed of Trust") related to the
9 Greenfield Property. (Hereinafter, the 2011 SBA Application, 2011 Authorization, 2011
10 Loan Agreement, 2011 Note, Rural Deed of Trust, Greenfield Deed of Trust and any other
11 documents executed and delivered in connection with the 2011 Loan are called the "Loan
12 Documents.")

13 11. On or about November 4, 2011, the 2011 Loan closed and was fully funded
14 on that same day.

15 12. On or about January 23, 2012, TMDB submitted to Republic a U.S. Small
16 Business Administration Application for Small Business Loan, requesting funds for
17 construction of and acquisition of equipment for a coffee/convenience store.

18 13. In or about February 2012, Republic submitted to the SBA, and the SBA
19 received, an application for the SBA to guarantee a loan in the amount of \$597,100.00
20 (the "2012 SBA Application") to TMDB.

21 14. On or about February 29, 2012, the SBA sent a "screen out" letter to
22 Republic relating to the 2012 SBA Application.

23 15. On or about March 14, 2012, the SBA approved the 2012 SBA Application,
24 evidenced by a U.S. Small Business Administration Authorization (SBA 7(A) Guaranteed
25 Loan) dated March 14, 2012 (the "2012 Authorization").

26 16. After receiving and signing the 2012 Authorization, Republic continued
27 working with TMDB to close the 2012 Loan (defined below).
28

1 17. On or about May 9, 2012, TMDB dba Glendale Ave./12 Street DB LLC
2 entered into a Construction Loan Agreement (the "2012 Loan Agreement") with Republic
3 for a loan in the maximum principal amount of \$597,100.00 (the "2012 Loan"). The
4 purpose of the 2012 Loan was to construct a Dutch Brothers coffee shop on real property
5 located at 1201 East Glendale Avenue, Phoenix, Arizona 85020 (the "Glendale
6 Property").

7 18. In connection with the 2012 Loan Agreement, TMCC executed and
8 delivered a U.S. Small Business Administration Note (the "2012 Note"), dated May 9,
9 2012, in the maximum principal amount of \$597,100.00 in favor of Republic.

10 19. In connection with the 2012 Loan, Thompson, McCarthy, TMCC, James L.
11 Living Trust Dated June 16, 1997, and Janice L. McCarthy Trust dated September 28,
12 2005 (collectively, the "Guarantors") executed and delivered to Republic a Guaranty of
13 Completion and Performance (the "2012 Guaranty"), whereby Guarantors unconditionally
14 guaranteed that the construction of the Glendale Project would be completed and to pay
15 such amounts as necessary to complete it.

16 20. The 2012 Loan was secured by, among other things, a Construction
17 Leasehold Deed of Trust granted by TMCC in favor of Republic, and recorded on June 6,
18 2012, at Recorder's No. 20120489027, records of Maricopa County, Arizona (the
19 "Glendale Deed of Trust") related to the Glendale Property. (Hereinafter, the 2012 SBA
20 Application, 2012 Authorization, 2012 Loan Agreement, 2012 Note, 2012 Guaranty,
21 Glendale Deed of Trust and any other documents executed and delivered in connection
22 with the 2012 Loan are called the "2012 Loan Documents." The 2011 Loan and the 2012
23 Loan are collectively, the "Loans." The 2011 Loan Documents and the 2012 Loan
24 Documents are collectively, the "Loan Documents.")

25 21. On or around May 11, 2012, the 2012 Loan closed and was fully funded on
26 May 14, 2012.

1 22. In or around mid-June 2012, Republic submitted, and the SBA received, an
2 application for an SBA loan to construct a Dutch Brothers in Paradise Valley, Arizona
3 (the "PV Loan Application").

4 23. On or about July 5, 2012, the SBA sent a "screen out" letter to Republic
5 relating to the PV Loan Application.

6 24. The SBA had multiple additional requests for documentation and
7 information relating to the PV Loan Application, which were timely relayed to TMCC.
8 The SBA was still requesting additional information as late as December 27, 2012.

9 25. On December 20, 2012, Thompson met with several **Republic** employees,
10 including Michael Harris, Emily Chedister and Stuart Olson. The parties agreed that they
11 no longer had a working relationship. Thompson told Republic he had decided to use
12 another lender going forward.

13 26. In or around January 2013, Republic offered Thompson a personal line of
14 credit to assist with cash flow and provide access to working capital.

15 27. Ultimately the PV Loan "timed out" of the SBA's system because the SBA
16 did not receive the additional information or documents it had requested.

17 28. In or around early February 2013, Republic was contacted by Mutual of
18 Omaha Bank ("Mutual of Omaha") regarding purchasing the Loans from Republic.

19 29. In or around May 2013, Mutual of Omaha approved the purchase of the
20 Loans from Republic.

21 30. In or around August 2013, Mutual of Omaha finally obtained SBA approval
22 for the purchase and assignment of the Loans.

23 31. On or about September 19, 2013, Republic and Mutual of Omaha entered
24 into and executed a Loan Purchase and Sale Agreement (With Consent of Obligors and
25 Pledgors) (hereafter the "Loan Purchase Agreement") for the sale and assignment of the
26 Loans by Republic to Mutual of Omaha. As part of the Loan Purchase Agreement, a
27 Consent of Obligors and Pledgors (as defined therein) was executed.

28 32. On or about September 23, 2013, the purchase of the Loans closed.

1 33. In 2011, Republic closed 27 SBA loans in the total amount of \$26.12
2 million.

3 34. In 2012, Republic closed 30 SBA loans in the total amount of \$42.38
4 million.

5 35. The approval process for an SBA loan takes longer than the approval
6 process for a standard loan due to SBA requirements.

7 36. The Loans were more complex than the typical or standard SBA loan. The
8 Loans, along with the contemplated future loans of TMCC, were unusual because there
9 were multiple real properties as collateral, all of which had complex title issues. Each
10 TMCC loan grew more complex as additional collateral was required. Due to the
11 complexity of the Loans, the amount of time required to obtain SBA approval was
12 increased.

13 **II. LEGAL THEORIES.**

14 **A. Negligent Misrepresentation.**

15 Plaintiff's first cause of action is for negligent misrepresentation. Arizona follows
16 the Restatement (Second) of Torts § 552 for claims of negligent misrepresentation:

17 (1) One who, in the course of his business, profession or
18 employment, or in any other transaction in which he has a
19 pecuniary interest, supplies false information for the guidance
20 of others in their business transactions, is subject to liability
21 for pecuniary loss caused to them by their justifiable reliance
22 upon the information, if he fails to exercise reasonable care or
23 competence in obtaining or communicating the information.

24 (2) Except as stated in Subsection (3), the liability stated in
25 Subsection (1) is limited to loss suffered

26 (a) by the person or one of a limited group of persons
27 for whose benefit and guidance he intends to supply the
28 information or knows that the recipient intends to
29 supply it; and

30 (b) through reliance upon it in a transaction that he
31 intends the information to influence or knows that the
32 recipient so intends or in a substantially similar
33 transaction.

34 ...

35 Restatement (Second) of Torts, § 552.

1 The Arizona Supreme Court has held that negligent misrepresentation requires a
2 misrepresentation or omission of a fact. However, "[a] promise of future conduct is not a
3 statement of fact capable of supporting a claim of negligent misrepresentation." *McAlister*
4 *v. Citibank*, 171 Ariz. 207, 215 (1992).

5 Because a claim for negligent misrepresentation is governed by the principles of
6 negligence, there must be a duty owed and a breach of that duty in order to be charged
7 with the negligent violation of that duty. *KB Home Tucson, Inc. v. Charter Oak Fire Ins.*
8 *Co.*, 236 Ariz. 326, 332 (2014).

9 Arizona case law holds that a relationship between a Bank and an ordinary
10 depositor, absent a special agreement, is that of creditor and debtor, and there is no
11 fiduciary duty in a debtor/creditor relationship. *Gould v. M & I Marshall & Isley Bank*,
12 860 F.Supp.2d 985, 989 (2012). Thus, there is no special duty of care here other than the
13 standard debtor/creditor relationship.

14 Here, TMCC has failed to satisfy the elements of negligent misrepresentation in
15 that it has failed to provide any evidence of a duty of care other than the standard
16 debtor/creditor relationship; therefore there can be no breach. Additionally, although the
17 Bank denies that it made a promise or guaranteed that TMCC would receive \$5 million in
18 SBA approved loans, even if such a promise were made, it would be a promise of future
19 conduct, which is not a statement of fact capable of supporting a claim of negligent
20 misrepresentation.

21 **B. Fraudulent Inducement.**

22 TMCC's second cause of action is a claim for fraudulent inducement. The
23 elements of a claim for fraud are: (1) A representation; (2) its falsity; (3) its materiality;
24 (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent
25 that it should be acted upon by the person and in the manner reasonably contemplated; (6)
26 the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely
27 thereon; and (9) his consequent and proximate injury. *Nielson v. Flashberg*, 101 Ariz.
28 335, 338-39 (1966).

1 TMCC has failed to satisfy the elements of fraud in that it has failed to provide any
2 evidence that it promised it would make SBA-guaranteed loans up to the SBA maximum
3 of \$5.0 million between 2011 and 2014. There is no evidence of any promises by
4 Republic to complete any loans within a certain timeframe, or that Republic promised the
5 SBA would approve every loan for which TMCC applied. Furthermore, TMCC has failed
6 to provide any evidence that any representations made by Republic were false, or that
7 Republic knew such representations were false at the time they were made. Even if such
8 statements were made, TMCC had no right to rely on them, as it was aware that SBA
9 approval was also required for any SBA loan. Finally, TMCC has failed to prove any
10 damages and therefore cannot demonstrate a proximate injury.

11 **C. Affirmative Defenses.**

12 TMCC's claims against Republic may be barred in whole or in part by the negligent
13 and/or intentional acts of other parties.

14 TMCC's claims are barred by the Statute of Frauds. Arizona's Statute of Frauds,
15 A.R.S. § 44-101(9), states:

16 No action shall be brought in any court in the following cases
17 unless the promise or agreement upon which the action is
18 brought, or some memorandum thereof, is in writing and
signed by the party to be charged, or by some person by him
thereunto lawfully authorized:

19 Upon a contract, promise, undertaking or commitment to loan
20 money or to grant or extend credit, or a contract, promise,
21 undertaking or commitment to extend, renew or modify a loan
22 or other extension of credit involving both an amount greater
than two hundred fifty thousand dollars and not made or
extended primarily for personal, family or household
purposes.

23 Here, there is nothing in writing to evidence that Republic promised or guaranteed
24 that TMCC would receive SBA approval for \$5 million of loans, or promised it would
25 have SBA approval for any loans by a certain date, and in the absence of such a writing
26 between the parties, TMCC's claims must fail. Republic could not and did not promise
27 anything other than its willingness to work with TMCC to try to obtain SBA loans up to
28 the \$5 million limit.

1 Republic alleges that its conduct did not cause or substantially contribute to
2 TMCC's alleged loss. TMCC has not alleged losses with any particularity at this time and
3 Republic is unaware of the amount of damages that TMCC believes are attributed to
4 Republic's conduct. There were many other factors which may have caused or
5 contributed to any losses sustained by TMCC, if any losses are actually proven.

6 Republic alleges that TMCC's claims are barred by the statute of limitations,
7 estoppel, unclean hands, and waiver.

8 TMCC's claims against Republic are barred in whole by the doctrines of
9 waiver/release. Specifically, the Consent of Obligor and Pledgors (the "Consent"),
10 executed on or about September 19, 2013 as part of the Loan Purchase Agreement by
11 TMCC as an Obligor, expressly states:

12 (e) As a material inducement to Lender to agree to sell the
13 Loans to Assignee, *each Obligor and Pledgor*, on behalf of
14 itself and its past and present officers, directors, shareholders,
15 agents, employees, attorneys, affiliates, subsidiaries and
16 parents, and their respective heirs, successors and assigns
17 (individually and collectively, the "Obligor/Pledgor Parties"),
18 *hereby fully and forever release and discharge Lender* and all
19 of Lender's past, present and future officers, directors,
20 shareholders, agents, employees, attorneys, affiliates,
21 predecessors in interest, successors in interest, the parent
22 corporations of Lender or its predecessors in interest, and all
23 of their respective heirs, personal representatives, successors
24 and assigns (individually and collectively, the "Lender
25 Parties") *from any and all claims, liabilities, demands,*
26 *damages, liens, causes of action, and rights of recoupment,*
27 *offset and/or reimbursement of any kind or nature*
28 *whatsoever, whether known or unknown, liquidated or*
unliquidated, asserted or unasserted, matured or unmatured,
and whether based on any contractual, tort, equitable,
common law, restitution, statutory or other ground or theory
of any nature whatsoever, including, without limitation, any
and all claims which in any way directly or indirectly rise out
of, relate to, result from or are connected to: (i) the Loans,
(ii) any and all acts, omissions or events relating to the
Loans, (iii) the sale of Lender's right, title and interest in the
Loans to Assignee, and (iv) the Collateral. In this connection,

1 *the Obligor/Pledgor Parties represent and warrant that they*
2 *realize and acknowledge that factual matters now unknown to*
3 *them may have given or may hereafter give rise to causes of*
4 *action, claims, demands, debts, controversies, damages,*
5 *costs, losses and expenses that are presently unknown,*
6 *undisclosed, unanticipated and unsuspected, and further*
7 *agree, represent and warrant that this release has been*
8 *negotiated and agreed upon in light of that realization and*
9 *that the Obligor/Pledgor Parties nonetheless intend to release*
10 *the Lender Parties from any such unknown claims that would*
11 *be among the matters described if known on the date hereof.*
12 The Obligor/Pledgor Parties hereby acknowledge that they
13 are signing this Consent with full knowledge of any and all
14 rights they may have and that they are not relying upon any
15 representations made by Lender or any other party other than
16 those set forth in the Agreement, and the Obligor/Pledgor
17 Parties hereby assume the risk of any mistake of facts now
18 known or unknown to them. The Obligor/Pledgor Parties
19 further acknowledge that they have conducted whatever
20 investigation they deemed necessary to ascertain all facts and
21 matters related to the Agreement and thus Consent. The
22 Obligor/Pledgor Parties represent that they have had the
23 opportunity to consult with legal counsel concerning the legal
24 consequences of this release.

25 (Emphasis added).

26 In the instant case, TMCC executed a waiver/release in signing the Consent. As
27 such, in executing and delivering the Consent to Republic, TMCC was and is under a
28 contractual obligation to "fully and forever release and discharge [Republic] . . . from any
29 and all claims, liabilities, demands, damages, liens, [and] causes of action," among other
30 things, thus rendering TMCC's Second Amended Complaint and all claims therein,
31 unenforceable. *See* Consent at Paragraph (e).

32 Under Arizona law, TMCC waived any all claims against Republic by virtue of
33 executing the Consent.

34 Generally, "[w]aiver is either the express, voluntary,
35 intentional relinquishment of a known right or such conduct
36 as warrants an inference of such an intentional
37 relinquishment." *Russo v. Barger*, 239 Ariz. 100, 103 ¶ 12,
38 366 P.3d 577, 580 (App. 2016) (citing *Am. Cont'l Life Ins.*

1 *Co. v. Ranier Constr. Co. Inc.*, 125 Ariz. 53, 55, 607 P.2d
2 372, 374 (1980)).

3 *Compass Bank v. Bennett*, 240 Ariz. 58, 375 P.3d 950, 3–953 (Ct. App. 2016), review
4 denied (Sept. 20, 2016).

5 Here, TMCC expressly, voluntarily, and intentionally relinquished its known right
6 to bring "any and all claims, liabilities, demands, damages, liens, [and] causes of action,"
7 against Republic once it executed and delivered the Consent to Republic, thus rendering
8 TMCC's Second Amended Complaint and all claims therein, unenforceable. *See* Consent
9 at Paragraph (e).

10 Republic alleges that TMCC's claims are barred by failure to mitigate damages. A
11 party's failure to mitigate damages may negate and reduce damages where the party,
12 through its own voluntary activity, has unreasonably exposed itself to damage or
13 increased its injury. *See Life Investors Ins. Co v. Horizon Resources Bethany, Ltd.*, 182
14 Ariz. 529, 534, 898 P.2d 478, 483 (Ct. App. 1995). TMCC's own conduct may have
15 unreasonably exposed TMCC to damage or increased its damages (assuming any damages
16 are actually proven by TMCC). First, TMCC was well aware of the timeline for SBA
17 approval, having applied for and received approval for two other SBA loans with
18 Republic. If TMCC believed that the amount of time it took to obtain SBA approval with
19 Republic was inadequate and could cause TMCC to sustain damage, then TMCC should
20 have used a different lender to apply for the SBA loan for construction of the Paradise
21 Valley store. Furthermore, even after Thompson informed Republic that TMCC was
22 going to use another lender going forward, Republic offered Thompson a personal line of
23 credit to assist with finances during the transition to another lender, and Thompson's
24 failure to pursue such line of credit was further failure to mitigate damages.

25 TMCC also fails to state a claim against **Republic** upon which an award of
26 attorneys' fees may be granted. TMCC has alleged negligent misrepresentation and
27 fraudulent inducement, both of which are tort claims. There is no contractual basis for
28 either of TMCC's claim. **A.R.S. §§ 12-341 and 12-341.01** provide that the successful

1 party in any action arising out of a contract may be awarded attorney's fees and costs.
2 Here, there was no express or implied contract that was the basis for either of TMCC's
3 claims, and therefore, TMCC has failed to state a claim upon which an award of attorneys'
4 fees can be granted.

5 Also, as discussed in subsections A. and B. above, TMCC fails to set forth the
6 prima facie elements to establish a claim for negligent misrepresentation and/or a claim or
7 fraudulent inducement.

8 **D. TMCC's Damages**

9 TMCC is not entitled to recover those damages, if any, that are remote, speculative,
10 or uncertain. TMCC's own damage expert, Leroy M. Gaintner ("Gaintner"), was unable
11 to determine any sum certain damage amount allegedly suffered by TMCC as a result of
12 Republic's actions. Instead, Gaintner's expert report as to TMCC's claimed damages,
13 dated March 5, 2016, presents three different *hypothetical* situations and corresponding
14 conjectural damage amounts. Furthermore, TMCC's alleged damages are based upon
15 delays purported to be caused by Republic for which no evidence exists. However,
16 Republic's SBA lending expert, Lisa G. Lerner, has determined that in light of the
17 complex nature of the Loans and collateral securing the Loans, Republic's actions were
18 reasonable and there were no delays. As such, without any delays suffered by TMCC,
19 Republic's damage expert, Peter S. Davis, asserts that there can be no damages accrued to
20 TMCC, and that Gaintner's damage calculations are entirely speculative, unsupported, and
21 baseless.

22 Furthermore, TMCC seeks damages that allegedly arise from consequential lost
23 profits. See *Flagstaff Affordable Housing Ltd. Partnership v. Design Alliance, Inc.*, 223
24 Ariz. 320, 323, 223 P.3d 664, 667 (2010) (holding that lost profits are a type of
25 consequential damages.) However, the measure of damages for breach of contract to loan
26 money limited to "the difference between the contracted for interest rate and the interest
27 rate at the time of breach," and it is impermissible for a plaintiff to recover consequential
28 damages where alternative financing is available or where the loan could be obtained from

1 another source. *McAlister v. Citibank*, 171 Ariz. 207, 212, 829 P.2d 1253, 1258 (Ariz. Ct.
2 App. 1992). Here, as TMCC could have and in fact, did, obtain financing through another
3 source - Mutual of Omaha - it is not entitled to recover any damages resulting from lost
4 profits.

5 **E. Attorneys' Fees.**

6 Republic alleges that this action is frivolous and in violation of the contractual
7 obligations pursuant to the Consent, and therefore, Republic is entitled to attorneys' fees
8 for defense of this action pursuant to the Consent, A.R.S. §§ 12-341, 12-341.01, and 12-
9 349 or as otherwise provided by law.

10 **III. WITNESSES EXPECTED TO TESTIFY AT TRIAL.**

11 Republic is unable to determine yet all of the persons it may call to testify at trial.
12 In addition to any witnesses identified in Section II and IV, TMCC may call as a witness
13 any individual identified in any Disclosure Statement of any other party now or
14 subsequently named in this action. Republic may also call as a witness any and all
15 persons necessary to authenticate or lay sufficient foundation for documentary evidence.
16 Republic reserves the right to supplement this list of witnesses.

17 **IV. PERSONS WHO MAY HAVE RECENT KNOWLEDGE OR**
18 **INFORMATION.**

- 19 1. Michael Harris
20 c/o W. Scott Jenkins, Jr.
21 Quarles & Brady, LLP
22 Renaissance One
Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

23 Mr. Harris was formerly a Vice President at Republic and was a Business
24 Relationship Manager and the loan officer for TMCC's two loans. Mr. Harris was in
25 frequent communication with Mr. Thompson and his accountant/bookkeeper Kathy
26 Pease ("Pease") regarding the Loans. Mr. Harris attended a meeting with Ms. Pease and
27 Mr. Thompson on December 20, 2012, at which the parties agreed they no longer had a
28

1 working relationship. As a result, Mr. Harris may have information, related to, among
2 other things, the facts and circumstances pertaining to TMCC's claims for negligent
3 misrepresentation and fraudulent inducement, including what representations were or
4 were not made to TMCC relating to the Loans.

5 2. Emily Chedister
6 RepublicBankAZ, N.A.
7 c/o W. Scott Jenkins, Jr.
8 Quarles & Brady, LLP
9 Renaissance One
Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

10 Ms. Chedister is a Vice President at Republic and was a Loan Administrator and
11 then Loan Operations Manager during the relevant period. Ms. Chedister worked on both
12 of the Loans, was in frequent communication with Ms. Pease and Mr. Thompson, and
13 attended a meeting with Ms. Pease and Mr. Thompson on December 20, 2012 at which
14 the parties agreed they no longer had a working relationship. As a result, Ms. Chedister
15 may have information, related to, among other things, the facts and circumstances
16 pertaining to TMCC's claims for negligent misrepresentation and fraudulent inducement,
17 including what representations were or were not made to TMCC relating to the Loans.

18 3. Stuart Olson
19 c/o W. Scott Jenkins, Jr.
20 Quarles & Brady, LLP
21 Renaissance One
Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

22 Mr. Olson was an Executive Vice President at Republic and was the Chief Credit
23 Officer during the relevant time period. Mr. Olson attended the December 20, 2012
24 meeting with Mr. Thompson and Ms. Pease at which the parties agreed they no longer had
25 a working relationship. As a result, Mr. Olson may have information, related to, among
26 other things, the facts and circumstances pertaining to TMCC's claims for negligent
27
28

1 misrepresentation and fraudulent inducement, including what representations were or
2 were not made to TMCC relating to the Loans.

3 4. Marla Woods
4 c/o W. Scott Jenkins, Jr.
5 Quarles & Brady, LLP
6 Renaissance One
7 Two North Central Avenue
8 Phoenix, Arizona 85004
9 Telephone: (602) 229-5200

10 Ms. Woods was a Loan Document Specialist at Republic during the relevant time
11 period. Ms. Woods assisted with the loan application and SBA approval process on the
12 Loans, and was in frequent communication with Mr. Harris regarding the status of the
13 Loans and additional documentation. Ms. Woods was in frequent communication with
14 the title companies relating to the Loans. Ms. Woods also e-mailed frequently with Mr.
15 Thompson and Ms. Pease regarding information and documents Republic needed. As a
16 result, Ms. Woods may have information, related to, among other things, the facts and
17 circumstances pertaining to TMCC's claims for negligent misrepresentation and
18 fraudulent inducement, including what representations were or were not made to TMCC
19 relating to relating to the Loans, and the particular circumstances regarding the
20 documentation and closing of the Loans.

21 5. Kimberly Pappas
22 c/o W. Scott Jenkins, Jr.
23 Quarles & Brady, LLP
24 Renaissance One
25 Two North Central Avenue
26 Phoenix, Arizona 85004
27 Telephone: (602) 229-5200

28 Ms. Pappas was a Vice President at Republic and was the Loan Operations
Manager during part of the relevant time period. As a result, Ms. Pappas may have
information, related to, among other things, the facts and circumstances pertaining to
TMCC's claims for negligent misrepresentation and fraudulent inducement, including
what representations were or were not made to TMCC relating to the Loans, and the
particular circumstances surrounding the documentation and closing of the Loans.

1 6. Anthony Bodnar
2 c/o W. Scott Jenkins, Jr.
3 Quarles and Brady, LLP
4 Renaissance One
5 Two North Central Avenue
6 Phoenix, Arizona 85004
7 Telephone: (602) 229-5200

8 Mr. Bodnar was an Assistant Vice President at Republic and was a Loan
9 Administrator during the relevant time period. As a result, Mr. Bodnar may have
10 information, related to, among other things, the facts and circumstances pertaining to
11 TMCC's claims for negligent misrepresentation and fraudulent inducement, including
12 what representations were or were not made to TMCC relating to relating to the Loans,
13 and the particular circumstances regarding the approval of the Loans.

14 7. James Thompson
15 c/o Francis J. Slavin, Esq.
16 Francis J. Slavin, P.C.
17 2198 East Camelback Road, Suite 285
18 Phoenix, Arizona 85016
19 Telephone: (602) 381-8700

20 Mr. Thompson is the principal and owner of TMCC. As a borrower and guarantor
21 of the Loans, Mr. Thompson was involved in the application and approval process and
22 communicated frequently with Mr. Harris and other Republic employees. As a result, Mr.
23 Thompson may have information, related to, among other things, the facts and
24 circumstances pertaining to TMCC's claims for negligent misrepresentation and
25 fraudulent inducement.

26 8. Kathye Pease
27 EQ8 A&B, LLC
28 P.O. Box 7433
29 Chandler, Arizona 85246
30 Telephone: (480) 359-4883

31 Ms. Pease is a manager of EQ8 A&B, LLC, and was Mr. Thompson's
32 accountant/bookkeeper. Ms. Pease provided and discussed financials documents and
33 information with Republic, had frequent communications with multiple employees of
34 Republic during the entire loan application, Republic approval, SBA approval, and

1 funding process, and was in attendance at the December 20, 2012 meeting with Mr.
2 Thompson, Mr. Harris, Mr. Olson and Ms. Chedister. As a result, Ms. Pease may have
3 information, related to, among other things, the facts and circumstances pertaining to
4 TMCC's claims for negligent misrepresentation and fraudulent inducement.

5 9. Corey Schimmel
6 Mutual of Omaha Bank
7 c/o Janet Ryan, Esq.
8 Janet.Ryan@mutualofomaha.com

9 Mr. Schimmel was a Vice President in Business Banking at Mutual of Omaha and
10 was the loan officer for the two loans acquired by Mutual of Omaha from Republic. As a
11 result, Mr. Schimmel may have information related to, among other things, the facts and
12 circumstances pertaining to the acquisition of the loans by Mutual of Omaha, including
13 the process and timeframe.

14 10. Any persons disclosed by TMCC as persons who may be called as
15 witnesses at trial.

16 **V. IDENTITY OF PERSONS WHO HAVE GIVEN STATEMENTS.**

17 No statements have been given yet in this matter.

18 **VI. EXPERT WITNESSES EXPECTED TO TESTIFY.**

19 The areas of expert testimony that Republic expects to provide an opinion include
20 expert testimony related to SBA procedures and policies relating to the loan application
21 and approval process, TMCC's damages (or lack thereof), and rebuttal expert testimony in
22 response to any and all opinions, facts and data contained in expert testimony provided by
23 TMCC.

24 1. SBA Loans, Procedures, Policies, and Approval Process.

25 Republic will call Lisa G. Lerner as an expert witness, who is qualified to testify as
26 to SBA loans in general, policies and procedures for SBA loans, the different types of
27 SBA-qualified lenders, the SBA application process, the SBA approval process, and
28 Republic's handling of the SBA loan applications of TMCC. Republic may also call an

1 expert for rebuttal testimony in response to any SBA loan testimony by any expert called
2 by TMCC.

3 Lisa G. Lerner
4 Enhanced Consultive Solutions, LLC
5 c/o W. Scott Jenkins, Jr.
6 Quarles & Brady, LLP
7 Renaissance One
Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

8 Ms. Lerner is an expert in the area of SBA lending procedures and processes. Ms.
9 Lerner is expected to testify regarding: the overall procedures as between the SBA and
10 lenders like Republic who participate in SBA loan programs; the SBA 7a loan program
11 that provides an SBA guaranty to a lender like Republic; the various programs for which
12 various lenders qualify, such as the General Lenders Program, the Preferred Lenders
13 Program, or the Certified Lenders Program; and the variables and complexities that affect
14 the closing and funding of a loan. Ms. Lerner's opinion is that due to the complex nature
15 of the Loans and the related Collateral, Republic acted within normal and reasonable
16 timeframes to close and fund the Loans, thus there was no improper delay on the part of
17 Republic. Ms. Lerner's opinion is based upon her professional training, practice, and
18 experience, as well as her review, analysis, and comparison of documents as set forth in
19 her expert report disclosed contemporaneously herewith and dated November 1, 2016.

20 2. Lost Profits and Other Damages.

21 Republic will call Peter S. Davis as an expert witness, who is qualified to testify as
22 to the standards for determining whether there were lost profits, how to calculate lost
23 profits, whether TMCC suffered any lost profits, whether Republic's representations or
24 actions were the proximate cause of such lost profits (if there were any), and the amount
25 of any lost profits and/or other damages of TMCC. Republic may also call an expert for
26 rebuttal testimony in response to any lost profits/damages testimony by any expert called
27 by TMCC.

28 Peter S. Davis

1 Simon Consulting, LLC
2 c/o W. Scott Jenkins, Jr.
3 Quarles & Brady, LLP
4 Renaissance One
5 Two North Central Avenue
6 Phoenix, Arizona 85004
7 Telephone: (602) 229-5200

8 Mr. Davis is an expert in the area of forensic accounting, commercial damages and
9 valuations in connection with complex litigation, and forensic economics, including
10 analyses and determinations of loss profits and lost earnings related to tort and contract
11 matters. Mr. Davis is expected to testify regarding: the assumptions and analyses
12 presented in the Gaintner Report; the methodology relied upon in the Gaintner Report and
13 related damage calculations asserted therein; the conflicting and irreconcilable assertions
14 set forth in the Gaintner Report; the absence of proximate cause to the damages asserted
15 by TMCC; and the absence of actual damages incurred by TMCC. Mr. Davis' opinion is
16 based upon his professional training, practice, and experience, as well as his review,
17 analysis, and comparison of documents as set forth in his expert report disclosed
18 contemporaneously herewith and dated November 1, 2016.

19 Republic reserves the right to call the following witnesses designated as experts by
20 TMCC:

- 21 1. Leroy M. Gaintner
22 c/o Francis J. Slavin, Esq.
23 Francis J. Slavin, P.C.
24 2198 East Camelback Road, Suite 285
25 Phoenix, Arizona 85016
26 Telephone: (602) 381-8700

27 Mr. Gaintner is a certified public accountant and the expert retained by TMCC to
28 provide an analysis of TMCC's claimed damages (e.g. the Gaintner Report). Mr. Gaintner
is expected to testify regarding the substance and contents of his report, including but not
limited to his opinion that "RBA approvals/funding were not timely forthcoming,"; that
Republic "require[d] TMC to delay completing/opening certain Stores and completely
delay[ed] or stop[ed] several other planned stores,"; and the assumptions and analyses

1 asserted in the Gaintner Report; and the various damage calculations set forth under
2 Scenario 1, Scenario 2, and Scenario 3 as defined within the Gaintner Report. Mr.
3 Gaintner is also expected to testify regarding his professional training, practice, and
4 experience, as well as his review, analysis, and comparison of documents as set forth in
5 the Gaintner Report.

6 2. Douglas T. Haman
7 c/o Francis J. Slavin, Esq.
8 Francis J. Slavin, P.C.
9 2198 East Camelback Road, Suite 285
 Phoenix, Arizona 85016
 Telephone: (602) 381-8700

10 Mr. Haman is a Senior Vice President of Seacoast Commerce Bank and the expert
11 retained by TMCC to provide an analysis of SBA lending procedures and processes
12 (hereafter, the "Haman Report"). Mr. Haman is expected to testify regarding the
13 substance and contents of his report, including but not limited to his opinion that
14 "RBA/approvals/funding were not timely forthcoming, thus requiring TMC to delay
15 completing/opening certain stores." Mr. Haman is also expected to testify regarding his
16 professional training, practice, and experience, as well as his review, analysis, and
17 comparison of documents as set forth in the Haman Report.

18 Republic reserves its right to supplement this **Fourth** Supplemental Disclosure
19 Statement to identify expert witnesses and matters upon which such expert witnesses are
20 expected to testify.

21 **VII. COMPUTATION AND MEASURE OF DAMAGES.**

22 TMCC claims damages of between \$1,583,000 to \$5,672,000 based upon three
23 different scenarios. Republic asserts that TMCC has not suffered any damages, and that
24 TMCC fully waived and released Republic from any and all claims, liabilities, and
25 damages by virtue of executing the Consent in favor of Republic.

26 ///

27 ///

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VIII. TANGIBLE EVIDENCE AND RELEVANT DOCUMENTS THAT MAY BE USED AT TRIAL.

Republic is unaware at this time which documents it intends to use at trial, but may use the following documents at trial. Republic reserves its right to further timely supplement this list as discovery proceeds.

DOCUMENT DESCRIPTION	DATE	BATES NUMBERS
E-mail correspondence relating to loans-internal, with Thompson, Kathy Pease, SBA, and Mutual of Omaha	02/2008 – 12/2008	RBAZ 000001 - RBAZ 004890.011
Later supplemented e-mails with redactions removed	Various	RBAZ 002980 - 2981 and RBAZ 002984
Documents with redactions removed produced by Republic on September 9, 2016 subject to Stipulated Protective Order filed September 9, 2016	2011 - 2012	RBAZ 00163, 00164, 00165 - 00170, 00260-00261, 00262 - 00263, 00268 - 00271, 00272 - 00275, 00285, 00754 - 00755, 00766 - 00768, 01223, 01224, 01225 - 01226, 01504, 01833, 01853 - 01854, 01858, 01859 - 01860, 02171, 02978, 02980 - 02981, 02982, 02984, 02996, 03035, 03088, 03089, 03361, 03394, 03925, 03928
Organizational Documents of TMCC and related entities	01/2009 – 12/2009	RBAZ 04891 - RBAZ 05649
Loan File for Loan No. 826005400 in the amount of \$1,026,300.00 (October 24, 2011 Loan)	2010-2012	RBAZ 05650 - RBAZ 06619
Loan File for Loan No. 826007200 in the amount of \$597,100.00_ (May 9, 2012 Loan)	2011-2012	RBAZ 06620 - RBAZ 08351
Additional e-mails, SBA correspondence, and memoranda	2011 - 2013	RBAZ 08352 - RBAZ 08428

1	Documents produced by TMCC with Initial Disclosure Statement and as later supplemented with redactions removed		TMCC00001 - TMCC02848
2			
3			
4	Documents produced by TMCC with Fourth Supplemental Disclosure Statement		TMCC002849 - TMCC006375
5	Documents provided by the SBA to Republic	2011 - 2013	SBA 00001 - 00969
6	Documents provided by the SBA to Republic	2012	SBA2 00001 - 00194
7	Documents provided by the SBA to TMCC	Various	SBA000001 - SBA000029
8	Documents produced by Mutual of Omaha in response to TMCC's subpoena	2012-2015	MB000102 - 009483
9	TMCC's expert report dated March 5, 2016 prepared by Leroy M. Gaintner, CPA, PLC and schedules, exhibits, and addenda	3/5/2016	n/a
10			
11	File of Leroy M. Gaintner, CPA, PLC	Various	GA000001 - GA000437 and other documents without bates labels
12			
13	TMCC's expert report dated September 20, 2016 prepared by Douglas T. Haman and addendum	9/20/2016	n/a
14			
15	Documents produced by Nationwide Valuations in response to TMCC's subpoena	Various	NV000001 - 001197
16	Documents produced by First Arizona Title Agency in response to TMCC's subpoena	Various	FAZT000001 - 000167
17			
18	Documents produced by Thomas Title & Escrow in response to TMCC's subpoena	Various	TT000001 - 000578
19	Expert Report of Peter S. Davis of Simon Consulting, LLC, dated November 1, 2016	11/1/2016	n/a
20	Expert Report of Lisa G. Lerner of Enhanced Consultive Solutions, LLC, dated November 1, 2016	11/1/2016	n/a
21			
22	Rebuttal Expert Report of Lisa G. Lerner of Enhanced Consultive Solutions, LLC, dated November 23, 2016	11/23/2016	n/a
23			

24 **IX. OTHER RELEVANT DOCUMENTS.**

- 25 1. All documents listed above in Section VIII.
- 26 2. All documents disclosed pursuant to any subpoena issued in this case.
- 27
- 28

1 3. All documents attached to or referenced in TMCC's Second
2 Amended Complaint, Republic's Answer to the Second Amended Complaint, and any
3 other pleadings filed by the parties in this case.

4 4. All documents attached to or referenced in the parties' disclosure
5 statements.

6 5. All deposition transcripts from any deposition taken in this case.

7 6. All exhibits to any deposition taken in this case, or documents
8 referred to during any deposition taken in this case.

9 7. All documents or information produced in response to any discovery
10 response in this case.

11 8. All documents or information produced by any third party in
12 response to a subpoena in this case.

13 9. All documents informally exchanged between the parties' attorneys
14 in this case.

15 DATED this 28th day of November, 2016.

16 QUARLES & BRADY LLP
17 Renaissance One
18 Two North Central Avenue
19 Phoenix, AZ 85004-2391

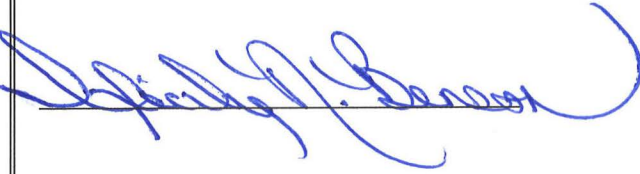
20 By Andrea Landeen

21 W. Scott Jenkins, Jr.
22 Andrea H. Landeen
23 Alissa Brice Castañeda

24 Attorneys for Defendant RepublicBankAZ, N.A.
25
26
27
28

1 ORIGINAL mailed and COPY emailed
2 this 28th day of November, 2016 to:

3 Francis J. Slavin, Esq.
4 Heather N. Dukes, Esq.
5 Daniel Slavin, Esq.
6 FRANCIS J. SLAVIN, P.C.
7 2198 East Camelback Road, Suite 285
8 Phoenix, Arizona 85016
9 Email: b.slavin@fjslegal.com
10 Email: h.dukes@fjslegal.com
11 Email: d.slavin@fjslegal.com
12 Attorneys for Thompson/McCarthy Coffee Co.

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ENHANCED CONSULTIVE SOLUTIONS, LLC

Lisa G. Lerner, Principal

602-684-5521

E-mail: Lisagllerner@cox.net

November 23, 2016

W. Scott Jenkins, Jr.
Andrea H. Landeen
Alissa A. Brice Castaneda
Quarles & Brady LLP
One Renaissance Square
Two North Central Avenue
Phoenix, Arizona 85004-2391

Re: Thompson/McCarthy Coffee Co. v RepublicBankAZ, N.A.
Maricopa County Superior Court, Case Number CV2014-014647 (the "Case").

Dear Scott, Andrea and Alissa:

Pursuant to your request and our Engagement Letter dated March 21, 2016, please accept this rebuttal report in response to the correspondence dated September 20, 2016 from Douglas T. Haman (the "Haman Report") to Francis J. Slavin, Esq. with respect to the above-referenced Case.

As stated in the Haman Report, Mr. Haman reviewed and analyzed documentation provided to him by Mr. Slavin, as well as answering Mr. Slavin's 25 specific questions.

Upon my review of the Haman Report, it is my conclusion that the Haman Report fails to provide sufficient evidence in support of Mr. Haman's general conclusion that SBA loans are typically closed within 30 to 60 days, and specifically that loans ("Loan Number One," "Loan Number Two," and application for "Loan Number Three") made to Thompson/McCarthy Coffee Co. (the "Borrower") by RepublicBankAZ, N.A. (the "Bank") were not closed within generally accepted procedures by lending institutions.

Observations to support this conclusion include, but are not limited to, the following items:

1. Mr. Haman's lack of direct experience in the loan process.

Mr. Haman's autobiographical *curriculum vitae* ("Haman CV"), attached as an exhibit to the Haman Report, describes his experience as "responsible for SBA 7a and 504 loan production" in what clearly appears to be a business development role. Notably missing from his experience is in-depth credit analyses and hands-on due diligence and research in the actual processing, documentation, and closing of SBA loans.

Inherent in a loan production role is an incentive to close as many loans as possible as quickly as possible in order to meet and exceed production goals.

To the contrary, credit approval and loan closing roles have the objectives of conducting due diligence, research, analysis, etc., in order to mitigate risk to the lending institution, borrower and other related parties to the transaction.

The production role versus the role of credit approval and loan processing have different and often opposing objectives. Although Mr. Haman's experience describes a sales career including SBA lending, his experience does not appear to include the perspective or experience required to adequately review and analyze these transactions from a due diligence perspective.

Lastly, Mr. Haman's experience with General Loan program SBA lending (GP lending) "averaged less than one [loan] per year." (Haman Report, page 6, #15.) The Bank in this Case provides SBA loans using GP lending authority. Thus, Mr. Haman's opinions are presumably based upon his very limited experience in GP lending.

2. Discussion in the Haman Report of the "General Process of an SBA Loan" was incomplete.

Mr. Haman describes the process of an SBA loan as follows:

General Process of an SBA Loan

There are generally three phases of an SBA 7a loan: Application, Underwriting and Closing. These three phases are typically not mutually exclusive from one another but rather overlap in order to fund the loan in a timely manner. It is the lender's responsibility to facilitate the loan request in a timely manner within the guidelines of all applicable governing authorities and properly set the applicant's expectations from the outset and throughout the entire process. The lender is to work diligently toward satisfying the expectations set forth.

2

(Haman Report, page 2.)

A myriad of steps were overlooked in Mr. Haman's discussion of the general process, including, but not limited to, the following:

a. Internal Bank credit analysis and approval was not discussed.

According to Mr. Haman: "Once the borrower meets the criteria of a complete application, the underwriting process officially begins." (Haman Report, page 3, # 1.)

However, during any part of the credit underwriting process, there may be more information requested of the applicant or of a third party due to internal bank credit issues, SBA requirements, information deemed missing, or issues that arise after credit underwriting has “officially” begun. An initial underwriting “pre-screen” often takes place before financial analysis takes place. Once the credit has been fully underwritten and the general terms are accepted by the applicant, loan processing typically begins. Mr. Haman fails to address the credit underwriting process in depth, which is an integral part of any loan, but must be in greater detail with complex loans such as those in this Case.

b. There was no discussion regarding SBA lending program eligibility.

This topic should be included in the underwriting credit analysis and approval document in detail. The lender must accurately and fully describe, in the credit memorandum, how the applicant and the transaction is eligible for an SBA Loan.

These eligibility points include several items, two of which are:

1. how the credit facility is not available without the SBA loan guaranty; and
2. how the applicant fits the small loan size standard.

By overlooking this discussion, a lender risks losing, or a reduction of, the guaranty by the SBA in the event of default. By omitting eligibility discussion in a credit memo, a lender would also risk failing an internal or SBA audit.

This critical step is not discussed in the Haman Report.

c. The SBA approval process is not described in the Haman Report.

This process is also significant, as it includes several steps. The process can vary depending on how the loan is submitted, with respect to the loan details, and processing at the SBA (e.g. if there is any backlog) if a loan is submitted directly to the SBA for their approval. The Haman Report fails to discuss this process.

d. Loan processing, including due diligence, is not fully discussed.

Examples include, but are not limited to, the following:

- Lien searches
- Credit bureau background investigations
- Legal permanent resident status verification
- Tax transcript verification
- Franchise document review
- Construction contract review

A significant portion of this due diligence includes third party vendor involvement and management. Examples include, but are not limited to, the following:

- Title insurance
- Hazard insurance lender loss payable endorsements requirements
- Life insurance assignments
- Real estate appraisals
- Environmental investigations
- Equipment appraisals
- Business valuations
- Franchisor document approval
- Contractors documents

Each loan potentially includes a different combination of due diligence requirements, depending on the loan terms and conditions, collateral, the applicant(s) / borrower(s) entity(ies), and more.

Due diligence often uncovers issues which beget multiple requests for information for clarification purposes and additional follow up. For example: a lien search could reveal that another lender has secured an interest on the collateral where a new lender expects no security interest to exist. The existing lienholder can then become an unexpected party to the transaction.

The loans in this Case included construction and construction lending, which by its very nature adds additional risk and enhanced due diligence. Lenders can mitigate construction risk by employing proper investigation, controls, and due diligence, which take time to complete.

In addition, it is important to note that any third party vendors' timing is not in the control of the Bank; this issue was ignored in the Haman Report.

3. There was no specific loan analysis included in the Haman Report.

The Haman Report failed to discuss the specific loans in detail but merely copied and referenced email communications between the parties. The messages quoted also did not define the context in which they were communicated. Consequently, without a specific analysis of each loan, Mr. Haman's conclusion is unsupported and incomplete.

4. The collateral valuation discussion for Loan Number Three, the PV location, overlooked additional possibilities and made certain assumptions from which it drew unsupported conclusions:

The Haman Report discusses Loan Number Three's SBA screen out letter dated June 28, 2012, as follows:

7. In reviewing a needs list/screen out letter from the SBA for an SBA loan application you had submitted on behalf of your client/borrower, if the SBA had not requested a business valuation, would you nevertheless have obtained a business appraisal and submitted it? Why? While a lender can have additional requirements to what the SBA requires, in my experience it would be unlikely for a lender to require a business valuation due to a screen out from the SBA which is not requiring it.

(Haman Report, page 5, #7.)

The SBA screen out letter stated as follows:

2. A revision to your proposed collateral to reduce or eliminate the collateral shortfall as required by SOP 50 10 5(E), pages 188-189. *(As submitted, there is a collateral shortfall of \$586.9K, and based on information provided with your application, there appears to be Personal and Commercial Real Estate along with Cash Value Life Insurance owned by James Thompson and Janice McCarthy which could further secure this loan. If this is not the case, please provide an explanation of why the collateral is not available.)*

The Haman Report overlooks the possibility that the Borrower was unwilling to pledge additional collateral and that this conversation between the Bank and the Borrower may have occurred earlier within the process of Loan Number One and Loan Number Two. The Bank's option to address this issue in the screen out letter would logically then be to obtain a valuation to support the collateral value. With sufficient collateral, there would be no need for an applicant to pledge any additional collateral. Thus, the Haman Report does not address the obvious fact that the Bank endeavored to address this issue with a third party by showing how the value did not indicate a shortfall.

5. SBA delegated authority differences: General Program Lending versus Preferred Lending Program.

The Haman Report states the following:

The underwriting process for SBA 7a lenders varies somewhat depending on how it is processed.

(Haman Report, page 3.)

This statement is not accurate. A bank's credit underwriting should not vary depending on how a request is processed, whether as a PLP (delegated) lender or as a GP (non-delegated) lender. A GP loan must include a complete credit approval narrative with the submission to the SBA for its approval. A PLP loan must include in its file the same information but the PLP lender needs only to submit a limited amount of information to the SBA to obtain the

SBA's approval. (Refer to my report dated November 1, 2016 for a further explanation of the GP versus PLP processing methods.)

SBA loan programs are NOT to be utilized as a substitute for poor credit risk. SBA loan applications must clearly show that loans can be repaid from business cash flow. Collateral requirements may not be as stringent on SBA loans as they may be on non-SBA loans; the business applying for the credit facility must be credit worthy and show repayment ability.

Regardless of what SBA authority a lender has, the credit process should be prudent and documented in the same way, whether a loan is submitted as a GP loan or a PLP loan. It should be noted that Mutual of Omaha Bank is a PLP lender and, yet, its timing mirrored the Bank's GP lender timing. (It appears from the Haman Report that Mr. Haman did not review the documents from Mutual of Omaha Bank.)

In summary, a process variable between a PLP (delegated) lender and a GP (non-delegated) lender, is how much information must be provided to the SBA to obtain the SBA's approval; however, the lender's file must contain the same information regardless of a lending institution's SBA delegated or non-delegated authority level.

6. No support is provided to support a 30 to 60 day closing timeframe.

The Haman Report describes a 30 to 60 day timeframe to close:

As you have requested, a reasonable timeline to obtain an SBA Authorization and closing of the loan, assuming a full SBA credit review, is as follows: Up to three weeks to receive screen out from the SBA from date of submission; typically a couple days to two weeks to respond with answers to questions and provide any potential additional information requested; a few days up to three additional weeks for Authorization, and; one to two weeks to close. To recap, a 30 to 60 day timeframe to close is generally expected when a loan is initially sent to the SBA for a full credit review.

(Haman Report, page 17, last paragraph.)

This 30 to 60 day timeframe is not supported by any specific detail, nor does it account for complex versus simple transactions.

With several third parties involved in these transactions, and with the unexpected issues that arose for each loan, a 30 to 60 day timeframe is an unrealistic and inadequate time period to close the loans, as specifically described in my report dated November 1, 2016.

To illustrate this point, consider this scenario below:

An unsecured loan for \$20,000 with one borrower and one guarantor would have a higher probability of closing within a shorter time than a more complex secured loan which includes construction, multiple entities, multiple landlords, multiple real estate issues such as the loans in the case referenced above.

SBA loans, by their very nature, are not uniform and involve varying degrees of credit analysis, due diligence, processing, and third party involvement. Mr. Haman's 30 to 60 day timeframe is not only unsupported in the absence of any detailed explanation or data he relied upon to draw such a conclusion, but it is also unreasonable because it fails to address and consider the complexities and complications which arise for loans as intricate as those in this Case.

Conclusion:

The Haman Report lacks specific analysis to conclude that the loans involved in this Case were closed outside the generally accepted practices of other lenders who provide SBA lending. Mr. Haman's SBA experience is limited to sales and appears to lack direct loan processing experience, thus hampering his ability to define the specific steps required to conduct due diligence, and document and close complicated and complex loans such as those involved in this Case. He provides no support for his conclusions; thus, the Haman Report fails to show how the loans were closed outside generally accepted procedures.

Very truly yours,



Lisa G. Lerner

Member, Enhanced Consultive Solutions, LLC

RepublicBankAZ, N.A.'s
Fifth Supplemental Disclosure Statement

1 Quarles & Brady LLP
2 Firm State Bar No. 00443100
3 Renaissance One
4 Two North Central Avenue
5 Phoenix, AZ 85004-2391
6 TELEPHONE 602.229.5200

7 Attorneys for RepublicBankAZ, N.A.

8 W. Scott Jenkins, Jr. (Bar #021841)
9 Scott.Jenkins@quarles.com
10 Andrea H. Landeen (Bar #024705)
11 Andrea.Landeen@quarles.com
12 Alissa Brice Castañeda (Bar #027949)
13 Alissa.Castaneda@quarles.com

14 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
15 **IN AND FOR THE COUNTY OF MARICOPA**

16 THOMPSON/McCARTHY COFFEE CO.,
17 an Arizona corporation,

18 Plaintiff,

19 vs.

20 REPUBLICBANKAZ, N.A.,

21 Defendant.

Case No. CV2014-014647

**FIFTH SUPPLEMENTAL
DISCLOSURE STATEMENT**

(Assigned to the Honorable
Dawn Bergin)

22 RepublicBankAZ, N.A. ("Republic") hereby discloses the following information to
23 Thompson/McCarthy Coffee Co. ("TMCC"). Republic reserves the right to supplement
24 and amend this **Fifth** Supplemental Disclosure Statement as appropriate during the course
25 of discovery should further research or investigation reveal the existence of other facts,
26 legal theories, witnesses, documents, or other information subject to disclosure.

27 **I. FACTUAL BACKGROUND.**

28 1. On or about December 23, 2010, TMCC submitted to Republic a U.S. Small
Business Administration ("SBA") Application for Business Loan, requesting funds for
construction of and acquisition of equipment for a coffee/convenience store.

1 2. On or about July 12, 2011, TMCC submitted to Republic a U.S. Small
2 Business Administration Application for Business Loan, requesting funds for construction
3 of and acquisition of equipment for a coffee/convenience store.

4 3. On or about July 13, 2011, Republic submitted to the SBA, and the SBA
5 received, an application for the SBA to guarantee a loan in the amount of \$1,026,300.00
6 (the "2011 SBA Application") to Thompson/McCarthy DB LLC ("TMDB," now TMCC¹),
7 James L. Thompson ("Thompson") and Janice L. McCarthy ("McCarthy") (collectively,
8 the "2011 Loan Borrowers").

9 4. On or about July 27, 2011, the SBA sent a "screen out" letter to Republic
10 relating to the 2011 SBA Application.

11 5. On or about August 3, 2011, the SBA approved the 2011 SBA Application,
12 evidenced by a U.S. Small Business Administration Authorization (SBA 7(A) Guaranteed
13 Loan) dated August 3, 2011 (the "2011 Authorization").²

14 6. After receiving and signing the 2011 Authorization, Republic continued
15 working with the 2011 Loan Borrowers to close the 2011 Loan (defined below).

16 7. On or about October 24, 2011, TMDB, Thompson, and McCarthy entered
17 into a Construction Loan Agreement (the "2011 Loan Agreement") with Republic for a
18 loan in the maximum principal amount of \$1,026,300.00 (the "2011 Loan"). The purpose
19 of the 2011 Loan was to construct Dutch Brothers coffee shops on real property located at
20 6461 South Rural Road, Tempe, Arizona 85283 (the "Rural Property"), and 1122 South
21 Greenfield Road, Mesa, Arizona 85208 (the "Greenfield Property").

22 8. In connection with the 2011 Loan Agreement, TMDB, Thompson, and
23 McCarthy executed and delivered a U.S. Small Business Administration Note (the "2011
24 Note"), dated October 24, 2011, in the maximum principal amount of \$1,026,300.00 in
25 favor of Republic.

26 ¹ Upon information and belief, Thompson/McCarthy Coffee Co. is the successor in interest of
27 Thompson/McCarthy DB LLC.

28 ² All documents defined in this Initial Disclosure Statement were previously produced on July 2,
2015.

1 9. The 2011 Loan was also secured by, among other things, a Construction
2 Deed of Trust granted by TMDB in favor of Republic, and recorded on November 4,
3 2011, at Recorder's No. 20110918231, records of Maricopa County, Arizona, related to
4 the Rural Property (the "Rural Deed of Trust").

5 10. The 2011 Loan was secured by, among other things, a Construction Deed of
6 Trust granted by Greenfield Southern DB LLC, TMDB, Thompson and McCarthy in
7 favor of Republic, and recorded on July 17, 2012, at Recorder's No. 20120626574,
8 records of Maricopa County, Arizona (the "Greenfield Deed of Trust") related to the
9 Greenfield Property. (Hereinafter, the 2011 SBA Application, 2011 Authorization, 2011
10 Loan Agreement, 2011 Note, Rural Deed of Trust, Greenfield Deed of Trust and any other
11 documents executed and delivered in connection with the 2011 Loan are called the "Loan
12 Documents.")

13 11. On or about November 4, 2011, the 2011 Loan closed and was fully funded
14 on that same day.

15 12. On or about January 23, 2012, TMDB submitted to Republic a U.S. Small
16 Business Administration Application for Small Business Loan, requesting funds for
17 construction of and acquisition of equipment for a coffee/convenience store.

18 13. In or about February 2012, Republic submitted to the SBA, and the SBA
19 received, an application for the SBA to guarantee a loan in the amount of \$597,100.00
20 (the "2012 SBA Application") to TMDB.

21 14. On or about February 29, 2012, the SBA sent a "screen out" letter to
22 Republic relating to the 2012 SBA Application.

23 15. On or about March 14, 2012, the SBA approved the 2012 SBA Application,
24 evidenced by a U.S. Small Business Administration Authorization (SBA 7(A) Guaranteed
25 Loan) dated March 14, 2012 (the "2012 Authorization").

26 16. After receiving and signing the 2012 Authorization, Republic continued
27 working with TMDB to close the 2012 Loan (defined below).
28

1 17. On or about May 9, 2012, TMDB dba Glendale Ave./12 Street DB LLC
2 entered into a Construction Loan Agreement (the "2012 Loan Agreement") with Republic
3 for a loan in the maximum principal amount of \$597,100.00 (the "2012 Loan"). The
4 purpose of the 2012 Loan was to construct a Dutch Brothers coffee shop on real property
5 located at 1201 East Glendale Avenue, Phoenix, Arizona 85020 (the "Glendale
6 Property").

7 18. In connection with the 2012 Loan Agreement, TMCC executed and
8 delivered a U.S. Small Business Administration Note (the "2012 Note"), dated May 9,
9 2012, in the maximum principal amount of \$597,100.00 in favor of Republic.

10 19. In connection with the 2012 Loan, Thompson, McCarthy, TMCC, James L.
11 Living Trust Dated June 16, 1997, and Janice L. McCarthy Trust dated September 28,
12 2005 (collectively, the "Guarantors") executed and delivered to Republic a Guaranty of
13 Completion and Performance (the "2012 Guaranty"), whereby Guarantors unconditionally
14 guaranteed that the construction of the Glendale Project would be completed and to pay
15 such amounts as necessary to complete it.

16 20. The 2012 Loan was secured by, among other things, a Construction
17 Leasehold Deed of Trust granted by TMCC in favor of Republic, and recorded on June 6,
18 2012, at Recorder's No. 20120489027, records of Maricopa County, Arizona (the
19 "Glendale Deed of Trust") related to the Glendale Property. (Hereinafter, the 2012 SBA
20 Application, 2012 Authorization, 2012 Loan Agreement, 2012 Note, 2012 Guaranty,
21 Glendale Deed of Trust and any other documents executed and delivered in connection
22 with the 2012 Loan are called the "2012 Loan Documents." The 2011 Loan and the 2012
23 Loan are collectively, the "Loans." The 2011 Loan Documents and the 2012 Loan
24 Documents are collectively, the "Loan Documents.")

25 21. On or around May 11, 2012, the 2012 Loan closed and was fully funded on
26 May 14, 2012.

1 22. In or around mid-June 2012, Republic submitted, and the SBA received, an
2 application for an SBA loan to construct a Dutch Brothers in Paradise Valley, Arizona
3 (the "PV Loan Application").

4 23. On or about July 5, 2012, the SBA sent a "screen out" letter to Republic
5 relating to the PV Loan Application.

6 24. The SBA had multiple additional requests for documentation and
7 information relating to the PV Loan Application, which were timely relayed to TMCC.
8 The SBA was still requesting additional information as late as December 27, 2012.

9 25. On December 20, 2012, Thompson met with several Republic employees,
10 including Michael Harris, Emily Chedister and Stuart Olson. The parties agreed that they
11 no longer had a working relationship. Thompson told Republic he had decided to use
12 another lender going forward.

13 26. In or around January 2013, Republic offered Thompson a personal line of
14 credit to assist with cash flow and provide access to working capital.

15 27. Ultimately the PV Loan "timed out" of the SBA's system because the SBA
16 did not receive the additional information or documents it had requested.

17 28. In or around early February 2013, Republic was contacted by Mutual of
18 Omaha Bank ("Mutual of Omaha") regarding purchasing the Loans from Republic.

19 29. In or around May 2013, Mutual of Omaha approved the purchase of the
20 Loans from Republic.

21 30. In or around August 2013, Mutual of Omaha finally obtained SBA approval
22 for the purchase and assignment of the Loans.

23 31. On or about September 19, 2013, Republic and Mutual of Omaha entered
24 into and executed a Loan Purchase and Sale Agreement (With Consent of Obligors and
25 Pledgors) (hereafter the "Loan Purchase Agreement") for the sale and assignment of the
26 Loans by Republic to Mutual of Omaha. As part of the Loan Purchase Agreement, a
27 Consent of Obligors and Pledgors (as defined therein) was executed.

28 32. On or about September 23, 2013, the purchase of the Loans closed.

1 33. In 2011, Republic closed 27 SBA loans in the total amount of \$26.12
2 million.

3 34. In 2012, Republic closed 30 SBA loans in the total amount of \$42.38
4 million.

5 35. The approval process for an SBA loan takes longer than the approval
6 process for a standard loan due to SBA requirements.

7 36. The Loans were more complex than the typical or standard SBA loan. The
8 Loans, along with the contemplated future loans of TMCC, were unusual because there
9 were multiple real properties as collateral, all of which had complex title issues. Each
10 TMCC loan grew more complex as additional collateral was required. Due to the
11 complexity of the Loans, the amount of time required to obtain SBA approval was
12 increased.

13 **II. LEGAL THEORIES.**

14 **A. Negligent Misrepresentation.**

15 Plaintiff's first cause of action is for negligent misrepresentation. Arizona follows
16 the Restatement (Second) of Torts § 552 for claims of negligent misrepresentation:

17 (1) One who, in the course of his business, profession or
18 employment, or in any other transaction in which he has a
19 pecuniary interest, supplies false information for the guidance
20 of others in their business transactions, is subject to liability
21 for pecuniary loss caused to them by their justifiable reliance
22 upon the information, if he fails to exercise reasonable care or
23 competence in obtaining or communicating the information.

24 (2) Except as stated in Subsection (3), the liability stated in
25 Subsection (1) is limited to loss suffered

26 (a) by the person or one of a limited group of persons
27 for whose benefit and guidance he intends to supply the
28 information or knows that the recipient intends to
29 supply it; and

30 (b) through reliance upon it in a transaction that he
31 intends the information to influence or knows that the
32 recipient so intends or in a substantially similar
33 transaction.

34 ...

35 Restatement (Second) of Torts, § 552.

1 The Arizona Supreme Court has held that negligent misrepresentation requires a
2 misrepresentation or omission of a fact. However, "[a] promise of future conduct is not a
3 statement of fact capable of supporting a claim of negligent misrepresentation." *McAlister*
4 *v. Citibank*, 171 Ariz. 207, 215 (1992).

5 Because a claim for negligent misrepresentation is governed by the principles of
6 negligence, there must be a duty owed and a breach of that duty in order to be charged
7 with the negligent violation of that duty. *KB Home Tucson, Inc. v. Charter Oak Fire Ins.*
8 *Co.*, 236 Ariz. 326, 332 (2014).

9 Arizona case law holds that a relationship between a Bank and an ordinary
10 depositor, absent a special agreement, is that of creditor and debtor, and there is no
11 fiduciary duty in a debtor/creditor relationship. *Gould v. M & I Marshall & Isley Bank*,
12 860 F.Supp.2d 985, 989 (2012). Thus, there is no special duty of care here other than the
13 standard debtor/creditor relationship.

14 Here, TMCC has failed to satisfy the elements of negligent misrepresentation in
15 that it has failed to provide any evidence of a duty of care other than the standard
16 debtor/creditor relationship; therefore there can be no breach. Additionally, although the
17 Bank denies that it made a promise or guaranteed that TMCC would receive \$5 million in
18 SBA approved loans, even if such a promise were made, it would be a promise of future
19 conduct, which is not a statement of fact capable of supporting a claim of negligent
20 misrepresentation.

21 **B. Fraudulent Inducement.**

22 TMCC's second cause of action is a claim for fraudulent inducement. The
23 elements of a claim for fraud are: (1) A representation; (2) its falsity; (3) its materiality;
24 (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent
25 that it should be acted upon by the person and in the manner reasonably contemplated; (6)
26 the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely
27 thereon; and (9) his consequent and proximate injury. *Nielson v. Flashberg*, 101 Ariz.
28 335, 338-39 (1966).

1 TMCC has failed to satisfy the elements of fraud in that it has failed to provide any
2 evidence that it promised it would make SBA-guaranteed loans up to the SBA maximum
3 of \$5.0 million between 2011 and 2014. There is no evidence of any promises by
4 Republic to complete any loans within a certain timeframe, or that Republic promised the
5 SBA would approve every loan for which TMCC applied. Furthermore, TMCC has failed
6 to provide any evidence that any representations made by Republic were false, or that
7 Republic knew such representations were false at the time they were made. Even if such
8 statements were made, TMCC had no right to rely on them, as it was aware that SBA
9 approval was also required for any SBA loan. Finally, TMCC has failed to prove any
10 damages and therefore cannot demonstrate a proximate injury.

11 **C. Affirmative Defenses.**

12 TMCC's claims against Republic may be barred in whole or in part by the negligent
13 and/or intentional acts of other parties.

14 TMCC's claims are barred by the Statute of Frauds. Arizona's Statute of Frauds,
15 A.R.S. § 44-101(9), states:

16 No action shall be brought in any court in the following cases
17 unless the promise or agreement upon which the action is
18 brought, or some memorandum thereof, is in writing and
signed by the party to be charged, or by some person by him
thereunto lawfully authorized:

19 . . .
20 Upon a contract, promise, undertaking or commitment to loan
21 money or to grant or extend credit, or a contract, promise,
22 undertaking or commitment to extend, renew or modify a loan
or other extension of credit involving both an amount greater
than two hundred fifty thousand dollars and not made or
extended primarily for personal, family or household
purposes.

23 Here, there is nothing in writing to evidence that Republic promised or guaranteed
24 that TMCC would receive SBA approval for \$5 million of loans, or promised it would
25 have SBA approval for any loans by a certain date, and in the absence of such a writing
26 between the parties, TMCC's claims must fail. Republic could not and did not promise
27 anything other than its willingness to work with TMCC to try to obtain SBA loans up to
28 the \$5 million limit.

1 Republic alleges that its conduct did not cause or substantially contribute to
2 TMCC's alleged loss. TMCC has not alleged losses with any particularity at this time and
3 Republic is unaware of the amount of damages that TMCC believes are attributed to
4 Republic's conduct. There were many other factors which may have caused or
5 contributed to any losses sustained by TMCC, if any losses are actually proven.

6 Republic alleges that TMCC's claims are barred by the statute of limitations,
7 estoppel, unclean hands, and waiver.

8 TMCC's claims against Republic are barred in whole by the doctrines of
9 waiver/release. Specifically, the Consent of Obligor and Pledgors (the "Consent"),
10 executed on or about September 19, 2013 as part of the Loan Purchase Agreement by
11 TMCC as an Obligor, expressly states:

12 (e) As a material inducement to Lender to agree to sell the
13 Loans to Assignee, *each Obligor and Pledgor*, on behalf of
14 itself and its past and present officers, directors, shareholders,
15 agents, employees, attorneys, affiliates, subsidiaries and
16 parents, and their respective heirs, successors and assigns
17 (individually and collectively, the "Obligor/Pledgor Parties"),
18 *hereby fully and forever release and discharge Lender and all*
19 *of Lender's past, present and future officers, directors,*
20 *shareholders, agents, employees, attorneys, affiliates,*
21 *predecessors in interest, successors in interest, the parent*
22 *corporations of Lender or its predecessors in interest, and all*
23 *of their respective heirs, personal representatives, successors*
24 *and assigns (individually and collectively, the "Lender*
25 *Parties") from any and all claims, liabilities, demands,*
26 *damages, liens, causes of action, and rights of recoupment,*
27 *offset and/or reimbursement of any kind or nature whatsoever,*
28 *whether known or unknown, liquidated or unliquidated,*
asserted or unasserted, matured or unmatured, and whether
based on any contractual, tort, equitable, common law,
restitution, statutory or other ground or theory of any nature
whatsoever, including, without limitation, any and all claims
which in any way directly or indirectly rise out of, relate to,
result from or are connected to: (i) the Loans, (ii) any and all
acts, omissions or events relating to the Loans, (iii) the sale of
Lender's right, title and interest in the Loans to Assignee, and
(iv) the Collateral. In this connection, the Obligor/Pledgor
Parties represent and warrant that they realize and
acknowledge that factual matters now unknown to them may
have given or may hereafter give rise to causes of action,
claims, demands, debts, controversies, damages, costs, losses
and expenses that are presently unknown, undisclosed,
unanticipated and unsuspected, and further agree, represent
and warrant that this release has been negotiated and agreed

1 upon in light of that realization and that the Obligor/Pledgor
2 Parties nonetheless intend to release the Lender Parties from
3 any such unknown claims that would be among the matters
4 described if known on the date hereof. The Obligor/Pledgor
5 Parties hereby acknowledge that they are signing this Consent
6 with full knowledge of any and all rights they may have and
7 that they are not relying upon any representations made by
8 Lender or any other party other than those set forth in the
9 Agreement, and the Obligor/Pledgor Parties hereby assume
the risk of any mistake of facts now known or unknown to
them. The Obligor/Pledgor Parties further acknowledge that
they have conducted whatever investigation they deemed
necessary to ascertain all facts and matters related to the
Agreement and thus Consent. The Obligor/Pledgor Parties
represent that they have had the opportunity to consult with
legal counsel concerning the legal consequences of this
release.

10 (Emphasis added).

11 In the instant case, TMCC executed a waiver/release in signing the Consent. As
12 such, in executing and delivering the Consent to Republic, TMCC was and is under a
13 contractual obligation to "fully and forever release and discharge [Republic] . . . from any
14 and all claims, liabilities, demands, damages, liens, [and] causes of action," among other
15 things, thus rendering TMCC's Second Amended Complaint and all claims therein,
16 unenforceable. See Consent at Paragraph (e).

17 Under Arizona law, TMCC waived any all claims against Republic by virtue of
18 executing the Consent.

19 Generally, "[w]aiver is either the express, voluntary,
20 intentional relinquishment of a known right or such conduct
21 as warrants an inference of such an intentional
22 relinquishment." *Russo v. Barger*, 239 Ariz. 100, 103 ¶ 12,
366 P.3d 577, 580 (App. 2016) (citing *Am. Cont'l Life Ins.*
Co. v. Ranier Constr. Co. Inc., 125 Ariz. 53, 55, 607 P.2d
372, 374 (1980)).

23 *Compass Bank v. Bennett*, 240 Ariz. 58, 375 P.3d 950, 3–953 (Ct. App. 2016), review
24 denied (Sept. 20, 2016).

25 Here, TMCC expressly, voluntarily, and intentionally relinquished its known right
26 to bring "any and all claims, liabilities, demands, damages, liens, [and] causes of action,"
27 against Republic once it executed and delivered the Consent to Republic, thus rendering
28

1 TMCC's Second Amended Complaint and all claims therein, unenforceable. *See* Consent
2 at Paragraph (e).

3 Republic alleges that TMCC's claims are barred by failure to mitigate damages. A
4 party's failure to mitigate damages may negate and reduce damages where the party,
5 through its own voluntary activity, has unreasonably exposed itself to damage or
6 increased its injury. *See Life Investors Ins. Co v. Horizon Resources Bethany, Ltd.*, 182
7 Ariz. 529, 534, 898 P.2d 478, 483 (Ct. App. 1995). TMCC's own conduct may have
8 unreasonably exposed TMCC to damage or increased its damages (assuming any damages
9 are actually proven by TMCC). First, TMCC was well aware of the timeline for SBA
10 approval, having applied for and received approval for two other SBA loans with
11 Republic. If TMCC believed that the amount of time it took to obtain SBA approval with
12 Republic was inadequate and could cause TMCC to sustain damage, then TMCC should
13 have used a different lender to apply for the SBA loan for construction of the Paradise
14 Valley store. Furthermore, even after Thompson informed Republic that TMCC was
15 going to use another lender going forward, Republic offered Thompson a personal line of
16 credit to assist with finances during the transition to another lender, and Thompson's
17 failure to pursue such line of credit was further failure to mitigate damages.

18 TMCC also fails to state a claim against Republic upon which an award of
19 attorneys' fees may be granted. TMCC has alleged negligent misrepresentation and
20 fraudulent inducement, both of which are tort claims. There is no contractual basis for
21 either of TMCC's claim. A.R.S. §§ 12-341 and 12-341.01 provide that the successful
22 party in any action arising out of a contract may be awarded attorney's fees and costs.
23 Here, there was no express or implied contract that was the basis for either of TMCC's
24 claims, and therefore, TMCC has failed to state a claim upon which an award of attorneys'
25 fees can be granted.

26 Also, as discussed in subsections A. and B. above, TMCC fails to set forth the
27 prima facie elements to establish a claim for negligent misrepresentation and/or a claim or
28 fraudulent inducement.

1 **D. TMCC's Damages**

2 TMCC is not entitled to recover those damages, if any, that are remote, speculative,
3 or uncertain. TMCC's own damage expert, Leroy M. Gaintner ("Gaintner"), was unable
4 to determine any sum certain damage amount allegedly suffered by TMCC as a result of
5 Republic's actions. Instead, Gaintner's expert report as to TMCC's claimed damages,
6 dated March 5, 2016, presents three different *hypothetical* situations and corresponding
7 conjectural damage amounts. Furthermore, TMCC's alleged damages are based upon
8 delays purported to be caused by Republic for which no evidence exists. However,
9 Republic's SBA lending expert, Lisa G. Lerner, has determined that in light of the
10 complex nature of the Loans and collateral securing the Loans, Republic's actions were
11 reasonable and there were no delays. As such, without any delays suffered by TMCC,
12 Republic's damage expert, Peter S. Davis, asserts that there can be no damages accrued to
13 TMCC, and that Gaintner's damage calculations are entirely speculative, unsupported, and
14 baseless.

15 Furthermore, TMCC seeks damages that allegedly arise from consequential lost
16 profits. *See Flagstaff Affordable Housing Ltd. Partnership v. Design Alliance, Inc.*, 223
17 Ariz. 320, 323, 223 P.3d 664, 667 (2010) (holding that lost profits are a type of
18 consequential damages.) However, the measure of damages for breach of contract to loan
19 money limited to "the difference between the contracted for interest rate and the interest
20 rate at the time of breach," and it is impermissible for a plaintiff to recover consequential
21 damages where alternative financing is available or where the loan could be obtained from
22 another source. *McAlister v. Citibank*, 171 Ariz. 207, 212, 829 P.2d 1253, 1258 (Ariz. Ct.
23 App. 1992). Here, as TMCC could have and in fact, did, obtain financing through another
24 source - Mutual of Omaha - it is not entitled to recover any damages resulting from lost
25 profits.

26 **E. Attorneys' Fees.**

27 Republic alleges that this action is frivolous and in violation of the contractual
28 obligations pursuant to the Consent, and therefore, Republic is entitled to attorneys' fees

1 for defense of this action pursuant to the Consent, A.R.S. §§ 12-341, 12-341.01, and 12-
2 349 or as otherwise provided by law.

3 **III. WITNESSES EXPECTED TO TESTIFY AT TRIAL.**

4 Republic is unable to determine yet all of the persons it may call to testify at trial.
5 In addition to any witnesses identified in Section II and IV, TMCC may call as a witness
6 any individual identified in any Disclosure Statement of any other party now or
7 subsequently named in this action. Republic may also call as a witness any and all
8 persons necessary to authenticate or lay sufficient foundation for documentary evidence.
9 Republic reserves the right to supplement this list of witnesses.

10 **IV. PERSONS WHO MAY HAVE RECENT KNOWLEDGE OR**
11 **INFORMATION.**

- 12 1. Michael Harris
13 c/o W. Scott Jenkins, Jr.
14 Quarles & Brady, LLP
15 Renaissance One
Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

16 Mr. Harris was formerly a Vice President at Republic and was a Business
17 Relationship Manager and the loan officer for TMCC's two loans. Mr. Harris was in
18 frequent communication with Mr. Thompson and his accountant/bookkeeper Kathye
19 Pease ("Pease") regarding the Loans. Mr. Harris attended a meeting with Ms. Pease and
20 Mr. Thompson on December 20, 2012, at which the parties agreed they no longer had a
21 working relationship. As a result, Mr. Harris may have information, related to, among
22 other things, the facts and circumstances pertaining to TMCC's claims for negligent
23 misrepresentation and fraudulent inducement, including what representations were or
24 were not made to TMCC relating to the Loans.

- 25 2. Emily Chedister
26 RepublicBankAZ, N.A.
27 c/o W. Scott Jenkins, Jr.
28 Quarles & Brady, LLP
Renaissance One
Two North Central Avenue
Phoenix, Arizona 85004

1 Telephone: (602) 229-5200

2 Ms. Chedister is a Vice President at Republic and was a Loan Administrator and
3 then Loan Operations Manager during the relevant period. Ms. Chedister worked on both
4 of the Loans, was in frequent communication with Ms. Pease and Mr. Thompson, and
5 attended a meeting with Ms. Pease and Mr. Thompson on December 20, 2012 at which
6 the parties agreed they no longer had a working relationship. As a result, Ms. Chedister
7 may have information, related to, among other things, the facts and circumstances
8 pertaining to TMCC's claims for negligent misrepresentation and fraudulent inducement,
9 including what representations were or were not made to TMCC relating to the Loans.

10 3. Stuart Olson
11 c/o W. Scott Jenkins, Jr.
12 Quarles & Brady, LLP
13 Renaissance One
14 Two North Central Avenue
15 Phoenix, Arizona 85004
16 Telephone: (602) 229-5200

17 Mr. Olson was an Executive Vice President at Republic and was the Chief Credit
18 Officer during the relevant time period. Mr. Olson attended the December 20, 2012
19 meeting with Mr. Thompson and Ms. Pease at which the parties agreed they no longer had
20 a working relationship. As a result, Mr. Olson may have information, related to, among
21 other things, the facts and circumstances pertaining to TMCC's claims for negligent
22 misrepresentation and fraudulent inducement, including what representations were or
23 were not made to TMCC relating to the Loans.

24 4. Marla Woods
25 c/o W. Scott Jenkins, Jr.
26 Quarles & Brady, LLP
27 Renaissance One
28 Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

Ms. Woods was a Loan Document Specialist at Republic during the relevant time
period. Ms. Woods assisted with the loan application and SBA approval process on the
Loans, and was in frequent communication with Mr. Harris regarding the status of the
Loans and additional documentation. Ms. Woods was in frequent communication with

1 the title companies relating to the Loans. Ms. Woods also e-mailed frequently with Mr.
2 Thompson and Ms. Pease regarding information and documents Republic needed. As a
3 result, Ms. Woods may have information, related to, among other things, the facts and
4 circumstances pertaining to TMCC's claims for negligent misrepresentation and
5 fraudulent inducement, including what representations were or were not made to TMCC
6 relating to relating to the Loans, and the particular circumstances regarding the
7 documentation and closing of the Loans.

8 5. Kimberly Pappas
9 c/o W. Scott Jenkins, Jr.
10 Quarles & Brady, LLP
11 Renaissance One
12 Two North Central Avenue
13 Phoenix, Arizona 85004
14 Telephone: (602) 229-5200

15 Ms. Pappas was a Vice President at Republic and was the Loan Operations
16 Manager during part of the relevant time period. As a result, Ms. Pappas may have
17 information, related to, among other things, the facts and circumstances pertaining to
18 TMCC's claims for negligent misrepresentation and fraudulent inducement, including
19 what representations were or were not made to TMCC relating to the Loans, and the
20 particular circumstances surrounding the documentation and closing of the Loans.

21 6. Anthony Bodnar
22 c/o W. Scott Jenkins, Jr.
23 Quarles and Brady, LLP
24 Renaissance One
25 Two North Central Avenue
26 Phoenix, Arizona 85004
27 Telephone: (602) 229-5200

28 Mr. Bodnar was an Assistant Vice President at Republic and was a Loan
Administrator during the relevant time period. As a result, Mr. Bodnar may have
information, related to, among other things, the facts and circumstances pertaining to
TMCC's claims for negligent misrepresentation and fraudulent inducement, including
what representations were or were not made to TMCC relating to relating to the Loans,
and the particular circumstances regarding the approval of the Loans.

1 7. James Thompson
2 c/o Francis J. Slavin, Esq.
3 Francis J. Slavin, P.C.
4 2198 East Camelback Road, Suite 285
 Phoenix, Arizona 85016
 Telephone: (602) 381-8700

5 Mr. Thompson is the principal and owner of TMCC. As a borrower and guarantor
6 of the Loans, Mr. Thompson was involved in the application and approval process and
7 communicated frequently with Mr. Harris and other Republic employees. As a result, Mr.
8 Thompson may have information, related to, among other things, the facts and
9 circumstances pertaining to TMCC's claims for negligent misrepresentation and
10 fraudulent inducement.

11 8. Kathye Pease
12 EQ8 A&B, LLC
13 P.O. Box 7433
 Chandler, Arizona 85246
 Telephone: (480) 359-4883

14 Ms. Pease is a manager of EQ8 A&B, LLC, and was Mr. Thompson's
15 accountant/bookkeeper. Ms. Pease provided and discussed financials documents and
16 information with Republic, had frequent communications with multiple employees of
17 Republic during the entire loan application, Republic approval, SBA approval, and
18 funding process, and was in attendance at the December 20, 2012 meeting with Mr.
19 Thompson, Mr. Harris, Mr. Olson and Ms. Chedister. As a result, Ms. Pease may have
20 information, related to, among other things, the facts and circumstances pertaining to
21 TMCC's claims for negligent misrepresentation and fraudulent inducement.

22 9. Corey Schimmel
23 Mutual of Omaha Bank
24 c/o Janet Ryan, Esq.
 Janet.Ryan@mutualofomaha.com

25 Mr. Schimmel was a Vice President in Business Banking at Mutual of Omaha and
26 was the loan officer for the two loans acquired by Mutual of Omaha from Republic. As a
27 result, Mr. Schimmel may have information related to, among other things, the facts and
28

1 circumstances pertaining to the acquisition of the loans by Mutual of Omaha, including
2 the process and timeframe.

3 10. Any persons disclosed by TMCC as persons who may be called as
4 witnesses at trial.

5 **V. IDENTITY OF PERSONS WHO HAVE GIVEN STATEMENTS.**

6 No statements have been given yet in this matter.

7 **VI. EXPERT WITNESSES EXPECTED TO TESTIFY.**

8 The areas of expert testimony that Republic expects to provide an opinion include
9 expert testimony related to SBA procedures and policies relating to the loan application
10 and approval process, TMCC's damages (or lack thereof), and rebuttal expert testimony in
11 response to any and all opinions, facts and data contained in expert testimony provided by
12 TMCC.

13 1. SBA Loans, Procedures, Policies, and Approval Process.

14 Republic will call Lisa G. Lerner as an expert witness, who is qualified to testify as
15 to SBA loans in general, policies and procedures for SBA loans, the different types of
16 SBA-qualified lenders, the SBA application process, the SBA approval process, and
17 Republic's handling of the SBA loan applications of TMCC. Republic may also call an
18 expert for rebuttal testimony in response to any SBA loan testimony by any expert called
19 by TMCC.

20 Lisa G. Lerner
21 Enhanced Consultive Solutions, LLC
22 c/o W. Scott Jenkins, Jr.
23 Quarles & Brady, LLP
24 Renaissance One
25 Two North Central Avenue
26 Phoenix, Arizona 85004
27 Telephone: (602) 229-5200

28 Ms. Lerner is an expert in the area of SBA lending procedures and processes. Ms.
Lerner is expected to testify regarding: the overall procedures as between the SBA and
lenders like Republic who participate in SBA loan programs; the SBA 7a loan program
that provides an SBA guaranty to a lender like Republic; the various programs for which

1 various lenders qualify, such as the General Lenders Program, the Preferred Lenders
2 Program, or the Certified Lenders Program; and the variables and complexities that affect
3 the closing and funding of a loan. Ms. Lerner's opinion is that due to the complex nature
4 of the Loans and the related Collateral, Republic acted within normal and reasonable
5 timeframes to close and fund the Loans, thus there was no improper delay on the part of
6 Republic. Ms. Lerner's opinion is based upon her professional training, practice, and
7 experience, as well as her review, analysis, and comparison of documents as set forth in
8 her expert report dated November 1, 2016, **as well as her Rebuttal Expert Report dated**
9 **November 23, 2016.**

10 2. Lost Profits and Other Damages.

11 Republic will call Peter S. Davis as an expert witness, who is qualified to testify as
12 to the standards for determining whether there were lost profits, how to calculate lost
13 profits, whether TMCC suffered any lost profits, whether Republic's representations or
14 actions were the proximate cause of such lost profits (if there were any), and the amount
15 of any lost profits and/or other damages of TMCC. Republic may also call an expert for
16 rebuttal testimony in response to any lost profits/damages testimony by any expert called
17 by TMCC.

18 Peter S. Davis
19 Simon Consulting, LLC
20 c/o W. Scott Jenkins, Jr.
21 Quarles & Brady, LLP
22 Renaissance One
Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

23 Mr. Davis is an expert in the area of forensic accounting, commercial damages and
24 valuations in connection with complex litigation, and forensic economics, including
25 analyses and determinations of loss profits and lost earnings related to tort and contract
26 matters. Mr. Davis is expected to testify regarding: the assumptions and analyses
27 presented in the Gaintner Report; the methodology relied upon in the Gaintner Report and
28 related damage calculations asserted therein; the conflicting and irreconcilable assertions

1 set forth in the Gaintner Report; the absence of proximate cause to the damages asserted
2 by TMCC; and the absence of actual damages incurred by TMCC. Mr. Davis' opinion is
3 based upon his professional training, practice, and experience, as well as his review,
4 analysis, and comparison of documents as set forth in his expert report dated November 1,
5 2016, **as well as his Expert Rebuttal Report dated January 17, 2017 and disclosed**
6 **contemporaneously herewith.**

7 Republic reserves the right to call the following witnesses designated as experts by
8 TMCC:

- 9 1. Leroy M. Gaintner
10 c/o Francis J. Slavin, Esq.
11 Francis J. Slavin, P.C.
12 2198 East Camelback Road, Suite 285
Phoenix, Arizona 85016
Telephone: (602) 381-8700

13 Mr. Gaintner is a certified public accountant and the expert retained by TMCC to
14 provide an analysis of TMCC's claimed damages (e.g. the Gaintner Report). Mr. Gaintner
15 is expected to testify regarding the substance and contents of his report, including but not
16 limited to his opinion that "RBA approvals/funding were not timely forthcoming,"; that
17 Republic "require[d] TMC to delay completing/opening certain Stores and completely
18 delay[ed] or stop[ed] several other planned stores,"; and the assumptions and analyses
19 asserted in the Gaintner Report; and the various damage calculations set forth under
20 Scenario 1, Scenario 2, and Scenario 3 as defined within the Gaintner Report. Mr.
21 Gaintner is also expected to testify regarding his professional training, practice, and
22 experience, as well as his review, analysis, and comparison of documents as set forth in
23 the Gaintner Report, **and the Gaintner Rebuttal Report dated December 12, 2016.**

- 24 2. Douglas T. Haman
25 c/o Francis J. Slavin, Esq.
26 Francis J. Slavin, P.C.
27 2198 East Camelback Road, Suite 285
28 Phoenix, Arizona 85016
Telephone: (602) 381-8700

Mr. Haman is a Senior Vice President of Seacoast Commerce Bank and the expert retained by TMCC to provide an analysis of SBA lending procedures and processes (hereafter, the "Haman Report"). Mr. Haman is expected to testify regarding the substance and contents of his report, including but not limited to his opinion that "RBA/approvals/funding were not timely forthcoming, thus requiring TMC to delay completing/opening certain stores." Mr. Haman is also expected to testify regarding his professional training, practice, and experience, as well as his review, analysis, and comparison of documents as set forth in the Haman Report, **and the Mr. Haman's Rebuttal Report dated December 22, 2016.**

Republic reserves its right to supplement this **Fifth** Supplemental Disclosure Statement to identify expert witnesses and matters upon which such expert witnesses are expected to testify.

VII. COMPUTATION AND MEASURE OF DAMAGES.

TMCC claims damages of between \$1,583,000 to \$5,672,000 based upon three different scenarios. Republic asserts that TMCC has not suffered any damages, and that TMCC fully waived and released Republic from any and all claims, liabilities, and damages by virtue of executing the Consent in favor of Republic.

VIII. TANGIBLE EVIDENCE AND RELEVANT DOCUMENTS THAT MAY BE USED AT TRIAL.

Republic is unaware at this time which documents it intends to use at trial, but may use the following documents at trial. Republic reserves its right to further timely supplement this list as discovery proceeds.

DOCUMENT DESCRIPTION	DATE	BATES NUMBERS
E-mail correspondence relating to loans-internal, with Thompson, Kathy Pease, SBA, and Mutual of Omaha	02/2008 – 12/2008	RBAZ 000001 - RBAZ 004890.011
Later supplemented e-mails with redactions removed	Various	RBAZ 002980 - 2981 and RBAZ 002984

Documents with redactions removed produced by Republic on September 9, 2016 subject to Stipulated Protective Order filed September 9, 2016	2011 - 2012	RBAZ 00163, 00164, 00165 - 00170, 00260-00261, 00262 - 00263, 00268 - 00271, 00272 - 00275, 00285, 00754 - 00755, 00766 - 00768, 01223, 01224, 01225 - 01226, 01504, 01833, 01853 - 01854, 01858, 01859 - 01860, 02171, 02978, 02980 - 02981, 02982, 02984, 02996, 03035, 03088, 03089, 03361, 03394, 03925, 03928
Organizational Documents of TMCC and related entities	01/2009 – 12/2009	RBAZ 04891 - RBAZ 05649
Loan File for Loan No. 826005400 in the amount of \$1,026,300.00 (October 24, 2011 Loan)	2010-2012	RBAZ 05650 - RBAZ 06619
Loan File for Loan No. 826007200 in the amount of \$597,100.00 (May 9, 2012 Loan)	2011-2012	RBAZ 06620 - RBAZ 08351
Additional e-mails, SBA correspondence, and memoranda	2011 - 2013	RBAZ 08352 - RBAZ 08428
Documents produced by TMCC with Initial Disclosure Statement and as later supplemented with redactions removed		TMCC00001 - TMCC02848
Documents produced by TMCC with Fourth Supplemental Disclosure Statement		TMCC002849 - TMCC006375
Documents provided by the SBA to Republic	2011 - 2013	SBA 00001 - 00969
Documents provided by the SBA to Republic	2012	SBA2 00001 - 00194
Documents provided by the SBA to TMCC	Various	SBA000001 - SBA000029
Documents produced by Mutual of Omaha in response to TMCC's subpoena	2012-2015	MB000102 - 009483
TMCC's expert report dated March 5, 2016 prepared by Leroy M. Gaintner, CPA, PLC and schedules, exhibits, and addenda	3/5/2016	n/a

1	File of Leroy M. Gaintner, CPA, PLC	Various	GA000001 - GA000437 and other documents without bates labels
2			
3	TMCC's expert report dated September 20, 2016 prepared by Douglas T. Haman and addendum	9/20/2016	n/a
4			
5	Documents produced by Nationwide Valuations in response to TMCC's subpoena	Various	NV000001 - 001197
6			
7	Documents produced by First Arizona Title Agency in response to TMCC's subpoena	Various	FAZT000001 - 000167
8			
9	Documents produced by Thomas Title & Escrow in response to TMCC's subpoena	Various	TT000001 - 000578
10			
11	Expert Report of Peter S. Davis of Simon Consulting, LLC, dated November 1, 2016	11/1/2016	n/a
12			
13	Expert Report of Lisa G. Lerner of Enhanced Consultive Solutions, LLC, dated November 1, 2016	11/1/2016	n/a
14			
15	Rebuttal Expert Report of Lisa G. Lerner of Enhanced Consultive Solutions, LLC, dated November 23, 2016	11/23/2016	n/a
16			
17	Expert Rebuttal Report of Peter S. Davis of Simon Consulting, LLC, dated January 17, 2017	1/17/2017	n/a

18 **IX. OTHER RELEVANT DOCUMENTS.**

- 19 1. All documents listed above in Section VIII.
- 20 2. All documents disclosed pursuant to any subpoena issued in this case.
- 21 3. All documents attached to or referenced in TMCC's Second Amended
22 Complaint, Republic's Answer to the Second Amended Complaint, and any other
23 pleadings filed by the parties in this case.
- 24 4. All documents attached to or referenced in the parties' disclosure statements.
- 25 5. All deposition transcripts from any deposition taken in this case.
- 26 6. All exhibits to any deposition taken in this case, or documents referred to
27 during any deposition taken in this case.
- 28 7. All documents or information produced in response to any discovery
response in this case.

8. All documents or information produced by any third party in response to a subpoena in this case.

9. All documents informally exchanged between the parties' attorneys in this case.

DATED this 18th day of January, 2017.

QUARLES & BRADY LLP
Renaissance One
Two North Central Avenue
Phoenix, AZ 85004-2391

By Andrea Landeen
W. Scott Jenkins, Jr.
Andrea H. Landeen
Alissa Brice Castañeda

Attorneys for Defendant RepublicBankAZ, N.A.

ORIGINAL mailed and COPY emailed
this 18th day of January, 2017 to:

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Attorneys for Thompson/McCarthy Coffee Co.

[Handwritten signature]



Thompson/McCarthy Coffee Co.
v.
RepublicBankAZ, N.A.

Expert Rebuttal Report of Peter S. Davis

Simon Consulting, LLC

January 17, 2017

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1. Background

Thompson/McCarthy Coffee Co.¹ (“TMCC” or “Plaintiff”) builds and operates Dutch Bros. Coffee franchises in the Phoenix metropolitan area (“Stores”). Plaintiff asserts that it requested that RepublicBankAZ, N.A. (“Republic Bank” or “Defendant”) attempt to secure loans up to \$5,000,000 guaranteed by the Small Business Administration (“SBA”) to build ten additional franchise Stores. Plaintiff built seven Stores prior to requesting funding from Republic Bank.

Plaintiff asserts that Republic Bank failed to timely provide the funding and was thereby damaged due to delays and/or causing the inability to open the planned Stores. Plaintiff’s damage expert, Leroy Gaintner, prepared an expert report dated March 5, 2016 (the “Gaintner Report”), which purports to calculate Plaintiff’s losses from the alleged wrongful acts.

Plaintiff’s lending expert, Douglas T. Haman, prepared a report dated September 20, 2016 (the “Haman Report”).

Simon Consulting, LLC (“Simon”) prepared a rebuttal report to the Gaintner Report on November 1, 2016 (“Simon Rebuttal Report”).

Republic Bank’s lending expert Lisa Lerner prepared a report dated November 1, 2016.

Mr. Gaintner prepared a response to the Simon Rebuttal Report dated December 12, 2016 (“Gaintner Rebuttal Report”).

2. Scope of Work

Simon was asked by counsel for Republic Bank to analyze the Gaintner Rebuttal Report and comment on the report if necessary. Simon’s analysis of the Gaintner Rebuttal Report is discussed in the remainder of this report. Peter S. Davis performed the analysis on behalf of Simon. See **Appendix A** for his *curriculum vitae*. The documents considered during Simon’s work are listed at **Appendix B**.

Simon offers no opinions as to Defendant’s liability in this matter.

3. Summary of the Gaintner Rebuttal Report

The Gaintner Rebuttal Report responds to the criticisms in the Simon Rebuttal Report in four categories:

1. *Causal Link* – The Gaintner Rebuttal Report asserts that it has no responsibility to evaluate causation in this matter.
2. *Multiple Damage Amounts* – The Gaintner Rebuttal Report asserts the presentation of three mutually exclusive damage amounts is appropriate because “the time frame of

¹ Formerly Thompson/McCarthy DB, LLC.

economic impact and resulting damage is not an accounting issue” but an issue to be determined by the Trier-of-Fact.

3. *Cash Balances and Mitigation* – The Gaintner Rebuttal Report states that the cash balance analysis in the Gaintner Report was to demonstrate the Plaintiff’s mitigation efforts.
4. *Business Plan* – The Gaintner Rebuttal Report states that a formal business plan is not necessary to establish or measure damages.

The Gaintner Rebuttal Report also lists three categories that it asserts the Trier-of Fact must consider in order to determine Plaintiff’s damages.

4. Analysis of the Gaintner Rebuttal Report

Simon’s analysis of the Gaintner Rebuttal Report’s assertions are discussed below.

4.1. Causation

As noted in the Simon Report, the Gaintner Report makes three fundamental assumptions that underpin its damage calculations: 1) that there were improper delays in loan funding caused by Republic Bank; 2) that all such delays were caused solely by Republic Bank; and 3) the delays resulted in the inability to build three Stores or alternatively, a three year delay in building three Stores.

The Gaintner Rebuttal Report states that, as a damages expert, it is not necessary, nor is it the norm, to establish a causal link between the actions of Republic Bank and the Plaintiff’s alleged damages.² The Gaintner Rebuttal Report also states “I was asked by TM’s attorney to assume a causal link.”³

While it is not always necessary that a damages expert opine on causation, causation must be considered in evaluating damages. In this instance, neither the Plaintiff’s damages expert nor the Plaintiff’s SBA lending expert address causation as it relates to the claimed damages. Moreover, in this instance it is certainly possible that inordinate delays in funding, if any, were at least in part, caused by third parties or factors outside of Republic Bank’s control. Yet these complicating factors are assumed away in the Gaintner Report, apparently at the direction of Plaintiff’s counsel. If these factors are not properly taken into account, then the resultant damage calculation is not properly calculated.

The American Institute of Certified Public Accountants (“AICPA”) *Forensic & Valuation Services Practice Aid – Attaining Reasonable Certainty in Economic Damages Calculations* states:

If the damages expert is asked by counsel to assume the existence of causation as to damages, then does the expert need to consider this issue any further?
The answer to this seemingly simple question is not always clear. Some argue

² Gaintner Rebuttal Report, pg. 1.

³ Ibid.

that in this situation, the damages expert has no obligation to undertake further analysis of the causation issue. But when taking this approach, damages experts should be aware of the attendant risks. Specifically, the acceptability of the expert's assumption on causation becomes less clear when it may be argued that the damages are attributable to factors having nothing to do with the purported bad acts.⁴

In this instance, it is not clear that any alleged delays in funding were solely caused by Republic Bank. Therefore, to the extent that delays in funding, if any, were due to factors not attributable to Republic Bank, then the Gaintner Report has not properly calculated damages as to Republic Bank. Thus, in this matter, as indicated by the AICPA practice aid, it is important for the damages expert to consider the causation issues so as to not overstate damages. Furthermore, if Mr. Gaintner did not feel qualified to opine on causation it would have been prudent to coordinate with the Plaintiff's lending expert so that a proper causation analysis, as to damages, was performed so that only damages attributable to Republic Bank were calculated.

4.2. Multiple Damage Amounts – Failure to Offer a Damage Conclusion

The Simon Report states:

In order to properly calculate damages it is necessary, among other steps, to determine the damage period. The Gaintner Report puts forth three dramatically different damage periods and asserts it is up to the trier of fact to determine the appropriate damage period. Yet, the Gaintner Report never concludes as to which of these three damage periods is applicable, and offers no analysis or explanation as to how the trier of fact is to determine the appropriateness of the various options presented. Therefore, the Gaintner Report does not present an opinion of damages but instead presents three hypothetical and unsupported calculations based on meritless assumptions.⁵

The Gaintner Rebuttal Report states in response that “the time frame of economic impact and resulting damage is not an accounting issue, but rather – as noted in my Original Report – a determination that necessarily must be made by the Trier-of-Fact.”⁶ The Gaintner Rebuttal Report further states “It is not my role to decide such [time frame or duration of impact], nor to limit analysis to a single possibility.”⁷

Defining the damage period is a necessary component in calculating lost profit damages. Lost profit damages cannot be calculated unless it is known when damages begin and when they end. Therefore, contrary to Mr. Gaintner's assertion, it is incumbent on the damages expert to determine the damage period. Moreover, calculating damages is not confined solely to “accounting issues” and is certainly more than an accounting or mathematical exercise.

⁴ AICPA Forensic & Valuation Services Practice Aid – Attaining Reasonable Certainty in Economic Damages Calculations, pg. 34.

⁵ Simon Report, pg. 5.

⁶ Gaintner Rebuttal Report, pg. 2.

⁷ Ibid.

Mr. Gaintner attempts to justify his failure to determine a reasonable damage period by making the conclusory statement that the damage period is “a determination that necessarily must be made by the Trier-of-Fact.” However, the Gaintner Report offers no explanation why he, as a damages expert, is unable to make a determination as to the damage period. Nor does he explain why this fundamental element of damages must be made only by the Trier-of-Fact rather than by the damage expert and/or lending expert.

For example, if damages arose from the failure to receive timely financing, then damages would logically end no later than when alternative financing was obtained, absent some contravening facts. Yet the Gaintner Report asserts it is unable to perform this analysis, which is typically expected of a damage expert. Furthermore, to the extent any expertise in lending practices is needed to make this determination, the Plaintiff engaged a lending expert who could have worked in conjunction with Mr. Gaintner to make the necessary determination as to the damage period.

Moreover, while Mr. Gaintner asserts that it is not his role to determine the damage period, he nonetheless presents three damage amounts by assuming three entirely different damage periods. How or why the three damage periods were chosen over any other damage period is not explained.

If Mr. Gaintner is unable to properly determine a reasonable damage period in this matter, then a more appropriate approach would have been to present damage amounts for each year or perhaps each month. For example, assuming that the Trier-of-Fact determines that damages are applicable, it could be determined that damages accrue for only three months. In which case, the Gaintner Report is of no value because no such calculation is presented.

The Gaintner Report also presents a list of items, which it is asserted, must be determined by the Trier-of-Fact with regard to Plaintiff’s purported damages.⁸ However, certain of these questions posed to the Trier-of-Fact, are inappropriate because they improperly limit the area of inquiry to only the three unsupported damage periods proposed by the Gaintner Report. Given that the Gaintner Report fails to independently opine on the damage period, then the proper question is “what is the proper damage period?” rather than the improper question “which of the three damage periods presented in the Gaintner Report is valid?”

The three damage scenarios utilized in the Gaintner Report should be disregarded, or at a minimum given no weight over any other damage period, given the admission that Mr. Gaintner has no opinion as to the damage period and has performed no analysis to support the reasonableness of the three damage scenarios presented.

Lastly, the Gaintner Rebuttal Report’s list of items to be determined by the Trier-of-Fact fails to include important factors which must be considered in evaluating damages such as causation, and mitigation.

In summary, the Gaintner Rebuttal Report concedes that it has not properly calculated damages in this matter as it has no opinion as to the proper damage period and has therefore only performed certain mathematical/accounting calculations related to three damage periods for which no support

⁸ Gaintner Rebuttal Report, pg. 2.

or analysis is offered. Therefore, the purported damage analyses falls short of the standard necessary to determine damages, if any, in this matter.

4.3. Cash Balances and Failure to Address Mitigation

The Gaintner Rebuttal Report confirms that no damages are asserted due to Plaintiff's purported depleted operating cash.⁹ The Gaintner Rebuttal Report explains that the extensive analysis of the Plaintiff's cash balances was performed to demonstrate Plaintiff's mitigation efforts related to completing certain stores. The Gaintner Rebuttal Report opines that the Plaintiff's mitigation efforts with regard to completing Stores #11, #12, and #13 were "reasonable and appropriate."

Therefore, the Gaintner Rebuttal Report demonstrates the ability to evaluate and opine on the reasonableness of Plaintiff's mitigation efforts. Nonetheless, the Gaintner Report fails to perform any analysis of Plaintiff's mitigation efforts after Plaintiff secured a replacement lender.

Despite the critique presented in the Simon Report, the Gaintner Rebuttal Report offers no explanation why the three unbuilt Stores remain unbuilt more than three years after a replacement lender was secured.¹⁰ Neither Gaintner report explains why the Plaintiff was not able to continue to mitigate its damages by utilizing its cash reserves to build one or more of the unbuilt stores. Schedule 6.1 to the Gaintner Report shows significant cash balances in 2014 and after, which presumably could have been utilized to mitigate Plaintiff's damages, as it had in the past, absent funding from the replacement lender.

As discussed at length in the Simon Report, mitigation must be taken into account when calculating damages, the omission of a mitigation analysis, beyond the cash balance analysis, renders the Gaintner Report speculative. Moreover, the omission of a full and complete mitigation analysis is particularly glaring given the extensive work performed to demonstrate and opine on the reasonableness of Plaintiff's mitigation efforts related to Stores #11, #12, and #13. Nonetheless, the Gaintner Rebuttal Report fails to address any of Simon's criticisms regarding the failure to address Plaintiff's mitigation efforts.

In summary, the Gaintner Rebuttal Report concludes that the conclusions in the Gaintner Report are stated to a reasonable degree of certainty and are not speculative despite Simon's criticisms.¹¹ However, it is not clear on what basis Mr. Gaintner can assert that the damages are calculated to a reasonable degree of certainty and are not speculative, if Plaintiff's mitigation efforts, have not been properly evaluated and given that Simon's criticisms of such are not addressed in the Gaintner Rebuttal Report.

⁹ Gaintner Rebuttal Report, pg. 3.

¹⁰ All three of the Gaintner Report damage calculations indicate that the unbuilt Stores should have been built in 2014 (Gaintner Report Schedules 11, 12, 13), with one store being built in 2013 (Gaintner Report Schedule 11 and 12). Therefore, the Gaintner Report inexplicably assumes that Plaintiff was damaged for unbuilt Stores when Republic was no longer the Plaintiff's lender and during a period when Plaintiff had a new lender.

¹¹ Gaintner Rebuttal Report, pg. 3.

4.4. Business Plan

The Gaintner Rebuttal Report states:

The Davis Report is critical that no written business plan is presented substantiating the TM Plans. However, a formal business plan is not a required component in either establishing or measuring damage, and the lack thereof does not negate damage. Further, TM... had expressly communicated its plans and intentions to RBAZ.¹²

First, the Gaintner Rebuttal Report mischaracterizes the criticism in the Simon Report. The Simon Report states:

Further, the Gaintner Report does not identify a business plan prepared contemporaneously with Republic Bank's involvement, which specifies the number of stores and timelines for opening the stores utilized in the Gaintner damage calculations.¹³

The Simon Report did not specify that a "formal" written business plan was necessary to establish or measure damages. The Simon Report simply notes that the Gaintner Report fails to identify where the Plaintiff documented or communicated the expected number of Stores and timelines for opening the Stores. This information is central to the Plaintiff's damages as it would demonstrate what the "Should Have Been" scenario would be, which is necessary in order to calculate lost profits. Such information could have been formally or informally prepared and/or communicated by Plaintiff.

Second, the Gaintner Rebuttal Report states that Plaintiff "expressly communicated its plans and intentions to RBAZ."¹⁴ Yet, the Gaintner Rebuttal Report fails to identify the specific documents or instances which "expressly" explains Plaintiff's plans. This is, in fact, the point that was being made in the Simon Report, i.e., that the Gaintner Report fails to identify any contemporarily prepared documents explaining the number of store openings and timelines expected by Plaintiff, which forms the basis for its damage claims. The Gaintner Rebuttal Report again makes a conclusory statement and fails to address the initial criticism presented in the Simon Report.

5. Conclusion

The Gaintner Rebuttal Report fails to adequately rebut the material errors in the damage calculations presented in the Gaintner Report, as discussed in the Simon Report. Moreover, the Gaintner Rebuttal Report fails to rebut or address the criticisms related to the lack of mitigation analysis in the Gaintner Report.

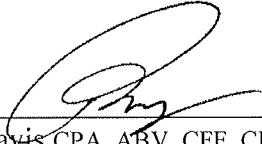
¹² Gaintner Rebuttal Report, pg. 2.

¹³ Simon Report, pg. 3.

¹⁴ Ibid.

Simon Consulting, LLC
Thompson/McCarthy Coffee Co. v. RepublicBankAZ, N.A.

Based on the above, no adjustments or modifications to the conclusions in the Simon Report are necessary.



Peter S. Davis CPA, ABV, CFF, CIRA, CTP, CFE
Simon Consulting, LLC

1/17/2017

Date



PETER S. DAVIS CPA, ABV, CFF, CIRA, CTP, CFE

EDUCATION AND TRAINING

Federal Bureau of Investigation Citizens' Academy, 2004

Master of Business Administration, Arizona State University, 2001

Bachelor of Science in Accounting, Loyola Marymount University, 1991

Minor in Political Science, Loyola Marymount University, 1991

Numerous technical training courses on subjects including damages, valuation, fraud detection, fraud deterrence, accounting, finance and economics

PROFESSIONAL DESIGNATIONS

Certified Public Accountant, State of Arizona,¹ 1995

Accredited in Business Valuation, 2005

Certified in Financial Forensics, 2008

Certified Insolvency and Restructuring Advisor, 2005

Certified Turnaround Professional, 2012

Certified Fraud Examiner, 1998

PROFESSIONAL ORGANIZATIONS

American Bankruptcy Institute, Member

American Institute of Certified Public Accountants, Member

Arizona Foundation for Legal Services & Education, Next Generation Fellow

Arizona Society of Certified Public Accountants, Member

Association of Certified Fraud Examiners, Member

Association of Certified Fraud Examiners, Arizona Chapter, Member

Association of Insolvency and Restructuring Advisors, Member

National Association of Federal Equity Receivers, Member

National Association of Corporate Directors, Member

Turnaround Management Association, Member

¹ Peter S. Davis is a licensed CPA in Arizona. Neither Peter S. Davis nor Simon Consulting, LLC provide audit or review services.



PETER S. DAVIS CPA, ABV, CFF, CIRA, CTP, CFE

PUBLICATION

“Fraudulent Manipulation of Bank Statements in Adobe Acrobat PDF format,” *Receivership NEWS*, a Publication of the California Receivers Forum, Summer 2013 Issue 48, page 22

COURT APPOINTMENTS

Magnotta v Serra, et al; Maricopa County Superior Court; Receiver, 2016

Arizona Corporation Commission v DenSco Investment Corporation; Maricopa County Superior Court; Receiver, 2016

Protective Life Insurance Company v MJKL Enterprises LLC; Maricopa County Superior Court; Receiver, 2016

Titan Capital Holdings LLC, et al; Maricopa County Superior Court; Receiver, 2016

Cale A. Clayton v CV Flooring Mgmt. LLC, et al.; Maricopa County Superior Court; Receiver, 2015

Hallmark Hospice LLC v Garrett, et al; Maricopa County Superior Court; Receiver, 2014

Ronco v Friedman, et al.; Maricopa County Superior Court; Special Master, 2014

Securities and Exchange Commission v Berger, et al.; United States District Court, Eastern District of New York; Distribution Agent, 2014

SVP Restaurant Financing LLC v KCI Restaurant Management LLC, et al.; Maricopa County Superior Court; Receiver, 2014

PNTM Management Services LLC, et al. v Absolute Healthcare Inc., et al.; Maricopa County Superior Court; Receiver, 2014

Sonnenschein, et al. v Palo Verde Capital LLC; Maricopa County Superior Court; Receiver, 2013

Hellman v Edgar, Ancillary Care Solutions LLC; Maricopa County Superior Court; Receiver, 2013

Federal Trade Commission v Money Now Funding LLC, et al.; United States District Court, District of Arizona; Receiver, 2013

Pipe Doctor Plumbing LLC; Maricopa County Superior Court; Special Master, 2013

Pham v All Greens Inc., et al.; Maricopa County Superior Court; Receiver, 2013

Talisman Partners LLC v LHR Inc., et al.; Maricopa County Superior Court; Receiver, 2012

Federal Trade Commission v National Card Monitor LLC, et al.; United States District Court, District of Arizona; Receiver, 2012

Federal Trade Commission v ELH Consulting LLC, et al.; United States District Court, District of Arizona; Receiver, 2012



PETER S. DAVIS CPA, ABV, CFF, CIRA, CTP, CFE

COURT APPOINTMENTS (Continued)

Laflin, et al. v TLR Group LLC, et al.; Maricopa County Superior Court; Special Master, 2012

Crane v Crane; Maricopa County Superior Court; Tax Practitioner, 2012

Securities and Exchange Commission v Poirier, et al.; United States District Court, District of Arizona; Distribution Agent, 2012

Golden State Bank v Sean Brunske (dba Travel Inn); Maricopa County Superior Court; Receiver, 2011

In the Matter of the Estate of Aida M. Vavro, Deceased; Maricopa County Superior Court; Third Party Successor Trustee, 2011

Klemp v AZ Wine Outlet Party Rentals and Appliances #1 LLP, et al.; Maricopa County Superior Court; Receiver, 2011

Two Brothers XI Inc., Debtor, et al.; United States Bankruptcy Court, District of Arizona; Chapter 11 Examiner, 2011

Lohoff v Lohoff; Maricopa County Superior Court; Business Evaluator, 2011

Cedar Unified School District; Arizona State Board of Education; Receiver, 2011

McMaster v Master Block Inc., et al.; Maricopa County Superior Court; Receiver, 2011

Bank of America NA v Estrella Mountain Dentistry PLLC, et al.; Maricopa County Superior Court; Receiver, 2011

Babcock v Babcock; Maricopa County Superior Court; Family Law Master, 2011

Wenima Development LLC v Wenima Village LP, et al.; Apache County Superior Court; Receiver, 2010

Marino v Focus Home Therapy & Medical Services LLC, et al.; Maricopa County Superior Court; Receiver, 2010

First Fidelity Bank NA v TL Qik Stop Market Inc.; Maricopa County Superior Court; Receiver, 2010

National Bank of Arizona NA v Rock Hard Designs Inc.; Maricopa County Superior Court; Receiver, 2010

Waldren v Allen, et al.; Maricopa County Superior Court; Special Master, 2010

Tung v US Mental Math Federation Inc., et al.; Maricopa County Superior Court; Receiver, 2010

First Citizens Bank & Trust Company v Terra Villa Estates LLC, et al.; Maricopa County Superior Court; Receiver, 2010

JPMorgan Chase Bank NA v Hutchinson's Furniture of Lake Havasu City Inc., et al.; Mohave County Superior Court; Receiver, 2010



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COURT APPOINTMENTS (Continued)

First Financial Bank NA v Mesa Auto X-Change Inc., et al.; Maricopa County Superior Court; Receiver, 2010

US Bank NA v Educational Facilities Acquisition LLC; Maricopa County Superior Court; Receiver, 2010

Vega v Macias, et al.; Maricopa County Superior Court; Rule 53 Special Master, 2010

Securities and Exchange Commission v McMillan; United States District Court, District of Arizona; Distribution Agent, 2010

Midfirst Bank v Alba Investment Group LLC, et al.; Maricopa County Superior Court; Receiver, 2009

Heights Village LLC v Noodles Development LP; Maricopa County Superior Court; Receiver, 2009

Odom, et al. v Andrews, et al.; Maricopa County Superior Court; Receiver, 2009

First Regional Bank v Casa Real Apartments LLC; Maricopa County Superior Court; Receiver, 2009

Fortune, et al. v Hoover, et al.; Mohave County Superior Court; Receiver, 2009

Stradling v Grant, et al.; Maricopa County Superior Court; Temporary Receiver, 2009

Steri-Lube International Ltd.; Maricopa County Superior Court; Receiver, 2009

Sturman v Adamson, et al.; Maricopa County Superior Court; Special Master, 2009

KeyBank NA v Power Marine Sales Inc., et al.; Maricopa County Superior Court; Receiver, 2009

Wells Fargo Bank NA v Vega, Pratt, et al.; Maricopa County Superior Court; Receiver, 2009

Sherk v Wenrick, TGR Properties LLC; Maricopa County Superior Court; Receiver, 2008

Prestige Window Cleaning Inc., et al.; Maricopa County Superior Court; Receiver, 2008

M&I Marshall & Ilsley Bank v Namwest-Pinnacle Peak & 7th Avenue LLC; Maricopa County Superior Court; Receiver, 2008

M&I Marshall & Ilsley Bank v Namwest-67th Avenue & I-10 LLC; Maricopa County Superior Court; Receiver, 2008

M&I Marshall & Ilsley Bank v 67th & Glendale LLC; Maricopa County Superior Court; Receiver, 2008

Cook v Cook; Maricopa County Superior Court; Certified Tax Practitioner, 2008

Aracaju Inc., Gwilliam v True North Inc., Gwilliam; Maricopa County Superior Court; Receiver, 2008



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COURT APPOINTMENTS (Continued)

Four Horsemen LLC, et al. v Coram Deo Partners Inc., et al.; Maricopa County Superior Court; Rule 53 Special Master and Receiver, 2007

Wiggins v Kremer, et al.; Maricopa County Superior Court; Court Appointed Accountant, 2007

Lugar v Spanfelner, Advanced Pump and Controls Inc.; Maricopa County Superior Court; Court Appointed Accountant, 2007

Kaar v Gildersleeve, Pipkin, Byron, Dental Impressions Family Dentistry LLC, Advanced Family Dentistry LLC; Maricopa County Superior Court; Rule 53 Special Master, 2007

Arizona Corporation Commission v The 12 Percent Fund I LLC, Coyote Growth Management LLC; Maricopa County Superior Court; Receiver, 2007

Union Elementary School District; Arizona State Board of Education; Receiver, 2007

Garcia v Young; Maricopa County Superior Court; Court Appointed Accountant, 2007

Jones v K&L Furniture, et al.; Pinal County Superior Court; Receiver, 2007

Arizona Corporation Commission v Trend Management Group Inc., Trend Capital LLC; Maricopa County Superior Court; Receiver, 2006

Drexler v Ray, Creative Fine Dining LLC; Maricopa County Superior Court; Rule 53 Special Master, 2006

Jones, Dirt 101 LLC, Access 101 LLC v Myers, KJK Management Inc.; Maricopa County Superior Court; Receiver, 2006

White-DiGiuseppe v DiGiuseppe; Maricopa County Superior Court; Forensic Accountant, 2006

Global Grounds Greenery LLC, Debtor, et al.; United States Bankruptcy Court, District of Arizona; Estate Representative, 2006

Gates-04 LLC, et al. v ENTI Inc., et al.; Maricopa County Superior Court; Receiver, 2006

Colorado City Unified School District; Arizona State Board of Education; Receiver, 2005

JM Financial Capital LLC v Olcott & Cannon, PLLC; Maricopa County Superior Court; Deputy Receiver, 2005

Flores v Martinez; Pinal County Superior Court; Business Appraiser, 2005

Jones v Jones; Maricopa County Superior Court; Rule 53 Special Master and Receiver, 2005

Normand v Normand; Maricopa County Superior Court; Rule 53 Special Master and Receiver, 2005

Tartaglio v Tartaglio; Maricopa County Superior Court; Forensic Accountant, 2005

Miller Revocable Family Trust; Maricopa County Superior Court; Rule 53 Special Master, 2004

Will, Debtor, et al.; United States Bankruptcy Court, District of Arizona; Plan Agent, 2003



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COURT APPOINTMENTS (Continued)

Fox v Brown; Maricopa County Superior Court; Forensic Accountant, 2002

Klass v Mothershead; Maricopa County Superior Court; Forensic Accountant, 2002

Sikorsky v Sikorsky; Maricopa County Superior Court; Rule 53 Special Master, 2002

Lever v Lever; Maricopa County Superior Court; Rule 53 Special Master, 2001

DCS v Buttrum; Maricopa County Superior Court; Rule 53 Special Master, 2001

BOARD OF DIRECTORS APPOINTMENTS

Acumen Energy Solutions Inc.; Board of Directors; 2013 - Present

The Tungland Corporation; Board of Directors; 2013 - Present

Davis Enterprises Management Company; Board of Directors; 2013 - 2015

Arizona Foundation for Legal Services & Education; Board of Directors; 2013 - Present

Guyann Corporation; Board of Directors; 2012 - Present

Three-Five Systems Inc.; Board of Directors; 2006 - 2010

TESTIMONY EXPERIENCE

Magnotta v Serra, et al; Maricopa County Superior Court; Testimony, 2016

Arizona Corporation Commission v DenSco Investment Corporation; Maricopa County Superior Court; Testimony, 2016

James Lloyd Goble v Keri Truscan-Goble; Maricopa County Superior Court; Testimony, 2016

TKC Aerospace, Inc. v Phoenix Heliparts, Inc., et al.; United States Bankruptcy Court, District of Arizona; Testimony, 2016

Bernard Cantor, et al. v Green Hills Patient Center, Inc., et al.; Maricopa County Superior Court; Testimony, 2016

TKC Aerospace, Inc. v Phoenix Heliparts, Inc., et al.; Maricopa County Superior Court; Testimony, 2015

Mohit Asnani v Ponderosa Botanical Care, Inc. d/b/a Ponderosa Releaf Dispensary; Pinal County Superior Court; Testimony, 2015

PNTM Management Services LLC, et al. v Absolute Healthcare Inc., et al.; Maricopa County Superior Court; Testimony, 2015 and 2014

SVP Financial Services Partners LLLP, et al.; United States Bankruptcy Court, District of Arizona; Testimony, 2014

James A. Worman v LeadMD Inc.; Maricopa County Superior Court; Testimony, 2014



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TESTIMONY EXPERIENCE (Continued)

Estate of Ellen Derges Foster; Maricopa County Superior Court; Testimony, 2014

Trisports.com LLC, et al.; United States Bankruptcy Court, District of Arizona; Testimony, 2014

Galczynski, et al. v Terra Funding LLC, et al.; American Arbitration Association; Testimony, 2014
Talisman Partners LLC v LHR Inc., et al.; Maricopa County Superior Court; Testimony, 2014

Tri-Core Companies LLC, et al.; Arizona Corporation Commission; Testimony, 2014

Blumberg v Blumberg; Maricopa County Superior Court; Testimony, 2013

State of Arizona v DeMocker; Yavapai County Superior Court; Testimony, 2013

Roberts v Roberts; Maricopa County Superior Court; Testimony, 2013

State of Arizona v Nozicka, et al.; Maricopa County Superior Court; Grand Jury Testimony, 2012

Enterprise Bank & Trust v Saad, et al.; Maricopa County Superior Court; Testimony, 2012

Two Brothers XI Inc., Debtor, et al.; United States Bankruptcy Court, District of Arizona; Testimony, 2012

State Farm v Stone, et al.; Maricopa County Superior Court; Testimony, 2012

Lohoff v Lohoff; Maricopa County Superior Court; Testimony, 2012

Field v Field; Maricopa County Superior Court; Testimony, 2012

Bennett, Debtor; United States Bankruptcy Court, District of Arizona; Testimony, 2011

Film Management Services Corporation, Debtor; United States Bankruptcy Court, District of Arizona; Testimony, 2011

In the Matter of the Estate of T. Marie Smith, Deceased; Smith v Del Giorgio; Coconino County Superior Court; Testimony, 2011

Stradling v Grant, et al.; Maricopa County Superior Court; Testimony, 2011

Greenbelt Property Management LLC, Debtor, v Transnation Title Insurance Company; United States Bankruptcy Court, District of Arizona; Testimony, 2011

McMaster v Master Block Inc., et al.; Maricopa County Superior Court; Testimony, 2011

Bank of America NA v Estrella Mountain Dentistry PLLC, et al.; Maricopa County Superior Court; Testimony, 2011

In the Matter of a Member of the State Bar of Arizona, Robert J. Rosepink; Supreme Court of Arizona; Testimony, 2010

Fortune, et al. v Hoover, et al.; Mohave County Superior Court; Arbitration Testimony, 2010



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TESTIMONY EXPERIENCE (Continued)

Marrero, et al. v Empyrean Construction LLC, et al.; Maricopa County Superior Court; Testimony, 2010

Maasen v Maasen; Maricopa County Superior Court; Testimony, 2010

Happy State Bank v Desert Springs Community Corporation, et al.; District Court of Clark County, Nevada; Testimony, 2010

Ravenscroft Conservatorship; Maricopa County Superior Court; Testimony, 2010

Batlan as Disbursing Agent for Debtor Thompson & Walters Nursery LLC v WT Consulting Inc., et al.; United States Bankruptcy Court, District of Oregon; Testimony, 2010

Midfirst Bank v Alba Investment Group LLC, et al.; Maricopa County Superior Court; Testimony, 2010

Odom, et al. v Andrews, et al.; Maricopa County Superior Court; Testimony, 2009

Cochise Agricultural Properties LLC, et al. v Ratliff Farms LLC, et al.; United States Bankruptcy Court, District of Arizona; Testimony, 2009

Leroy v Seattle Funding Group of Arizona LLC, et al.; Maricopa County Superior Court; Testimony, 2009

Sprouss v Sprouss; Maricopa County Superior Court; Testimony, 2009

KeyBank NA v Power Marine Sales Inc., et al.; Maricopa County Superior Court; Testimony, 2009

Sherk v Wenrick, TGR Properties LLC; Maricopa County Superior Court; Testimony, 2009

Arizona Corporation Commission v Trend Management Group Inc., et al.; Maricopa County Superior Court; Testimony, 2009

Lucerne Development LLC v Offices at Desert Fairways Unit Owners Association, et al.; Maricopa County Superior Court; Testimony, 2008 and 2009

Allen v Gwilliam; Maricopa County Superior Court; Testimony, 2008

State of Arizona v Galyon, et al.; Maricopa County Superior Court; Grand Jury Testimony, 2008

Aracaju Inc., Gwilliam v True North Inc., Gwilliam; Maricopa County Superior Court; Testimony, 2008 and 2009

State of Arizona v Herndon; Maricopa County Superior Court; Testimony, 2008

Molina v Molina; Maricopa County Superior Court; Testimony, 2008

Drexler v Ray, Creative Fine Dining LLC; Maricopa County Superior Court; Testimony, 2007

Flores v Martinez; Pinal County Superior Court; Testimony, 2007



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TESTIMONY EXPERIENCE (Continued)

Global Grounds Greenery LLC, Debtor, et al.; United States Bankruptcy Court, District of Arizona; Testimony, 2006, 2007, and 2008

Gates-04 LLC, et al. v ENTI Inc., et al.; Maricopa County Superior Court; Testimony, 2006 and 2007

Garcia v Young; Maricopa County Superior Court; Testimony, 2007

Primary Systems Services Group LLC v Clayjen Holding Co. LLC, et al.; Coconino County Superior Court; Testimony, 2007

Hydromaid International Inc., Debtor; United States Bankruptcy Court, District of Arizona; 341 Hearing Testimony, 2007

Kaar v Gildersleeve, et al.; Maricopa County Superior Court; Testimony, 2007

Everett, Debtor; United States Bankruptcy Court, District of Arizona; Testimony, 2007

White-DiGiuseppe v DiGiuseppe; Maricopa County Superior Court; Testimony, 2007

Patchell v Patchell; Maricopa County Superior Court; Testimony, 2007

Romano v The Corner Shopping Center LLC, et al.; Maricopa County Superior Court; Testimony, 2006

Jones, Dirt 101 LLC, Access 101 LLC v Myers, KJK Management Inc.; American Arbitration Association; Testimony, 2006

Cohill's Building Specialties Inc. v QC Construction Products LLC; United States District Court, District of Arizona; Testimony, 2006

Miller Revocable Family Trust; Maricopa County Superior Court; Testimony, 2006

Colorado City Unified School District Receivership; Arizona Senate; Committee on Appropriations, Committee on K-12 Education; Testimony, 2006

Colorado City Unified School District Receivership; Arizona House of Representatives, Committee on Appropriations (B), Committee on K-12 Education; Testimony, 2006

JM Financial Capital LLC v Olcott & Cannon, PLLC; Maricopa County Superior Court; Testimony, 2006

Dusharm v Elegant Custom Homes Inc.; United States Bankruptcy Court, District of Arizona; Testimony, 2006

Colorado City Unified School District Receivership; Arizona State Board of Education; Testimony, 2006

Saddle Rock Ranch, et al. v Burke; American Arbitration Association; Testimony, 2005

Strawberry Water Company Inc. v Paulsen et al; Maricopa County Superior Court; Testimony, 2005



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TESTIMONY EXPERIENCE (Continued)

Tartaglio v Tartaglio; Maricopa County Superior Court; Testimony, 2005

Park v Park; Maricopa County Superior Court; Testimony, 2005 and 2004

Adams v Schering-Plough; United States District Court, District of Arizona; Testimony, 2005

Blakemore v Blakemore; Maricopa County Superior Court; Testimony, 2004

Miller v Young; Maricopa County Superior Court; Testimony, 2003

Fox v Brown; Maricopa County Superior Court; Testimony, 2003

Bentley v Bentley; Maricopa County Superior Court; Testimony, 2003

Southwest Designs v Aqua Perfect; Maricopa County Superior Court; Testimony, 2003

Mendoza v Mungillo; Maricopa County Superior Court; Testimony, 2002

Parmelee v Parmelee; Maricopa County Superior Court; Testimony, 2002

Cooper v Martin; Maricopa County Superior Court; Testimony, 2002

Wenzel Matter; United States District Court, District of Arizona; Testimony, 1999

Hard Rock Café v Camelback Plaza; Maricopa County Superior Court; Testimony, 1999

Thompson/McCarthy Coffee Co. v. RepublicBankAZ, N.A.
Documents Considered

Document	Bates #
1 Second Amended Complaint Dated 4/7/2015	
2 Answer to Second Amended Complaint Dated 5/11/2015	
3 Plaintiff's Request for Production of Documents and Things to RepublicBankAZ, N.A. Dated 4/13/2015	
4 Plaintiff's Initial 26.1 Disclosure Statement Dated 8/25/2015	
5 Plaintiff's First Supplemental Rule 26.1 Disclosure Statement Dated 11/2/2015	
6 Defendant's Initial Disclosure Statement Pursuant to Rule 26.1 Dated 8/26/2015	
7 Defendant's First Supplemental Disclosure Statement Dated 11/2/2015	
8 Joint Report Dated 8/31/2015	
9 Proposed Scheduling Order	
10 Scheduling Order Dated 10/8/2015	
11 Douglas T. Haman Report Dated 9/20/2016	
12 Enhanced Consultive Solutions, LLC Draft Report Dated 10/25/2016	
13 Leroy M. Gaintner Report Dated 3/5/2016	
14 Leroy M. Gaintner Report and Work Papers	GA000001-437
15 Nationwide Valuations Business Valuation Report Dated 10/24/2012	
16 Thompson/McCarthy Coffee Co. Profit & Loss Statements for Years 2008-2015 Q1	
17 Thompson/McCarthy Coffee Co. Balance Sheets for Years 2011-2015 Q1	
18 Dutch Brothers Coffee Franchise Agreement - Glendale/12th DB. LLC Dated 12/15/2011	
19 Dutch Brothers Coffee Franchise Agreement - Greenfield/Southern Db. LLC Dated 12/19/2011	
20 Dutch Brothers Coffee Franchise Agreement - Rural & Guadalupe Dated 7/21/2010	
21 Miscellaneous Emails	RBAZ004232-4237
22 Miscellaneous Emails - Re: Paradise Village SBA Loan	TMCC00059-60
23 Miscellaneous Emails Requested by Plaintiff's SBA Expert	RBAZ001225-1226
24 Miscellaneous Emails Requested by Plaintiff's SBA Expert	RBAZ001504
25 Miscellaneous Emails Requested by Plaintiff's SBA Expert	RBAZ001833
26 Miscellaneous Emails Requested by Plaintiff's SBA Expert	RBAZ001853-1854
27 Miscellaneous Emails Requested by Plaintiff's SBA Expert	RBAZ001858
28 Miscellaneous Emails Requested by Plaintiff's SBA Expert	RBAZ001859-1860
29 Various Mutual of Omaha Bank Documents	
30 Litigation Service Handbook Fourth Edition Chapter 2	
31 Plaintiff's Sixth Supplemental Rule 26.1 Disclosure Statement - Gaintner Rebuttal Report	GA000438-442
32 Forensic & Valuation Services Practice Aid - Attaining Reasonable Certainty in Economic Damages Calculations	
33 Expert Report of Lisa Lerner dated November 1, 2016.	
34 Expert Rebuttal Report of Lisa Lerner dated November 23, 2016	
35 BVR's Guide to Lost Profits Damages Case Law - Chapter 1 - Reasonable Certainty	

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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THOMPSON/McCARTHY COFFEE CO.,
an Arizona corporation,

Plaintiff,

vs.

REPUBLICBANKAZ, N.A.,

Defendant.

Case No. CV2014-014647

**REPLY IN SUPPORT OF
REPUBLICBANKAZ, N.A.'s
APPLICATION FOR AWARD OF
ATTORNEYS' FEES AND COSTS**

(Assigned to Hon. Dawn Bergin)

Pursuant to Rule 54(g), Ariz. R. Civ. P., RepublicBankAZ, N.A. ("Republic") hereby files this Reply to the *Response to RepublicBankAZ, N.A.'s Application for Attorneys' Fees and Costs* (the "Response") filed by Thompson/McCarthy Coffee Co.'s ("TMCC") on November 4, 2017, to request an award of attorneys' fees in the amount of \$402,835.50, costs in the amount of \$97,506.50, expended by Republic in defense of the claims asserted by Thompson/McCarthy Coffee Co.'s ("TMCC") in this action. This Reply is supported by the following Memorandum of Points and Authorities and the entire record before the Court.

1 **PREFATORY STATEMENT**

2 It is nothing less than ironic that the majority of TMCC's Response is spent on
3 Republic's alleged "delay" in asserting release, when TMCC was the actual signor of the
4 subject Release, had actual knowledge thereof, and therefore should never have asserted
5 *any* claims against Republic in the first instance. Consequently, TMCC either: (i) was in
6 possession of the Consent, ignored the comprehensive Release therein, and then
7 proceeded to file a lawsuit against Republic; **or** (ii) overlooked the Consent within the
8 28,000 pages of documents that were exchanged between the parties until Republic's
9 *Third Supplemental Disclosure Statement*, yet proceeded with litigation against Republic
10 after TMCC was put on notice.

11 Further, TMCC's Response is silent as to the fact that Republic twice offered to
12 resolve this matter at no further cost to TMCC, but TMCC rejected Republic's offers of
13 settlement, and charged forward with its lawsuit in a panicked yet unsuccessful effort to
14 invalidate the Consent and Release. Republic has incurred attorneys' fees in the amount
15 of \$402,835.50, costs in the amount of \$97,506.50 only because TMCC breached the
16 terms and conditions of the Release, which by Arizona law, is a contract in and of itself,
17 thus Republic - as the prevailing party - should be awarded the entire amount of its
18 attorneys' fees and costs.

19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 **I. REPUBLIC IS ENTITLED TO ITS ATTORNEYS' FEES AND COSTS**
21 **UNDER CONTRACT AND A.R.S. § 12-341.01.**

22 **A. The parties' contract.**

23 Republic does not dispute TMCC asserted tort claims for Negligent
24 Misrepresentation and Fraudulent Inducement - claims made in breach of the parties'
25 written Release. The following is also undisputed:
26

1 (i) On September 19, 2013, Republic and TMCC's substitute lender,
2 Mutual of Omaha Bank ("MOB"), entered into the *Loan Purchase and Sale Agreement*
3 (*With Consent of Obligors and Pledgors*) (hereafter the "Loan Purchase Agreement" or
4 "LPSA"), and "[i]n connection with the LPSA, Plaintiff signed a document entitled
5 "Consent of Obligors and Pledgors" (the 'Release'), which included a broad release of
6 claims." [See *Under Advisement Ruling* dated September 8, 2017 at pg. 1.]

7 (ii) In Arizona, a "[r]elease is a contract." *Parrish v. United Bank of*
8 *Arizona*, 164 Ariz. 18, 20, 790 P.2d 304, 306 (App. 1990); *see also Spain v. General*
9 *Motors Corp., Chevrolet Motor Div.*, 171 Ariz. 226, 227, 829 P.2d 1272, 1273 (App.
10 1992), *citing Parrish*, *supra*, 164 Ariz. 18, 790 P.2d 304.). More specifically,

11 (1) A release is a writing providing that a duty owed to the
12 maker of the release is discharged immediately or on the
13 occurrence of a condition.

14 (2) The release takes effect on delivery as stated in §§ 101- 03
15 and, subject to the occurrence of any condition, discharges the
16 duty.

17 Restatement (Second) of Contracts § 284 (1981);

18 (iii) The Release was executed by TMCC in favor of Republic, and is a
19 part of the LPSA.

20 The Court rejects [TMCC's] argument that the Consent is not
21 part of the LPSA because the LPSA: (1) explicitly references
22 the Consent and notes that the Consent is attached to the
23 LPSA; (2) cites the Release as a benefit accruing to Republic;
24 (3) is specifically referenced in the Consent; (4) is entitled
25 'Loan Purchase and Sale Agreement (*With Consent of*
26 *Obligors and Pledgors*) (emphasis added); and (5) is
numbered pages 1 through 8 with the Consent immediately
following at pages 9 through 12."];

[June 1, 2017 *Under Advisement Ruling* at ¶ 3];

(iv) Under the LPSA, which includes the Release:

1 5.4 Attorneys' Fees. In the event of a lawsuit or arbitration
2 proceeding **under this Agreement or any of the**
3 **Assignment Documents, the prevailing party shall be**
4 **entitled to recover costs and reasonable attorneys' fees**
5 **incurred in connection with the lawsuit or arbitration**
6 proceeding, as determined by the court or arbitrator (and not
7 by a jury).

8 (Emphasis added.)

9 As this matter would not have arisen but for TMCC's breach of the Release, and
10 thus its obligations under the LPSA, Republic should be awarded its attorneys' fees and
11 costs under Section 5.4 of the LPSA. TMCC argues that because it was not a party to the
12 Loan Purchase Agreement, there is "no factual basis for Republic to claim TMCC agreed
13 to its terms." [Response at Section II, pg. 5.] TMCC made this same argument in its
14 MSJ Response, which was flatly rejected by the Court in its Under Advisement Ruling
15 dated May 30, 2017 at Paragraph 4. Specifically, and as noted by this Court, *the very*
16 *first sentence of the Consent* states that:

17 **Each Obligor and each Pledgor** identified below hereby
18 represents, warrants and agrees as follows, with the
19 understanding and intention that Lender and Assignee will rely
20 thereon **in entering into the foregoing Loan Purchase and**
21 **Sale Agreement ("Agreement")**:

22 . . .
23 (c) Each Obligor or Pledgor . . . represents and warrants
24 to Lender that . . . (ii) such Obligor or Pledgor is authorized
25 and empowered to **enter into this Agreement, and the**
26 **individual executing this Agreement on behalf of such**
Obligor or Pledgor is authorized to do so, and take any
actions necessary or desirable, in connection the
transaction described in the Agreement.

(Emphasis added.)

Consequently, Jim Thompson, on behalf of TMCC, "entered[ed] into this Agreement"
which was unequivocally defined as the "Loan Purchase and Sale Agreement," further

1 confirming that TMCC is a party thereto and subject to the express attorneys' fees and
2 costs provision of Section 5.4 of said "Agreement" or LPSA.

3 To that end, Republic maintains that under Section 5.4 of the LPSA, Republic may
4 recover costs in the amount of \$97,506.50, which includes its expert costs, since Republic
5 is the prevailing party and Section 5.4 - which deliberately permits the prevailing party "to
6 recover costs and reasonable attorneys' fees"- is precisely the kind of agreement
7 contemplated and authorized by A.R.S. § 12-332(A)(6) with regard to the allocation of
8 costs. Notably absent in Section 5.4 is any kind of limitation as to the definition or
9 recovery of "costs." ¹

10 **B. A.R.S. § 12-341.01.**

11 Alternatively, Republic is entitled to recover attorneys' fees under A.R.S. § 12-
12 341.01. The Court of Appeals in *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*,
13 elaborated upon the distinction between a contractual duty implied-in-fact and a duty
14 implied-in-law as it relates to an award of fees under A.R.S. § 12-341.01(A). 198 Ariz.
15 10, 6 P.3d 315 (App. 2000). There, the court acknowledged that an implied-in-fact
16 contractual term is part of the contract between the parties, the breach of which
17 could give rise to a claim "arising out of contract" and form the basis for an award of
18 attorneys' fees. The court of appeals thus held that:

19 [W]hen a contractual duty, either express or implied-in-
20 fact, merely repeats the duty already imposed by law, a
21 breach of that duty does not create a claim "arising out of
22 contract" under A.R.S. § 12- 341.01(A). On the other hand,
23 when an implied-in-fact term creates an obligation in

24 ¹ Republic's arguments as to costs are set forth more fully in its *Reply to Response and Opposition to*
25 *RepublicBankAZ's Statement of Costs* filed on October 27, 2017 ("Reply in support of Statement of Costs"). In
26 response to TMCC's lengthy discussion about costs, which should have been raised in a sur-response, Republic
reasserts its arguments as set forth in its Reply in support of Statement of Costs, and the applicable Arizona case law
cited therein.

1 addition to those implied by law, a breach of that
2 obligation would arise from the contract.

3 *Ramsey Air Meds, LLC*, 198 Ariz. at 17,315 P.3d at 322.

4 Here, under the *Ramsey* analysis, the Release contained express and "implied-in-
5 fact" terms, which created an obligation for TMCC to release any and all claims against
6 Republic in relation to the Loans. Such an obligation to release claims was not implied by
7 law, and TMCC's breach of the Release is a breach of contract under both the express and
8 implied-in-fact terms of the LPSA and specifically, the Consent thereto.

9 Finally, although attorneys' fees under A.R.S. § 12-341.01(A) are generally
10 restricted to actions "arising out of a contract," the Arizona Supreme Court has held that
11 this requirement is not limited only to those cases in which a contract is entered into and
12 subsequently breached. *Marcus v. Fox*, 150 Ariz. 333, 723 P.2d 682 (1986). Instead, the
13 courts have awarded attorneys' fees on non-contractual claims **as long as a contract**
14 **served as the basis, source, or origin of the dispute.** See *McKesson Chem. Co. v. Van*
15 *Waters & Rogers*, 153 Ariz. 557, 739 P.2d 211 (App. 1987) (emphasis added); *Lewin v.*
16 *Miller Wagner & Co.*, 151 Ariz. 29, 725 P.2d 736 (App. 1986) (A.R.S. § 12-341.01
17 applies where a contract "was the factor" giving rise to the litigation, clarifying *ASH,*
18 *Inc. v. Mesa Unified School Dist. No. 4*, 138 Ariz. 190, 673 P.2d 934 (App. 1983), where
19 the court held that the statute applied in an action in which a contract was "a factor"
20 causing the dispute).

21 In determining whether an action arises out of a contract within the meaning of the
22 statute, the courts will analyze and consider "the essence of the action." *ASH, Inc.*, 138
23 Ariz. at 193, 673 P.2d at 937. Thus, in *Deutsche Credit Corp.*, an action for conversion by
24 a secured creditor against the buyer of equipment subject to a security interest, the court
25 observed that the Arizona Supreme Court has directed a broad interpretation of the kinds
26

1 of transactions included within § 12- 341.01(A), and concluded that the claim fell within
2 the statute because it involved the "rights, obligations, validity, enforceability and priority
3 of rights arising out of contract." 179 Ariz. 155, 876 P.2d 1190 (App. 1994); *see also*
4 *Lohse v. Faultner*, 176 Ariz. 253, 860 P.2d 1306 (App. 1992) (action by adjoining
5 property owner as a result of forest fire arose out of contract because contract between
6 owner and subcontractor was "an essential medium" for assertion of tort claim against
7 property owner on theory that owner was third-party beneficiary of loggers contract with
8 Forest Service, establishing non-delegable duty to prevent and suppress forest fires). At a
9 bare minimum, the "essence of the action" in the instant case arises out of TMCC's breach
10 of the terms and conditions of LPSA's Consent, for which Republic should recover its
11 attorneys' fees and costs.

12 **II. REPUBLIC DID NOT DELAY IN ASSERTING ITS DEFENSES, WHICH**
13 **WERE TIMELY DISCLOSED UNDER ARIZONA'S DISCOVERY RULES.**

14 **A. Republic's Answer to Second Amended Complaint timely set forth its**
15 **defenses.**

16 TMCC argues that Republic's *Answer to Second Amended Complaint* dated
17 May 11, 2015 (the "Answer"), was somehow deficient in asserting its defenses, despite
18 the fact that Republic unequivocally raised the affirmative defense of waiver² and further
19 stated that "the Bank has been forced to retain the services of attorneys to defend this
20 action and is entitled to recover its reasonable attorneys' fees and costs in connection
21

22 ² This Court held that:

23 While it does appear that Defendant first argued that the Consent constituted a release (rather than
24 just a waiver) in its Reply in support of the Motion for Summary Judgment, the Court declines to
25 preclude Defendant from asserting release as a defense. . . the doctrines of waiver and release are
26 similar . . ."

[Minute Entry Ruling dated March 9, 2017 at pg. 3.]

1 herewith pursuant to A.R.S. §§ 12-341 and 12-341.01." [Answer at ¶¶22, 25.] But more
2 importantly, Republic's Answer affirmatively asserted:

3 The Bank has not completed its investigation or conducted
4 discovery in this matter, and as such, is uncertain as to any
5 additional affirmative defense that may be applicable in
6 response to the Complaint. **Accordingly, the Bank hereby**
7 **places TMC and its counsel on notice that the Bank**
8 **reserves the right to plead any other affirmative defenses,**
 including but not limited to those recognized or authorized,
 under Rules 8 and 12, Ariz. R. Civ. P.

9 [Answer at ¶ 27 (emphasis added).]

10 Republic, in anticipation of the fact that all of its defenses were not known and
11 obvious at the time of filing its Answer, expressly pled that subject to further investigation
12 and discovery, it reserved the right to plead other affirmative defenses, which
13 subsequently included the defense of release, as permitted under Rule 8, Ariz. R. Civ. P.
14 Thus, as early as May 2015, TMCC was put on actual notice that Republic could raise
15 additional defenses.

16 **B. TMCC's interpretation of "delay" is unreasonable and defeats the**
17 **purpose of Rules 26 and 26.1, Ariz. R. Civ. P.**

18 TMCC appears to believe that Republic's defense of release was not expressly set
19 forth until its *Third Supplemental Disclosure Statement* on November 1, 2016, despite the
20 fact that TMCC presumably possessed a copy of the LPSA and the Release upon its
21 execution of the same on or about September 19, 2013, and most certainly had a copy
22 when it was sent to TMCC's counsel by MOB as early as June 4, 2015, just two months
23 after having filed its (Second Amended) Complaint and three weeks after receiving
24 Republic's Answer. [E-mail and attachments from Jeffrey Wentzel to Buzz Slavin dated
25 June 4, 2015, bates labeled MB006327 - MB006409.] Thus, at worst, TMCC was aware
26

1 prior to filing its Complaint that it had no justification to bring any claims against
2 Republic. At best, assuming that TMCC had reviewed the 6,409 pages of documents
3 provided to it by MOB, TMCC was aware two months after filing its Complaint on
4 Republic that it had no grounds for its claims therein and could not, in good faith, bring
5 any causes of action against Republic. However, TMCC's conduct throughout this
6 litigation suggests that TMCC *did not*, in fact, review the 6,409 pages produced by MOB
7 on June 4, 2015, and that TMCC had no idea that the Consent even existed until
8 Republic's Third Supplemental Disclosure Statement, at which time TMCC ignored
9 Republic's first offer of settlement and elected to continue litigation.

10 Republic expended considerable amounts of time in the months following the
11 Complaint, requesting, producing, and reviewing roughly 28,200 pages of documents,
12 with an emphasis on those which could shed light upon TMCC's claims of Fraudulent
13 Inducement and Negligent Misrepresentation. In other words, Republic was merely
14 undertaking discovery and disclosure as intended by (among others) Rules 26 and 26.1,
15 Ariz. R. Civ. P.

16 **The rules of discovery should be broadly and liberally**
17 **construed to facilitate identifying the issues**, promote
18 justice, provide for a more efficient and speedy disposition of
19 cases, avoid surprise, and prevent the trial of a lawsuit from
20 becoming a guessing game. *Industrial Commission v.*
21 *Superior Court*, 122 Ariz. 374, 595 P.2d 166 (1979); *Cornet*
22 *Stores v. Superior Court*, 108 Ariz. 84, 492 P.2d 1191 (1972);
23 *Watts v. Superior Court*, 87 Ariz. 1, 347 P.2d 565 (1959). As
24 noted in *Simpson v. Heiderich*, 4 Ariz.App. 232, 419 P.2d 362
25 (1966):

26 **“The whole object of discovery is that mutual knowledge**
of all the relevant facts gathered by both parties is
essential to proper litigation.” 4 Ariz.App. at 236, 419 P.2d
362.

1 *U-Totem Store v. Walker*, 142 Ariz. 549, 552, 691 P.2d 315, 318 (App. 1984)(emphasis
2 added).

3 TMCC repeatedly vilifies Republic for "17 months of delay" in raising the Release
4 when TMCC itself was absolutely silent for those same 17 months! If TMCC's
5 interpretation of "delay" were applicable to the instant case, the whole purpose of
6 discovery as set forth in *U-Totem Store, supra*, would be defeated, since "identifying the
7 issues" and gathering the "relevant facts," was what Republic was doing within the
8 months following the Complaint. *U-Totem Store*, 142 Ariz. at 552, 691 P.2d at 318.
9 Furthermore, apart from untimely disclosures identified in Rule 26.1(d)(2), Rules 26 and
10 26.1 do not impose time limits for disclosing facts, witnesses or legal theories and
11 defenses. To do so would arguably be counterproductive to the discovery rules which
12 "should be broadly and liberally construed to facilitate identifying the issues, promote
13 justice, provide for a more efficient and speedy disposition of cases." *Id.* Specifically,
14 Rule 26.1(d)(2) states:

15 *Additional or Amended Disclosures.* The duty of disclosure
16 prescribed in Rule 26.1(a) is a continuing duty, and each
17 party must serve additional or amended disclosures when new
18 or additional information is discovered or revealed. A party
19 must serve such additional or amended disclosures in a timely
20 manner, but in no event more than 30 days after the
21 information is revealed to or discovered by the disclosing
22 party. If a party obtains or discovers information that it knows
23 or reasonably should know is relevant to a hearing or
24 deposition scheduled to occur in less than 30 days, the party
25 must disclose such information reasonably in advance of the
26 hearing or deposition. . . A party seeking to use information
that it first disclosed later than the deadline set in a
Scheduling Order or Case Management Order--or in the
absence of such a deadline, later than 60 days before trial--
must obtain leave of court to extend the time for disclosure as
provided in Rule 37(c)(4) or (5).

25 Republic's disclosures were entirely consistent with Rules 26 and 26.1, and it is not
26 credible for TMCC to argue otherwise. Republic acted well within the parameters of the

1 discovery rules, and its conduct was neither dilatory nor egregious as alleged by TMCC.
2 Simply put, Republic (i) was served with a Complaint, (ii) filed an Answer which
3 expressly preserved Republic's right to conduct discovery and assert additional defenses,
4 (iii) timely disclosed the Consent along with other documents over the course of
5 conducting discovery, and (iv) disclosed the legal theory that ultimately resulted in the
6 dismissal of TMCC's claims.

7 **III. CONCLUSION**

8 It is noteworthy that TMCC's Response accuses Republic of having "consciously
9 waited 17 months to assert the release it had been sitting on," when by applying that same
10 logic to TMCC's own actions, it would mean that TMCC "consciously waited" or rather,
11 failed to disclose the Consent/Release "it had been sitting on" ever since Jim Thompson
12 signed it on September 19, 2013, or at least since it was disclosed by MOB to TMCC on
13 June 4, 2015. TMCC then "consciously" chose to twice ignore Republic's offers of
14 settlement when TMCC failed to respond to Republic's Rule 408 letter dated November
15 14, 2016, and also walked out of the parties' Mediation on June 7, 2017. Hence, TMCC's
16 failure to either discover or disclose the Consent/Release as soon as June 4, 2015, was
17 followed by TMCC's refusal to settle on multiple occasions.

18 Instead, despite the disclosure of the Consent and Republic's insistence that the
19 claims were released, TMCC proceeded with its pursuit of its damages, and in so doing,
20 filed superfluous motions and . TMCC cannot simply roll the dice and then avoid the
21 consequences of its own actions. TMCC's conduct has caused Republic to defend a
22 lawsuit due to TMCC's breach of the LPSA's Consent, thus under the LPSA and A.R.S. §
23 12-341.01, Republic respectfully requests the Court to enter an award of attorneys' fees
24 and expenses in favor of Republic and against TMCC in the amount of \$402,835.50, and
25 costs in the amount of \$97,506.50.
26

1 DATED this 17th day of November, 2017.

2 QUARLES & BRADY LLP

3
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