

SUPREME COURT OF ARIZONA

THOMPSON/MCCARTHY COFFEE CO.,

Plaintiff/ Appellant/
Cross-Appellee,

v.

REPUBLICBANKAZ, N.A.,

Defendant/ Appellee/
Cross-Appellant.

Arizona Supreme Court
No. CV-20-0021-PR

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

Maricopa County
Superior Court
No. CV2014-014647

COMBINED RESPONSE TO PETITION FOR REVIEW AND APPENDIX

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INTRODUCTION

In a narrow Memorandum Decision (“Decision” or “Dec.”), the Court of Appeals (Morse, Jones, Johnsen) remanded for the superior court to apply settled law to the facts of this case. [Dec. ¶ 2](#). The Decision broke no new legal ground, created no conflict, and no confusion exists among the lower courts over how to apply the precedent in this case. The Court should deny review.

BACKGROUND*

This case involves a dispute between a successful coffee company, Thompson/McCarthy Coffee Co. (“Dutch Bros.”), and its former lender, RepublicBankAZ, N.A. (“Republic”). [Dec. ¶ 2](#). For several years, Dutch Bros. used Republic to underwrite construction loans guaranteed by the U.S. Small Business Administration (“SBA”). *Id.* Although Republic initially closed several loans for Dutch Bros., Dutch Bros. eventually lost faith in Republic’s ability to timely deliver the loans needed to expand its business. [[APP041](#); [APP069](#); [APP150-51](#).]

* Selected record items cited are included in the Appendix attached hereto and cited by page numbers (e.g., [APP147](#)). Other record items are cited with “IR-” followed by the record number.

Unfortunately, Dutch Bros. did not know that behind Republic's incompetence lied extraordinary fraud and deception. For example, Republic told Dutch Bros. that some of the SBA financing should come through "any day at this point" when in fact Republic had not yet even submitted the application. [APP087-88; APP091-92; APP096; APP105-07; APP110; APP112; APP115-17; APP151.] Republic then began doctoring documents it had received from the SBA to deceive Dutch Bros. [APP101; APP138-39; APP143.] As detailed in the Opening Brief (at 12-22), Republic's fraud borders on the unbelievable, and Republic made no effort to dispute or otherwise defend its egregious misconduct on appeal, *see* AB at 63-80.

Facing a cash crunch, [APP147; APP153], and convinced of Republic's incompetence, Dutch Bros. decided to switch lenders. Dec. ¶ 2. To do so, Republic required Dutch Bros. to execute a document entitled "Consent of Obligors and Pledgors" ("Consent") to release Dutch Bros.'s collateral so that it could be used to secure the new loans. *See id.*; *see also* [APP055-56; APP151-52].

Although Republic failed to provide Dutch Bros. the complete loan purchase agreement, what Republic provided (only the Consent) included an extremely broad paragraph in which each "Obligor and Pledgor"

released “any and all claims” against the “Lender.” [APP055-56; APP156.] When read in context with the rest of the agreement (to which Dutch Bros. was not a party and was not provided [APP156]), the Consent essentially released any claims Dutch Bros. had against Republic. In other words, when Dutch Bros. fired Republic, the bank extracted a broad release it hoped would protect it should its gross fraud ever come to light.

In 2014, Dutch Bros. sued Republic based primarily on the bank’s incompetence. Dec. ¶ 3. Although typically when a party with a release gets sued, the party’s lawyer immediately picks up the phone to notify the plaintiff’s lawyer about the release, thereby avoiding needless litigation. But Republic did not mention the Consent, and the litigation ramped up.

In April 2015, Dutch Bros. served Republic with its Second Amended Complaint, alleging negligent misrepresentation and fraudulent inducement. *Id.* Republic asserted several affirmative defenses in its answer, including “waiver.” *Id.* ¶¶ 3-4. But Republic did not assert the conceptually distinct defense of release, *id.*, which Arizona Rule of Civil Procedure 8(d)(1) separately enumerates from waiver.

Republic then buried the Consent among nearly 8,000 pages of its initial document production. [APP174.] Republic did not separately

mention the Consent in its early disclosure statements, nor did it connect the Consent to any defense. [APP168-69.] Republic ultimately did not mention the Consent for another year-and-a-half.

In the meantime, the parties engaged in extensive discovery, including exchanging tens of thousands of pages of documents and four expert reports, which had nothing to do with the Consent. Then, two years into the litigation, Republic filed a motion for summary judgment asserting that Dutch Bros. had waived its claims against Republic by executing the Consent. Dec. ¶ 3. By that time, the parties had collectively spent over \$550,000 litigating the *merits* of the case. [APP159-60; APP180; IR-77 at 9; IR-122 at 2.]

Dutch Bros. opposed the motion, arguing that the Consent was unenforceable on several grounds. Dec. ¶ 3. In its reply, Republic for the first time invoked release—a contractual defense—equivocally referring to the Consent as a “waiver and release.” *Id.* In light of this new argument in Republic’s reply, Dutch Bros. sought leave to file supplemental briefing to argue that Republic had waived its right to rely on the purported release by actively litigating the merits of the case for too long before raising the

defense. *Id.* ¶ 4. The superior court denied Republic’s request and granted Republic summary judgment. *Id.* ¶¶ 5-6.

On appeal, Dutch Bros. contended that the superior court erred by granting summary judgment for several reasons, including because it “fail[ed] to preclude Republic’s use of the release defense due to waiver by litigation conduct.” *Id.* ¶ 11. Republic “addressed the merits of” this waiver issue on appeal and did not contend the issue had been waived below. *Id.* ¶¶ 12-13 & n.3. Although Dutch Bros. contended the existing record permitted the Panel to decide the issue (in Dutch Bros.’s favor), the Panel concluded otherwise. It noted that although a “superior court’s finding of waiver generally binds this court,” the superior court failed to make any findings on waiver due to the case’s unusual procedural history. *Id.* (citation omitted). The Panel accordingly remanded “to the superior court to determine, in the first instance, whether Republic ‘engage[d] in substantial conduct to litigate the merits that would not have been necessary had [Republic] not delayed in asserting the defense.’” *Id.* ¶ 13 (citation omitted; alterations in Decision).

The Panel did not purport to resolve any legal issue, interpret any cases, or announce any new rule. Indeed, the substantive legal discussion is

set forth in one short paragraph, which relies exclusively on *City of Phoenix v. Fields*, 219 Ariz. 568 (2009):

[Dutch Bros.] also argues the superior court erred in failing to preclude Republic's use of the release defense due to waiver by litigation conduct. Even if properly pled in an answer, affirmative defenses are subject to waiver by a defendant's litigation conduct that is inconsistent with the affirmative defense. *City of Phoenix v. Fields*, 219 Ariz. 568, 574, ¶¶ 27-29 (2009). Waiver of an affirmative defense "should be found when the defendant 'has taken substantial action to litigate the merits of the claim that would not have been necessary had the [defendant] promptly raised the defense.'" *Id.* at 575, ¶ 30 (quoting *Jones v. Cochise County*, 218 Ariz. 372, 380, ¶ 26 (App. 2008)).

Dec. ¶ 11. The Decision merely *summarized* existing law and ultimately left it to the superior court to apply this settled law to the unique facts of this case. *See id.* ¶ 13.

REASONS THE COURT SHOULD DENY REVIEW

I. This case does not warrant review because it involves an unpublished decision remanding to the superior court to apply settled law to the unique facts of the case.

In this case, the Panel merely summarized this Court's settled precedent concerning waiver by litigation conduct set forth in *Fields* and left it to the superior court to apply this settled law to the facts of this case. *See* 219 Ariz. at 574-75 ¶¶ 27-30; *see also* Dec. ¶¶ 11-13. No reasonable litigant reviewing the Decision could possibly believe it announces any new rules,

or somehow modifies *Fields*. After all, in the two sentences that mention *Fields* the first one properly cites the case for the proposition asserted, and the second sentence consists primarily of a quotation from the case. See [Dec. ¶ 11](#).

Even Republic acknowledges (at 20 n.4) that “a case-specific application of settled law” is “not worthy of review.” True enough, but a decision that the factual record is too sparse to even allow a panel to apply settled law deserves review even less. The Decision is, therefore, a paradigm example of a case that does not warrant review.

II. The lower courts have had no difficulty applying the waiver by litigation conduct doctrine.

The Petition (at 19) presupposes that the waiver by litigation conduct doctrine should apply “to only a few unusual defenses,” yet acknowledges (at 15) that some cases “suggest the doctrine applies across the board.” This, the Petition claims (at 17-20), has injected uncertainty that requires this Court’s intervention. But this alleged confusion doesn’t exist.

The general waiver rules are well-settled and uncontroversial: “Waiver is either the express, voluntary, intentional relinquishment of a known right or such conduct as warrants an inference of such an intentional

relinquishment.” *Am. Cont’l Life Ins. Co. v. Ranier Constr. Co.*, [125 Ariz. 53, 55](#) (1980). Waiver by conduct requires “evidence of acts inconsistent with an intent to assert the right.” *Id.*

In litigation, acts inconsistent with an intent to assert an affirmative defense include omitting the defense “from an answer.” *Fields*, [219 Ariz. at 574 ¶ 27](#). Moreover, “[e]ven when a party preserves an affirmative defense” in an answer, “it may waive that defense by its subsequent conduct in the litigation.” *Id.* at [574 ¶ 29](#) (citing *Cont’l Bank v. Meyer*, [10 F.3d 1293, 1296-97](#) (7th Cir. 1993) (finding personal jurisdiction defense waived)). In particular, if the defense would permit the party to “avoid litigating the merits of a claim,” the party waives the defense if it takes “substantial action to litigate the merits of the claim that would not have been necessary had the entity promptly raised the defense.” *Id.* at [575 ¶ 30](#).

These settled waiver rules are not limited “to only a few unusual defenses,” (Pet. at 19), but instead apply generally. However, determining whether a party has waived an affirmative defense through litigation conduct—i.e., acted inconsistently with an intent to assert the defense—necessarily depends on the particular facts of the case. Because of the fact-specific nature of the inquiry, some decisions have naturally spent more time

analyzing the issue than others. *See, e.g., Ponce v. Parker Fire Dist.*, [234 Ariz. 380, 383-84 ¶¶ 10-13](#) (App. 2014) (finding notice of claim defense waived); *In re Cortez*, [226 Ariz. 207, 211-13 ¶¶ 4-12](#) (App. 2010) (finding arbitration clause defense waived). But this difference results from applying the same settled legal rules to different situations, not from any confusion over legal doctrine.

In this case, the Panel did not decide whether a waiver had actually occurred; it remanded to the superior court to do that. That differentiates this case from cases like *Ponce*, *Cortez*, *Russo v. Barger*, [239 Ariz. 100](#) (App. 2016), and *State ex rel. Horne v. Campos*, [226 Ariz. 424](#) (App. 2011). *See* Pet. at 16. The Panel’s purportedly cursory analysis in this case will mislead no one.

Tellingly, Republic has been unable to identify *any* decision—published or not—that has expressed confusion over how to apply *Fields*. This is not an area of the law that needs further clarification.

III. The Petition’s first issue suffers other problems that make it inappropriate for review.

Republic’s first issue also improperly asks for advisory opinions on an issue the Panel did not decide.

A. The Panel did not extend *Fields* to *all* affirmative defenses.

This Court does not issue advisory opinions or take cases to opine about issues not presented in the case. Indeed, [ARCAP 23\(d\)\(1\)](#) states that a petition for review “must contain concise statements of . . . [t]he issues that *were decided* by the Court of Appeals that the petitioner is presenting for Supreme Court review.” (Emphasis added.) Yet in this case, the Petition presents as its first issue (at 5) whether “the doctrine of waiver by litigation conduct . . . appl[ies] to *all* affirmative defenses,” characterizing (at 11) the Decision as “extend[ing]” the doctrine “to all other affirmative defenses.” But the Court will not find any discussion of this broad issue in the Decision because that is not an issue the Panel actually decided.

Tellingly, the Petition says (at 5-6) that the Panel “assumed” (i.e., not decided) the doctrine applies to all defenses. But even that weak “assumed” characterization stretches the Decision too far. At best, the Decision “assumed” the doctrine applies to release—the only affirmative defense at issue in the case. And, as explained below, no one can seriously question the Panel’s “assumption” on this issue because release is a paradigm example of the type of affirmative defense subject to waiver under *Fields*. See [Section IV](#).

Moreover, it would be difficult for the Court to resolve this undecided issue without any context for any affirmative defense other than release. It would require the Court to catalog every possible affirmative defense, and then analyze each defense to determine whether it could ever be waived under any possible set of hypothetical circumstances. To say that *Fields* could never apply to a particular affirmative defense would mean that no amount of unrelated litigation could waive the defense.

Before forever completely excluding an affirmative defense from *Fields*, the Court would want to make sure it had not overlooked any situation where the result could be otherwise. Unfortunately, the parties are unlikely to provide the Court any help with this issue – except in connection with the affirmative defense of release. After all, neither party has a concrete interest in what the Court decides on any defense other than release.

B. Republic’s reasons for its broad request lack merit.

1. Republic worries (at 19) that litigants now face “the highly tenuous position” of risking waiver if they conduct discovery on their affirmative defenses. But *Fields* and its progeny provide that a party risks waiving an affirmative defense when the defense would permit the party to “entirely avoid litigating the merits of a claim,” and the party has

nevertheless taken “substantial action to litigate the merits of the claim that would not have been necessary had [it] promptly raised the defense.” [219 Ariz. at 575 ¶ 30](#) (citation omitted). Thus, a party risks waiver by seeking discovery unrelated to the defense.

Most defenses require no discovery to assert. For example, to assert a notice of claim defense a defendant need only state that the plaintiff failed to file a proper notice of claim. The plaintiff may attempt to rebut the defense by raising all sorts of fact-intensive issues, in which case the court may permit “some limited discovery directed at this discrete issue,” followed by “a one or two day jury trial on this limited issue” in order to “expeditiously” resolve the threshold defense. *See, e.g., Lee v. State*, [225 Ariz. 576, 581 ¶ 17](#) (App. 2010). In such a case, there is no risk of waiver because the defendant has not “substantially participated in th[e] litigation before raising [its] notice of claim statute defense[.]” *Fields*, [219 Ariz. at 575 ¶ 31](#). This holds true with release, which is likewise easy to assert early on. *See* [Section IV](#).

2. Republic imagines (at 17-18) a scenario where two judges interpret the waiver by litigation conduct cases in different ways, generating inconsistent results. The solution to Republic’s hypothetical is not for this

Court to issue advisory opinions, but rather for the appellate process to correct any actual conflict.

Republic suggests (at 16-17) that *Harding v. Ariz. Bd. of Dental Examiners*, No. 1 CA-CV 18-0597, [2019 WL 6713433](#) (Ariz. App. Dec. 10, 2019), adds to “uncertainty” that is “likely to produce inconsistent results.” Not so. Like the Decision, *Harding* relies on *Fields* for the proposition that “a party ‘may waive that defense by its subsequent conduct in the litigation.’” *Id.* at *3 ¶ 17 (quoting *Fields*, [219 Ariz. at 574 ¶ 29](#)).

Unlike the Decision, however, *Harding* reached the waiver issue (rather than remanding) and concluded that the defendant did *not* waive its statute of limitations affirmative defense based on that case’s unique facts and circumstances. *Id.* at *4 ¶¶ 18-21. In other words, *Harding* agreed that waiver depends upon the particular facts of the case.

3. Republic worries (at 18) that the cursory treatment of waiver in the Decision and *Harding* will “signal that *of course* the doctrine applies to all defenses.” But Republic does not explain why judges would ignore *Fields* (cited in both the Decision and in *Harding*). Nor does Republic explain how these memorandum decisions are in any way inconsistent with *Fields*. And, again, any deviation from *Fields* can be corrected on appeal.

4. Finally, Republic frets (at 18-19) that defendants must now promptly assert their affirmative defenses at the outset of litigation or risk losing them. Republic is right. But that is a good thing, and is why the Court adopted the waiver by litigation conduct doctrine. The doctrine incentivizes defendants to raise potentially case dispositive affirmative defenses “that courts can quickly and easily adjudicate early in the litigation.” *Fields*, 219 Ariz. at 575 ¶ 30. Resolving these defenses at the outset rather than allowing a defendant to strategically reserve them means parties are “spared considerable expense and the judicial system [spared] a significant expenditure of its resources.” *Id.* at 575 ¶ 33. This doctrine exists to avoid the situation that unfolded below.

IV. The Petition’s second issue ignores that the Panel correctly concluded that waiver by litigation conduct applied to release.

Republic maintains that if the Court won’t limit *Fields* “to only a few unusual defenses,” (Pet. at 19), it should at least decide “whether waiver by litigation conduct applies to the affirmative defense of release,” (Pet. at 21). But because the Panel remanded, Republic is asking the Court to adopt the bright-line rule that a party may *never* waive its release defense through litigation conduct, regardless of the facts of the case.

That is an untenable position. “A release 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 most cases the enforceability of the release will have *nothing* to do with the merits of the released claims. And in most cases merely *asserting* the defense will not require any discovery.

In this case, for example, Republic only needed to produce the Consent and say “the Consent bars your claims, Dutch Bros. End the litigation.” Because, however, Republic instead chose to litigate the merits of the case — i.e., act inconsistently with an intent to assert the release defense — the parties spent hundreds of thousands of dollars litigating the merits of the case, which would have been unnecessary had Republic raised the Consent issue upfront. Although Dutch Bros.’s theories for *avoiding* the Consent required some limited discovery, that discovery did not “overlap[]” with the merits

in the manner suggested by Republic (Pet. at 22).¹ Indeed, a release allows a defendant to *completely avoid litigating the merits* of a plaintiff's claims, contrary to Republic's claim (at 23).

Perhaps recognizing that under existing law a party may waive a release defense under *Fields*, Republic invents a new test for waiver by litigation conduct. Under Republic's test, the only waivable defenses are "threshold defenses that either can be quickly adjudicated early in the case or are necessary to settle the question of the appropriate forum," (Pet. at 5), or that "go to the court's power to decide the case" (Pet. at 14-15). Tellingly, however, this test does not help Republic because release (1) is a threshold defense that can be quickly adjudicated early in the case, and (2) goes to the court's power to decide the case.

1. The prima facie case for release is simple—produce the release and state that it extinguishes plaintiff's claims. That's it. Although occasionally there may be fact-intensive rebuttals to a release defense, that does not mean the defense itself is not a threshold defense that can be

¹ Given the posture of the case, the superior court will need to decide in the first instance whether Republic acted inconsistently with an intent to assert the release defense.

resolved early on. *See, e.g., Lee*, 225 Ariz. at 581 ¶ 17 (court may permit “some limited discovery directed at this discrete issue,” followed by “a one or two day jury trial on this limited issue” to “expeditiously” resolve a threshold affirmative defense).

2. Release goes to the heart of a court’s power to hear a suit because release involves “immunity or excuse from suit.” 76 C.J.S. *Release* § 1 (Sept. 2018). A valid release completely “extinguishe[s]” covered claims. *Cunningham*, 194 Ariz. at 241 ¶ 25. Indeed, whereas an arbitration clause “gives the defendant a contractual right to avoid litigating” in a *court*, (Pet. at 23), a release gives the defendant a contractual right to avoid litigating anywhere.

ARCAP 23(f)(2)

There are no issues that this Court would need to decide under ARCAP 23(f)(2) if it decided to grant review.

CONCLUSION

The Court should deny review.

RESPECTFULLY SUBMITTED this 20th day of March, 2020.

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* The appendix page number matches the electronic PDF page number. Counsel has added emphasis to selected pages in this Appendix using yellow highlighting to assist the Court with its review of the record. Some record items included in the Appendix contain only a limited excerpt. This Appendix complies with the bookmarking requirements of ARCAP 13.1(d)(3).

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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. 27, 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

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

THOMPSON/MCCARTHY COFFEE CO.,
Plaintiff/Appellant-Cross Appellee,

v.

REPUBLIC BANK AZ N.A.,
Defendant/Appellee-Cross Appellant.

No. 1 CA-CV 18-0349
FILED 12-10-2019

Appeal from the Superior Court in Maricopa County
No. CV2014-014647
The Honorable Dawn M. Bergin, Judge

VACATED IN PART; REMANDED WITH INSTRUCTIONS

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MEMORANDUM DECISION

Judge James B. Morse Jr. delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Diane M. Johnsen joined.

M O R S E, Judge:

¶1 Thompson/McCarthy Coffee Company, Inc. ("Thompson") appeals a superior court order granting summary judgment to RepublicBank AZ N.A. ("Republic"). Republic cross-appeals the court's denial of its application for attorneys' fees and costs. For the following reasons, we vacate in part, and remand for further proceedings consistent with this decision.¹

FACTS AND PROCEDURAL BACKGROUND

¶2 Between 2010 and 2012, Republic made commercial real estate loans to Thompson that were guaranteed by the U.S. Small Business Administration ("SBA") and underwritten by Republic (the "Construction Loans"). In 2013, Thompson decided to move its loans to Mutual of Omaha ("MOH"). Republic agreed to sell the Construction Loans to MOH pursuant to a Loan Purchase and Sale Agreement ("LPSA"). Thompson signed a document entitled "Consent of Obligors and Pledgors" (the "Consent") as part of the loan-purchase transaction in September 2013.

¶3 Thompson filed suit against Republic in 2014 and served Republic with its Second Amended Complaint in April 2015, alleging negligent misrepresentation and fraudulent inducement. In its answer, Republic asserted numerous affirmative defenses, including "waiver." In December 2016, Republic moved for summary judgment premised upon

¹ We also deny Republic's motion for leave to file a sur-reply brief, or in the alternative, to strike Thompson's reply brief.

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the Consent, referring to it as an "express waiver of any and all claims against Republic." Thompson responded, asserting the Consent was unenforceable under various contract law theories, including fraud. In its reply supporting summary judgment, Republic referred to the Consent as a "waiver and release."

¶4 Two weeks after Republic filed its reply brief, Thompson filed a motion for supplemental briefing. In the motion, Thompson requested additional briefing and time to conduct discovery to support its fraud defense to Republic's motion for summary judgment but did not advance any other defenses. Republic opposed the motion, asserting that Thompson waived the request by not asserting it pursuant to Arizona Rule of Civil Procedure 56(d). In reply, Thompson asserted that Republic waived the release defense when it failed to plead "release" as an affirmative defense in its answer, and subsequently waived release by its conduct during the litigation, including waiting 18 months before raising it.² Although Thompson asserted these arguments in its reply in support of its motion for supplemental briefing, it never requested to supplement its opposition to the motion for summary judgment to assert waiver of the release defense. However, during argument on the motion for supplemental briefing, Thompson orally requested supplemental briefing on the waiver-by-litigation-conduct argument and asked the superior court to preclude Republic from asserting the release defense.

¶5 After the hearing, the superior court granted Thompson's written motion for supplemental briefing on fraud and denied Thompson's oral request for supplemental briefing on whether Republic's litigation conduct waived its release defense.

¶6 The superior court eventually granted Republic's motion for summary judgment, but denied Republic's request for attorneys' fees and most of its costs. Both parties timely appealed and we have jurisdiction pursuant to A.R.S. §§ 12-2101(A)(1) and -2101(A)(5)(a).

DISCUSSION

I. Failure to plead release in the answer.

¶7 Thompson argues the superior court erred in failing to preclude Republic's use of the release defense because it did not plead

² Republic filed a motion to strike Thompson's reply, which the court denied.

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release in its answer. "Affirmative defenses are required to be pleaded to prevent surprise." *City of Phoenix v. Linsenmeyer*, 86 Ariz. 328, 333 (1959); *see also* Ariz. R. Civ. Proc. 8(d)(1)(M) (defendant must "affirmatively state" defense of "release" in answer). However, the superior court "may properly allow a defendant to amend an answer to include an omitted defense as long as the plaintiff is not surprised or prejudiced." *Sirek v. Fairfield Snowbowl, Inc.*, 166 Ariz. 183, 186 (App. 1990); *see also* *Gary Outdoor Advertising Co. v. Sun Lodge, Inc.*, 133 Ariz. 240, 241-242 (1982). We review the superior court's decision on preclusion of an affirmative defense for an abuse of discretion. *Sirek*, 166 Ariz. at 185. Additionally, "liberality in permitting amendments of pleadings to conform to the evidence is the general rule." *Bujanda v. Montgomery Ward & Co., Inc.*, 125 Ariz. 314, 316 (App. 1980).

¶8 On this record, we cannot say that the superior court abused its discretion. In answering the first amended complaint, Republic affirmatively asserted waiver, which is often used interchangeably with release. *See, e.g., Lindsay v. Cave Creek Outfitters, LLC*, 207 Ariz. 487, 491, ¶ 12 (App. 2003) ("trial court [concluded] that by signing the release, the plaintiff had waived her right to sue"); *see also* *Robert W. Baird & Co. Inc. v. Whitten*, 244 Ariz. 121, 125, ¶ 9 (App. 2017) ("Waiver is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right.") (citing *Green v. United States*, 355 U.S. 184, 191 (1957)). Republic produced the Consent in discovery in July 2015. Thompson also received the LPSA and Consent from MOH in October 2014, prior to initiating the lawsuit. Finally, Thompson's principals are the individuals who signed the Consent on behalf of Thompson in September 2013.

¶9 Thompson asserts that it suffered prejudice from the delayed disclosure. However, "[d]elay, standing alone, does not necessarily establish prejudice." *Allstate Ins. Co. v. O'Toole*, 182 Ariz. 284, 288 (1995). The relevant question is whether the delay "is harmful to the opposing party or to the justice system." *Id.* A party can suffer prejudice "if there is insufficient time to investigate fully and prepare rebuttal." *Link v. Pima County*, 193 Ariz. 336, 340, ¶ 10 (App. 1998). Here, Thompson does not contend it was unable to fully respond to Republic's arguments, and the superior court allowed it extra briefing on the release issue. Additionally, at Thompson's request, the court deferred ruling on Thompson's fraud defense to allow Thompson to pursue additional discovery in support of its argument.

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¶10 Although Republic did not formally amend its answer to include release as an affirmative defense, it offered during the oral argument to move to amend its answer, and we construe the court's ruling as effectively granting that motion. *See generally In re McCauley's Estate*, 101 Ariz. 8, 17 (1966) ("Rule 15(b) . . . permits the granting of a motion to amend a pleading to conform to proof unless the objecting party can show [a]ctual, as distinguished from [l]egal surprise."); *cf. also Electrical Advertising, Inc. v. Sakato*, 94 Ariz. 68, 71 (1963) ("Failure to formally amend the pleadings will not affect a judgment based upon competent evidence.").

II. The record below is insufficient to address Thompson's claim of waiver by litigation conduct.

¶11 Thompson also argues the superior court erred in failing to preclude Republic's use of the release defense due to waiver by litigation conduct. Even if properly pled in an answer, affirmative defenses are subject to waiver by a defendant's litigation conduct that is inconsistent with the affirmative defense. *City of Phoenix v. Fields*, 219 Ariz. 568, 574, ¶¶ 27-29 (2009). Waiver of an affirmative defense "should be found when the defendant 'has taken substantial action to litigate the merits of the claim that would not have been necessary had the [defendant] promptly raised the defense.'" *Id.* at 575, ¶ 30 (quoting *Jones v. Cochise County*, 218 Ariz. 372, 380, ¶ 26 (App. 2008)).

¶12 Waiver is generally a question of fact and a superior court's finding of waiver generally "binds this court unless we conclude that the finding is clearly erroneous." *Minjares v. State*, 223 Ariz. 54, 58, ¶ 17 (App. 2009) (citing *Goglia v. Bodnar*, 156 Ariz. 12, 19 (App. 1987)); *see also Fields*, 291 Ariz. at 575, ¶ 32 ("[t]ypically, waiver is 'a question of fact.'") (quoting *Chaney Bldg. Co. v. Sunnyside Sch. Dist. No. 12*, 147 Ariz. 270, 273 (App. 1985)). However, when "the facts relating to waiver are uncontested, occurred after litigation began, and are wholly unrelated to the underlying facts of the claim," we treat the issue of waiver as a question of law and review *de novo*. *Jones*, 218 Ariz. 372, 380, ¶ 28; *see Russo v. Barger*, 239 Ariz. 100, 105, ¶ 20 (App. 2016) (same).

¶13 Because the superior court did not consider Thompson's arguments regarding waiver by conduct, the record does not contain facts, contested or otherwise, bearing upon the issue.³ Thompson asserts that

³ We note that although Thompson first raised the waiver-by-conduct issue in its reply brief to a motion for supplemental briefing on fraud as a

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extensive unnecessary discovery, including preparation of four expert reports, occurred during the 18 months between the second amended complaint and Republic's motion for summary judgment. Republic contends that no substantive motions were filed, no depositions were taken, the discovery was necessary because much of it was relevant to the enforceability of the release, and Thompson sought additional discovery after the motion for summary judgment was filed. We are not the trier of facts and the record contains neither undisputed facts nor factual findings we can review for clear error. Accordingly, we must vacate summary judgment and the superior court's March 9, 2017, order denying Thompson's request to assert waiver by litigation conduct as a defense to the release. We remand to the superior court to determine, in the first instance, whether Republic "engage[d] in substantial conduct to litigate the merits that would not have been necessary had [Republic] not delayed in asserting the defense." *Ponce v. Parker Fire Dist.*, 234 Ariz. 380, 383, ¶ 11 (App. 2014).

CONCLUSION

¶14 Because we remand to the superior court to determine whether Republic waived its release defense through litigation conduct, we also conditionally vacate the entry of summary judgment in Republic's favor, the superior court's orders denying Republic's request for fees, and the order partially granting the request for costs. This decision should not be interpreted as favoring one outcome over another. We decline to address any of the other issues raised by the parties concerning the merits of the release defense. If the superior court determines that Republic did not waive the release by its litigation conduct, the court shall reinstate its entry of summary judgment and other orders on the existing record. Because neither party prevailed, we decline to award fees or costs incurred on appeal.



AMY M. WOOD • Clerk of the Court
FILED: AA

defense to the release, Republic has addressed the merits of Thompson's waiver arguments on appeal and has not asserted before this court that Thompson waived the argument below.

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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.

NO. CV2014-014647

**REPUBLICBANKAZ, N.A.'S
SEPARATE STATEMENT OF FACTS
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

(Assigned to Hon. Dawn Bergin)

Pursuant to Rule 56(c)(2), Arizona Rules of Civil Procedure, RepublicBankAZ, N.A. ("Republic"), respectfully submits the following separate Statement of Facts in support of its Motion for Summary Judgment:

1. In 2010, Thompson/McCarthy Coffee Co. ("TMCC") met with Republic for the purpose of obtaining certain commercial real estate loans, to be guaranteed by the U.S. Small Business Administration ("SBA"), in order to finance TMCC's construction and expansion of Dutch Bros. coffee stores in the Phoenix metropolitan area. [See Plaintiff's Initial Rule 26.1 Disclosure Statement ("Plaintiff's Disclosure Statement") at pg. 1, lines 25-28, attached hereto as **Exhibit A.**]

2. Republic was willing to make SBA guaranteed loans to TMCC up to the SBA maximum amount of \$5.0 million. [See email correspondence between Jim Thompson and Michael Harris dated November 10, 2011, attached hereto as **Exhibit B.**]

3. On or about October 24, 2011, Thompson/McCarthy DB LLC ("TMDB," now TMCC¹), James L. Thompson ("Thompson") and Janice L. McCarthy ("McCarthy") entered into a Construction Loan Agreement with Republic, among other things, for a construction and permanent loan in the maximum principal amount of \$1,026,300.00 (the "2011 Loan"). The purpose of the 2011 Loan was to construct Dutch Bros. coffee shops on real property located at 6461 South Rural Road, Tempe, Arizona 85283, and 1122 South Greenfield Road, Mesa, Arizona 85208. [See 2011 Construction Loan Agreement and SBA Note attached hereto as **Exhibit C.**]

4. On or about May 9, 2012, TMDB dba Glendale Ave./12 Street DB LLC entered into a Construction Loan Agreement with Republic for a loan in the maximum principal amount of \$597,100.00 (the "2012 Loan"). The purpose of the 2012 Loan was to construct a Dutch Bros. coffee shop on real property located at 1201 East Glendale Avenue, Phoenix, Arizona 85020. [See 2012 Construction Loan Agreement and SBA Note attached hereto as **Exhibit D.**] (The 2011 Loan and the 2012 Loan are collectively, the "Loans.")

5. In or around mid-June 2012, Republic submitted, and the SBA received, an application for an SBA loan to construct a Dutch Bros. coffee shop in Paradise Valley, Arizona (the "PV Loan Application"). [See PV Application attached hereto as **Exhibit E.**]

6. The SBA was requesting information as late as December 2012, which was conveyed by Republic to TMCC, but TMCC ultimately never obtained a loan with

¹ Upon information and belief, Thompson/McCarthy Coffee Co. is the successor-in-interest of Thompson/McCarthy DB LLC.

Exhibit "N"

**FIRST AMENDMENT TO
LOAN PURCHASE AND SALE AGREEMENT**

This First Amendment to Loan Purchase and Sale Agreement (this "Amendment") is made by and between **RepublicBankAz, N.A.**, a national banking association ("Lender"), and **Mutual of Omaha Bank**, a federally chartered thrift ("Assignee"), for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged.

1. Recitals

1.1 Lender and Assignee have entered into a Loan Purchase and Sale Agreement dated September 19, 2013 (the "Agreement") with respect to the purchase and sale of the Loans described therein.

1.2 The parties wish to extend the Closing Deadline (defined in paragraph 2.4 of the Agreement) and to update and clarify certain other provisions of the Agreement.

2. Operative Agreements

2.1 The Closing Deadline is hereby extended from 5:00 p.m. MST on September 19, 2013 to 5:00 p.m. MST on September 23, 2013.

2.2 According to Lender's records, as of the date of this Amendment: (a) the current outstanding principal balance of the 2011 Note is \$985,950.94, and accrued but unpaid interest thereon is \$ _____; and (b) the current outstanding principal balance of the 2012 Note is \$580,826.18, and accrued but unpaid interest thereon is \$ _____. Therefore, the Purchase Price (defined in paragraph 2.1 of the Agreement) for the 2011 Note will be \$ _____ and the Purchase Price for the 2012 Note shall be \$ _____ (a total of \$ _____).

2.3 All other provisions of the Agreement shall remain unchanged except as provided herein.

DATED this ____ day of September, 2013.

Address for Notice:

909 East Missouri Avenue
Phoenix, AZ 85014

RepublicBankAz, N.A., a national banking association

By: _____
Emily Chedister, Loan Operations Manager, V.P.

555 West Chandler Boulevard
Chandler, AZ 85225

Mutual of Omaha Bank, a federally chartered thrift

By: Corey Schimmel
Corey Schimmel, Vice President

**FIRST AMENDMENT TO
LOAN PURCHASE AND SALE AGREEMENT**

This First Amendment to Loan Purchase and Sale Agreement (this "Amendment") is made by and between RepublicBankAz, N.A., a national banking association ("Lender"), and Mutual of Omaha Bank, a federally chartered thrift ("Assignee"), for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged.

1. Recitals

1.1 Lender and Assignee have entered into a Loan Purchase and Sale Agreement dated September 19, 2013 (the "Agreement") with respect to the purchase and sale of the Loans described therein.

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2. Operative Agreements

2.1 The Closing Deadline is hereby extended from 5:00 p.m. MST on September 19, 2013 to 5:00 p.m. MST on September 23, 2013.

2.2 According to Lender's records, as of September 23, 2013: (a) the current outstanding principal balance of the 2011 Note will be \$985,950.94, and accrued but unpaid interest thereon will be \$931.93; and (b) the current outstanding principal balance of the 2012 Note will be \$580,826.18, and accrued but unpaid interest thereon will be \$1,662.91. Therefore, the Purchase Price (defined in paragraph 2.1 of the Agreement) for the 2011 Note will be \$247,419.70 and the Purchase Price for the 2012 Note shall be \$146,869.46 (a total of \$394,289.16).

2.3 All other provisions of the Agreement shall remain unchanged except as provided herein.

DATED this 20th day of September, 2013.

Address for Notice:

909 East Missouri Avenue
Phoenix, AZ 85014

RepublicBankAz, N.A., a national banking association

By: Emily Chedister, VP
Emily Chedister, Loan Operations Manager, V.P.

555 West Chandler Boulevard
Chandler, AZ 85225

Mutual of Omaha Bank, a federally chartered thrift

By: _____
Corey Schinunel, Vice President

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09/20/13

RBAZ07952

APP044

LOAN PURCHASE AND SALE AGREEMENT
(With Consent of Obligors and Pledgors)

This Loan Purchase and Sale Agreement (this "Agreement") is made this 19th day of September, 2013, by and between RepublicBankAz, N.A., a national banking association ("Lender"), and Mutual of Omaha Bank, a federally chartered thrift ("Assignee"), for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged.

1. Recitals

1.1 Lender provided a \$1,026,300 construction loan (Loan #8260005400) (the "2011 Loan"), to Thompson/McCarthy DB LLC ("TMDB"), James L. Thompson ("JLT") and Janice L. McCarthy ("JLM") for the construction of Dutch Bros. retail stores at 6461 South Rural Road, Tempe, Arizona, and 1136 South Greenfield Road, Mesa, Arizona. The 2011 Loan:

(a) is evidenced by a Note dated October 24, 2011, made by TMDB, JLT and JLM (collectively, "Original Borrowers") and payable to the order of Lender (the "2011 Note");

(b) was advanced pursuant to a Construction Loan Agreement dated October 24, 2011, between Original Borrowers and Lender;

(c) is secured by (i) a Construction Deed of Trust recorded November 4, 2011, at Document No. 2011-0918231, records of Maricopa County, Arizona (the "Tempe Deed of Trust"), (ii) a Construction Deed of Trust recorded July 17, 2012, at Document No. 2012-0626574, records of Maricopa County, Arizona (the "Mesa Deed of Trust"); (iii) the 2011 Security Agreements listed on the attached Exhibit "A"; and (iv) the UCC Financing Statements listed on the attached Exhibit "A"; and

(d) is guaranteed by (i) Unconditional Guarantees, each dated October 24, 2011, from the James L. Thompson Living Trust dated June 16, 1997 (the "JLT Trust") and the Janice L. McCarthy Trust dated September 28, 2005 (the "JLM Trust") in favor of Lender; and (ii) a Guaranty of Completion and Performance dated October 24, 2011, from the JLT Trust and the JLM Trust (collectively, the "Trusts") in favor of Lender.

According to Lender's records, as of the date of this Agreement, the current outstanding principal balance of the 2011 Note is \$985,950.94, and accrued but unpaid interest is \$310.64.

1.2 Lender also provided a \$597,100 tenant improvement loan (Loan #8260007200) (the "2012 Loan"), to Thompson/McCarthy DB LLC DBA Glendale Ave./12th Street DB LLC [which was intended to refer to TMDB and Glendale Ave./12th Street DB LLC, an Oregon limited liability company ("Glendale/12th"), as separate entities, with no "DBA" designation] for a Dutch Bros. retail store at 1201 East Glendale Avenue, Phoenix, Arizona. The 2012 Loan:

(a) is evidenced by a Note dated May 9, 2012, made by Thompson/McCarthy DB LLC DBA Glendale Ave./12th Street DB LLC [which was intended to refer to TMDB and Glendale/12th, as separate entities, with no "DBA" designation] and payable to the order of Lender (the "2012 Note");

(b) was advanced pursuant to a Construction Loan Agreement dated May 9, 2012, between Thompson/McCarthy DB LLC DBA Glendale Ave./12th Street DB LLC [which was intended to refer to TMDB and Glendale/12th, as separate entities, with no "DBA" designation] and Lender (the "2012 Loan Agreement");

(c) is secured by (i) a Construction Leasehold Deed of Trust with Assignment of Rents, Security Agreement and Fixture Filing recorded June 6, 2012, at Document No. 2012-0489027, records of Maricopa County, Arizona (the "Glendale Deed of Trust"), (ii) the 2012 Security Agreements listed on the attached Exhibit "A"; and (iii) the UCC Financing Statements listed on the attached Exhibit "A"; and

(d) is guaranteed by (i) Unconditional Guarantees, each dated May 9, 2012, from JLT, JLM, the Trusts and Thompson/McCarthy Coffee Co., an Oregon corporation ("TMCC"), in favor of Lender; and (ii) a Guaranty of Completion and Performance dated May 9, 2012, from JLT, JLM, the Trusts and TMCC in favor of Lender.

According to Lender's records, as of the date of this Agreement, the current outstanding principal balance of the 2012 Note is \$580,826.18, and accrued but unpaid interest is \$1,312.83.

1.3 Assignee wishes to purchase, and Lender wishes to sell, Lender's interest in the 2011 Loans and the 2012 Loan (collectively, the "Loans"), all loan documents described in paragraphs 1.1 and 1.2 above (collectively, the "Loan Documents") and all other rights of Lender, if any, that are related to the Loans, as more particularly described in the Assignment Documents (defined below), upon the terms and conditions set forth herein.

2. Sale and Assignment

2.1 Sale and Assignment: Purchase Price. Lender hereby agrees to sell and assign the Loans to Assignee, WITHOUT RECOURSE, REPRESENTATION OR WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, EXCEPT AS EXPRESSLY SET FORTH IN SECTION 2.6 BELOW, and Assignee hereby agrees to purchase and accept an assignment of the Loans and assume Lender's obligations thereunder, for a purchase price equal to the aggregate outstanding amount of principal and accrued interest evidenced by the 2011 Note and the 2012 Note (collectively, the "Notes"), less any such amounts that are legally or equitably owned by participants, co-lenders or investors in the Notes, as of the date of the Closing (the "Purchase Price").

2.2 Escrow. The parties agree to conduct the purchase and sale of the Loans and the transfer of the documents and funds described in paragraph 2.4 below through an escrow to be established with Thomas Title & Escrow, LLC ("Escrow Agent"), 16435 North Scottsdale Road, Suite 405, Scottsdale, Arizona 85254. This Agreement shall constitute escrow instructions to Escrow Agent and a copy shall be deposited with Escrow Agent for this purpose. By accepting this escrow, Escrow Agent agrees to the terms of this Agreement as they relate to the duties of Escrow Agent. If Escrow Agent requires the execution of its standard form printed escrow instructions, the parties agree to execute those instructions, as appropriately modified to reflect the transaction described in this Agreement; however, those instructions shall be construed as applying only to Escrow Agent's engagement, and if conflicts exist between the terms of this Agreement and the terms of the printed escrow instructions, the terms of this Agreement shall control.

2.3 Closing Conditions and Deliveries. The sale and assignment of the Loans is subject to the following conditions precedent (the "Closing Conditions"):

(a) Assignee shall have delivered into escrow in immediately available funds the Purchase Price plus Assignee's share of closing costs as described in paragraph 2.5 below;

(b) Lender shall have delivered into escrow the original Loan Documents and all of its loan and credit files relating to the Loans; and

(c) Lender shall have delivered to Escrow Agent the following documents (collectively, the "Assignment Documents"): (i) the 2011 Note and the 2012 Note, each endorsed to Assignee, without recourse, representation or warranty, by Allonges in the forms attached hereto as Exhibits "B-1" and "B-2", respectively; (ii) an executed and acknowledged Assignment of Beneficial Interests under Deeds of Trust (the "ABI") under the Tempe Deed of Trust, the Mesa Deed of Trust and the Glendale Deed of Trust for recording with the Maricopa County Recorder in the form attached hereto as Exhibit "C"; (iii) an executed Assignment of Rights Under Loan Documents in the form attached hereto as Exhibit "D"; (iv) completed assignments to Assignee of each of the UCC Financing Statements described on the attached Exhibit "A" in form suitable for filing in the appropriate public office(s); and (v) Transfers of Participation Agreements, signed by Lender, in the forms attached hereto as Exhibits "E-1" and "E-2", respectively.

2.4 Closing and Closing Deadline. The closing of the transaction described herein (the "Closing") shall occur by not later than 5:00 p.m. MST on September 19, 2013 (the "Closing Deadline"). If the Closing has not occurred by the Closing Deadline, neither Lender nor Assignee shall have any further obligations to each other under this Agreement, unless the failure to close constitutes a default by either party. Upon the Closing, Escrow Agent will: (a) deliver to Lender the Purchase Price, less Lender's share of closing costs as described in paragraph 2.5 below; and (b) record the ABI in the records of the Maricopa County Recorder and deliver to Assignee all other items delivered into escrow by Lender.

2.5 Closing Costs. Assignee shall be responsible for the customary escrow, recording and filing fees incurred in connection with the closing of the transaction described herein. Assignee will also be responsible for the payment of all title insurance premiums with respect to the interests it acquires under this Agreement. Each party shall bear its own attorneys' fees and costs in connection with the negotiation of this Agreement and the closing of the transaction described herein

2.6 Additional Documents and Post-Closing Cooperation. Lender hereby agrees to execute and deliver to Assignee and the U.S. Small Business Administration ("SBA") such documents in addition to the Assignment Documents (including, without limitation, an SBA Form 1502 report for each of the Loans) that are consistent with this Agreement that Assignee or the SBA may reasonably request in order to effectuate the purpose of this Agreement. Following the Closing, Assignee shall be responsible for recording and filing the Assignment Documents and any other documents required to provide public notice of Assignee's acquisition of the Loans, and for obtaining any appropriate assignment or other endorsements to Lender's existing title insurance policies.

2.7 Assignee's Investigation. Assignee acknowledges that it has been given a reasonable opportunity to request and obtain directly from Original Borrowers, the Trusts, Glendale Ave./12th Street DB LLC and TMCC (collectively, "Obligors") any financial or other information and/or explanations Assignee considers to be relevant to its purchase of the Loans, has had reasonable access to the collateral securing the Loans (the "Collateral") for the purposes of inspecting the Collateral, and has made its own independent investigation of any issues in connection with Obligors, the Loans and the Collateral that it may consider relevant to its purchase of the Loans.

2.8 Lender Representations and Warranties; Assignee Acknowledgments. Lender hereby represents and warrants that: (a) Lender is the sole legal and beneficial owner of, and has good title to, the Loans (except that an investor owns a 75% participation interest in each of the Loans) and the Loan Documents, free and clear of any lien, encumbrance or security interest that would prevent Lender from assigning an unencumbered interest therein to Assignee; (b) except as noted in the foregoing clause (a), Lender has not previously sold or assigned either of the Loans or any interest therein; (c) Lender has authority to sell and convey its interest in the Loans as described herein; (d) the execution and delivery of this Agreement and the Assignment Documents have been duly and validly authorized, executed and delivered, by Lender, the U.S. Small Business Administration and the investor referenced in the foregoing clause (a); (e) Lender has provided Assignee true and correct copies of all Loan Documents, including all schedules and exhibits to such documents; and (f) Lender has not consented to any material modifications, releases or waivers of any term or provision of any of the Loan Documents. Assignee acknowledges that, with the exception of the foregoing sentence, Lender has not made, and does not make, any representation or warranty of any kind, express or implied, with respect to any of the Loan Documents, the Loans or the Collateral, and Assignee acknowledges that Lender is selling and assigning the Loans to Assignee "AS IS" AND WITHOUT RECOURSE AGAINST LENDER, AND WITHOUT REPRESENTATION OR WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, BY LENDER.

2.9 Assignee Representations and Warranties. Assignee represents and warrants to Lender that Assignee has full power, authority and legal right to execute and deliver, and to perform and observe the provisions of, this Agreement and to purchase the Loans from Lender. Assignee also represents and warrants that it has access to any legal and financial advice that may be necessary to fully investigate all matters pertaining to the Loans and the Collateral.

3. Remedies

3.1 Assignee Default. If Assignee defaults under this Agreement, Lender may, as its sole and exclusive remedy hereunder, terminate this Agreement; provided that Lender first provides Assignee with written notice of the default and Assignee fails to cure any such default within five (5) business days following written notice thereof from Lender.

3.2 Lender Default. If Lender defaults under this Agreement, Assignee may, as its sole and exclusive remedy hereunder, seek specific performance of this Agreement; provided that Assignee first provides Lender with written notice of default and Lender fails to cure any such default within five (5) business days after written notice thereof from Assignee.

4. Escrow Matters

4.1 Scope of Undertaking. Escrow Agent's duties and responsibilities in connection with this Agreement shall be purely ministerial and shall be limited to those expressly set forth in this Agreement. Escrow Agent is not a principal, participant or beneficiary in any transaction underlying this Agreement and shall have no responsibility or obligation of any kind in connection with this Agreement or the Purchase Price, and shall not be required to take any action with respect to any matters that might arise in connection therewith, other than to receive, hold, invest and deliver the Purchase Price as herein provided. Without limiting the generality of the foregoing, Escrow Agent shall not be required to exercise any discretion hereunder and shall have no investment or management responsibility and, accordingly, shall have no duty to, or liability for its failure to, provide investment recommendations or investment advice to Lender or Assignee. Escrow Agent shall not be liable for any error in judgment, any act or omission, any mistake of law or fact, or for anything it may do or refrain from doing in connection herewith, except for, subject to Section 4.2 below, its own willful misconduct or negligence. Escrow Agent shall never be required to use, advance or risk its own funds or otherwise incur financial liability in the performance of any of its duties or the exercise of any of its rights and powers hereunder.

4.2 Reliance; Liability; No Implied Covenants. Escrow Agent may rely on, and shall not be liable for acting or refraining from acting in accordance with, any written notice, instruction or request or other paper furnished to it hereunder or pursuant hereto and believed by it to have been signed or presented by the proper party or parties. Escrow Agent shall be responsible for holding, investing and disbursing the Purchase Price pursuant to this Agreement; *provided, however*, that in no event shall Escrow Agent be liable for any lost profits, lost savings or other special, exemplary, consequential or incidental damages in excess of Escrow Agent's fee hereunder and *provided further*, that Escrow Agent shall have no liability for any loss arising from any cause beyond its control, including, but not limited to, the following: (a) acts of God, force majeure, including, without limitation, war (whether or not declared or existing), revolution, insurrection, riot, civil commotion, accident, fire, explosion, stoppage of labor, strikes and other differences with employees; (b) the act, failure or neglect of Lender or Assignee or any agent or correspondent or any other person selected by Escrow Agent; (c) any delay, error, omission or default of any mail, courier, telegraph, cable or wireless agency or operator; or (d) the acts or edicts of any government or governmental agency or other group or entity exercising governmental powers. Escrow Agent is not responsible or liable in any manner whatsoever for the sufficiency, correctness, genuineness or validity of the subject matter of this Agreement or any part hereof or for the transaction or transactions requiring or underlying the execution of this Agreement, the form or execution hereof or for the identity or authority of any person executing this Agreement or any part hereof or depositing the Purchase Price. No implied covenants (including the covenant of good faith and fair dealing), responsibilities, duties, obligations or liabilities shall be interpreted into this Agreement.

4.3 Right of Interpleader. Should any controversy arise involving Lender or Assignee with respect to this Agreement or the Purchase Price, or should a substitute escrow agent fail to be designated as provided in Section 4.6 hereof, or if Escrow Agent should be in doubt as to what action to take, Escrow Agent shall have the right, but not the obligation, either to (a) withhold delivery of the Purchase Price until the controversy is resolved, the conflicting demands are withdrawn or its doubt is resolved, or (b) institute a petition for interpleader in any court of competent jurisdiction to determine the rights of the parties hereto. Should a petition for interpleader be instituted, or should Escrow Agent be threatened with litigation or become involved in litigation or binding arbitration in any manner whatsoever in connection with this Agreement or the Purchase Price, Lender and Assignee hereby jointly and severally agree to reimburse Escrow Agent for its attorney's fees and any and all other out of pocket expenses, losses, costs and damages incurred by Escrow Agent in connection with or resulting from such threatened or actual litigation or arbitration prior to any disbursement hereunder.

4.4 Indemnification. Lender and Assignee hereby jointly and severally agree to indemnify and defend Escrow Agent, its officers, directors, partners and employees (each herein called and "Indemnified Party") against, and hold each Indemnified Party harmless from, any and all out of pocket losses, liabilities and expenses, including, but not limited to, fees and expenses of outside counsel, court costs, damages and claims, and costs of investigation, litigation and arbitration, suffered or incurred by any Indemnified Party in connection with or arising from or out of (i) the execution, delivery or performance of this Agreement, or (ii) the compliance or attempted compliance of any Indemnified Party with any instruction or direction upon which Escrow Agent is authorized to rely under this Agreement, except to the extent that any such loss, liability or expense may result from the willful misconduct or negligence of such Indemnified Party.

4.5 Compensation and Reimbursement of Expenses. Assignee hereby agrees to pay Escrow Agent for its escrow and recording fees and to pay all expenses incurred by Escrow Agent in connection with the performance of its obligations hereunder and otherwise in connection with the administration and enforcement of this Agreement, including, without limitation, attorney's fees and related out of pocket expenses, incurred by Escrow Agent. The foregoing notwithstanding, the defaulting party shall be liable to Escrow Agent for the payment of all such fees and expenses.

4.6 Resignation. Escrow Agent may resign hereunder upon ten (10) days' prior notice to Lender and Assignee. Upon the effective date of such resignation, Escrow Agent shall deliver the Purchase Price (if then in Escrow Agent's possession) to any substitute escrow agent designated by Lender and Assignee in writing. If Lender and Assignee fail to designate a substitute escrow agent within ten (10) days after the giving of such notice, Escrow Agent may institute a petition for interpleader. Escrow Agent's sole responsibility after such 10-day notice period expires shall be to hold the Purchase Price (if then in Escrow Agent's possession) and to deliver the same to a designated substitute escrow agent, if any, or in accordance with the directions of a final order or judgment of a court of competent jurisdiction, at which time of delivery Escrow Agent's obligations hereunder shall cease and terminate.

5. Miscellaneous

5.1 Entire Agreement. This Agreement and the Assignment Documents constitute and embody the full and complete understanding and agreement of Lender and Assignee with respect to the subject matter hereof and supersede all prior written or oral understandings or agreements with regard thereto.

5.2 Controlling Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona, and the courts of Maricopa County, Arizona, shall have exclusive jurisdiction over any litigation arising out of or related to this Agreement.

5.3 Jury Trial Waiver. Each of the parties waives the right to trial by jury in any and all actions or proceedings in any court between them or to which they may be parties, whether arising out of, under or by reason of this Agreement or any of the Assignment Documents, or any acts or transactions hereunder or, the interpretation or validity hereof.

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

5.5 Interpretation of Agreement. This Agreement shall apply to the parties hereto according to the context hereof, without regard to the number or gender of words or expressions used herein. The headings or captions of Articles or sections in this Agreement are for convenience and reference only, and in no way define, limit or describe the scope or intent of this Agreement or the provisions of such Articles or sections. This Agreement shall be construed as a whole, in accordance with the fair meaning of its language, and, as each party has been represented and advised by legal counsel of its choice in the negotiation of this Agreement, neither this Agreement nor any provision thereof shall be construed for or against any party by reason of the identity of the party drafting this Agreement. As used in this Agreement, the term(s): (a) "include" or "including" shall mean without limitation by reason of enumeration; and (b) "herein," "hereunder," "hereof," "hereinafter" or similar terms refer to this Agreement as a whole rather than to any particular paragraph. Any document incorporated herein by reference shall be made a part hereof for all purposes, and references in this Agreement to such document shall be deemed to include such reference and incorporation.

5.6 Representation by Counsel. Each party has had the opportunity to have this Agreement and all related documentation reviewed by legal counsel of its own choosing. Each party enters into this Agreement freely, without coercion, and based upon that party's own judgment.

5.7 Severability. If any one or more provisions of this Agreement is for any reason held to be invalid, illegal or unenforceable under any present or future law by the final judgment of a court of

competent jurisdiction, such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement, and this Agreement shall be construed as if the invalid, illegal or unenforceable provision had not been contained herein, but had been replaced with a valid, legal and enforceable provision as similar as possible to the replaced provision.

5.8 Binding Effect. This Agreement shall be binding upon and inure to the benefit of Lender, Assignee and their respective successors and assigns, but there are otherwise no third party beneficiaries to this Agreement (provided, however, that the Lender Parties will be beneficiaries of paragraph (e) of the attached Consent of Obligors and Pledgors).

5.9 Confidentiality. Each party agrees that it will not disclose or discuss the transaction described herein with any other person or entity, except for such party's agents, employees, affiliates and attorneys, or to reproduce or duplicate this Agreement; provided, however, that the foregoing shall not prohibit Lender from responding to legal process, making and filing reports that may be required by applicable law or regulation, or responding truthfully and completely to inquiries that it receives from third parties.

5.10 Notices. All notices and other communications described herein shall be in writing and shall be delivered in person, or by overnight courier, postage prepaid, addressed to the relevant party's address set forth on the signature page of this Agreement. All notices given in accordance with the terms hereof shall be deemed delivered and received on the next business day, if sent for next-day delivery with an overnight courier; or when delivered personally or otherwise received. Any party hereto may change the address for receiving notices, requests, demands or other communication by notice sent in accordance with the terms of this Section.

5.11 Counterparts/Electronic Signatures. This Agreement may be executed in one or more counterparts. Signature pages may be detached from the counterparts and attached to a single copy of this Agreement to physically form one legally effective document. Signatures submitted by facsimile or email (pdf) transmission shall be effective in all respects as original signatures.

[SIGNATURES APPEAR ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year set forth above.

Address for Notice:

909 East Missouri Avenue
Phoenix, AZ 85014

RepublicBankAZ, N.A., a national banking association

By: Emily Chedister, VP
Emily Chedister, Loan Operations Manager, V.P.

555 West Chandler Boulevard
Chandler, AZ 85225

Mutual of Omaha Bank, a federally chartered thrift

By: _____
Corey Schimmel, Vice President

CONSENT AND AGREEMENT OF ESCROW AGENT

Escrow No. 132573-33A

The undersigned hereby agrees to act as escrow agent in accordance with the terms of the foregoing Loan Purchase and Sale Agreement and to comply with the escrow's agent's duties thereunder.

Dated: September __, 2013

Thomas Title & Escrow, LLC

By: _____
Jennifer Teynor
Escrow Officer

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year set forth above.

Address for Notice:

909 East Missouri Avenue
Phoenix, AZ 85014

RepublicBankAz, N.A., a national banking association

By: _____
Emily Chedister, Loan Operations Manager, V.P.

555 West Chandler Boulevard
Chandler, AZ 85225

Mutual of Omaha Bank, a federally chartered thrift

By: Corey Schimmel
Corey Schimmel, Vice President

CONSENT AND AGREEMENT OF ESCROW AGENT

Escrow No. 132573-33A

The undersigned hereby agrees to act as escrow agent in accordance with the terms of the foregoing Loan Purchase and Sale Agreement and to comply with the escrow's agent's duties thereunder.

Dated: September __, 2013

Thomas Title & Escrow, LLC

By: _____
Jennifer Teynor
Escrow Officer

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year set forth above.

Address for Notice:

909 East Missouri Avenue
Phoenix, AZ 85014

RepublicBankAz, N.A., a national banking association

By: _____
Emily Chedister, Loan Operations Manager, V.P.

555 West Chandler Boulevard
Chandler, AZ 85225

Mutual of Omaha Bank, a federally chartered thrift

By: Corey Schimmel
Corey Schimmel, Vice President

CONSENT AND AGREEMENT OF ESCROW AGENT

Escrow No. 132573-33A

The undersigned hereby agrees to act as escrow agent in accordance with the terms of the foregoing Loan Purchase and Sale Agreement and to comply with the escrow's agent's duties thereunder.

Dated: September 20, 2013

Thomas Title & Escrow, LLC

By: Jennifer Teynor
Jennifer Teynor
Escrow Officer

CONSENT OF OBLIGORS AND PLEDGORS

Each Obligor and each Pledgor identified below hereby represents, warrants and agrees as follows, with the understanding and intention that Lender and Assignee will rely thereon in entering into the foregoing Loan Purchase and Sale Agreement ("Agreement"):

(a) Each Obligor and Pledgor acknowledges the accuracy of the recitals in Article 1 of the Agreement, and reaffirms to Lender each of the representations, warranties, covenants and agreements of such Obligor or Pledgor set forth in the Loan Documents with the same force and effect as if each were 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.

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

(c) Each Obligor or Pledgor which constitutes an entity or a trust represents and warrants to Lender that: (i) the organizational or trust documents of such Obligor or Pledgor that were in effect at the time of the original closing of the applicable Loan continue in full force and effect and have not been further modified or amended; and (ii) such Obligor or Pledgor is authorized and empowered to enter into this Agreement, and the individual executing this Agreement on behalf of such Obligor or Pledgor is authorized to do so, and to take any actions necessary or desirable, in connection with the transaction described in the Agreement.

(d) Each Obligor and Pledgor represents and warrants that there is not pending against such Obligor or Pledgor a voluntary or involuntary petition in bankruptcy, an assignment for the benefit of creditors, a petition seeking reorganization or any arrangement under the bankruptcy or insolvency laws of the United States or any state, or any other action brought under similar laws, and such Obligor or Pledgor is not "insolvent" within the meaning of Section 101 of the federal Bankruptcy Code or A.R.S. Section 44-1002.

(e) As a material inducement to Lender to agree to sell the Loans to Assignee, each Obligor and Pledgor, on behalf of itself and its past and present officers, directors, shareholders, agents, employees, attorneys, affiliates, subsidiaries and parents, and their respective heirs, successors and assigns (individually and collectively, the "Obligor/Pledgor Parties"), hereby fully and forever release and discharge Lender and all of Lender's past, present and future officers, directors, shareholders, agents, employees, attorneys, affiliates, predecessors in interest, successors in interest, the parent corporations of Lender or its predecessors in interest, and all of their respective heirs, personal representatives, successors and assigns (individually and collectively, the "Lender 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, or 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 arise 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

upon in light of that realization and that the Obligor-Pledgor Parties nonetheless intend to release the Lender Parties from any such unknown claims that would be among the matters described if known on the date hereof. The Obligor-Pledgor Parties hereby acknowledge that they are signing this Consent with full knowledge of any and all rights they may have and that they are not relying upon any representations made by Lender or any other party, other than those set forth in the 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 this Consent. The Obligor-Pledgor Parties represent that they have had the opportunity to consult with legal counsel concerning the legal consequences of this release.

(f) The representations, warranties, covenants and agreements of the Obligors and Pledgors in this Consent shall survive the closing of the purchase and sale of the Loans described in the Agreement.

(g) TMDB and Glendale/12th specifically represent, warrant and agree that the references in the 2012 Note, 2012 Loan Agreement and the 2012 Security Agreements to "Thompson/McCarthy DB LLC DBA Glendale/12th" (i) were intended to refer to TMDB and Glendale/12th, as separate entities, and (ii) shall hereafter be construed as if TMDB and Glendale/12th had each originally and separately signed such documents.

(h) TMDB, JLT and JLM specifically represent, warrant and agree that the references (in the paragraph entitled "THE LOAN") in their Assignment of Construction Contracts and Assignment of Architect's Contracts, each dated June 22, 2012, are intended to refer to a Construction Loan Agreement dated October 24, 2011, rather than a Construction Loan Agreement dated June 22, 2012.

OBLIGORS:

Thompson/McCarthy DB LLC, an Oregon limited partnership

By James L. Thompson
James L. Thompson, Manager

James L. Thompson
James L. Thompson, personally and as Trustee of the James L. Thompson Living Trust dated June 16, 1997

Janice L. McCarthy
Janice L. McCarthy, personally and as Trustee of the Janice L. McCarthy Trust dated September 28, 2005

Thompson/McCarthy Coffee Co., an Oregon corporation

By: James L. Thompson
James L. Thompson, President

Glendale Ave./12th Street DB LLC, an Oregon limited liability company

By: James L. Thompson
James L. Thompson, Manager

PLEDGORS

Rural Guadalupe DB LLC, an Oregon limited liability company

By: James L. Thompson
James L. Thompson, Manager

Greenfield Southern DB LLC, an Oregon limited liability company

By: James L. Thompson
James L. Thompson, Manager

McQueen/Guadalupe DB LLC, an Oregon limited liability company

By: James L. Thompson
James L. Thompson, Manager

Camelback Central DB LLC, an Oregon limited liability company

By: James L. Thompson
James L. Thompson, Manager

Mill Avenue/Southern DB LLC, an Oregon
limited liability company

By: James L. Thompson
James L. Thompson, Manager

Gilbert Road/McKellips DB LLC, an Oregon
limited liability company

By: James L. Thompson
James L. Thompson, Manager

Bell Road and 29th Street DB LLC, an Oregon
limited liability company

By: James L. Thompson
James L. Thompson, Manager

Rural Road/Lemon DB LLC, an Oregon limited
liability company

By: James L. Thompson
James L. Thompson, Manager

Papago Plaza DB LLC, an Oregon limited
liability company

By: James L. Thompson
James L. Thompson, Manager

EXHIBIT "A"
(to Loan Purchase and Sale Agreement)

PERSONAL PROPERTY SECURITY DOCUMENTS

2011 Security Agreements

Name of Document	Date	Grantor/Debtor
Commercial Security Agreement	10-24-2011	TMDB, Rural Guadalupe DB LLC and Greenfield Southern DB LLC
Commercial Pledge Agreement	10-24-2011	McQueen/Guadalupe DB LLC, Camelback Central DB LLC, Mill Avenue/Southern DB LLC, Gilbert Road/McKellips DB LLC, Bell Road and 29 th Street DB LLC, Rural Road/Lemon DB LLC, Papago Plaza DB LLC and Thompson/McCarthy Coffee Co.
Assignment of Construction Contracts (MA Schaefer Construction Company Inc.)	06-22-2012	TMDB, JLT and JLM
Assignment of Construction Contracts (Laurshan, Inc.)	10-24-2011	TMDB, JLT and JLM
Assignment of Architect's Contracts (sake reindersma architecture pllc)	06-22-2012	TMDB, JLT and JLM
Assignment of Architect's Contracts (Kistler + Small + White Architects)	10-24-2011	TMDB, JLT and JLM

2012 Security Agreements

Name of Document	Date	Grantor/Debtor
Commercial Security Agreement	5-09-2012	TMDB, Glendale Ave./12 th Street DB LLC and TMCC
Commercial Pledge Agreement	5-09-2012	Rural Guadalupe DB LLC, McQueen/Guadalupe DB LLC, Camelback Central DB LLC, Mill Avenue/Southern DB LLC, Gilbert Road/McKellips DB LLC, Bell Road and 29 th Street DB LLC, Rural Road/Lemon DB LLC, Papago Plaza DB LLC and Greenfield Southern DB LLC
Assignment of Construction Contracts (M.A. Schaefer Construction Company Inc.)	10-04-2012	TMDB DBA Glendale Ave./12 th Street DB LLC
Assignment of Architect's Contracts (sake reindersma architecture pllc)	10-04-2012	TMDB DBA Glendale Ave./12 th Street DB LLC

UCC Financing Statements (Oregon Secretary of State)

Debtor Name	Date Filed	Filing Number
TMDB, Rural Guadalupe DB LLC and Greenfield Southern DB LLC	10-25-2011, 5-14-2012	89034495 89034495-1
McQueen/Guadalupe DB LLC, Camelback Central DB LLC, Mill Avenue/Southern DB LLC, Gilbert Road/McKellips DB LLC Bell Road and 29 th Street DB LLC, Rural Road/Lemon DB LLC, Papago Plaza DB LLC, and Thompson/McCarthy Coffee Co.	10-25-2011	89034560

UCC Financing Statements (Arizona Secretary of State)

Debtor Name	Date Filed	Filing Number
TMDB, Rural Guadalupe DB LLC and Greenfield Southern DB LLC	10-25-2011, 5-15-2012	201116687972 Amendment
McQueen/Guadalupe DB LLC, Camelback Central DB LLC, Mill Avenue/Southern DB LLC, Gilbert Road/McKellips DB LLC Bell Road and 29 th Street DB LLC, Rural Road/Lemon DB LLC, Papago Plaza DB LLC, and Thompson/McCarthy Coffee Co.	10-25-2011	201116688019

UCC Financing Statement (Fixture Filing) (Maricopa County Recorder)

Debtor Name	Date Recorded	Recorder Number
TMDB, Rural Guadalupe DB LLC and Greenfield Southern DB LLC	11-07-2011	2011-0921234

EXHIBIT "B-1"
(to Loan Purchase and Sale Agreement)

ALLONGE TO NOTE

This Allonge is attached to, and made a part of, that Note dated October 24, 2011, in the principal amount of \$1,026,300.00, executed by Thompson/McCarthy DB LLC, James L. Thompson and Janice L. McCarthy, and payable to the order of the undersigned.

Pay to the order of Mutual of Omaha Bank, a federally chartered thrift ("Assignee"), WITHOUT RECOURSE, WARRANTY OR REPRESENTATION BY THE UNDERSIGNED OF ANY KIND, EXPRESS OR IMPLIED, except the representations and warranties that are expressly set forth in paragraph 2.8 of that Loan Purchase and Sale Agreement dated as of September 19, 2013, between the undersigned and Assignee.

RepublicBankAz, N.A., a national banking association

By: Emily Chedister, VP
Emily Chedister, Loan Operations Manager, V.P.

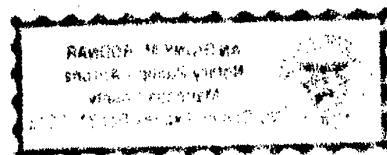


EXHIBIT "D"
(to Loan Purchase and Sale Agreement)

ASSIGNMENT OF RIGHTS UNDER LOAN DOCUMENTS

BY THIS ASSIGNMENT, RepublicBankAz, N.A., a national banking association ("Lender"), for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, hereby absolutely and unconditionally assigns, transfers, conveys and sets over to Mutual of Omaha Bank, a federally chartered thrift ("Assignee"), all of Lender's right, title and interest in and to the following documents (collectively, the "Loan Documents");

(a) A Note dated October 24, 2011, made by Thompson/McCarthy DB LLC ("TMDB"), James L. Thompson ("JLT") and Janice L. McCarthy ("JLM") (collectively, "Original Borrowers") and payable to the order of Lender.

(b) A Construction Loan Agreement dated October 24, 2011, between Original Borrowers and Lender.

(c) (i) A Construction Deed of Trust recorded November 4, 2011, at Document No. 2011-0918231, records of Maricopa County, Arizona (the "Tempe Deed of Trust"), (ii) a Construction Deed of Trust recorded July 17, 2012, at Document No. 2012-0626574, records of Maricopa County, Arizona (the "Mesa Deed of Trust"); (iii) the 2011 Security Agreements listed on Attachment "1" hereto; and (iv) the UCC Financing Statements listed on Attachment "1" hereto.

(d) (i) Unconditional Guarantees, each dated October 24, 2011, from the James L. Thompson Living Trust dated June 16, 1997 (the "JLT Trust") and the Janice L. McCarthy Living Trust dated September 28, 1997 (the "JLM Trust") in favor of Lender; and (ii) a Guaranty of Completion and Performance dated October 24, 2011, from the JLT Trust and the JLM Trust (collectively, the "Trusts") in favor of Lender.

(e) A Note dated May 9, 2012, made by Thompson/McCarthy DB LLC DBA Glendale Ave./12th Street DB LLC [which was intended to refer to TMDB and Glendale Ave./12th Street DB LLC, an Oregon limited liability company ("Glendale/12th"), as separate entities, with no "DBA" designation] and payable to the order of Lender.

(f) A Construction Loan Agreement dated May 9, 2012, between Thompson/McCarthy DB LLC DBA Glendale Ave./12th Street DB LLC [which was intended to refer to TMDB and Glendale/12th, as separate entities, with no "DBA" designation] and Lender.

(g) (i) A Construction Leasehold Deed of Trust with Assignment of Rents, Security Agreement and Fixture Filing recorded June 6, 2012, at Document No. 2012-0489027, records of Maricopa County, Arizona (the "Glendale Deed of Trust"), (ii) the 2012 Security Agreements listed on Attachment "1" hereto; and (iii) the UCC Financing Statements listed on Attachment "1" hereto.

(h) (i) Unconditional Guarantees, each dated May 9, 2012, from JLT, JLM, the Trusts and Thompson/McCarthy Coffee Co., an Oregon corporation ("TMCC"), in favor of Lender; and (ii) a Guaranty of Completion and Performance dated May 9, 2012, from JLT, JLM, the Trusts and TMCC in favor of Lender.

Lender hereby authorizes Assignee to enforce Lender's rights under the Loan Documents and to receive any performances of any or all obligors thereunder. Lender hereby authorizes and directs any and all obligors under the Loan Documents to make and render directly to Assignee all acts and performances required of them under the terms of the Loan Documents.

Lender also absolutely and unconditionally assigns, transfers, conveys and sets over to Assignee all of Lender's right, title and interest in and to:

(i) All other documents executed and delivered by or on behalf of any of the obligors or pledgors of collateral in connection with the obligations described in the Loan Documents, and all extensions, modifications, amendments and renewals of any of the foregoing.

(ii) All title insurance policies and other indemnities or warranties with respect to the liens of the Tempe Deed of Trust, the Mesa Deed of Trust and the Glendale Deed of Trust.

(iii) To the extent assignable, the SBA 7(A) Guarantee Authorizations and related documentation with respect to the loans described above.

(iv) All benefits of Lender under that Subordination Agreement recorded June 17, 2012, at Document No. 2012-0626576, records of Maricopa County, Arizona, with Aqua Tots Swim School Holdings, LLC, as landlord.

(v) All benefits of Lender under that Standby Creditor's Agreement dated October 24, 2011, with JLT, as Standby Creditor.

(vi) All benefits of Lender under that Landlord's Consent to Assignment recorded November 4, 2011, at Document No. 2011-0918233, records of Maricopa County, Arizona, with J & B Store Rentals, LLC, as landlord.

DATED this 19th day of September, 2013.

RepublicBankAz, N.A., a national banking
association

By Emily Chedister, VP
Emily Chedister, Loan Operations Manager, V.P.

ATTACHMENT "1"
(to Assignment of Rights of Rights Under Loan Documents)

PERSONAL PROPERTY SECURITY DOCUMENTS

2011 Security Agreements

Name of Document	Date	Grantor/Debtor
Commercial Security Agreement	10-24-2011	TMDB, Rural Guadalupe DB LLC and Greenfield Southern DB LLC
Commercial Pledge Agreement	10-24-2011	McQueen/Guadalupe DB LLC, Camelback Central DB LLC, Mill Avenue/Southern DB LLC, Gilbert Road/McKellips DB LLC, Bell Road and 29 th Street DB LLC, Rural Road/Lemon DB LLC, Papago Plaza DB LLC and Thompson/McCarthy Coffee Co.
Assignment of Construction Contracts (MA Schaefer Construction Company Inc.)	6-22-2012	TMDB, JLT and JLM
Assignment of Construction Contracts (Laurshan, Inc.)	10-24-2011	TMDB, JLT and JLM
Assignment of Architect's Contracts (sake reindersma architecture pllc)	6-22-2012	TMDB, JLT and JLM
Assignment of Architect's Contracts (Kistler + Small + White Architects)	10-24-2011	TMDB, JLT and JLM

2012 Security Agreements

Name of Document	Date	Grantor/Debtor
Commercial Security Agreement	5-09-2012	TMDB, Glendale Ave./12 th Street DB LLC and TMCC
Commercial Pledge Agreement	5-09-2012	Rural Guadalupe DB LLC, McQueen/Guadalupe DB LLC, Camelback Central DB LLC, Mill Avenue/Southern DB LLC, Gilbert Road/McKellips DB LLC, Bell Road and 29 th Street DB LLC, Rural Road/Lemon DB LLC, Papago Plaza DB LLC and Greenfield Southern DB LLC
Assignment of Construction Contracts (M.A. Schaefer Construction Company Inc.)	10-04-2012	TMDB DBA Glendale Ave./12 th Street DB LLC
Assignment of Architect's Contracts (sake reindersma architecture pllc)	10-04-2012	TMDB DBA Glendale Ave./12 th Street DB LLC

UCC Financing Statements (Oregon Secretary of State)

Debtor Name	Date Filed	Lien Number
TMDB, Rural Guadalupe DB LLC and Greenfield Southern DB LLC	10-25-2011, 5-14-2012	89034495 89034495-1
McQueen/Guadalupe DB LLC, Camelback Central DB LLC, Mill Avenue/Southern DB LLC, Gilbert Road/McKellips DB LLC Bell Road and 29 th Street DB LLC, Rural Road/Lemon DB LLC, Papago Plaza DB LLC, and Thompson/McCarthy Coffee Co.	10-25-2011	89034560

UCC Financing Statements (Arizona Secretary of State)

Debtor Name	Date Filed	Lien Number
TMDB, Rural Guadalupe DB LLC and Greenfield Southern DB LLC	10-25-2011, 5-15-2012	201116687972 Amendment
McQueen/Guadalupe DB LLC, Camelback Central DB LLC, Mill Avenue/Southern DB LLC, Gilbert Road/McKellips DB LLC Bell Road and 29 th Street DB LLC, Rural Road/Lemon DB LLC, Papago Plaza DB LLC, and Thompson/McCarthy Coffee Co.	10-25-2011	201116688019

UCC Financing Statement (Fixture Filing) (Maricopa County Recorder)

Debtor Name	Date Recorded	Recorder's Number
TMDB, Rural Guadalupe DB LLC and Greenfield Southern DB LLC	11-07-2011	2011-0921234

EXHIBIT "E-1"
(to Loan Purchase and Sale Agreement)

TRANSFER OF PARTICIPATION AGREEMENT
(2011 Loan)

[SEE ATTACHED]

EXHIBIT 4

Message

From: Thompson Jim L. [dutchbrosjt@gmail.com]
Sent: 11/10/2011 11:53:29 PM
To: Pease Kathye [accounting@equ8ation.com]
Subject: Fwd: Dutch Bros

Lets comply with 90 day financials well oiled machine...mmmmmmm

Begin forwarded message:

From: Michael Harris <mHarris@republicaz.com>

Date: November 10, 2011 3:52:01 PM MST

To: Thompson Jim L. <dutchbrosjt@gmail.com>

Subject: Re: Dutch Bros

Jim you can go to \$5 million without any issues. I have to submit all new locations to the SBA before we can fund on them it's part of financing. Also the remaining funds should have been taken care of today. Also until you are capped off at \$5 million I will need updated financial statements every 90 days. The funding issue was due to a typo by Jill Trimmer and was corrected. We should all start to function like well oiled machine going forward.

Sent from my iPhone

On Nov 10, 2011, at 3:43 PM, "Thompson Jim L." <dutchbrosjt@gmail.com> wrote:

Michael Are we truly approved for 2.5 million...to add 3 locations now. What are chances of going to the SBA 5 million limit? Still dealing with funding...did receive a check today for 35% of funds due me.....jim

On Nov 10, 2011, at 9:43 AM, Michael Harris wrote:

Jim,

This is in response to your voicemail regarding the three new locations. Here is what I need:

- Copies of the signed leases
- Copy of the purchase contract for the land at Paradise Valley
- Updated Thompson McCarthy financial statement that covers 9/30/2011

Once I have the information listed above I will complete a new SBA application for the new loan amount and get it over to you for signature. Please call or email me with any questions and concerns.

MICHAEL HARRIS
Vice President - Business Relationship Manager
REPUBLIC BANK AZ
909 E. Missouri Ave
Phoenix, AZ 85014
(602) 280-9412 (D)
(602) 277-5321 (F)

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(541) 941-1152

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Dutch Bros. Coffee☐

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Message

From: Accounting [accounting@equ8ation.com]
Sent: 2/4/2014 8:44:12 PM
To: Jim Thompson [dblegalaz@gmail.com]
Subject: Fwd: new sites Dutch Bros

Kathye Pease, MBA

EQ8, LLC

PO Box 7433
Chandler AZ 85246

480-359-4883 (office)
602-513-7255 (fax)
480-466-6589 (cellular)

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----- Forwarded message -----

From: Thompson Jim L. <dutchbrosit@gmail.com>
Date: Mon, Nov 4, 2013 at 10:54 AM
Subject: Fwd: new sites Dutch Bros
To: Pease Kathye <accounting@equ8ation.com>

Begin forwarded message:

From: Accounting <accounting@equ8ation.com>
Subject: Re: new sites Dutch Bros
Date: October 15, 2012 at 9:09:06 AM MST
To: "Jim L. Thompson" <dutchbrosit@gmail.com>

Jim.

If the SBA only "hinted at needed the business valuation" and there is no issue. WHY are we still waiting on approval? And why are we waiting on the Business valuation at all if they never officially REQUESTED it?

So what is the official hold up? And why are we still waiting on a loan from RepublicBank AZ 10 months after we requested it.

I know, I know..... breathe!. :-) Have a great Monday!

Kathye Pease, MBA

EQ8, LLC

PO Box 7433
Chandler AZ 85246

480-359-4883 (office)
602-513-7255 (fax)
480-466-6589 (cellular)

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On Mon, Oct 15, 2012 at 9:03 AM, Jim L. Thompson <dutchbrosjt@gmail.com> wrote:

Begin forwarded message:

From: Michael Harris <mHarris@republicaz.com>
Subject: RE: new sites Dutch Bros
Date: October 15, 2012 9:01:28 AM MST
To: "Jim L. Thompson" <dutchbrosjt@gmail.com>

Jim,

I am fine meeting with you how about Wednesday morning at 9AM at our Mesa location here is the address:

1845 S Dobson
Ste 101
Mesa, AZ 85202

The cross streets are Baseline and Dobson.

Also, I need you to please understand the issue here is not the credit or ability to secure credit. I am not worried at all about you reaching the \$5MM limit with us and in fact we plan on it. We hit the limit in which we could just use your balance sheet to value the company. Also, they hinted that if we did obtain a business valuation we would need to secure additional assets (such as liens on other real estate or have you pledge stock) in this case the Business Valuation is the best way to go.

Jim you are and have been our guy and we are going to stand behind you and get these location established as quickly as we can.

MICHAEL HARRIS
VICE PRESIDENT - BUSINESS RELATIONSHIP MANAGER
REPUBLIC BANK AZ
909 E. MISSOURI AVE
PHOENIX, AZ 85014
(602) 280-9412 (D)
(602) 277-5321 (F)

From: Jim L. Thompson [mailto:dutchbrosjt@gmail.com]
Sent: Saturday, October 13, 2012 5:40 PM
To: Michael Harris
Subject: new sites Dutch Bros

Michael I would like to talk or meet with you early this week. Given the delay with the Business Valuation, I am again not feeling comfortable about moving forward with new locations. I just need to know the score as I am looking at 7 sites, of which I believe we will open at 4 of these.

Indian School/42nd St Phoenix.....lease is prepared and we have completed the set up of this entity with both Oregon and Arizona. We are working with the City on some needed variances and have not yet signed the lease...but will need to do so very soon.

Pima Rd/Pinnacle Peak N Scottsdale. We should hear within 2 weeks from landowner regarding the approval from City as to our use. We are down to talking about their landscape issues. This is a premium site and tough to replace.

Fiesta Mall...Alma School/Southern We are close to agreement on terms and this is at a stop light at the entrance to the Mall, next to In & Out Burger.

Gilbert Rd/ Guadalupe Gilbert We are on a great go side to freeway, on the same pad with a new concept, Salad N Go. Bill Cantieri would build both stores and this is a great site with good demographics, big traffic, and a super low lease rate.

Cave Creek Rd/Cactus Phoenix This is a long shot with lots of site work needed and not close to a deal as yet. Massive traffic on the SW hard corner.

I have understood from the beginning that we would be approved for the SBA max at 5 Million. The current issues cause me concern that I am wasting my energy without a solid financial commitment. Perhaps we should meet at the Bank

Thank You Jim



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Scottsdale, AZ 85262 |
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Dutch Bros. Coffee



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(541) 941-1152*

"To talk health, happiness, and prosperity to every person you meet"

From: Jim L. Thompson <dutchbrosjt@gmail.com>
Sent: Wednesday, November 28, 2012 11:52 AM
To: Michael Harris <mHarris@republicaz.com>; Stuart Olson <solson@republicaz.com>
Subject: Dutch Bros Loans
Attach: PastedGraphic-1.tiff

Michael and Stuart Thanks for the conference call yesterday. You said you are confident that the loan application for the Paradise Village Pkwy N site is about to be approved ...I am assuming that the funds we have needed to use to build out this project will be reimbursed to Thompson/McCarthy DB LLC. As discussed, the three sites now about to go to lease....Indian School / 42nd St, Fiesta Mall Alma School/Southern, and Gilbert Rd/Juniper, will be funded through the SBA program, or from Republic Bank. These projects will each average \$450K. I appreciate our relationship and have placed trust in Republic Bank to move forward to the 5 Million amount through SBA as promised, and perhaps further.

Can you please send to me a password to open the secure documents being sent me via email? Thanks Jim

 Dutch Bros. Coffee

27915 N 100th Place,
Scottsdale, AZ 85262 |
(541) 941-1152

"To talk health, happiness, and prosperity to every person you meet"

RBAZ 003947

APP076

EXHIBIT 5

DOUGLAS T. HAMAN

7746 E. Rose Lane

Scottsdale, AZ 85250

September 20, 2016

Francis J. Slavin, Esq.

2198 E. Camelback Road, Ste. 285

Phoenix, AZ 85016

Re: Thompson McCarthy DB LLC v Republic Bank AZ, NA

CV 2014-014647

Mr. Slavin:

At your request I have reviewed and analyzed the provided documentation and questions relating to the above referenced matter. Based on the information reviewed, my answers and conclusions are reported below.

Qualifications

I am a Senior Vice President for a bank which specializes in SBA lending. A copy of my curriculum vitae is attached to this report as Addendum 1. As indicated in it, I have been a banker specializing in SBA lending for over 19 years.

I am being compensated for my work and analysis at an hourly rate of \$200 (\$250 testimony). I am independent of Plaintiff and Defendant and my compensation is in no way dependent upon the substance of my opinions and conclusions, or on the outcome of the trial in this case.

Background

Thompson McCarthy DB LLC dba Dutch Bros Coffee ("TMC") owns and operates various Dutch Bros Coffee franchise locations ("stores") in the greater Phoenix metropolitan area. After self-funding and successfully operating seven stores, TMC secured financing commitments from Republic Bank Arizona ("RBA") to finance and build three locations. TMC was in the process of obtaining financing for a fourth [which TMC was led to believe was imminent by RBA], and potentially up to ten stores through RBA with

SBA guaranteed loans after being told by RBA "Jim you can go up to \$5 million without any issues" (TMCC002627)". This was in response to TMC's inquiry to RBA, "Michael Are we truly approved for 2.5 million...to add 3 locations now. What are chances of going to the SBA 5 million limit? (TMCC002627)". The RBA approvals/funding were not timely forthcoming, thus requiring TMC to delay completing/opening certain stores.

Scope of Work

I have been asked to:

- 1 Review various correspondence emails and associated documentation between RBA, TMC, the SBA and third parties.
- 2 Discuss the general SBA loan process, including timing of: applying, obtaining an approval and closing.
- 3 Respond to a list of 25 questions provided by Francis J. Slavin, Esq.
- 4 Based on my experience, identify and discuss various acts and omissions of RBA which caused delay in the timely funding of TMC's loan applications.

Documents and Information

The following have been made available to me in this matter which I have reviewed in forming my opinions herein:

- 16 binders of email correspondence dated between December 21, 2010 and December 11, 2014 with bates numbers beginning with TMCC, SBA, NV and RBAZ. The documentation was provided chronologically by date rather than chronologically by bates numbers. The emails were pertaining to the financing of four TMC Dutch Bros. stores by RBA. These locations include: 1136 S. Greenfield Road, Mesa, AZ ("Greenfield"), 6461 S. Rural Road, Tempe, AZ ("Rural"), 1201 E. Glendale Avenue, Phoenix, AZ ("Glendale") and 12629 N. Paradise Village Parkway West, Phoenix, AZ ("PV"), along with other several addresses of locations TMC indicated they would finance through RBA to utilize the SBA maximum guaranty limit.
- Two CDs containing email correspondence provided by the SBA in relation to the TMC loan requests with Bates numbers beginning with SBA and RBAZ. Most of the data contained within the CD's is a duplicate of the information within the binders.

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.

1. Application: The application is first and consists of the applicant providing the required information and documentation by the SBA and the particular bank of the applicant's choice. The SBA sets forth their requirements in their Standard Operating Procedures ("SOP"). Lenders must meet the requirements of the SBA SOP but are allowed to have additional requirements of their own. The lender gathers the required information and documentation. The underwriting process, or analyzing the credit request most often begins at this point. Once the borrower meets the criteria of a complete application, the underwriting process officially begins.
2. Underwriting: The underwriting process typically begins as the application is being received. The lender reviews the information provided and informs the applicant if additional information is required, depending upon the information provided. This could extend the timing of the request within the application process prior to moving into the underwriting process. Once a complete application is received by the lender, the lender has an obligation under Regulation B ("Reg B") by the Equal Credit Opportunity Act ("ECOA") to underwrite the loan request within a reasonable time. Most lenders use the same timeframe for business credit requests as consumer credit requests, which is 30 days from the date of the credit request for the action taken. The action taken can be favorable, adverse or incomplete and that action must be communicated to the applicant within that time. If the action taken is favorable and the applicant accepts the terms of credit extended, the credit request moves to the closing process. The underwriting process for SBA 7a lenders varies somewhat depending on how it is processed. The more experienced lenders have the SBA's Preferred Lender Program ("PLP") designation and utilize this when processing an SBA 7a loan request. Lenders may use their PLP status when underwriting the loan request, whereby the SBA accepts the lender's determination of the applicant's credit worthiness in order to issue the Authorization. In the case of a GP lender, the credit worthiness of the applicant is determined by both the lender and the SBA to issue the Authorization.
3. Closing: Closing consists of: 1) satisfying the conditions set forth in the lender's commitment letter and SBA Authorization, 2) signing the required loan closing documents for the lender, SBA and third party (title company when involved) and, 3) funding and recording the necessary loan documents with the county. These conditions are items not required prior to loan approval (SBA Authorization) but prior to loan closing (funding and recording). The majority of loan conditions are standard for all loans, with potentially a few that are not. Therefore, most lenders continuously work toward having loan closing conditions satisfied throughout the entire loan process to avoid unnecessary time delays.

Questions From Francis J. Slavin, Esq.

1. Does a bank typically approve a loan internally prior to submitting an application for an SBA loan prior to submitting for the SBA approval? Why? Yes. If the lender has a PLP designation and uses it to obtain the Authorization, the SBA does not review the credit request but utilizes the lender's credit approval. If a lender is a non-PLP lender ("GP Lender") utilizing standard processing, or if a PLP lender utilizes SBA Central Processing, the loan request is first approved

by that lender and their justification for offering credit is part of the loan package submitted to the SBA for their review and direct Authorization.

2. In your experience, how long would it take for the SBA to review an SBA application and respond with an authorization, needs list/screen out letter? When a credit request is submitted to the SBA for full review, it generally takes a few days up to three weeks for a screen out, or needs list, to be received from the SBA.
3. Once an SBA loan application is submitted, what is the typical time period before receiving an authorization (SBA approval) or a declination of the application? In your experience is this authorization (approval) or declination always in writing? The SBA typically sends a screen out letter prior to authorization/declination of an application. The screen out letter is usually sent within a few days up to three weeks after receipt of the application depending on their current case load. The screen out identifies questions and additional information required prior to the SBA moving forward with the application review. When all items are addressed by the screen out it typically takes an additional few days up to three weeks before the authorization or declination is provided. Yes, my experience is that the authorization or declination has always been in writing. The estimated timing listed above appears to be consistent with the applications submitted by RBA to the SBA on behalf of TMC. Based on the provided documentation the Rural and Greenfield stores were submitted on 7/13/11 (SBA00039), the screen out was produced in two weeks on 7/27/11 (SBA00029) and the Authorization was dated four days later on 8/3/11 (SBA00016). The Glendale store's submission date appears to be 2/24/12 (SBA00242) with a screen out date five days later on 2/29/12 (SBA00209), RBA's response as of 3/6/12 (SBA00206) and SBA Authorization was eight days later on 3/14/12 (SBA00193). PV's submission date appears to be 6/20/12 (RBAZ003268). The screen out was completed on 6/28/12 and sent to RBAZ on 7/2/12 (RBAZ003384), 12 days after receipt. RBA's response is dated five months later on 12/3/12 (RBAZ003983). The SBA followed up the same day requesting current financials (RBAZ003974). The SBA responded the following day on 12/4/12 indicating several of the items on the screen out dated 6/28/12 still needed to be addressed (SBA004135). The last communication available is from 12/27/12 from the SBA indicating that they are following up on a voicemail the SBA left for Michael Harris on the previous Thursday but have yet to receive a response (RBAZ004188). The purpose was stated to finalize the underwriting and complete the loan authorization.
4. Would a lender, upon receiving a response from the SBA with an authorization, declination or needs list/screen out, be required to convey that response to the borrower/applicant? The SBA authorization is not a commitment to loan but rather an agreement with the lender for the government guaranty. However, as per Reg B lenders have legal obligations to communicate to borrowers within a reasonable time whether their loan application is approved, adverse or incomplete.
5. If the loan for the Paradise Valley location were submitted in January/February of 2012, and it were not approved by the SBA, would the lender have been required to notify TMCC that the SBA loan application had been declined? Is this requirement referred to as Regulation B or "Reg B?" If the loan request had been adverse at either the bank or SBA level, the lender is required to notify the borrower in a reasonable timeframe to be compliant with "Reg B".

6. If the SBA had screened out your client's application for an SBA on the basis that it believed there to be a "collateral shortfall", and the SBA had suggested additional assets your client could pledge in order to satisfy what the SBA had suggested was "collateral shortfall", would you have given your client the option of pledging the additional assets to satisfy the SBA? Yes.
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.
8. If a borrower such as TMCC were to request your bank to make it a loan for \$500,000, would your bank make such a loan if all TMCC collateral had already been secured by another bank, and the individual principals of TMCC had already made themselves personally obligated for the previous loans in the amount of \$1.6 million? While it is possible for a bank to extend credit approval if there is a lack of sufficient collateral available due to another lender's security interest in the applicant's collateral, in my experience banks are very reluctant to do so. A personal guaranty to other banks would not necessarily prevent an approval if the applicant demonstrates sufficient ability for repayment.
9. On the Rural/Guadalupe and Greenfield/Southern stores which were processed in one loan application, would it take any longer for SBA authorization with 2 stores than 1 store? Having two stores processed within one application does not necessarily require a longer time for authorization. It is possible for it to take longer if one of the stores adds complexity that has additional requirements needing more time to satisfy. Typically, however, meeting the requirements for each location under one loan can be done simultaneously. Referring back to the answer for Question 3, the SBA provided the screen out in 12 days and the Authorization in 4 days after receiving RBA's response. We generally anticipate the SBA to respond with a screen out to a loan request within three weeks.
10. Is there a standard checklist of documents a lender would require in order to underwrite and close a loan when dealing with construction of a building to be situated on property leased by the borrower? Yes, typically lenders have prepared checklists which cover a variety of potential circumstances for loan requests, including construction on leased land.
11. Is there a different checklist of documents a lender would require when the borrower owns rather than leases the property? Owning versus leasing land creates some differences in documentation. An example of a difference would be obtaining a copy of ownership records and/or loan information on owned land compared to obtaining a copy of the lease for leased land. Security interest is also impacted when comparing owned versus leased land.
12. What are the general differences between a PLP lender and GP lender? A PLP lender must be one of the more experienced SBA lenders and are delegated the authority to process, close, service and liquidate most loans without prior SBA review. A GP lender must submit each SBA loan request to Standard Processing for a full SBA review.
13. What do you believe to be the major advantage a PLP lender has over a GP lender? A PLP lender has the authority to make SBA loans, subject only to a brief eligibility review and assignment of a

loan number by the SBA. A GP lender does not have that authority. Therefore, the underwriting process is generally quicker for a loan processed by a PLP lender because it only happens at the bank level. A loan submitted by a GP lender is underwritten at both the bank level and the SBA level. The typical time expected for the SBA to review and provide a screen out letter is up to three weeks. Once the lender responds to all of the screen out questions and provides any additional information required, we expect the Authorization decision within days but at the latest three weeks.

14. From a borrower's perspective, what is / are the most paramount issue(s) in obtaining a loan? Most applicants are able to complete the application process without issue. Completing the application is more of a timing factor based on the applicant's efforts. Meeting the criteria for approval is typically the most paramount issue which is at the underwriting level. During the underwriting process, most lenders determine the viability of the applicant to produce the conditional requirements to close the loan. If a lender is not comfortable that the applicant will be able to adequately satisfy the conditional requirements the lender will typically require the information prior to approval.
15. As a PLP lender, have you processed loans through "General Processing" on occasion? How many GP loans have you been involved with over your career? No. As a PLP lender, we can have a loan request fully reviewed by the SBA similar to the Standard Processing that is required for GP lenders. I do not recall exactly how many loans I have had fully reviewed by the SBA during the past 19 years, but it has averaged less than one per year. Additionally, I have assisted other bankers on loan applications that have been fully reviewed by the SBA.
16. In your experience, had RBAZ submitted both the Glendale/12th St loan application and the PV loan application together as 1 loan application, would the SBA have accepted that application and processed it as 1 loan request? Yes. There is no apparent reason the SBA would not have processed Glendale and PV as a single loan request, similar to how the SBA processed TMC's first two store locations financed by RBA, Greenfield and Rural
17. What is an SBA "screen out" letter? After reviewing the submitted application, the SBA will generally provide a screen out of questions and/or information required to complete their review in order to come to an approval decision, or Authorization. In my experience it is common for a loan request to receive a screen out prior to receiving the Authorization.
18. Is there an SBA deadline for compliance with a "Screen out" letter"? Is that set forth in any published SBA regulation? How do clients you've processed SBA loans in the past for typically react to screen out letters/ needs lists from the SBA? I am not aware of a deadline set forth in any published SBA regulation. Applicants typically have deadlines to close the loan so they most likely comply to the SBA screen out requirements. It is up to the lender to properly set the applicant's expectations that the screen out is an expected part of the process.
19. In your experience, how soon does an SBA lender respond to an SBA screen out letter? As soon as possible. Depending on what is required from the screen out will determine how long it takes to respond. Generally, the responses to the screen out can be provided within days and up to two weeks.

20. In viewing the items set forth in the June 28, 2012 screen out letter from the SBA for the PV store location, what do you believe would be the typical time it would have taken an SBA lender to provide an adequate response? (RBAZ 003385) The requests by the SBA on the screen out appear to be reasonable and typical. Excluding the items required to be brought in by TMC, a typical time to provide a response would be within a week. The records provided show TMC was consistently timely in providing items requested. Therefore, adding the items required to be brought in by TMC should not have added any additional time.
21. What is the consequence if an SBA loan applicant fails to timely comply with the "screen out" requirements? The SBA will not move forward toward authorization without a response to the screen out.
22. Is it commonly understood among SBA lenders that personal Financial documents/statement will become stale at a certain period of time? What is that period of time?(RBAZ 003980) Yes, it is commonly understood among SBA lenders that personal financial documents become stale after 90 days, as outlined within the SBA SOP.
23. Within 30 days of a completed application, is it a requirement that a lender provide the applicant with an approval, declination or a needs list? In your experience is this always in writing? After receiving a completed loan application, it is my experience that It is common practice among SBA lenders to provide an applicant with an approval, adverse action or incomplete notice in writing within 30 days to comply with Reg B.
24. In your 14 years of experience, has the SBA ever provided you or anyone you work with a "verbal" approval of an SBA loan? In my 19 years of experience in SBA lending, the SBA has not been known to provide a verbal approval, at least not accompanied by a written Authorization. Lenders rely on the SBA Authorization to secure the Government Guaranty.
25. Once an SBA loan has approved a loan application, what is the maximum period allowed for the SBA Lender to close the loan? The SBA allows a loan's first disbursement of loan proceeds up to six months after the date of Authorization. They allow for the loan's full disbursement up to 24 months. An extension to each can be requested.

Opinion from Reviewing RBAZ and Third Party Loan Files

Based upon my 19 years of SBA lending experience in which I have been involved with hundreds of SBA 7a loan requests, my opinion from reviewing RBA's handling of the three loan requests by TMC for the four store locations at Greenfield, Rural, Glendale and PV are that the lender caused multiple delays, often poorly setting the applicant's expectations. In a number of instances, RBA not only poorly set the applicant's expectations but provided misleading statements to the applicant. Applicants rely on their chosen lender to guide them through the process and set their expectations for timing and the process in general.

There are numerous times throughout the three loan requests by TMC that RBA did not appear to act in a timely manner. Most of the delays can be measured in days or weeks, but several can be measured in months. The last application request was for PV, which appears to have the longest delays. A few examples include:

- The first communication within the provided documentation was between TMC, Kathye Pease and Jim Thompson, dated 12/21/10 (RBAZ08178). Kathye P. states, "Jim. Attached are all the forms. The PFS is completed and signed but you have to sign the other forms". On 12/29/10 (TMCC006071) Jim T. emailed David Sczapa of Homerun Financial that "Forms have been completed and thought Kathye forwarded to you. Please check prior to me contacting Kathye." Additionally on 12/29/10(RBAZ06886) Michael Harris of RBA emailed Penny Johnson stating, "Penny, I need you to obtain a credit report on the following potential borrowers please: James Thompson – [xxx-xx-xxxx] Janice McCarthy – [xxx-xx-xxxx]". On 6/9/11(RBAZ000151) Jim T. sent an email to a group including Kathy P. with Michael H. and David S. cc'd stating, "Ladies This loan app has been in review for 4 months thru SBA and is ready to be funded with this information. Please assist to get this information to Michael Harris asap THANKS". [There is very limited documentation provided through June 2011 but the documentation available shows that TMC appears to be actively completing a loan request with RBAZ since December 2010, including completing loan application forms and having their credit reports obtained. The loan was not submitted for Rural and Greenfield until 7/13/11 (SBA00209).]
- The Rural and Greenfield application appears to have been first submitted to the SBA by RBA on 7/13/11 (SBA00039). The SBA Authorization is dated 8/3/11 (SBA00016). The title company appears to first have been contacted on 8/30/11 (RBAZ000256) to provide title. Request for title commitment can be ordered prior to receiving a complete application. Most lenders request title commitment while a completed application is being internally underwritten. The title commitment was communicated to be available on 10/17/11 (RBAZ000429).
- On 11/10/11(TMCC002674) Michael Harris responded to a voicemail from Jim Thompson regarding three new locations, including PV. He indicated he needed three items in order to complete a new SBA application: Copies of the signed leases, Copy of the purchase contract for the land at Paradise Valley and Updated Thompson McCarthy financial statement that covers 9/30/2011. The application for PV appears to have been submitted on 6/20/12 (RBAZ003268). [Often the delay in submitting an application can be outside of the lender's control as they may need to wait for requested information from the applicant. However, in this case the applicant, TMC, is typically very responsive and proactive in providing documentation.] The applicant (Kathye Pease) and Michael Harris of RBA had email correspondence on 2/15/12(TMCC002099 and TMCC002261) about the PV loan request 'missing the deadline' due to financials dated beyond 90 days when it was submitted. There have been no records provided which support that the PV loan request was submitted prior to 2/15/12. The available records indicate the submittal date was 6/20/12. Kathye P. provided the updated financials on 2/21/12(TMCC001967) and asked Michael H. if anything was needed. On 2/22/12(TMCC002075) Michael H. indicated "I need the following and then I was told we would be done....2010 Personal Tax returns...2011 W2 income statement." The tax returns were provided the same day and the W2s were provided on 2/27/12(TMCC001975). The following day Kathye P. asked Michael H. and Emily Chedister of

RBA via email(TMCC006363-6364) when they could expect funding for Glendale and PV. His response was "any day now". She followed up asking again if they are "headed for another long approval process" and he again responded "Not at all I am truly expecting your authorization from them any day at this point". Kathye asked again (TMCC002105) "anything from me? You have all right?" Michael H.'s response was "Nope we are solely waiting on the SBA right now". On 3/6/12(TMCC001978) the applicant again asked about PV and was told by Michael H. "Guys I am a step ahead of you Paradise Valley will be the fastest yet, it has already been prescreened and is well on its way to being authorized." The applicant requested the status of the PV several times more prior to the record of submission on 6/20/12. On 4/26/12(TMCC001274) Michael H. indicated "Paradise Valley is at the mercy of the SBA, I checked in this morning and they have moved it on to the signature (approval) level however they are still running a couple of weeks behind. I was told to call back tomorrow and/or Friday as they will be able to give me a better target date for approval." [The records provided show the loan would not be submitted for another 55 days and not at the signature (approval) level as was indicated by Michael H.] On 6/11/12(TMCC001464) Kathye P. inquired to Michael H. and Anthony B. "What is the status of the SBA approval for Paradise Valley location? This has been in the process since Jan/Feb. Let me know." Michael H. responded, "I spoke with them on Friday and it was approve at the Loan Specialist level and now we are waiting on the director's signature. It's the director who has been backed up, however, I anticipate an approval in the next couple of days since I am calling everyday at this point."(TMCC000983)

- The SBA Authorization for Glendale is dated 3/14/12 and Kathye P asks on 3/19/12 (RBAZ001752) "I understand the funds have been approved for DB Glendale 12th Street location. Effective 3/14/12. I am working to gather all the receipts together so that I can get Thompson McCarthy reimbursed....". Emily Chedister replied, "We received the SBA Authorization on Friday. Michael is out of the office today and should be back tomorrow. There are initial loan docs that will need to be executed and the draw spreadsheet completed before we can advance any funds for this location." [They didn't close until approximately three months later on 6/11/12.]
- The SBA provided their screen out of the PV loan request on 7/2/12(RBAZ003384). The screen out lists their questions and requirements to proceed toward Authorization. The answers to the screen out were not sent from RBA to the SBA until 12/3/12(RBAZ003983). [Between 7/12/12 and 12/4/12 the applicant asked RBA multiple times about the status and if anything else was required. When the applicant was provided with items needed they responded in a timely manner.] The applicant is informed on 9/6/12(TMCC005372) after another inquiry regarding the PV loan approval status by Michael H. that "the lone item that we need to complete PV is a business valuation. I have the bid requests out to three companies currently. Once I get them back I will let you know the cost and time to complete it. This is something the SBA wants to see due to the continued growth of the company." The business valuation appears to have not been engaged until 10/10/12 (NV000017, 48-51), or 34 days later. When the applicant asked whether the SBA or the bank is requiring the business valuation, Michael H. stated the SBA is requiring it. There is no record provided

that the SBA required the business valuation and the applicant asked Michael H. multiple times to receive a copy of the SBA's request for the business valuation. The applicant continued to inquire about the valuation's completion from 9/6/12 through its completion on 10/24/12. There were additional items requested by RBA after the valuation completion [in which the applicant appears to provide in a timely manner]. RBA's response to the SBA's screen out was provided to the SBA on 12/3/16 according to the records reviewed five months after receiving the screen out.

Setting an applicant's expectations are critical for a lender. Applicants rely on a lender's experience and expertise in properly processing their loan request in a timely manner. Most applicants incur other expenses during the process and these expenses can be significant. These fees are not limited to but may include: legal, escrow deposits, survey, architectural, accounting, construction, permitting and inspection. Many of the fees may not be recovered if the loan is not closed. Delays can also cause prospective borrowers significant loss of opportunity. Expectations may be required to be updated or revised throughout the process as the process is fluid with many aspects of the loan process happening simultaneously. [In reviewing TMC's three loan requests for the Rural, Greenfield, Glendale and PV locations, there appear to be many instances whereby the applicant's expectations were not properly set by RBA. In some instances, the records indicate the applicant was misled throughout the process.] Multiple examples are listed as follows:

- There was very limited documentation available prior to 6/9/11 but on that date (RBAZ000153) Michael H. indicated "I need these as quickly as possible as I had them agree to the authorization pending these documents". The pending documents were listed as the applicants' 2010 W2s and 2007-2009 tax returns for the James L. Thompson Living Trust. [Based on the records provided, this loan request doesn't appear to have been submitted until 7/13/11. It has been my experience the SBA doesn't agree to an authorization prior to reviewing the loan application.]
- On 11/10/11(TMCC002627) Jim T. asked Michael H. "Are we truly approved for \$2.5 million...to add 3 locations now. What are chances of going to the SBA 5 million limit?". Michael H.'s response was, "Jim, you can go to \$5 million without any issues...We should all start to function like well oiled machine going forward."
- For the Glendale location the available records appear to indicate the loan application to first be submitted to the SBA on 2/24/12. However, on 2/8/12 (TMCC001866) Michael H. indicated in a response to Kathye P. providing the Glendale loan application and stating "It was faxed over to you last month as well", that he "Got it, and I forwarded it to the SBA. I will keep you posted on the progress".
- On 2/15/12(TMCC001904) Michael H. indicated, "I expect the approval any day now I answered a few questions for them on Friday so we should be set at any time now" in response to Kathye P.'s question, "When do we anticipate having funding for the 12th St. Glendale Location".
- In response to Jim T.'s question, "Are we headed for another long approval process? Not feeling secure with 3 upcoming projects happening soon." 2/28/12(TMCC006363), Michael

H. indicated "Not at all I am truly expecting your authorization from them any day at this point". The SBA sent an email of the screen out to Michael H. on 2/29/12(SBA00209) that they cannot complete their credit analysis and/or authorization without additional information as outlined in the screen out letter.

- Also on 2/28/12(TMCC002106/7) Kathy P. asked Michael H. "I am just checking on when the funds will be available for the 12th/Glendale and the PV locations. I am getting quite a few bills in here to pay". Michael H. responds "Any day now I am hoping we can have this done at the beginning of next week. I am still waiting on the loan authorization". [He doesn't address her inquiry about the PV location and doesn't let her know that PV has not been submitted.]
- On 3/2/12(TMCC002026) Michael H. states "If I get this [Certificate of Franchise] back today I can get the Authorization by Monday afternoon".
- On 3/5/12(TMCC002257) Michael H. states "I believe we will have our approval within the next couple days". On 3/6/12 (TMCC002113) Michael H. states "we are just waiting on the person who signs the authorizations to sign yours. So hopefully this afternoon or tomorrow we should have it".
- On 3/6/12 (TMCC002113) Kathy P asks Michael H. "Can you get the documents together so that we can [get] paradise valley rolling quickly...it is right behind Glendale n 12th street". He responds, "Guys I am a step ahead of you Paradise Valley will be the fastest yet, it has already been prescreened and is well on its way to being authorized". [The records available indicate it was not submitted to the SBA for Authorization until 6/20/12, 3 ½ months after his email.] Kathy P. forwards the response to Jim T. stating, "Ok...Now I know he is not being truthful (not say lying) but no tax id, no corp documents, no forms signed by you.....hmmm...".
- On 3/15/12(TMCC002048) Kathy P. asks Michael H., "Please let update me on the timeline for Glendale and for PV SBA approval". The authorization was on 3/14/12 (SBA00193) for Glendale.
- On 3/21/12 (TMC002301-2) Michael H. states, "'I am back in town and shooting for Friday" in response to Kathy P.'s email, "I hoped to get the loan docs signed this week, so that I can get the expenses reimbursed for this project."
- Applicants asked Michael H. about signing date on 3/23/12(TMCC002077), 3/27/12(RBAZ001761) and 3/28/12(TMCC001954).
- On 3/29/12(TMCC002310) [the applicants express their frustration in an exchange] Jim T. asks, "any response?" Kathy P. states, "Nothing. And I copied Stuart Olsen. Tomorrow I am in the area of the bank. I am dropping by. This is really ridiculous. Don't you agree?" "I do agree Get the two of them together", responds Jim. To which Kathy P. adds, "Even better since Michael Harris never tells two people the same thing".
- On 3/30/12(RBAZ001826) Michael H. asks Marla Woods of RBA, "get Thomas Title involved and see what their timing is".
- On 3/30/12(TMCC002084) Jim T. informs Michael H. "I am again not knowing what is going on with our loan through RepublicAz Bank. I have asked Kathy Pease to follow up and she is

very frustrated that not only do we not know what the issues are, we do not receive clear communication from yourself as to what the problems are. We are trying to be a good customer and to be patient, but the lack of information and timeline is not comforting. bsp; Usually there are problems when a business treats a customer in this manner...I can always deal with the real story and do not feel that you are being professional regarding our loan and the date to sign the documents. I would appreciate some straight up answers and am sure you would feel the same in our position". Michael H. responds, (TMCC001911) "One word, 'Marla'", adding "you will not head into next weekend without a closed loan". Kathy P. states to Jim T., "OMG....he not only throws everyone else under the bus, he lies....where is the list? Why is there any requests for documents at all, he said we would only need an approval. I bet it is the same stuff we already sent him...can I respond asking for the list". Kathy P. then emails Michael H. that evening (RBAZ001831), "I understand from Jim Thompson that you replied to his email last night and that there are issues in relation to the Glendale/12th site loan. He mentioned documents needed. I hope you can understand my frustration after calling you, leaving messages, dropping by and sending emails to you, and never receiving a response. I do not want to be harassing you, but I need some type of response when I have Jim waiting on an answer on a time for signing documents. My job for him is to get the loans approved and the projects funded, and ensure that everyone is paid in regards to his upcoming projects. I feel that I respond to both you and Emily quickly when asked to provide 'any' information in regards to the SBA loans. Please keep me in the loop and let me know what is happening, so that I can handle schedules or items on my end as **we will be working together for quite some time based on the growth that Jim has forecast for the next few years.** Please let me know what is needed to get this Glendale/12th Street loan funded". Michael H. responded the following day (TMCCC000973), "At this point the item I need from you is the insurance information".

- In response to Kathy P.'s question (TMCC001559) of, "What is the time line for getting the loan funded?" Michael H. responded "We are completing the loan documents as I send this email". On 4/6/12(RBAZ001855) [Marla W. appears to clearly be indicating the loan docs have not yet been prepared] as she states to Stuart Olson and Kimberly Pappas, both of RBA "Not all of the remaining items are needed to do the loan docs or close the loan, but some are".
- On 4/26/12(TMCC001638) Kathy P. asked Michael H., "What is the status of the funding for Glendale. I have some large bills coming through. And Paradise Valley? Same issue." His response was (TMCC001274), "We are getting close on Glendale...Paradise Valley is at the mercy of the SBA, I checked in this morning and they have moved it on to the signature (approval) level however they are still running a couple weeks behind. I was told to call back tomorrow and/or Friday as they will be able to give a better target date for approval". From the records provided it appears the PV loan request was not submitted to the SBA until 6/20/12.

- On 5/8/12(TMCC001130) Jim T. indicates to Michael H., "RepublicAZ has again not been able to close our loan at Glendale Ave. This long delay is causing both emotional and financial problems for myself and our company. Is there any way we can close this week?"
- Loan docs for Glendale were prepared on 5/9/12(RBAZ06455) and signed by applicant on 5/13/12(RBAZ06168).
- On 6/11/12 (TMCC001464) Kathye P. asks, "what is the status of the SBA approval for PV? This has been in process since Jan/Feb." Michael H. responds, "I spoke with them on Friday and it was approve at the Loan Specialist level and now we are waiting on the director's signature.....I anticipate an approval in the next couple of days since I am calling everyday at this point." The records indicate the loan request was not submitted to the SBA until 6/20/12 (RBAZ003268).
- On 6/14/12 (RBAZ003261-3266) Kathye P. sends an email to Jim T. expressing her frustration with RBA due to time frame issues and she had been "Informed by the SBA office that the 5 months we have been waiting for SBA approval on our PV loan is inaccurate. I am in the middle of finding ou[t] when or even if it was every submitted." Jim T. responds to pursue and he doesn't want to give RBA another loan application. [The email was apparently inadvertently sent to Emily C. of RBA.] Michael H. responded that he "will contact the SBA and withdraw the request for PV." Kathye P. responded they "did not ask you to withdraw anything or change anything for PV."
- On 6/28/12 (RBAZ003374-3375) Michael H. sent an email to the SBA checking on the status of the PV loan submission. The SBA responded on the same day "Your app has just been assigned to a loan officer for review. Please wait to hear from the SBA soon."
- On 6/29/12 (RBAZ 003376-3377) Michael H. forwarded what appears to be the same email to TMC but there were a couple significant changes to the SBA's wording. It now stated, "Your app has been assigned to aSr.loan officer forauthorization. Please wait to hear from the SBA soon."
- The SBA sent their prelim screen out to Michael H. on 7/2/12 (RBAZ003384-3387) and the formal screen out on 7/5/12 (RBAZ003389-3392).
- Kathye P. sends an email to Michael H. requesting a status for the SBA approval on PV on 7/11/12 (TMCC001041). The following day Michael H. sends a response that he is waiting for the "SBA's final questions which he should have today." (TMCC001287-1289)
- On 7/13/12 Michael H. sends an email responding to TMC's status request with an attachment. The attachment appears to be the identical screen out letter from the SBA dated 6/28/12 and originally sent to RBA on 7/2/12. However, when it was forwarded to TMC it shows a date of 7/12/12. In reviewing the documents provided by the SBA there is no record of a screen out dated 7/12/12, only the original one dated 6/28/12. Similar to the SBA email dated 6/28/12, the letter appears to have been altered prior to forwarding it to TMC (TMCC000638-642).
- On 7/14/12 and 7/18/12 (TMCC000602-608) the applicants have multiple emails amongst themselves questioning when the PV application was actually sent to the SBA and their ongoing frustration with RBA. TMC also asks Michael to "verify that we need to get all these

documents and forms prior to us going through all the processes and work to get this for him.” (TMCC000567-568) Michael H. states he is, “going through everything now and will follow up with TMC shortly.” (TMCC000849-851) TMC also requests the letter that Michael H. indicated he sent to the SBA because “this particular specialist is off base” (TMCC000894-897; TMCC000683-685). TMC also asks Michael H. if he was able to “sort everything out to update them on what they need to get together” (TMCC000531-534; TMCC000920-924).

- On 7/18/12 (TMCC000677-682) Jim T. asks Michael H. if, “we are really just beginning the PV approval?”. Michael H.’s response is, “who stated we were at the beginning stages of the PV approval? As this is incorrect”.
- On 7/26/12 (TMCC000852-853) Kathye P. asks Michael H. for the “status of the SBA approval” for PV and if he has “heard anything back from your letter or in regards to the list of requirements?”
- On 8/1/12 (TMCC0005971) Kathye P. asks Michael H. again “just checking to see if you have any word on the letter you sent and the list of items you said you would update me on”. His response is that he “was to received a new needs list yesterday and as now have not”. Again, there is no record of the letter Michael H. indicates he sent to the SBA for clarification of their 6/28/12 (7/12/12 according to Michael H.) screen out letter (TMCC005348).
- On 8/7/12 (TMCC005331-5335) Kathye P. informs Michael H. “still waiting on some clarification on what paperwork is being requested to get this PV location approved and funded”. She adds “this loan was requested in January, and we are entering August now. Do you have a time line that we can work with here?”
- On 8/8/12 (RBAZ003578) Michael H. responds to TMC “Okay I finally received my updated list” and also indicates “these are the only outstanding items needed by the SBA Specialist to complete the request.” There is no record in the provided files of an updated list by the SBA Specialist (RBAZ003578).
- 8/22/12 (TMCC00000476) Kathye P. states to Michael H. “last week I was under the impression that the PV loan approval was imminent”. Michael H. states “I have responded to the SBA with the financials and answered their questions we are waiting on them at this point”. There are no records provided indicating the financials were sent or received by the SBA at that time (TMCC000698-700).
- On 9/6/12 (TMCC005397-5398) Michael H. informs Jim T. “the lone item that we need to complete PV is a business valuation. I have bid requests out to the three companies currently. Once I get them back I will let you know the cost and time to complete it. This is something the SBA wants to see due to the continued growth of the company”. The business valuation is dated as of 8/31/12 and there are no provided records that the SBA has required a business valuation. Jim T. asks Michael for “a copy of the request from SBA for paradise”.
- On 9/11/12 (TMCC005521-5523) Kathye P. asks if the business valuation is an “SBA requirement, or the RepublicBank requirement?” and asks again to see a copy of the request. His response is “The valuation is an SBA requirement”.

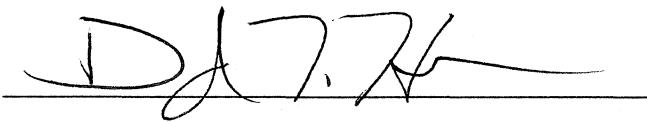
- On 9/24/12 (TMCC005318-5319) Jim T. asks Michael H. "how are we doing on the PV approval?" He responds "we are simply waiting on the appraisal". He adds "I anticipate having it back by Monday, the time frame after that is to get it over to the SBA attorney for review and it should be done within 2 days. However their two days is typically a week. I am hoping to have this closed by next Friday" (TMCC005645-5646).
- On 10/3/12 (TMCC005565-5566) Michael H. states to Jim T. "your appraisal should be completed on Tuesday. That's the last hurdle and then we will get PV closed during your long stay". He adds on 10/4/12 'I expect the loan to close on or before 10/12/2012.'
- On 10/5/12 (RBAZ003726-3727) Kathye P. asks Michael H. for "an update on the SBA approval for PV, or the business valuation". He responded "they should be on contact with you by Tuesday to finalize the valuation which the last hurdle for the final SBA authorization".
- On 10/10/12 (TMCC000172) Kathye P. informs Michael H. she did not receive a call from the valuation company and asks if she should give them a call.
- On 10/10/12 (TMCC000220-228) Kathye P. responds to Michael H. stating "you are getting ahead of everything" with "I wish I was getting ahead of myself, every time we think we might be close to closing this loan, or at the very least getting the SBA approval, something comes up".
- On 10/11/12 (TMCC00000188-192) Jim T. asks Michael H. if he is "talking to SBA about Paradise? Are you sure we can continue to move forward with a lease on another site? When do you expect paradise approval?" Michael H. replies "the issue with PV is not the SBA I have received their "Verbal" approval however we cannot get the signed authorization until we receive the business valuation.....So long story short there are no credit issues it's the SBA needing to check their appropriate boxes before they issue the Authorization. ...So yes go into the other lease".
- On 10/12/12 (TMCC000184-185) Michael H. emails TMC "On a side note, I will need the company financial statements through 8/31/12 or 9/30/12 if those are prepared also. My reasoning is that the original financial statements we sent to the SBA were from April and even though the SBA is telling me all we will need is the valuation, we have learned they always want more. The only thing I can see them asking for when I send the valuation in is an updated set of financial statements. So in an effort to be proactive I would like to get those from you now so we are ahead of the game." [From his statement that the original financial statements we sent to the SBA were from April, it appears to support the first submittal to the SBA for the PV loan was 5/1/12 or later.]
- On 10/13/12 (TMCC005694) Jim T. wants to meet with Michael H. because of the business valuation delay and he is "again not feeling comfortable about moving forward with new locations. I just need to know the score as I am looking at 7 sites".
- On 10/25/12 (TMCC005345-5347) Michael H. indicates they have received the business valuation and have officially sent it over to the SBA. Michael H. also indicated he will call to get an ETA on the authorization once he receives confirmation of its receipt. The first record of the SBA receiving the report is 12/3/12.

- On 11/1/12 (TMCC005640-5641) Jim T. asks Michael H. again for an update on the PV approval. He is told by Michael H. he believes it will be authorized as they would have denied it several months ago already. He also indicated he is "not worried in the least bit that we will get the loan done". The most recent communication provided of the application by the SBA is from the screen out which indicated they requested more information to complete their review.
- 11/14/12 (TMCC005519-5520) Jim T. explains the bind he is in financially and that he "really need this to happen quickly and not hearing any updates and expected approval date are causing me some grief".
- 11/27/12 (RBAZ003942-3943) Michael H. indicates to Kathye P. he "hopes to have this done with in the next two weeks, meaning you are completely closed and its funded".
- 11/28/12 (RBAZ003947) Jim T. thanked Michael H. and Stuart Olson for the conference call on 11/27/12. He recapped stating "You said you are confident the loan application for PV site is about to be approved...I am assuming that the funds we have needed to use to build this project will be reimbursed".
- In the documentation provided to me, 12/3/12 is the first date in which there is any information provided to the SBA from their 6/28/12 screen out. Michael H. states "Attached are the responses to the screen out questions dated 6/28/12. This is the first of two emails" (RBAZ004073; RBAZ003989-4072; RBAZ003987-3988).
- 12/3/12 (RBAZ003983) Michael H. sends a separate email to Dan Smallhouse, the SBA Loan Specialist, "giving him the heads up that RBA has responded to the screen out questions for PV". Michael H. replies to the email Dan Smallhouse sent on 7/2/12.
- An email dated 12/11/14 (RBAZ008428) to Ralph Tapscott from Emily C. stated on 12/20/12 she was asked to attend a meeting with TMC and RBA. She indicated Jim T. was more than frustrated with the amount of time it took RBA to receive an SBA Authorization....Michael H. and Stuart O. explained to TMC because RBA is not a PLP lender RBA could not approve the loans in house. It was concluded there was no longer a working relationship between TMC and RBA.
- 12/27/12 (RBAZ004188) Dan Smallhouse sends an email to Michael H. indicating he has not heard from him since he left a voicemail last Thursday. He also indicates he's looking for clarification on liens so that he can 'finalize the underwriting and complete the Loan Auth.'
- 1/8/13 (TMCC000001; TMCC000046-47) Jim T. sends an email to Michael H. and Stuart O. that he is "hoping that we are ready to close the loan for PV. I remain concerned about this loan and upcoming requests". It appears he still believe they have a working relationship as of that date. Michael H. responds that he is working with the SBA to get it completed as there were a couple of questions.' He appears to also believe they still have a working relationship.
- The final communication provided to me regarding RBA trying to complete the PV loan for TMC is from Jim T. asking Michael H. on 1/8/13 (TMCC000073-74) "if he is hanging on an illusion that he is really getting approved on this loan? Are the promises of upcoming new

sites being approved reality? How does Stuart leaving Republic affect the many assurances to him? "

I've listed all of these communications to illustrate the consistent pattern of TMC expressing their concern about RBA getting their loans approved and closed while RBA provided numerous assurances along the way how close they were to closing which were proven to be untrue. There also are numerous references listed above whereby RBA indicates they have had communication with the SBA which were not found in the emails provided by RBA nor the SBA. In some cases, the information provided to me contradicts what is being told to TMC by RBA. Therefore, the expectations set by RBA for the applicant appear to be poorly set throughout the process of their three loan applications, along with numerous delays by RBA that do not appear to be justified.

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.

A handwritten signature in black ink, appearing to read 'D. T. Haman', is written over a horizontal line.

Douglas T. Haman

EXHIBIT 7

Message

From: Michael Harris [mHarris@republicaz.com]
Sent: 2/15/2012 9:29:38 PM
To: 'Accounting' [accounting@equ8ation.com]
Subject: RE: PV Location

When PV was submitted it was past the 90-day mark. I was able to get Glendale in with the 9/30 statements. For PV I need them to be within the last 90 days.

MICHAEL HARRIS

Vice President - Business Relationship Manager

REPUBLIC BANK AZ

909 E. Missouri Ave

Phoenix, AZ 85014

(602) 280-9412 (D)

(602) 277-5321 (F)

From: Accounting [mailto:accounting@equ8ation.com]
Sent: Wednesday, February 15, 2012 2:28 PM
To: Michael Harris
Subject: Re: PV Location

Deadline?

Kathye Pease

Equ8ations, LLC

PO Box 7433

Chandler AZ 85246

480-359-4883 (office)

480-307-8412 (fax)

480-466-6589 (cellular)

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On Wed, Feb 15, 2012 at 2:23 PM, Michael Harris <mHarris@republicaz.com> wrote:

Kathye,

Can you forward me the 12/31/2011 financial statements (balance sheet and income statement).

We made the cut for Glendale but PV crossed over the deadline.

Thank you

APP097
TMCC002099

MICHAEL HARRIS

Vice President - Business Relationship Manager

REPUBLIC BANK AZ

909 E. Missouri Ave

Phoenix, AZ 85014

(602) 280-9412 (D)

(602) 277-5321 (F)

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EXHIBIT 8

From: Smallhouse, Dan J <daniel.smallhouse@sba.gov>
Sent: Monday, July 2, 2012 9:34 AM
To: Michael Harris <mHarris@republicaz.com>
Subject: Thompson McCarthy DB LLC - #43783
Attach: image001.png; 43783-ScrnOut-DJSMALLH0628121441.Docx

Michael - I have reviewed your Bank's loan submission on the above subject borrower and have a number of items that need to be addressed before I can further process/underwrite the request. Please review the attached copy of our prelim screen out letter reflecting the items in need of addressing and contact me if there are any questions.

If we don't receive a response within two business days, the request will be formally screened out with a copy of the attached letter, signed and resent.

Thank you for your assistance.

Description: Descripti...

Dan Smallhouse
Loan Specialist
SBA 7(a) Loan Processing Center
(916)735-1515 Ex:8224
Fax: (202) 481-0342

Be sure to visit the SBA Lender website at <http://www.sba.gov/aboutsba/sbaprograms/elending/lqpc/index.html> for current information about SBA programs, a searchable SOP and required SBA forms. The current SOP in effect is 50 10 5(D).



U. S. Small Business Administration
Standard 7(a) Loan Guaranty Processing Center
6501 Sylvan Road
Citrus Heights, CA 95610

Tel: (877) 475-2435

Fax: (606) 435-2400

June 28, 2012

Michael Harris
RepublicBankAz NA
909 Missouri Ave
Phoenix, AZ 85014

Re: Thompson McCarthy DB LLC (Scottsdale, AZ) - SBA Control # 43783

Dear Michael,

We have reviewed the information provided with your loan guarantee request, but we cannot complete our credit analysis and/or the Loan Authorization until we are in receipt of the following information:

1. A detailed listing of machinery and equipment along with bid invoices on the improvements to be purchased with loan proceeds, along with cost quotes. *(This is required per SOP 50 10 5(E), page 219.)*
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.)*
3. A revised copy of the Personal Financial Statement (SBA Form 413 may be used) for James Thompson and Janice McCarthy which addresses the following:
 - a. Janice McCarthy did not sign
4. Interim Historical Financial Statement information for the borrower that was omitted or requires clarification. Specifically, not signed and dated by an owner.
5. A signed and dated copy of a Balance Sheet for the borrower dated within 90 days of the application date.
6. A signed and dated copy of an Income Statement for the borrower dated within 90 days of the application date.

Page 2

Re: Thompson McCarthy DB LLC (Scottsdale, AZ) - SBA Control # 43783

7. Certification Letter from the trustee(s), James Thompson Trust and Janice McCarthy Trust, warranting the trust will not be revoked or substantially amended for the term of the loan without the consent of the SBA as well as certifying the following:
 - a. The trustee has the authority to act;
 - b. The trust has the authority to borrow funds, pledge trust assets, and lease the property to the Operating Company
 - c. The trustee has provided accurate, pertinent language from the trust agreement confirming the above; and
 - d. The trustee has provided and will continue to provide SBA with a true and complete list of all trustors and donors.
8. Signed and dated copies of the financial statements for the last 3 fiscal years and current (within 90 days of submission) interim financial statements for all affiliates. Specifically, James Thompson Family LP
9. A revised loan proposal which increases the borrower's injection requirement to an amount of at least \$60K. *(This is required because, after a detailed review of the loan request, (including the borrower's industry experience, management ability, credit history, and the nature of the business), the requested equity injection amount of \$0 has been determined to be inadequate.)* It is not clear as to why the borrower needs to retain over \$650K in their checking account, when as stated in your Bank's credit memo these funds are to be used for future expansion; which is the reason for this loan request.
10. A revised SBA Form 4-I, with a loan maturity that does not exceed the maximum allowed. *(Per SOP 50 10 5(E), page 151, the maximum term for this request is 10 years generally is the maximum allowed for leasehold improvements as well as the other uses requested. An exception may be granted along as the borrower agrees to obtain a full term lease for the premises; full term defined as no options to renew counted in at term determination.)*
11. Clarification of your loan request which resolves the inconsistencies between your application and the sample Loan Authorization you provided. Specifically, your credit memo indicates the shareholder's debt will be placed on full standby for the term of the loan, the draft loan authorization does not include this requirement.
12. SBA Form 912 for Janice McCarthy, who is an owner/officer of the business.
13. Copy of the 4506t form filed with the IRS on the borrower

14. SBA Eligibility Questionnaire Addendum C is needed. See Item 8

Page 3

Re: Thompson McCarthy DB LLC (Scottsdale, AZ) - SBA Control # 43783

15. An amended copy of SBA Form 4 that was submitted with your application, with the following sections completed:

- a. Question 12 is answered incorrectly –see item 8
- b. Date signed is missing on page 3
- c. Janice McCarthy did not sign page 4

16. Copy of James Thompson and Janice McCarthy's 2011 1040 or extension filed with the IRS.

To expedite the loan approval process, **please submit all items** together and in the above order via one of the following three methods:

FTP: Go to www.sba.gov/content/submit-file, and select "Send a file to the LGPC – CA or KY" (the preferred method for apps submitted to CA)

Fax: (606) 435-2400

E-mail: 7aLoanprogram@sba.gov (limited to file sizes under ten megabytes)

For the current SOP, forms, and other useful information, please visit www.sba.gov/for-lenders.

If you have any questions, please do not hesitate to call me at (916) 735-1500 or e-mail me at daniel.smallhouse@sba.gov; but please **do not** submit your response to this e-mail address.

Sincerely,

Dan Smallhouse
Loan Specialist

cc: Cathy M. Lease, Lender Relations Specialist, Arizona District Office - Fax:
(202) 481-0686

EXHIBIT 13

Message

From: Michael Harris [mHarris@republicaz.com]
Sent: 2/28/2012 9:48:31 PM
To: 'Accounting' [accounting@equ8ation.com]
Subject: RE: PIAZZA Invoices Whitestone, Paradise Valley and 12th-Glendale

Nope we are solely waiting on the SBA right now.

Please be advised that I will be out of the office beginning Monday March 12, 2012 returning Monday March 19, 2012

MICHAEL HARRIS

Vice President - Business Relationship Manager

REPUBLIC BANK AZ

909 E. Missouri Ave

Phoenix, AZ 85014

(602) 280-9412 (D)

(602) 277-5321 (F)

From: Accounting [mailto:accounting@equ8ation.com]
Sent: Tuesday, February 28, 2012 2:02 PM
To: Michael Harris
Subject: Re: PIAZZA Invoices Whitestone, Paradise Valley and 12th-Glendale

Anything from me? You have all right?

Kathye Pease

Equ8ations, LLC

PO Box 7433

Chandler AZ 85246

480-359-4883 (office)

480-307-8412 (fax)

480-466-6589 (cellular)

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On Tue, Feb 28, 2012 at 1:55 PM, Michael Harris <mHarris@republicaz.com> wrote:

Any day now I am hoping we can have this done at the beginning of next week. I am still waiting on the loan authorization.

*****Please be advised that I will be out of the office beginning Monday March 12, 2012 returning Monday March 19, 2012*****

MICHAEL HARRIS

Vice President - Business Relationship Manager

REPUBLIC BANK AZ

909 E. Missouri Ave

Phoenix, AZ 85014

(602) 280-9412 (D)

(602) 277-5321 (F)

From: Accounting [<mailto:accounting@equ8ation.com>]

Sent: Tuesday, February 28, 2012 1:54 PM

To: Emily Chedister; Michael Harris

Cc: Thompson Jim L.

Subject: Fwd: PIAZZA Invoices Whitestone, Paradise Valley and 12th-Glendale

Michael.

I am just checking on when the funds will be available for the 12th/Glendale and the PV locations. I am getting quite a few bills in here to pay. Which means we will need to be reimbursed again. And I know how confusing and convoluted that becomes on both our ends.

Kathye Pease

Equ8ations, LLC

PO Box 7433

APP107
TMCC002107

Chandler AZ 85246

480-359-4883 (office)

480-307-8412 (fax)

480-466-6589 (cellular)

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----- Forwarded message -----

From: **Bill Cantieri** <bill@piazza-az.com>

Date: Fri, Feb 24, 2012 at 8:27 AM

Subject: PIAZZA Invoices Whitestone, Paradise Valley and 12th-Glendale

To: Accounting <accounting@equ8ation.com>

Cc: JIM THOMPSON <dutchbrosjt@gmail.com>

Kathye,

Attached are invoices for the following phases of work:

1171----Investigate and Costing of Whitestone Properties projects

1172----Lease editing at Paradise Valley (it is the same total as invoice 1170 but a different scope of work)

1173---Preliminary site plan submission at Glendale & 12th.

Thank you!

Bill

Bill Cantieri

PIAZZA

Restaurant Construction Consultants

602-606-7546 office

602-476-7276 fax

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Message

From: Michael Harris [mHarris@republicaz.com]
Sent: 3/6/2012 10:28:03 PM
To: 'Equ8atiin' [accounting@equ8ation.com]
CC: Jim L Thompson (dutchbrosjt@gmail.com) [dutchbrosjt@gmail.com]
Subject: RE: 12th Street and Glendale

Guys I am a step ahead of you Paradise Valley will be the fastest yet, it has already been prescreened and is well on its way to being authorized.

PLEASE BE ADVISED THAT I WILL BE OUT OF THE OFFICE BEGINNING MONDAY MARCH 12, 2012 RETURNING MONDAY MARCH 19, 2012

MICHAEL HARRIS

VICE PRESIDENT - BUSINESS RELATIONSHIP MANAGER

REPUBLIC BANK AZ

909 E. MISSOURI AVE

PHOENIX, AZ 85014

(602) 280-9412 (D)

(602) 277-5321 (F)

From: Equ8atiin [mailto:accounting@equ8ation.com]
Sent: Tuesday, March 06, 2012 3:27 PM
To: Michael Harris
Cc: Jim L Thompson (dutchbrosjt@gmail.com)
Subject: Re: 12th Street and Glendale

Michael. Can you get the documents together so that we can paradise valley rolling quickly.... It is right behind Glendale n 12th street.

Sent from iPhone

On Mar 6, 2012, at 3:07 PM, Michael Harris <mHarris@republicaz.com> wrote:

I called to get our status, we are just waiting on the person who signs the authorizations to sign yours. So hopefully this afternoon or tomorrow we should have it.

*****PLEASE BE ADVISED THAT I WILL BE OUT OF THE OFFICE BEGINNING MONDAY MARCH 12, 2012
RETURNING MONDAY MARCH 19, 2012*****

MICHAEL HARRIS

VICE PRESIDENT - BUSINESS RELATIONSHIP MANAGER

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Message

From: Michael Harris [mHarris@republicaz.com]
Sent: 4/26/2012 10:30:26 PM
To: 'Accounting' [accounting@equ8ation.com]
Subject: RE: Glendale Ave

We are getting close on Glendale and last I heard was our Attorney was working with the landlord's attorney to get the lease assignment completed.

Paradise Valley is at the mercy of the SBA, I checked in this morning and they have moved it on to the signature (approval) level however they are still running a couple of weeks behind. I was told to call back tomorrow and/or Friday as they will be able to give me a better target date for approval.

MICHAEL HARRIS

Vice President - Business Relationship Manager

REPUBLIC BANK AZ

909 E. Missouri Ave

Phoenix, AZ 85014

(602) 280-9412 (D)

(602) 277-5321 (F)

From: Accounting [mailto:accounting@equ8ation.com]
Sent: Thursday, April 26, 2012 7:54 AM
To: Michael Harris
Subject: Glendale Ave

Michael. What is the status of the funding for Glendale. I have some large bills coming through.

And Paradise Valley? Same issue.

Kathye Pease

EQ8, LLC

PO Box 7433

Chandler AZ 85246

480-359-4883 (office)

602-513-7255 (fax)

480-466-6589 (cellular)

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Message

From: Michael Harris [mHarris@republicaz.com]
Sent: 6/11/2012 8:38:34 PM
To: 'Accounting' [accounting@equ8ation.com]; Anthony Bodnar [abodnar@republicaz.com]
Subject: RE: Paradise Valley

I spoke with them on Friday and it was approve at the Loan Specialist level and now we are waiting on the director's signature. It's the director who has been backed up, however, I anticipate an approval in the next couple of days since I am calling everyday at this point.

MICHAEL HARRIS

Vice President - Business Relationship Manager

REPUBLIC BANK AZ

909 E. Missouri Ave

Phoenix, AZ 85014

(602) 280-9412 (D)

(602) 277-5321 (F)

From: Accounting [mailto:accounting@equ8ation.com]
Sent: Monday, June 11, 2012 1:37 PM
To: Michael Harris; Anthony Bodnar
Subject: Paradise Valley

Michael/Anthony

What is the status of the SBA approval for Paradise Valley location? This has been in the process since Jan/Feb.

Let me know.

Message

From: Michael Harris [mHarris@republicaz.com]
Sent: 6/19/2012 7:42:05 PM
To: Jim L Thompson (dutchbrosjt@gmail.com) [dutchbrosjt@gmail.com]
CC: Accounting Template (accounting@equ8ation.com) [accounting@equ8ation.com]
Subject: PV SBA Loan
Attachments: 20120619123627282.pdf

Jim and Kathye,

I spoke with the SBA about 30 minutes ago and they wanted these documents updated along with an interim financial statement. Please get these back to me as soon as you can. I have also saved these in my electronic file for you so every time we start a location I will have you re-sign and date them. It seems they like to take just long enough to approve your loan request that we have to continue to do this.

However, this is the last hurdle.

Thank you

MICHAEL HARRIS
Vice President - Business Relationship Manager
REPUBLIC BANK AZ
909 E. Missouri Ave
Phoenix, AZ 85014
(602) 280-9412 (D)
(602) 277-5321 (F)

-----Original Message-----

From: scanner@republicaz.com [mailto:scanner@republicaz.com]
Sent: Tuesday, June 19, 2012 10:36 AM
To: Michael Harris
Subject:

This E-mail was sent from "128M5585101053" (Aficio MP 4000).

Scan Date: 06.19.2012 12:36:27 (-0500)

Queries to: scanner@republicaz.com

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U. S. Small Business Administration

OMB Approval No. 3245-0016
Expiration Date: 11/30/2012**APPLICATION FOR BUSINESS LOAN**

Individual James Thompson		Full Address 27915 N 100th Place Scottsdale, AZ 85282			
Name of Applicant Business Thompson McCarthy DB, LLC					Tax I.D. No. or SSN 20-8527338
Full Street Address of Business 27915 N 100th Place Scottsdale, AZ 85282					Tel. No. (inc. Area Code) 480-595-9082
City Scottsdale	County Maricopa	State AZ	Zip 85282	Number of Employees (including subsidiaries and affiliates) 74	
Type of Business Coffee-Convenience Store			Date Business Established 2006	At Time of Application 86	
Bank of Business Account and Address RepublicBankAz, N.A. 909 E Missouri Avenue Phoenix, AZ 85014					Subsidiaries or Affiliates (Separate for above)

Use of Proceeds: (Enter Gross Dollar Amounts Rounded to the Nearest Hundreds)	Loan Requested	Loan Request
Land Acquisition		Pay off SBA Loan
New Construction/ Expansion Repair	\$456,700	Pay off Bank Loan (Non SBA Associated)*
Acquisition and/or Repair of Machinery and Equipment	\$52,000	Other Debt Payment (Non SBA Associated)
Inventory Purchase		All Other
Working Capital (including Accounts Payable)	\$75,000	Total Loan Requested
Acquisition of Existing Business		Term of Loan - (Requested Maturity)
		25Yrs.

CURRENT AND PREVIOUS SBA AND OTHER GOVERNMENT DEBT: Complete the chart below if you, your business, any principal of your business, any affiliate of your business, any other business currently owned by a principal, or any business previously owned by you or a principal of your business has received or applied for any direct or guaranteed financial assistance from the Federal Government, including student loans and disaster loans. All current, previous, and pending Government debt must be listed, including loans that have been paid in full or those that resulted in a loss to the Government. (Note: Loans that resulted in a loss to the Government include loans that were charged off, compromised, or discharged as a result of bankruptcy. The amount of the loss is the outstanding principal balance of the loan that the Government had to write off after all collection activities (including compromise) were finalized.)

Name of Agency	Borrower's Name	Original Amount of Loan	Date of Application	Loan Status	Outstanding Balance	\$ Amount of Loss to the Government.
Agency Loan #						
1.RBAZ #8260005400	Thompson McCarthy	\$ 1,026,300	10/24/2011	Current	\$ 1,011,045	\$ 0
2.RBAZ #826007200	Thompson McCarthy	\$ 597,100	5/9/2012	Current	\$ 596,040.00	\$ 0
3. #		\$			\$	\$
4. #		\$			\$	\$

ASSISTANCE: Did you commit to pay -- or have you paid -- anyone (including the lender) to assist you in either obtaining this loan (such as a broker, consultant or referral agent) or in preparing the application or application materials for this loan (such as a loan packager)? Yes ☐ No ☒
If "yes," complete SBA Form 152 (7a) - (Fee Disclosure Form and Compensation Agreement) for each party that was paid or will be paid.)

Note: The estimated burden completing this form is 12.0 hours per response. You will not be required to respond to collection of information unless it displays a currently valid OMB approval number. Comments on the burden should be sent to the U.S. Small Business Administration, Chief, AIB, 409 3rd St., S.W., Washington, DC 20416 and Desk Office for Small Business Administration, Office of Management and Budget, New Executive Building, room 10202 Washington, D.C. 20503. OMB Approval (3245-0016). PLEASE DO NOT SEND FORMS TO OMB. SUBMIT COMPLETED APPLICATION TO LENDER OF CHOICE.

ALL EXHIBITS MUST BE SIGNED AND DATED BY PERSON SIGNING THIS FORM

BUSINESS INDEBTEDNESS: Furnish the following information on all outstanding installment debts, contracts, notes, and mortgages payable. Indicate by an asterisk (*) items to be paid by loan proceeds and reasons for paying them. (Present balance should agree with the latest balance sheet submitted).								
To Whom Payable	Original Amount	Original Date	Present Balance	Rate of Interest	Maturity Date	Monthly Payment	Security	Current or Past Due
Acct. #8260005400	\$1,026,300	10/24/2011	\$1,011,045	5.75%	10/24/2036	\$6,459	UCC	Current
Acct. #826007200	\$597,100	5/9/2012	\$596,040	5.50%	5/9/2037	\$3,668	UCC	Current
Acct. #	\$		\$			\$		
Acct. #	\$		\$			\$		
Acct. #	\$		\$			\$		

MANAGEMENT (Proprietor, partners, officers, directors, all holders of outstanding stock --100% of ownership must be shown.) Use separate sheet if necessary.				
Name and Social Security Number Position/Title	Complete Address	% Owned	*Veteran Status Veteran If yes, service-disabled? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	*Gender
James Thompson 540-50-2034 Manager	27915 N 100 Place Scottsdale, AZ 85262	50%	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	Male
Race * :Amer. Indian or Alaska Native <input type="checkbox"/> Asian <input type="checkbox"/> Black or African-Amer. <input type="checkbox"/> Native Haw. or Pacific Islander <input type="checkbox"/> White <input checked="" type="checkbox"/>	*Ethnicity:Hispanic or Latino <input type="checkbox"/> Not Hisp or Lantino <input type="checkbox"/>			
Janice L McCarthy 541-72-1057 Member	27915 N 100 Place Scottsdale, AZ 85262	50%	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	Female
Race * :Amer. Indian or Alaska Native <input type="checkbox"/> Asian <input type="checkbox"/> Black or African-Amer. <input type="checkbox"/> Native Haw. or Pacific Islander <input type="checkbox"/> White <input type="checkbox"/>	*Ethnicity:Hispanic or Latino <input type="checkbox"/> Not Hisp or Lantino <input type="checkbox"/>			
			*Veteran Status Veteran If yes, service-disabled? Yes <input type="checkbox"/> No <input type="checkbox"/>	
Race * :Amer. Indian or Alaska Native <input type="checkbox"/> Asian <input type="checkbox"/> Black or African-Amer. <input type="checkbox"/> Native Haw. or Pacific Islander <input type="checkbox"/> White <input type="checkbox"/>	*Ethnicity:Hispanic or Latino <input type="checkbox"/> Not Hisp or Lantino <input type="checkbox"/>			
			*Veteran Status Veteran If yes, service-disabled? Yes <input type="checkbox"/> No <input type="checkbox"/>	
Race * :Amer. Indian or Alaska Native <input type="checkbox"/> Asian <input type="checkbox"/> Black or African-Amer. <input type="checkbox"/> Native Haw. or Pacific Islander <input type="checkbox"/> White <input type="checkbox"/>	*Ethnicity:Hispanic or Latino <input type="checkbox"/> Not Hisp or Lantino <input type="checkbox"/>			

*This data is collected for statistical purposes only. It has no bearing on the credit decision. Disclosure is voluntary. One or more boxes for race may be selected

For Guaranty Loans please provide an original and one copy (Photocopy is Acceptable) of the Application Form and all Exhibits to the participating Lender. For Direct Loans submit one original copy of the application and Exhibits to SBA.

1. Submit SBA Form 912 (Statement of Personal History) for each proprietor (if sole proprietorship), partner (if a partnership), and by each officer, director, and owner of 20% or more of the company's stock (if a corporation, limited liability company or development company).

2. If your collateral consists of (A) Land and Building, (B) Machinery and Equipment, (C) Furniture and Fixtures, (D) Accounts Receivable, (E) Inventory, (F) Other, please provide an itemized list that contains serial and identification numbers for all articles that had an original value of greater than \$5,000. Include a legal description of Real Estate offered as collateral. Label it Exhibit A.

3. Furnish a signed current personal balance sheet (SBA Form 413 may be used for this purpose) for (1) each proprietor; or (2) each limited partner who owns 20% or more interest and each general partner; or (3) each stockholder owning 20% or more of voting stock. Include the assets and liabilities of the spouse and any minor children.

Also, include the tax i.d. number [EIN or Social Security Number (SSN)] Label it Exhibit B.

4. Include the financial statements listed below: a, b, c for the last three years; also a, b, c, and d as of the same date, - current within 90 days of filing the application; and statement e, if applicable. All information must be signed and dated. (a) Balance Sheet; (b) Profit and Loss Statement (if not available, explain why and substitute Federal income tax forms); (c) Reconciliation of Net Worth; (d) Aging of Accounts Receivable and and Payable (summary); (e) Projection of earnings for at least one year where financial statements for the last three years are unavailable or when SBA requests them, Label it Exhibit C. (Contact SBA for a referral if assistance with preparation is wanted.)

5. Provide a brief history of your company and a paragraph describing the expected benefits it will receive from the loan. Label it Exhibit D.

6. Provide a brief description similar to a resume of the education, technical and business background for all the people listed under Management. Label it Exhibit E.

7. Submit the name, addresses, tax I.D. number (EIN or SSN), and current personal financial statement of any co-signers who are not otherwise affiliated with the business and any guarantors for the loan not covered by 3. above. Exhibit F.

8. Include a list of any machinery or equipment or other non-real estate assets to be purchased with loan proceeds and the cost of each item as quoted by the seller. Include the seller's name and address. Exhibit G.

9. Have you or any officer of your company ever been involved in bankruptcy or insolvency proceedings? [] Yes [x] No. If yes, please provide the details as Exhibit H.

10. Are you or your business involved in any pending lawsuits? [] Yes [x] No. If yes, provide the details as Exhibit I.

11. Do you or your spouse or any member of your household, or anyone who owns, manages, or directs your business or their spouses or members of their households work for the Small Business Administration, Small Business Advisory Council, SCORE or ACE, any Federal Agency, or the participating lender? [] Yes [x] No. If yes, please provide the name and address of the person and the office where employed. Label this Exhibit J.

12. Does your business, its owners or majority stockholders own or have a controlling interest in other businesses? [] Yes [x] No. If yes, please provide their names and the relationship with your company along with financial data requested in question 4. Label this Exhibit K.

13. Do you buy from, sell to, or use the services of any concern in which someone in your company has a significant financial interest? [] Yes [x] No. If yes, provide details on a separate sheet of paper. Exhibit L.

14. Is your business is a franchise, [] Yes [x] No. If yes, include a copy of the franchise agreement and a copy of the FTC disclosure statement supplied to you by the Franchisor. Label this Exhibit M.

CONSTRUCTION LOANS ONLY

15. Include as a separate exhibit the estimated cost of the project and a statement of the source of any additional funds. Label this Exhibit N.

16. Provide copies of preliminary construction plans and specifications. Label this as Exhibit O. Final plans will be required prior to disbursement.

EXPORT LOANS

17. Does your business currently export, or will it start exporting, pursuant to this loan (if approved)?
Check here: [] Yes [x] No

18. If you answered yes to item 17, what is your estimate of the total export sales this loan would support? \$ _____

19. Would you like information on Exporting?
Check here: [] Yes [x] No

COUNSELING/TRAINING

20. Have you received counseling or training from SBA (e.g., SCORE, ACE, SBDC, WBC, etc.)?
Check here: [] Yes [x] No

SUBMIT COMPLETED APPLICATION TO LENDER OF CHOICE.

AGREEMENTS AND CERTIFICATIONS

AGREEMENTS:

By signing below you agree to the following:

(a) Agreements of non-employment of SBA Personnel. I agree that if SBA approves this application I will not, for at least two years, hire as an employee or consultant anyone that was employed by the SBA during the one year period prior to the loan disbursement.

(b) Waiver of Claims. As consideration for any Management, Technical, and/or Business Development Assistance that may be provided, I waive all claims against SBA and its consultants.

(c) Criminal Background. I authorize the SBA's Office of Inspector General to request criminal record information about me from criminal justice agencies for the purpose of determining my eligibility for assistance under the Small Business Act.

(d) Reimbursement of Expenses. I agree to pay for or reimburse SBA for the cost of any surveys, title or mortgage examinations, appraisals, credit reports, etc., performed by non-SBA personnel provided I have given my consent.

(e) Reporting. I agree to report to the SBA Office of the Inspector General, Washington, DC 20416 any federal government employee who offers, in return for any type of compensation, to help get this loan approved.

READ THE FOLLOWING CAREFULLY -- FALSE STATEMENTS ARE SUBJECT TO CRIMINAL PROSECUTION:

If you knowingly make a false statement, you can be fined up to \$250,000 and/or imprisoned for not more than five years under 18 USC 1001; if submitted to a Federally insured institution, under 18 USC 1014 by Imprisonment of not more than twenty years and/or a fine of not more than \$1,000,000

CERTIFICATIONS:

By signing below you certify as to the following:

(a) All information in this Application and the Exhibits is true and complete to the best of your knowledge. You understand that this information is being submitted to a lender and SBA so they can decide to make a loan or give a loan guaranty, and that the lender and SBA are relying on this information.

(b) You have not paid anyone employed by the Federal Government for help in getting this loan. You understand that you do not need to pay any other third-party for assistance in locating a lender or preparing this Application or Exhibits, and you certify that you will disclose all parties that were paid for such assistance to the Lender and will complete the SBA Form 159 for all such persons.

(c) I have read a copy of the "Statements Required By Law And Executive Order," which is attached to this application and agree to comply with the requirements in this Notice.

If Applicant is a proprietor or general partner, sign below.

By: X

If Applicant is a Corporation, sign below:

Corporate Name and Seal _____ Date _____

By: _____
Signature of President

Attested by: _____
Signature of Corporate Secretary

Other than the person that signed on page 3, each Partner, each Stockholder owning 20% or more, and each Guarantor must sign below. In addition, if a husband and wife collectively own 20% or more of a company, each spouse must also sign. No one should sign more than once.

Business Name: Thompson McCarthy DB, LLC

APPLICANT'S CERTIFICATION

READ THE FOLLOWING CAREFULLY -- FALSE STATEMENTS ARE SUBJECT TO CRIMINAL PROSECUTION:

If you knowingly make a false statement, you can be fined up to \$250,000 and/or imprisoned for not more than five years under 18 USC 1001; if submitted to a Federally insured institution, under 18 USC 1014 by Imprisonment of not more than twenty years and/or a fine of not more than \$1,000,000

By signing below you certify as to the following:

(a) You have reviewed (1) the responses to the question about debt on page 1 of the application; (2) the responses to questions 11, 12, and 13 (application-page 3), and (3) any financial statement that you were required to complete as Exhibit B or F to the application and certify that as to you personally all information in this Application and Financial Statement is true and complete to the best of your knowledge. You acknowledge that this information is being submitted to a lender and SBA so they can decide to make a loan or give a loan guaranty, and that the lender and SBA are relying on this information.

(b) You have read a copy of the "Statements Required By Law And Executive Order," which is attached to this application and agree to comply with the requirements in this Notice.

X

Signature

X

Date

Check all that apply: ☒ guarantor ☒ owner-indicate percentage owned: [50] [] partner-indicate whether [] general or [] limited

X

Signature

X

Date

Check all that apply: ☒ guarantor ☒ owner-indicate percentage owned: [50] [] partner-indicate whether [] general or [] limited

Signature

Date

Check all that apply: [] guarantor [] owner-indicate percentage owned: [] [] partner-indicate whether [] general or [] limited

Signature

Date

Check all that apply: [] guarantor [] owner-indicate percentage owned: [] [] partner-indicate whether [] general or [] limited

Signature

Date

Check all that apply: [] guarantor [] owner-indicate percentage owned: [] [] partner-indicate whether [] general or [] limited

Signature

Date

Check all that apply: [] guarantor [] owner-indicate percentage owned: [] [] partner-indicate whether [] general or [] limited

Signature

Date

Check all that apply: [] guarantor [] owner-indicate percentage owned: [] [] partner-indicate whether [] general or [] limited

PLEASE READ, DETACH, AND RETAIN FOR YOUR RECORDS
STATEMENTS REQUIRED BY LAW AND EXECUTIVE ORDER

Federal executive agencies, including the Small Business Administration (SBA), are required to withhold or limit financial assistance, to impose special conditions on approved loans, to provide special notices to applicants or borrowers and to require special reports and data from borrowers in order to comply with legislation passed by the Congress and Executive Orders issued by the President and by the provisions of various inter-agency agreements. SBA has issued regulations and procedures that implement these laws and executive orders, and they are contained in Parts 112, 113, 116, and 117, Title 13, Code of Federal Regulations Chapter 1, or Standard Operating Procedures.

Freedom of Information Act (5 U.S.C. 552)

This law provides, with some exceptions, that SBA must supply information reflected in agency files and records to a person requesting it. Information about approved loans that will be automatically released includes, among other things, statistics on our loan programs (individual borrowers are not identified in the statistics) and other information such as the names of the borrowers (and their officers, directors, stockholders or partners), the collateral pledged to secure the loan, the amount of the loan, its purpose in general terms and the maturity. Proprietary data on a borrower would not routinely be made available to third parties. All requests under this Act are to be addressed to the nearest SBA office and be identified as a Freedom of Information request.

Privacy Act (5 U.S.C. 552a)

A person can request to see or get copies of any personal information that SBA has in his or her file when that file is retrievable by individual identifiers such as name or social security numbers. Requests for information about another party may be denied unless SBA has the written permission of the individual to release the information to the requestor or unless the information is subject to disclosure under the Freedom of Information Act.

Under the provisions of the Privacy Act, you are not required to provide your social security number. Failure to provide your social security number may not affect any right, benefit or privilege to which you are entitled. Disclosures of name and other personal identifiers are, however, required for a benefit, as SBA requires an individual seeking assistance from SBA to provide it with sufficient information for it to make a character determination. In determining whether an individual is of good character, SBA considers the person's integrity, candor, and disposition toward criminal actions. In making loans pursuant to section 7(a)(6) of the Small Business Act (the Act), 15 USC Section 636(a)(6), SBA is required to have reasonable assurance that the loan is of sound value and will be repaid or that it is in the best interest of the Government to grant the assistance requested. Additionally, SBA is specifically authorized to verify your criminal history, or lack thereof, pursuant to section 7(a)(1)(B), 15 USC Section 636(a)(1)(B). Further, for all forms of assistance, SBA is authorized to make all investigations necessary to ensure that a person has not engaged in acts that violate or will violate the Act or the Small Business Investment Act, 15 USC Sections 634(b)(11) and 687(b)(a). For these purposes, you are asked to voluntarily provide your social security number to assist SBA in making a character determination and to distinguish you from other individuals with the same or similar name or other personal identifier.

The Privacy Act authorizes SBA to make certain "routine uses" of information protected by that Act. One such routine use for SBA's loan system of records is that when this information indicates a violation or potential violation of law, whether civil, criminal, or administrative in nature, SBA may refer it to the appropriate agency, whether Federal, State, local or foreign, charged with responsibility for or otherwise involved in investigation, prosecution, enforcement or prevention of such violations. Another routine use of personal information is to assist in obtaining credit bureau reports, including business credit reports on the small business borrower and consumer credit reports and scores on the principals of the small business and guarantors on the loan for purposes of originating, servicing, and liquidating small business loans and for purposes of routine periodic loan portfolio management and lender monitoring. See, 69 F.R. 58598, 58617 (and as amended from time to time) for additional background and other routine uses.

Right to Financial Privacy Act of 1978 (12 U.S.C. 3401)

This is notice to you as required by the Right of Financial Privacy Act of 1978, of SBA's access rights to financial records held by financial institutions that are or have been doing business with you or your business, including any financial institutions participating in a loan or loan guarantee. The law provides that SBA shall have a right of access to your financial records in connection with its consideration or administration of assistance to you in the form of a Government loan or loan guaranty agreement. SBA is required to provide a certificate of its compliance with the Act to a financial institution in connection with its first request for access to your financial records, after which no further certification is required for subsequent accesses. The law also provides that SBA's access rights continue for the term of any approved loan or loan guaranty agreement. No further notice to you of SBA's access rights is required during the term of any such agreement.

The law also authorizes SBA to transfer to another Government authority any financial records included in an application for a loan, or concerning an approved loan or loan guarantee, as necessary to process, service or foreclose on a loan or loan guarantee or to collect on a defaulted loan or loan guarantee. No other transfer of your financial records to another Government authority will be permitted by SBA except as required or permitted by law.

Flood Disaster Protection Act (42 U.S.C. 4011)

Regulations have been issued by the Federal Insurance Administration (FIA) and by SBA implementing this Act and its amendments. These regulations prohibit SBA from making certain loans in an FIA designated floodplain unless Federal flood insurance is purchased as a condition of the loan. Failure to maintain the required level of flood insurance makes the applicant ineligible for any future financial assistance from SBA under any program, including disaster assistance.

Executive Orders -- Floodplain Management and Wetland Protection (42 F.R. 26951 and 42 F.R. 26961)

The SBA discourages any settlement in or development of a floodplain or a wetland. This statement is to notify all SBA loan applicants that such actions are hazardous to both life and property and should be avoided. The additional cost of flood preventive construction must be considered in addition to the possible loss of all assets and investments in future floods.

Occupational Safety and Health Act (15 U.S.C. 651 et seq.)

This legislation authorizes the Occupational Safety and Health Administration in the Department of Labor to require businesses to modify facilities and procedures to protect employees or pay penalty fees. In some instances the business can be forced to cease operations or be prevented from starting operations in a new facility. Therefore, in some instances SBA may require additional information from an applicant to determine whether the business will be in compliance with OSHA regulations and allowed to operate its facility after the loan is approved and disbursed. Signing this form as borrower is a certification that the OSA requirements that apply to the borrower's business have been determined and the borrower to the best of its knowledge is in compliance.

Civil Rights Legislation

All businesses receiving SBA financial assistance must agree not to discriminate in any business practice, including employment practices and services to the public, on the basis of categories cited in 13 C.F.R., Parts 112, 113, and 117 of SBA Regulations. This includes making their goods and services available to handicapped clients or customers. All business borrowers will be required to display the "Equal Employment Opportunity Poster" prescribed by SBA.

Equal Credit Opportunity Act (15 U.S.C. 1691)

The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status or age (provided that the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program, or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The Federal agency that administers compliance with this law concerning this creditor is the Federal Trade Commission, Equal Credit Opportunity, Washington, D.C. 20580.

Executive Order 11738 -- Environmental Protection (38 C.F.R. 25161)

The Executive Order charges SBA with administering its loan programs in a manner that will result in effective enforcement of the Clean Air Act, the Federal Water Pollution Act and other environmental protection legislation. SBA must, therefore, impose conditions on some loans. By acknowledging receipt of this form and presenting the application, the principals of all small businesses borrowing \$100,000 or more in direct funds stipulate to the following:

1. That any facility used, or to be used, by the subject firm is not cited on the EPA list of Violating Facilities.
2. That subject firm will comply with all the requirements of Section 114 of the Clean Air Act (42 U.S.C. 7414) and Section 308 of the Water Act (33 U.S.C. 1318) relating to inspection, monitoring, entry, reports and information, as well as all other requirements specified in Section 114 and Section 308 of the respective Acts, and all regulations and guidelines issued thereunder.
3. That subject firm will notify SBA of the receipt of any communication from the Director of the Environmental Protection Agency indicating that a facility utilized, or to be utilized, by subject firm is under consideration to be listed on the EPA List of Violating Facilities.

Debt Collection Act of 1982 Deficit Reduction Act of 1984 (31 U.S.C. 3701 et seq. and other titles)

These laws require SBA to aggressively collect any loan payments which become delinquent. SBA must obtain your taxpayer identification number when you apply for a loan. If you receive a loan, and do not make payments as they come due, SBA may take one or more of the following actions:

- Report the status of your loan(s) to credit bureaus
- Hire a collection agency to collect your loan
- Offset your income tax refund or other amounts due to you from the Federal Government
- Suspend or debar you or your company from doing business with the Federal Government
- Refer your loan to the Department of Justice or other attorneys for litigation
- Foreclose on collateral or take other action permitted in the loan instruments.

Immigration Reform and Control Act of 1986 (Pub. L. 99-603)

If you are an alien who was in this country illegally since before January 1, 1982, you may have been granted lawful temporary resident status by the United States Immigration and Naturalization Service pursuant to the Immigration Reform and Control Act of 1986 (Pub. L. 99-603). For five years from the date you are granted such status, you are not eligible for financial assistance from the SBA in the form of a loan or guaranty under section 7(a) of the Small Business Act unless you are disabled or a Cuban or Haitian entrant. When you sign this document, you are making the certification that the Immigration Reform and Control Act of 1986 does not apply to you, or if it does apply, more than five years have elapsed since you have been granted lawful temporary resident status pursuant to such 1986 legislation.

Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821 et seq.)

Borrowers using SBA funds for the construction or rehabilitation of a residential structure are prohibited from using lead-based paint (as defined in SBA regulations) on all interior surfaces, whether accessible or not, and exterior surfaces, such as stairs, decks, porches, railings, windows and doors, which are readily accessible to children under 7 years of age. A "residential structure" is any home, apartment, hotel, motel, orphanage, boarding school, dormitory, day care center, extended care facility, college or other school housing, hospital, group practice or community facility and all other residential or institutional structures where persons reside.

Executive Order 12549, Debarment and Suspension (13 C.F.R. 145)

1. The prospective lower tier participant certifies, by submission of this loan application, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.
2. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participants shall attach an explanation to the loan application.



United States of America
SMALL BUSINESS ADMINISTRATION
STATEMENT OF PERSONAL HISTORY

Please Read Carefully: SBA uses Form 912 as one part of its assessment of program eligibility. Please reference SBA Regulations and Standard Operating Procedures if you have any questions about who must submit this form and where to submit it. For further information, please call SBA's Answer Desk at 1-800-U-ASK-SBA (1-800-827-5722), or check SBA's website at www.sba.gov.

Name and Address of Applicant (Firm Name)(Street, City, State, and ZIP Code)
Thompson McCarthy DB, LLC
27915 N 100 Place
Scottsdale, AZ 85262

SBA District/Disaster Area Office

Amount Applied for (when applicable)
\$640,400

File No. (if known)

1. Personal Statement of: (State name in full, if no middle name, state (NMN), or if initial only, indicate initial.) List all former names used, and dates each name was used. Use separate sheet if necessary.

First Middle Last
James L Thompson

2. Give the percentage of ownership or stock owned or to be owned in the small business or the development company
50%

Social Security No.
540-50-2034

3. Date of Birth (Month, day, and year)
2/15/45

4. Place of Birth: (City & State or Foreign Country)
McAlester, OK

Name and Address of participating lender or surety co. (when applicable and known)
RepublicBankAz, N.A.
909 E Missouri Avenue Phoenix, AZ 85014

5. U.S. Citizen? ☒ YES ☐ NO INITIALS: X
If No, are you a Lawful Permanent resident alien: ☐ YES ☐ NO
If non- U.S. citizen provide alien registration number:

6. Present residence address:

From: 2/1/2002

To: Present

Address: 27915 N 100th Place
Scottsdale, AZ 85262

Home Telephone No. (Include Area Code): 480-595-9082

Business Telephone No. (Include Area Code): 480-595-9082

Most recent prior address (omit if over 10 years ago):

From:

To:

Address:

PLEASE SEE REVERSE SIDE FOR EXPLANATION REGARDING DISCLOSURE OF INFORMATION AND THE USES OF SUCH INFORMATION.

YOU MUST INITIAL YOUR RESPONSES TO QUESTIONS 6,7,8 AND 9.

IF YOU ANSWER "YES" TO 7, 8, OR 9, FURNISH DETAILS ON A SEPARATE SHEET. INCLUDE DATES, LOCATION, FINES, SENTENCES, WHETHER MISDEMEANOR OR FELONY, DATES OF PAROLE/PROBATION, UNPAID FINES OR PENALTIES, NAME(S) UNDER WHICH CHARGED, AND ANY OTHER PERTINENT INFORMATION. AN ARREST OR CONVICTION RECORD WILL NOT NECESSARILY DISQUALIFY YOU; HOWEVER, UNTRUTHFUL ANSWER WILL CAUSE YOUR APPLICATION TO BE DENIED AND SUBJECT YOU TO OTHER PENALTIES AS NOTED BELOW.

7. Are you presently under indictment, on parole or probation? INITIALS: X
☐ Yes ☒ No (If yes, indicate date parole or probation is to expire.)

8. Have you ever been charged with, and/or arrested for, any criminal offense other than a minor motor vehicle violation? Include offenses which have been dismissed, discharged, or not prosecuted. (All arrests and charges must be disclosed and explained on an attached sheet.)

☐ Yes ☒ No INITIALS: X

9. Have you ever been convicted, placed on pretrial diversion, or placed on any form of probation, including adjudication withheld pending probation, for any criminal offense other than a minor vehicle violation?

☐ Yes ☒ No INITIALS: X

10. I authorize the Small Business Administration Office of Inspector General to request criminal record information about me from criminal justice agencies for the purpose of determining my eligibility for programs authorized by the Small Business Act, and the Small Business Investment Act.

CAUTION - PENALTIES FOR FALSE STATEMENTS: Knowingly making a false statement on this form is a violation of Federal law and could result in criminal prosecution, significant civil penalties, and a denial of your loan, surety bond, or other program participation. A false statement is punishable under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a Federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.

Signature

X

Title

Manager

Date

X

Agency Use Only

11. ☐ Fingerprints Waived

Date Approving Authority

☐ Fingerprints Required

Date Approving Authority

Date Sent to OIG

12. ☐ Cleared for Processing

Date Approving Authority

13. ☐ Request a Character Evaluation

Date Approving Authority

(Required whenever 7, 8 or 9 are answered "yes" even if cleared for processing.)

PLEASE NOTE: The estimated burden for completing this form is 15 minutes per response. You are not required to respond to any collection of information unless it displays a currently valid OMB approval number. Comments on the burden should be sent to U.S. Small Business Administration, Chief, AIB, 409 3rd St., S.W., Washington D.C. 20416 and Desk Officer for the Small Business Administration, Office of Management and Budget, New Executive Office Building, Room 10202, Washington, D.C. 20503. OMB Approval 3245-0178. PLEASE DO NOT SEND FORMS TO OMB.

NOTICES REQUIRED BY LAW

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Privacy Act (5 U.S.C. § 552a)

Any person can request to see or get copies of any personal information that SBA has in his or her file, when that file is retrieved by individual identifiers, such as name or social security numbers. Requests for information about another party may be denied unless SBA has the written permission of the individual to release the information to the requestor or unless the information is subject to disclosure under the Freedom of Information Act.

Under the provisions of the Privacy Act, you are not required to provide your social security number. Failure to provide your social security number may not affect any right, benefit or privilege to which you are entitled. Disclosures of name and other personal identifiers are, however, required for a benefit, as SBA requires an individual seeking assistance from SBA to provide it with sufficient information for it to make a character determination. In determining whether an individual is of good character, SBA considers the person's integrity, candor, and disposition toward criminal actions. In making loans pursuant to section 7(a)(6) the Small Business Act (the Act), 15 USC § 636 (a)(6), SBA is required to have reasonable assurance that the loan is of sound value and will be repaid or that it is in the best interest of the Government to grant the assistance requested. Additionally, SBA is specifically authorized to verify your criminal history, or lack thereof, pursuant to section 7(a)(1)(B), 15 USC § 636(a)(1)(B). Further, for all forms of assistance, SBA is authorized to make all investigations necessary to ensure that a person has not engaged in acts that violate or will violate the Act or the Small Business Investment Act, 15 USC §§ 634(b)(11) and 687b(a). For these purposes, you are asked to voluntarily provide your social security number to assist SBA in making a character determination and to distinguish you from other individuals with the same or similar name or other personal identifier.

When the information collected on this form indicates a violation or potential violation of law, whether civil, criminal, or administrative in nature, SBA may refer it to the appropriate agency, whether Federal, State, local, or foreign, charged with responsibility for or otherwise involved in investigation, prosecution, enforcement or prevention of such violations. See 74 Fed. Reg. 14890 (2009) for other published routine uses.



United States of America
SMALL BUSINESS ADMINISTRATION
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Name and Address of Applicant (Firm Name)(Street, City, State, and ZIP Code)
Thompson McCarthy DB, LLC
27915 N 100 Place
Scottsdale, AZ 85262

SBA District/Disaster Area Office

Amount Applied for (when applicable)
\$640,400

File No. (if known)

1. Personal Statement of: (State name in full, if no middle name, state (NMN), or if initial only, indicate initial.) List all former names used, and dates each name was used. Use separate sheet if necessary.

First Middle Last
Janice L McCarthy

2. Give the percentage of ownership or stock owned or to be owned in the small business or the development company
50%

Social Security No.

541-72-1057

3. Date of Birth (Month, day, and year)
1/11/1956

4. Place of Birth: (City & State or Foreign Country)
Spokane, WA

Name and Address of participating lender or surety co. (when applicable and known)
RepublicBankAz, N.A.
909 E Missouri Avenue Phoenix, AZ 85014

5. U.S. Citizen? ☒ YES ☐ NO

INITIALS: X

If No, are you a Lawful Permanent resident alien: ☐ YES ☐ NO

If non- U.S. citizen provide alien registration number:

6. Present residence address:

From: 2/1/2002

To: Present

Address: 27915 N 100th Place
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Home Telephone No. (Include Area Code): 480-595-9082

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8. Have you ever been charged with, and/or arrested for, any criminal offense other than a minor motor vehicle violation? Include offenses which have been dismissed, discharged, or not prosecuted. (All arrests and charges must be disclosed and explained on an attached sheet.)

☐ Yes ☒ No INITIALS: X

9. Have you ever been convicted, placed on pretrial diversion, or placed on any form of probation, including adjudication withheld pending probation, for any criminal offense other than a minor vehicle violation?

☐ Yes ☒ No INITIALS: X

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Signature

X

Title

Member

Date

X

Agency Use Only

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Date Approving Authority

☐ Fingerprints Required

Date Approving Authority

Date Sent to OIG

12. ☐ Cleared for Processing

Date Approving Authority

13. ☐ Request a Character Evaluation

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When the information collected on this form indicates a violation or potential violation of law, whether civil, criminal, or administrative in nature, SBA may refer it to the appropriate agency, whether Federal, State, local, or foreign, charged with responsibility for or otherwise involved in investigation, prosecution, enforcement or prevention of such violations. See 74 Fed. Reg. 14890 (2009) for other published routine uses.



**Certification Regarding
Debarment, Suspension, Ineligibility and Voluntary Exclusion
Lower Tier Covered Transactions**

This certification is required by the regulations implementing Executive Order 12549, Debarment and Suspension, 13 CFR Part 145. The regulations were published as Part VII of the May 26, 1988 *Federal Register* (pages 19160-19211). Copies of the regulations may be obtained by contacting the person to which this proposal is submitted.

(BEFORE COMPLETING CERTIFICATION, READ INSTRUCTIONS ON REVERSE)

- (1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals are presently debarred, suspended, proposed for disbarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.
- (2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Business Name Thompson McCarthy DB, LLC

Date X

By James Thompson, Manager
Name and Title of Authorized Representative

X
Signature of Authorized Representative

INSTRUCTIONS FOR CERTIFICATION

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.
2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.
3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
4. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations (13CFR Part 145).
5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.
6. The prospective lower tier participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--Lower Tier Covered Transactions," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.
7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, as it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the ineligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.
8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.
9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.



STATEMENT REGARDING LOBBYING

Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

- (1) If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form LLL, "Disclosure of Lobbying Activities," in accordance with its instructions.
- (2) Submission of this statement is a prerequisite for making or entering into this transaction imposed by Section 1352, Title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

Signature: X

Date: X

Name and Title: James Thompson, Manager





OMB APPROVAL NO. 3245-0188
EXPIRATION DATE: 09/30/2014

PERSONAL FINANCIAL STATEMENT

U.S. SMALL BUSINESS ADMINISTRATION

As of _____, _____

Complete this form for: (1) each proprietor; (2) general partner; (3) managing member of a limited liability company (LLC); (4) each owner of 20% or more of the equity of the Applicant (including the assets of the owner's spouse and any minor children); and (5) any person providing a guaranty on the loan. **Return completed form to:** 7(a) loans - to the lender processing the SBA application; 504 loans - to the Certified Development Company processing the SBA application; Disaster loans - to the Disaster Processing and Disbursement Center at 14925 Kingsport Road, Fort Worth, TX 76155-2243; and 8(a)/BD applicants who are *individuals claiming social and economic disadvantaged status and their spouses* - electronically at <http://www.sba.gov> or send hard copy with paper application to either of the two following offices:

Mail to the following address, if your firm is located in one of the states below:

US Small Business Administration
DPCE Central Office Duty Station
Parkview Towers
1150 First Avenue
10th Floor, Suite 1001
King of Prussia, PA 19406

Mail to the following address, if your firm is located in one of the states below:

Small Business Administration
Division of Program Certification and Eligibility
455 Market Street, 6th Floor
San Francisco, CA 94105

MA, ME, NH, CT, VT, RI, NY, PR (Puerto Rico), VI (US Virgin Islands), NJ, PA, MD, VA, WV, DC, DE, GA, AL, NC, SC, MS, FL, KY, TN

IL, OH, MI, IN, MN, WI, TX, NM, AR, LA, OK, MO, IA

Name James Thompson & Janice McCarthy

Business Phone 480-595-9082

Residence Address 27915 N 100th Place

Residence Phone 480-595-9082

City, State, & Zip Code Scottsdale, AZ 85262

Business Name of Applicant/Borrower Thompson McCarthy DB, LLC

ASSETS		LIABILITIES	
	(Omit Cents)		(Omit Cents)
Cash on hand & in Banks	\$ 125,000	Accounts Payable	\$
Savings Accounts	\$	Notes Payable to Banks and Others	\$ 939,674
IRA or Other Retirement Account	\$ 1,748,820	(Describe in Section 2)	
(Describe in Section 5)		Installment Account (Auto)	\$
Accounts & Notes Receivable	\$	Mo. Payments \$	
(Describe in Section 5)		Installment Account (Other)	\$
Life Insurance-Cash Surrender Value Only	\$ 206,555	Mo. Payments \$	
(Complete Section 8)		Loan on Life Insurance	\$
Stocks and Bonds	\$	Mortgages on Real Estate	\$ 3,264,703
(Describe in Section 3)		(Describe in Section 4)	
Real Estate	\$ 6,000,000	Unpaid Taxes	\$
(Describe in Section 4)		(Describe in Section 6)	
Automobiles - Total Present Value	\$	Other Liabilities	\$
(Describe in Section 5, and include Year/Make/Model)		(Describe in Section 7)	
Other Personal Property	\$	Total Liabilities	\$ 4,204,377
(Describe in Section 5)		Net Worth	\$ 3,875,998
Other Assets	\$		
(Describe in Section 5)		Total	\$ 8,080,375
Total	\$ 8,080,375		

Section 1. Source of Income

Salary

Net Investment Income

Real Estate Income

Other Income (Describe below)*

Contingent Liabilities

As Endorser or Co-Maker

Legal Claims & Judgments

Provision for Federal Income Tax

Other Special Debt

Description of Other Income in Section 1.

*Alimony or child support payments need not be disclosed in "Other Income" unless it is desired to have such payments counted toward total income.

Section 2. Notes Payable to Banks and Others. (Use attachments if necessary. Each attachment must be identified as a part of this statement and signed.)					
Name and Address of Noteholder(s)	Original Balance	Current Balance	Payment Amount	Frequency (monthly, etc.)	How Secured or Endorsed Type of Collateral
South Valley Bank and Trust	\$500,000	\$443,608	\$2,779	Monthly	Unsecured
Bank of America	\$500,000	\$496,067	\$1,149	Monthly	Second Deed of Trust

Section 3. Stocks and Bonds. (Use attachments if necessary. Each attachment must be identified as a part of this statement and signed.)					
Number of Shares	Name of Securities	Cost	Market Value Quotation/Exchange	Date of Quotation/Exchange	Total Value
	NADART 401K				746,820
	Morgan Stanley 401K				800,000
	Vista Capital 401K				800,000

Section 4. Real Estate Owned. (List each parcel separately. Use attachment if necessary. Each attachment must be identified as a part of this statement and signed.)			
	Property A	Property B	Property C
Type of Real Estate (e.g. Primary Residence, Other Residence, Rental Property, Land, etc.)	Primary Residence	Vacation Home	Commercial Property
Address	27915 N 100th Place Scottsdale, AZ 85262	196 Westwood Drive Grants Pass, Oregon	2810 Washburn Way Klamath Falls, Oregon
Date Purchased	2002	1996	
Original Cost	\$1,600,000	\$900,000	\$3,500,000
Present Market Value	\$1,600,000	\$900,000	\$3,500,000
Name & Address of Mortgage Holder	ING Direct	BAC Home Loans	Wells Fargo
Mortgage Account Number			
Mortgage Balance	\$1,046,163	\$73,539	\$3,000,000
Amount of Payment per Month/Year	\$5,379	\$3,678	\$17,014
Status of Mortgage	Current	Current	

Section 5. Other Personal Property and Other Assets. (Describe, and if any is pledged as security, state name and address of lien holder, amount of lien, terms of payment and if delinquent, describe delinquency)	

Section 6. Unpaid Taxes. (Describe in detail, as to type, to whom payable, when due, amount, and to what property, if any, a tax lien attaches.)	

Section 7. Other Liabilities. (Describe in detail.)	

All items with an original value greater than \$5,000 listed herein must show manufacturer or make, model, year, and serial number. Items with no serial number must be clearly identified (use additional sheet if more space is required).

[illegible]

All Information contained herein is TRUE and CORRECT to the best of knowledge. **If you knowingly make a false statement or overvalue a security to obtain a guaranteed loan from SBA, you can be fined up to \$250,000 and/or imprisoned for not more than five years under 18 USC 1001; if submitted to a Federally insured institution, under 18 USC 1014 by Imprisonment of not more than twenty years and/or a fine of not more than \$1,000,000.** I authorize the SBA's Office of Inspector General to request criminal record information about me from criminal justice agencies for the purpose of determining my eligibility for programs authorized by the Small Business Act, as amended.

Name X

Date X

Name _____

Date _____

NOTE: The estimated burden for completing this form is 0.5 hours per response. You will not be required to respond to collection of information unless it displays a currently valid OMB approval number. Comments on the burden should be sent to the U.S. Small Business Administration, Chief, AIB, 409 3rd St., S.W. Washington, D.C., 20416 and Desk Office for Small Business Administration, Office of Management and Budget, New Executive Office Building, Room 10202, Washington, D.C. 20503.

MANAGEMENT RESUME

Please fill in all spaces. If an item is not applicable, please indicate as such. You may include additional relevant information on a separate exhibit. SIGN & DATE where indicated.

PERSONAL INFORMATION:

Name James L. McCarty SS# 541-72-1057
Date of Birth 01-11-56 Place of Birth Spokane, WA
Residence Telephone # 509-474-9696 Business Telephone # 509-944-9899
Residence Address 196 West Duane St. City Spokane State WA Zip Code 99201
From 1975 To present date.

Previous Address: _____ City _____ State _____ Zip Code _____
From _____ to _____

Spouse's Name James L. Thompson SS# 540-50-2034
Are you employed by the U. S. Government? Yes ☒ NO Agency/Position _____
Are you a U.S. Citizen? ☒ Yes No, If no, give Alien Registration Number _____

EDUCATION:

High School/College/Technical Name/Location	Dates Attended	Major	Degree/Certificate
<u>Oregon Health Sciences Univ. School of Medicine</u>	<u>1979-1983</u>	<u>M.D.</u>	<u>M.D.</u>

MILITARY SERVICE BACKGROUND:

Branch of Service D Dates of Service _____ to _____

WORK EXPERIENCE: List chronologically with present employer.

Company Name / Location Three Rivers Radiology Associates
From 7/96 to present Title Physician
Duties Physician/Radiologist

Company Name / Location _____
From _____ to _____ Title _____
Duties _____

Company Name / Location _____
From _____ to _____ Title _____
Duties _____

Company Name / Location _____
From _____ to _____ Title _____
Duties _____
Signature James L. McCarty MD Date X

SBA Form for Management Resume

MANAGEMENT RESUME

Please fill in all spaces. If an item is not applicable, please indicate as such. You may include additional relevant information on a separate exhibit. SIGN & DATE where indicated.

PERSONAL INFORMATION:

Name James L. Thompson SS# 540-50-2084
 Date of Birth 02-15-45 Place of Birth McAlester, OK
 Residence Telephone # 470 545 9082 Business Telephone # 541 941 1152
 Residence Address 27915 N. 100th Place City Commerce State AZ Zip Code 85262
 From 2001 To present date.

Previous Address: _____ City _____ State _____ Zip Code _____
 From _____ to _____

Spouse's Name James L. McCarty SS# 541-72-1057
 Are you employed by the U. S. Government? Yes ☒ NO Agency/Position _____
 Are you a U.S. Citizen? ☒ Yes _____ No, if no, give Alien Registration Number _____

EDUCATION:

High School/College/Technical-Name/Location	Dates Attended	Major	Degree/Certificate
<u>Commerce Public High School</u>	<u>1960-1963</u>		<u>GRADUATED</u>
<u>Univ. of Oregon</u>	<u>1964-1966</u>	<u>BUS</u>	<u>NONE</u>

MILITARY SERVICE BACKGROUND:

Branch of Service NONE Dates of Service _____ to _____

WORK EXPERIENCE: List chronologically with present employer.

Company Name / Location DBA Cascone Auto Group Trinity Sales & Leasing
 From 1979 to present Title President
 Duties CEO - total operations

Company Name / Location _____
 From _____ to _____ Title _____
 Duties _____

Company Name / Location _____
 From _____ to _____ Title _____
 Duties _____

Company Name / Location _____
 From _____ to _____ Title _____
 Duties _____

☒ James L. Thompson Signature Date ☒ _____

SBA Form for Management Resume

EXHIBIT 14

From: 7a Questions <7aQuestions@sba.gov>
Sent: Thursday, June 28, 2012 5:50 PM
To: Michael Harris <mHarris@republicaz.com>
Cc: Doronio, Filamor M. <Filamor.Doronio@sba.gov>; Smallhouse, Dan J <daniel.smallhouse@sba.gov>
Subject: Thompson McCarthy DB, LLC SBA Control Number 43783

Your app has just been assigned to a loan officer for review. Please wait to hear from SBA soon.

*Thank you,
Pete Torres, Jr.
Loan Specialist/Call Center
Standard 7a LGPC/Citrus Heights, CA
877-475-2435*

From: Michael Harris [mailto:mHarris@republicaz.com]
Sent: Thursday, June 28, 2012 3:01 PM
To: 7a Questions
Subject: Thompson McCarthy DB, LLC SBA Control Number 43783

I am checking to get a status on the loan submission for the above mentioned applicant?

Thank you

MICHAEL HARRIS
VICE PRESIDENT - BUSINESS RELATIONSHIP MANAGER
REPUBLIC BANK AZ
909 E. MISSOURI AVE
PHOENIX, AZ 85014
(602) 280-9412 (D)
(602) 277-5321 (F)

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From: Michael Harris <mHarris@republicaz.com>
Sent: Friday, June 29, 2012 6:17 PM
To: Accounting Template (accounting@equ8ation.com); Jim L Thompson (dutchbrosjt@gmail.com)
Cc: Emily Chedister <echedister@republicaz.com>
Subject: FW: Thompson McCarthy DB, LLC

All,

Just wanted to forward you an update I received from the SBA yesterday. As you can see they don't ever really give me much to go off of.

Hopefully "Soon" is Monday.

I

MICHAEL HARRIS
VICE PRESIDENT - BUSINESS RELATIONSHIP MANAGER
REPUBLIC BANK AZ
909 E. MISSOURI AVE
PHOENIX, AZ 85014
(602) 280-9412 (D)
(602) 277-5321 (F)

From: 7a Questions [mailto:7aQuestions@sba.gov]
Sent: Thursday, June 28, 2012 3:50 PM
To: Michael Harris
Cc: Doronio, Filamor M.; Smallhouse, Dan J
Subject: Thompson McCarthy DB, LLC

Your app has just been assigned to aSr.loan officer for authorization. Please wait to hear from SBA soon.

*Thank you,
Pete Torres, Jr.
Loan Specialist/Call Center
Standard 7a LGPC/Citrus Heights, CA*

From: Michael Harris [mailto:mHarris@republicaz.com]
Sent: Thursday, June 28, 2012 3:01 PM
To: 7a Questions
Subject: Thompson McCarthy DB, LLC

I am checking to get a status on the loan submission for the above mentioned applicant?

Thank you

MICHAEL HARRIS
VICE PRESIDENT - BUSINESS RELATIONSHIP MANAGER
REPUBLIC BANK AZ
909 E. MISSOURI AVE
PHOENIX, AZ 85014
(602) 280-9412 (D)
(602) 277-5321 (F)

EXHIBIT 15

Message

From: Michael Harris [mHarris@republicaz.com]
Sent: 7/12/2012 6:56:06 PM
To: 'Accounting' [accounting@equ8ation.com]
CC: Thompson Jim L. [dutchbrosjt@gmail.com]
Subject: RE: Paradise Valley SBA Approval

Kathye, Jim,

I apologize for the delayed response, I spent most of yesterday preparing for today's loan committee. I spoke with our SBA loan specialist on Tuesday and he is sending me his final questions, which I should have today. Once I have those, I will get with both of you so we can respond and get the authorization.

The problem we have is that instead of having once single loan specialist in the SBA that understands the business we get a new one each loan request. Rather than he or she looking at the past loan approvals you have they treat it as a new request and we end up answering the same stuff over and over again.

MICHAEL HARRIS

Vice President - Business Relationship Manager

REPUBLIC BANK AZ

909 E. Missouri Ave

Phoenix, AZ 85014

(602) 280-9412 (D)

(602) 277-5321 (F)

From: Accounting [mailto:accounting@equ8ation.com]
Sent: Wednesday, July 11, 2012 2:20 PM

APP141
TMCC001287

Message

From: Michael Harris [mHarris@republicaz.com]
Sent: 7/13/2012 4:07:03 PM
To: Accounting Template (accounting@equ8ation.com) [accounting@equ8ation.com]
CC: Jim L Thompson (dutchbrosjt@gmail.com) [dutchbrosjt@gmail.com]
Subject: SBA Letter
Attachments: SBA Letter 7-12-12.pdf

I have attached the letter from the SBA, those items that have "Me" next to them are the things I will take care of. The remaining items I need you to clear up.

I am going to prepare a letter to go along with the response, as this particular specialist is off base with his view of the request. It is also evident that he has not looked at the two approved loans based on some of the items he is requesting. Normally the questions asked are not three pages and simply answered.

Call me if you have any questions.

MICHAEL HARRIS

Vice President - Business Relationship Manager

REPUBLIC BANK AZ

909 E. Missouri Ave

Phoenix, AZ 85014

(602) 280-9412 (D)

(602) 277-5321 (F)

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U. S. Small Business Administration
Standard 7(a) Loan Guaranty Processing Center
6501 Sylvan Road
Citrus Heights, CA 95610

Tel: (877) 475-2435
Fax: (606) 435-2400

July 12, 2012

Michael Harris
RepublicBankAz NA
909 Missouri Ave
Phoenix, AZ 85014

Re: Thompson McCarthy DB LLC (Scottsdale, AZ) - SBA Control # 43783

Dear Michael,

We have reviewed the information provided with your loan guarantee request, but we cannot complete the Loan Authorization until we are in receipt of the following information:

1. A detailed listing of machinery and equipment along with bid invoices on the improvements to be purchased with loan proceeds, along with cost quotes. *(This is required per SOP 50 10 5(E), page 219.)... me, I will use an existing one*
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.) me, I believe this is incorrect as you paid for all current stores with cash*
3. A revised copy of the Personal Financial Statement (SBA Form 413 may be used) for James Thompson and Janice McCarthy which addresses the following:
 - a. Janice McCarthy did not sign — *Attached*
4. Interim Historical Financial Statement information for the borrower that was omitted or requires clarification. Specifically, not signed and dated by an owner. *You*
5. A signed and dated copy of a Balance Sheet for the borrower dated within 90 days of the application date. *You*
6. A signed and dated copy of an Income Statement for the borrower dated within 90 days of the application date. *You*

Page 2

Re: Thompson McCarthy DB LLC (Scottsdale, AZ) - SBA Control # 43783

- You* - 7. Certification Letter from the trustee(s), James Thompson Trust and Janice McCarthy Trust, warranting the trust will not be revoked or substantially amended for the term of the loan without the consent of the SBA as well as certifying the following:
- The trustee has the authority to act;
 - The trust has the authority to borrow funds, pledge trust assets, and lease the property to the Operating Company
 - The trustee has provided accurate, pertinent language from the trust agreement confirming the above; and
 - The trustee has provided and will continue to provide SBA with a true and complete list of all trustors and donors.
- You* - 8. Signed and dated copies of the financial statements for the last 3 fiscal years and current (within 90 days of submission) interim financial statements for all affiliates. Specifically, James Thompson Family LP
9. A revised loan proposal which increases the borrower's injection requirement to an amount of at least \$60K. *(This is required because, after a detailed review of the loan request, (including the borrower's industry experience, management ability, credit history, and the nature of the business), the requested equity injection amount of \$0 has been determined to be inadequate.)* It is not clear as to why the borrower needs to retain over \$650K in their checking account, when as stated in your Bank's credit memo these funds are to be used for future expansion; which is the reason for this loan request. - *me, I can justify the historical cost to build existing stores with cash*
10. A revised SBA Form 4-1, with a loan maturity that does not exceed the maximum allowed. *(Per SOP 50 10 5(E), page 151, the maximum term for this request is 10 years generally is the maximum allowed for leasehold improvements as well as the other uses requested. An exception may be granted along as the borrower agrees to obtain a full term lease for the premises; full term defined as no options to renew counted in at term determination.)* - *me, he is incorrect as this includes construction of a building*
11. Clarification of your loan request which resolves the inconsistencies between your application and the sample Loan Authorization you provided. Specifically, your credit memo indicates the shareholder's debt will be placed on full standby for the term of the loan, the draft loan authorization does not include this requirement. *me*
12. SBA Form 912 for Janice McCarthy, who is an owner/officer of the business. - *You*
13. Copy of the 4506t form filed with the IRS on the borrower *me*
14. SBA Eligibility Questionnaire Addendum C is needed. See Item 8 - *me*

Page 3

Re: Thompson McCarthy DB LLC (Scottsdale, AZ) - SBA Control # 43783

15. An amended copy of SBA Form 4 that was submitted with your application, with the following sections completed:

- a. Question 12 is answered incorrectly –see item 8
- b. Date signed is missing on page 3
- c. Janice McCarthy did not sign page 4 — *ml*

16. Copy of James Thompson and Janice McCarthy's 2011 1040 or extension filed with the IRS. — *ml*

Sincerely,

Dan Smallhouse
Loan Specialist

EXHIBIT 18

From: Thompson Jim L. <dutchbrosjt@gmail.com>
Sent: Thursday, February 7, 2013 4:48 PM
To: Michael Harris <mHarris@republicaz.com>
Cc: Pease Kathy <accounting@equ8ation.com>
Subject: Re: Thompson/McCarthy

Michael The SBA is not willing to fund Paradise, as it has been completed paid for by our company. I may need a \$500K line to cover as **we are in a cash crunch now**, after no approval for Paradise. What is needed by yourself to set up the line? **The crunch was not because of the loan payoff, but Republic not able to get us a promised loan approval for Paradise site** Thanks Jim

On Feb 7, 2013, at 9:15 AM, Michael Harris <mHarris@republicaz.com> wrote:

> Jim,
>
> Please see below. Would like to pursue a personal credit line to have access to working capital in the interim to assist with insuring you do not have a cash crunch after repaying the \$400,000 credit line at the other Bank?

>
>
> MICHAEL HARRIS
> Sr. Vice President
> RepublicBankAz, N.A.
> 909 E. Missouri Ave
> Phoenix, AZ 85014
> (602) 280-9412 (D)
> (602) 277-5321 (F)

>
>
> -----Original Message-----
> From: Corey.Schimmel@mutualofomahabank.com [<mailto:Corey.Schimmel@mutualofomahabank.com>]
> Sent: Thursday, February 07, 2013 9:06 AM
> To: Michael Harris
> Subject: RE: Thompson/McCarthy

>
> Mid March.
>
>
> Corey Schimmel
> Vice President- Business Banker
> Mutual of Omaha Bank
> 555 W Chandler Blvd
> Chandler, AZ 85225
> office: 480.857.5601
> cell: 602.295.8113
> fax: 602.636.7052
> Corey.Schimmel@mutualofomahabank.com

>
>
>
>
>
> From: Michael Harris <mHarris@republicaz.com>
>
> To: "'Corey.Schimmel@mutualofomahabank.com'"
<Corey.Schimmel@mutualofomahabank.com>,
>
> Date: 02/06/2013 03:17 PM
>
> Subject: RE: Thompson/McCarthy

>

>
>
>
>
>
> Yes they are all secured with UCC filings, however, the 1201 E Glendale Avenue location has a leasehold deed of trust filed against it.
>
> What do you think your time frame will be on presenting the offer?
>
>
> MICHAEL HARRIS
> Sr. Vice President
> RepublicBankAz, N.A.
> 909 E. Missouri Ave
> Phoenix, AZ 85014
> (602) 280-9412 (D)
> (602) 277-5321 (F)
>
>
> -----Original Message-----
> From: Corey.Schimmel@mutualofomahabank.com [<mailto:Corey.Schimmel@mutualofomahabank.com>]
> Sent: Wednesday, February 06, 2013 2:51 PM
> To: Michael Harris
> Subject: Thompson/McCarthy
>
>
>
>
>
>
>
> Michael,
>
>
> I am working with our legal counsel to draft a formal proposal to purchase Thompson/McCarthy's notes from Republic Bank.
>
>
> I wanted to confirm that the current notes are only secured with UCC filings. Are there any Lease Hold Deeds of Trust? Any Fixture filings?
> Thank you for your assistance. Best Regards,
>
>
> Corey Schimmel
>
>
>
> Corey Schimmel
> Vice President- Business Banker
> Mutual of Omaha Bank
> 555 W Chandler Blvd
> Chandler, AZ 85225
> office: 480.857.5601
> cell: 602.295.8113
> fax: 602.636.7052
> Corey.Schimmel@mutualofomahabank.com
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>
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DECLARATION OF JAMES THOMPSON

1. I, James Thompson, together with my wife, Janice McCarthy, own Thompson/McCarthy Coffee Company, Inc., ("Plaintiff" or "TMCC"). I serve as president of TMCC and am authorized to make this Declaration on its behalf.

2. TMCC is in the business of owning and operating coffee stores as a franchisee under the name Dutch Bros. TMCC's franchise area essentially encompasses the central and eastern part of the Phoenix metropolitan area. Before engaging RepublicBank Arizona ("RBAZ") as its lender, TMCC had developed and was operating 7 coffee stores in the Phoenix metropolitan area using capital contributed by me.

3. TMCC's prototype store consists of an approximate 400 s.f. building which houses the coffee-making operations and employees, a drive-through lane, a small outdoor dining patio and associated parking. TMCC's stores are located on ground leases with minimum terms of 25 years.

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

5. RBAZ assured TMCC from the outset that the bank would obtain \$5.0 Million in lending to TMCC and repeatedly assured TMCC of the bank's willingness to loan the \$5.0 Million.

6. TMCC told RBAZ that a \$5.0 Million loan would enable TMCC to open 10 new coffee stores.

7. RBAZ represented to TMCC that (1) it would provide SBA loan funding for TMCC to build, equip and open additional Dutch Bros. coffee stores in a timely manner; (2) it was competent and experienced in timely obtaining and closing SBA



guaranteed loans; and (3) it had experienced staff available to be able to provide the funding of the SBA loans TMCC was seeking in a timely manner.

8. Based upon these representations and assurances, TMCC in or about October 2010 chose to use RBAZ as its lender for expanding its Dutch Bros. coffee store chain.

9. RBAZ required TMCC to pledge its 7 stores, including the buildings, leasehold interests, equipment, inventory and cashflow to secure repayment of loans RBAZ would be making to TMCC and also required my spouse Janice McCarthy and me, owners of TMCC, to personally guarantee repayment of the loans. At the outset, RBAZ requested TMCC to provide financial reports for the historical operations of the 7 stores.

10. In December 2010, TMCC began working with RBAZ to obtain a loan for new store locations at Rural and Guadalupe Roads and Southern and Greenfield Roads. The loan in the amount of \$1,026,300 closed about 11 months later.

11. In November, 2011, TMCC began working with RBAZ on loans for new coffee store locations at Glendale and 12th Street and Paradise Valley Mall.

12. The loan of \$597,100 for the Glendale Store closed in early May, 2012.

13. Defendant RBAZ informed Plaintiff on multiple occasions that the Paradise Valley application had been submitted to the SBA prior to June 2012.

14. The SBA ultimately declined the PV loan application due to RBAZ's non-responsiveness.

15. Due to RBAZ's repeated failure to effectively process TMCC's PV loan application to closing with the SBA, TMCC had no other choice but to find an alternate lending source.

16. In order for Mutual of Omaha Bank ("MB") to lend TMCC monies for its Dutch Bros. coffee stores, MB required that it have as security all of the collateral



sources Defendant RBAZ had tied up on the 2 SBA loans RBAZ funded through the SBA.

17. RBAZ did not transfer TMCC's collateral to MB until September of 2013 when RBAZ sold and assigned TMCC's loans and collateral to MB.

18. In September, 2013, TMCC had drained its cash operating reserves per store to open 3 new coffee stores and was forced to juggle funds between and among its stores to pay operating expenses. This situation was very stressful for me.

19. There was no banking relationship between Plaintiff and Mutual of Omaha Bank ("MB") in 2012. Plaintiff did not commence a banking relationship with MB until the loans were transferred from RBAZ to MB in September 2013.

20. TMCC did not negotiate or draft the Consent of Obligors and Pledgors, nor was I provided a copy of the Consent prior to signing it. I was informed by Mutual of Omaha Bank that my signature was required on the Consent in order to authorize the transfer of the SBA loans from RBAZ to MB.

21. I did not authorize release language to be included in the Consent. I had no intention of releasing any claims against RBAZ. No one ever explained to me that RBAZ sought or required a release of liability in order for it to sell and transfer the loans to MB.

22. I was never informed that by signing the Consent I would be releasing any claims TMCC had against RBAZ from any liability for their tortious acts. Again, I had no intention of releasing any claims against RBAZ.

23. TMCC would have immediately brought its lawsuit against RBAZ upon learning of the following (i) RBAZ had forwarded to TMCC altered communications from the SBA administration in a pattern of deceit and misrepresentation in order to induce TMCC to believe its PV loan application was being timely processed when it was not; or (ii) that it had deceived TMCC by misrepresenting that its PV SBA loan application had been submitted when it had not.



24. During a meeting with RBAZ on December 20, 2012, there was no agreement made that there was no longer a banking relationship between RBAZ and TMCC. After the December 20, 2012 meeting, Michael Harris of RBAZ agreed to work on closing the loan on the Paradise Valley Store.

25. In February 2013, I requested RBAZ to issue TMCC a \$500,000 line of credit to be used to restore TMCC's cash reserves expended to construct and equip the Paradise Valley Store.

26. RBAZ knew at the time, but withheld from TMCC, that (i) RBAZ had altered communications from the Small Business Administration in a pattern of deceit and misrepresentation in order to induce TMCC to believe its Paradise Valley loan application had been submitted in early 2012 when (a) RBAZ never previously submitted it prior to June 20, 2012, and (b) when it finally got around to submitting it many months later in June 2012, the SBA had screened it out of processing and RBAZ left it screened out for 5 months; and (ii) that RBAZ had deceived TMCC through its correspondence with TMCC to believe that loans were actively being processed, prescreened and approved when the loans had not been processed, prescreened or approved.

27. I first learned of RBAZ's fraud and deception from TMCC's lawyers after filing of the subject lawsuit.

28. I was never informed during my relationship with RBAZ that RBAZ was under investigation by the Office of the Comptroller of Currency during the pendency of the Paradise Valley loan, which investigation "found unsafe and unsound banking practices" being engaged in by RBAZ to "credit risk management and credit administration."



29. I declare under penalty of perjury that the foregoing is true and correct.

DATED this 17 day of January, 2017.


James Thompson

EXHIBIT 24

EXHIBIT 24

DECLARATION OF JAMES THOMPSON

1. I, James Thompson, together with my wife, Janice McCarthy, own Thompson/McCarthy Coffee Company, Inc., ("Plaintiff" or "TMCC"). I serve as president of TMCC and am authorized to make this Declaration on its behalf.

2. As declared in my January 17, 2017 Declaration: (1) TMCC would have immediately brought its lawsuit against RBAZ upon learning of the following (i) RepublicBankAZ, N.A. ("RBAZ") had forwarded to TMCC altered communications from the SBA administration in a pattern of deceit and misrepresentation in order to induce TMCC to believe its PV loan application was being timely processed when it was not; or (ii) that it had deceived TMCC by misrepresenting that its PV SBA loan application had been submitted when it had not; and (2) I first learned of RBAZ's fraud and deception from TMCC's lawyers after filing of the subject lawsuit.

3. Had TMCC learned of RBAZ's fraud and deception at anytime prior to the transfer of the SBA loans from RBAZ to Mutual of Omaha Bank, TMCC would have (i) immediately filed its lawsuit against RBAZ, and (ii) would not have signed any documents that had any relation to a transaction with RBAZ.

4. To the best of my recollection, I was never presented, at anytime, with a copy of the Loan Purchase and Sale Agreement between RBAZ and Mutual of Omaha Bank.

5. To the best of my recollection, the Consent of Obligors and Pledgors document was presented to me as a standalone document, and it was signed as a standalone document.

6. I have never before read the Loan Purchase and Sale Agreement between RBAZ and Mutual of Omaha Bank.

7. I declare under penalty of perjury that the foregoing is true and correct.

DATED this 7th day of March, 2017.



James Thompson

EXHIBIT “B”

1 FRANCIS J. SLAVIN, P.C.
Francis J. Slavin, #002972
2 Daniel J. Slavin, #024780
Jessica L. Dorvinen, #028351
3 2198 East Camelback Road, Suite 285
Phoenix, Arizona 85016
4 Telephone (602) 381-8700
Fax: (602) 381-1920
5 E-mail: b.slavin@fjslegal.com
d.slavin@fjslegal.com
6 j.dorvinen@fjslegal.com
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.
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DATED this 3rd day of November, 2017.

FRANCIS J. SLAVIN P.C.

By:  _____

Francis J. Slavin, Esq.
Daniel J. Slavin, Esq.
Jessica L. Dorvinen, Esq.
Attorneys for Plaintiff

EXHIBIT “C”

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)
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11 Alissa.Brice@quarles.com

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:

22 Francis J. Slavin
23 Heather N. Dukes
24 Francis J. Slavin, P.C.
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26 Phoenix, Arizona 85016
27 Email: b.slavin@fjslegal.com
28 Email: h.dukes@fjslegal.com
Attorneys for Thompson/McCarthy Coffee Co.

Nenne O'Connell

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A P P E A R A N C E S

On Behalf of the Plaintiffs:

Daniel J. Slavin, Esq.
Jessica Dorvinen, Esq.

On Behalf of the Defendant:

W. Scott Jenkins Jr., Esq.
Andrea Landeen, Esq.

P R O C E E D I N G S

THE COURT: Good afternoon. Please be seated.
Okay. This is the time set for an oral argument on
Plaintiff's motion for supplemental briefing and request for
continuance of oral argument in CV2014-014647. Could I have
appearances, please?

MR. SLAVIN: Yes, Your Honor. This is Daniel Slavin
and Jessica Dorvinen for the Plaintiff.

THE COURT: Thank you. Good afternoon.

MR. JENKINS: Good morning, Your Honor. Scott
Jenkins and Andrea Landeen with Quarles & Brady, and I also
have Ralph Tapscott, President of Republic Bank with me in the
courtroom.

THE COURT: Thank you. Good afternoon.

MR. JENKINS: Good afternoon.

THE COURT: Okay. So we had originally I think I
had this date for scheduled for the motion -- oral argument on
the motion for summary judgment, but then I'd gotten the
motion for supplemental briefing and I just changed it to an
oral argument on the motion for supplemental briefing.

So I have looked over, did not study in detail, look
up cases, et cetera, on the motion for summary judgment just
so I would be able to put the motion for supplemental briefing
in context. So I'm going to go through with you -- I have
questions and I have concerns. And so I'm just going to

1 issue I'd like to -- you mentioned that you don't like
2 complaining without the specific request for relief, and I
3 just want to address another --

4 THE COURT: Sure.

5 MR. SLAVIN: -- point and I'll try to be quick.

6 When Republic filed their motion for summary judgment, they
7 were arguing this was a waiver. And in fact, in their motion
8 itself it said this consent constitutes a waiver.

9 Now, when they filed their answer in this matter,
10 they waived -- they raised waiver as a defense. They did not
11 raise release as a defense. Under 8(c) you have to raise each
12 affirmative defense or you waive it.

13 So they were trying to shoehorn in a release as a
14 waiver to try to get leverage on getting a motion for summary
15 judgment granted. When we responded, we -- to the motion for
16 summary judgment, we said this is not a waiver. If anything,
17 it's a release, but it doesn't constitute a -- a valid
18 release.

19 The in the reply for the first time, they changed
20 courses and they said oh, okay. This is actually a release.
21 And they go into talking about how the release is a contract,
22 it's a valid contract, they're a party to the contract, they
23 raise that for the first time in their reply.

24 So if there's a reason for supplemental briefing, it
25 would be either surreply, surresponse, whatever the Court

1 calls that, a chance to brief that issue. Had they raised
2 that that was a -- a release, they were -- I think they were
3 purposely trying to avoid denominating it a release to avoid
4 the fact that they had just litigated for 18 months, not ever
5 having raised this defense before, and then for the first
6 time, after 18 months of litigating, and our client spending
7 over \$200,000 in money, we found a document.

8 And so when -- when you're talking about I heard all
9 this chatter about you did this for the first time and what's
10 going on there, we never before had an opportunity to raise
11 economic duress as a defense to the consent because it was
12 never raised by them previously until November 1st, 2016.

13 THE COURT: What was never raised by them until
14 November --

15 MR. SLAVIN: They never raised the consent. They
16 never raised the consent ever before as a defense.

17 THE COURT: You mean the consent whether you're --
18 whether you're interpreting it as a waiver or a release?

19 MR. SLAVIN: Right. It was disclosed --

20 THE COURT: But -- but --

21 MR. SLAVIN: -- amongst the parties, but they never
22 said hey, we have a defense to your case, here it is.

23 THE COURT: So they -- they had pled waiver and they
24 gave you the consent, but they never tied them together in any
25 disclosure?

1 MR. SLAVIN: The waiver was in a pile of 9,000
2 documents. So --

3 THE COURT: What wa -- when you say the waiver was.

4 MR. SLAVIN: What they're calling the waiver.

5 THE COURT: Oh.

6 MR. SLAVIN: There is -- they're calling the consent
7 a waiver. It was a waiver, now it's a release. The theory --

8 THE COURT: Okay.

9 MR. SLAVIN: -- on the motion for summary judgment
10 was that this waiver -- that this re -- consent is a waiver.
11 Then we pointed out it's not a waiver, and then their theory
12 has now changed it's a release. And then they spend their
13 objection saying well, Your Honor, you shouldn't grant this
14 motion for supplemental briefing because this is a valid --
15 this is a valid contract and it's enforceable, therefore, in -
16 - and they went on and argued that whole -- that whole
17 position.

18 So -- and I'm sorry if this is coming across as
19 confusing. But the idea being is that they raised a theory, a
20 legal theory, that -- that the consent is a release --

21 THE COURT: Uh-huh.

22 MR. SLAVIN: -- for the first time in the reply to
23 their motion for summary judgment. I believe that warrants us
24 an opportunity to brief the issue. And it could have been --
25 it's -- it's somewhat been briefed already because when we

1 filed our motion for supplemental briefing, they responded in
2 their objection that they had raised the consent as
3 affirmative defense, yet, in the entire objection, they're
4 calling that consent a release.

5 THE COURT: Okay. So let me -- let me ask a couple
6 clarifying -- clarifying questions. So the consent was
7 disclosed to you in normal course. This document.

8 MR. SLAVIN: Correct.

9 THE COURT: Okay.

10 MR. SLAVIN: We -- 30,000-some documents, yes.

11 THE COURT: Right. Got it. So then -- and in their
12 answer they pled waiver, but not release.

13 MR. SLAVIN: Correct.

14 THE COURT: Okay. Just in the Rule 8(c) for above -
15 - okay.

16 MR. SLAVIN: But they didn't all of them, they --
17 they picked waiver, Your Honor.

18 THE COURT: Right. Okay. I appreciate that. Most
19 -- most lawyers do all of them and any other thing that
20 anybody could ever think of.

21 MR. SLAVIN: That's right.

22 MR. JENKINS: I'm trying.

23 THE COURT: So then we've got disclosure statements,
24 right?

25 MR. SLAVIN: Right.

1 THE COURT: So they've said waiver, they've given
2 you the consent, and it seemed to me that you were saying, you
3 know, they didn't even raise this waiver until November. And
4 by that do you mean that they didn't tie the -- this -- this
5 consent is the waiver; is that -- is that what you mean?

6 MR. SLAVIN: Okay. So -- somewhat. In their answer
7 they said waiver.

8 THE COURT: Right.

9 MR. SLAVIN: They -- they reserved the right to add
10 any affirmative defenses as discovery goes on. They never
11 changed the answer to include release.

12 THE COURT: Did they -- but okay, so --

13 MR. SLAVIN: So then we -- so then at some -- they
14 raised waiver, they talk about all their defenses in detail
15 about how this defense is this, how this defense is that, but
16 they never once mention this loan purchase and sale agreement
17 with a consent to it. They never once raised it as hey, we --
18 this document's a defense to our claims. And -- and let me
19 just point out something --

20 THE COURT: So what did they say was the basis of
21 the waiver in their disclosure statements?

22 MR. SLAVIN: They don't.

23 THE COURT: Okay.

24 MR. SLAVIN: They don't. And it -- and correct me
25 if I'm wrong. I don't believe -- I don't believe they did.

1 But and overriding I think view we can look at this, is if
2 they had a copy of this get out of jail free card from the
3 beginning, and they knew about it, don't you think they would
4 have filed a motion to dismiss right off the bat or they would
5 have turned around and filed a motion for summary judgment
6 right away, said hey, you released us from claims, we're done?

7 THE COURT: And why do you think they didn't?

8 MR. SLAVIN: Because they didn't know about it.

9 THE COURT: They didn't know about what?

10 MR. SLAVIN: Or -- they didn't know about the
11 consent agreement. They didn't -- they didn't --

12 THE COURT: But they had it --

13 MR. SLAVIN: They had it.

14 THE COURT: -- and they didn't tie it together.

15 MR. SLAVIN: They never tied it together.

16 THE COURT: Okay. All right.

17 MR. SLAVIN: They never -- they never put us on
18 notice that hey, Thompson/McCarthy Coffee Co., you sued us, we
19 want to let you know that we have this document, we're going
20 to call it a consen -- a release, waiver, whatever you want to
21 call it, and we're -- we're going to get out of all your
22 claims. They never said that to us.

23 THE COURT: The first time you found out about that
24 was?

25 MR. SLAVIN: The connection was made November 1,

1 2016.

2 THE COURT: Okay. All right. So November 1, 2016
3 is when they're telling you hey, by the way, you know this
4 waiver defense that we pled, it's based on this consent?

5 MR. SLAVIN: Right.

6 THE COURT: Okay. So then you're saying that they -
7 - they're using waiver, using waiver, and then we get to the
8 reply and they change it to release?

9 MR. SLAVIN: That's correct.

10 THE COURT: And they never pled release and they
11 never put release in their 26.1 disclosure statement.

12 MR. SLAVIN: That's correct.

13 THE COURT: And so what you're asking for is not
14 that I strike the release defense. You're saying we should
15 get supplemental briefing no matter what so that we can
16 respond to this release or are you asking me to strike release
17 as an affirmative defense? Which one?

18 MR. SLAVIN: Yes, I'm asking you to strike release
19 as an affirmative defense.

20 THE COURT: Because it wasn't raised before?

21 MR. SLAVIN: Because it wasn't raised before and
22 under the rules, they were required to raise it or it's
23 waived. And we also pointed out case law that says hey, if
24 you have an affirmative defense and you sit on it for 18
25 months and you actively litigate and -- and, you know, there's

1 a lot that was going on here. We were exchanging expert
2 reports, we were --

3 THE COURT: Okay.

4 MR. SLAVIN: -- spending all that -- that time and
5 money. Now, in -- I will say this. In the disclosure on
6 November -- and call it maybe a release of waiver or maybe
7 call it a waiver of release in November 1st, 2016. But they
8 still didn't go back and amend their answer to include release
9 as an affirmative defense.

10 THE COURT: Okay. So breaking down the quote,
11 supplemental briefing --

12 MR. SLAVIN: Correct.

13 THE COURT: -- one component is you want to be able
14 to argue that they've waived their -- any release -- claim for
15 release, right?

16 MR. SLAVIN: Yes, Your Honor.

17 THE COURT: Okay. So that would be one component.
18 And then the other component, if there are only two, is you
19 want to wait until you get this discovery so that you can then
20 supplement with more evidence of tortious conduct to undermine
21 their claim that the consent is valid?

22 MR. SLAVIN: That's correct, Your Honor.

23 THE COURT: Are those the only two things, because
24 it seemed like there were a lot of other things.

25 MR. SLAVIN: I -- let me just think here for a

1 legal argument --

2 THE COURT: Let me see if I'm looking at the right
3 thing. You raised a new legal argument on waiver of the
4 defense. That's what I -- that's what the basis of their
5 motion to strike was.

6 MR. SLAVIN: Hmm.

7 THE COURT: Right?

8 MR. SLAVIN: Right.

9 THE COURT: So I mean, I would deny that because I -
10 - I mean, I've already talked about --

11 MR. SLAVIN: Right.

12 THE COURT: -- 56(d). I don't consider that to be -
13 - I mean, that's technical to me.

14 MR. SLAVIN: Correct.

15 THE COURT: And then the wai -- waiver of the
16 Defense, I mean, they're arguing well, for the first time you
17 raised this legal argument in your reply in support of the
18 motion of the motion for supplemental briefing, that's the
19 first time you ever said that they had waived their release
20 defense, right? And you're saying well, you didn't raise the
21 release until this time period.

22 MR. SLAVIN: Right. It -- it's sort of more from
23 the motion was about it being a waiver and then it started in
24 the rep -- in the reply there is -- it turned into this waiver
25 release, and then by the end of the reply, it's all in on

1 release. Then we draft a motion for supplemental briefing and
2 then we get an objection where the entire thing is a release
3 and they cite this Jones case and talking about this release.
4 And -- and so, our position is well, they've adop -- they've
5 basically changed their motion from one that the consent -- we
6 have a theory of waiver to get us out of this -- this claim
7 because you waived any and all claims. And then it turned
8 into release.

9 Now, if it's a release, they've failed to raise it
10 as an affirmative defense and we just want the opportunity for
11 the Court to evaluate those arguments. If -- if they failed
12 to raise it as an affirmative defense, we think that's
13 important that the Court hear the case law on that issue and -
14 - and we believe that the Court would --

15 THE COURT: Right.

16 MR. SLAVIN: -- would deny the motion for summary
17 judgment on the mere fact that not only did they not put it in
18 their answer or amend their answer, they -- they litigate it
19 for 18 months by -- by their conduct waiving it. So we have
20 to charge them with the idea that they knew about the consent
21 document when they signed it back in 2013 and we have to
22 charge them with that, knowing that they went forward and
23 litigated this case for 18 months. And if they had that as a
24 defense, they've waived that. So --

25 THE COURT: Okay.

1 MR. SLAVIN: -- any of that --

2 THE COURT: Well, so I mean, I'll just tell you, Mr.
3 Jenkins, if you want to make argument, I -- I would den -- I
4 would deny the motion to strike because you're asking me to
5 strike it just because they raised something that you don't
6 think they were entitled to raise. But that is really not
7 relevant to whether I allow them to supplement the briefing
8 overall. So I --

9 MR. JENKINS: Can I be heard?

10 THE COURT: Yeah, go ahead.

11 MR. JENKINS: You had your time. I've been patient.
12 I always like when I file motions, and the other side go
13 first, right? Well, again --

14 THE COURT: I'm sorry, that doesn't always happen in
15 my court.

16 MR. JENKINS: No, I know, I know. I know. Well, it
17 wasn't my motion so I didn't get a chance to go first.

18 I mean, you -- you started your comments with we're
19 not getting off on a side issues --

20 THE COURT: Uh-huh (affirmative).

21 MR. JENKINS: -- and we just jumped to right in the
22 middle of the side issue. And so now we're under attack for
23 disclosure and, you know, messing around, and it's just --
24 it's just not true. And what you just heard is they're upset,
25 so they had the consent from Mutual of Omaha. Before we even

1 -- so they filed their complaint, they waited six months or so
2 to -- to file it, they did an amended complaint, they
3 propounded initial discovery to us, there's like 28,000
4 documents in this case.

5 THE COURT: Uh-huh (affirmative).

6 MR. JENKINS: There's a lot of documents. Okay?
7 And this relationship of multiple loans went on for a long
8 time.

9 So as we had properly -- we asserted waiver in our
10 answer, preserved that affirmative defense. They actually
11 propounded discovery to us at the time they filed their second
12 amended complaint and finally served us, so not only did they
13 have it from Mutual of Omaha, the consent, they got it from us
14 from the production of documents, and then they got it again
15 from us on initial disclosure statement.

16 And as you've just heard from Counsel, they have
17 this theory of all these different misrepresentations and
18 fraudulent accusations and -- and so what we did, which I
19 think is -- I mean, very rarely do I get blamed for, you know,
20 supplementing disclosure. I -- that's what we did.

21 We have it in our answer, we have it in our initial
22 disclosure statement waiver. It is a waiver. We haven't
23 changed it.

24 THE COURT: Yeah, but -- but -- do you disagree with
25 me that when you assert a waiver, that once you get to the

1 26.1, you have to say and you waived your claims because you
2 signed "X" document?

3 MR. JENKINS: We weren't there yet, because if we --

4 THE COURT: Okay.

5 MR. JENKINS: -- we went through an exhaustive
6 investigation because of the allegations of wrongdoing.
7 Interviewed every employee -- so, one of the things there's --
8 there's been tremendous turnover at the bank. Mr. Tapscott
9 was not the president at the time, there's a whole new board,
10 and so had to hunt down people. We hunted down people, we did
11 the full 28,000 page review --

12 THE COURT: Uh-huh.

13 MR. JENKINS: -- of the documents searching for all
14 emails to make sure that we were comfortable, that we still
15 had the consent, you know, waiver argument. In November, so
16 five months ago, disclosed it in a very supplemental
17 disclosure statement, wrote them a letter, said we -- we --
18 here's our position, we've --

19 THE COURT: Uh-huh.

20 MR. JENKINS: -- reviewed everything, we've
21 interviewed everybody, there's no misrepresentations
22 whatsoever dealing with the consent, dismiss the case. Okay?
23 That didn't happen, we waited 30 days, we filed summary
24 judgment on December 2nd, 2016. All right.

25 THE COURT: Okay.

1 MR. JENKINS: Comprehensive full summary judgment,
2 you've signed this, how do I know you -- how do I -- how do I
3 know that Thompson and McCarthy saw the document? They signed
4 it. They have not -- I mean, these are -- she's a physician,
5 he's a sophisticated entrepreneur, this is not Joe Blow, you
6 know, that's never seen loan documents before, okay?

7 So we filed summary judgment on the 2nd. We give
8 them two extensions to file a response.

9 THE COURT: Uh-huh.

10 MR. JENKINS: They file a response on January 16th.
11 They propounded discovery to us with the FOIA OCC request on
12 January 3rd, two weeks before they filed the response. Our
13 whole point on the 56(d) thing is, it's not the technicality,
14 it's you don't get to file this 56(d) after you've responded.
15 That's totally improper. You don't respond to your summary
16 judgment, we then reply, and then pop up and say, I don't like
17 the way the pleadings are going, so I'm going to file a
18 supplemental response. It's not like a document dropped out
19 of nowhere. This is -- they're -- they're whole response is
20 the basis for the request for production of documents that
21 they did before filing a response. And so our whole point,
22 it's a -- it's -- I mean, it's a fact, they asked this
23 information from the OCC before filing a response.

24 Our position is they had two choices at that point;
25 proceed with the briefing, which they did, and they didn't

1 bring up waiver or any of these argument. There's was hey, we
2 didn't see it and we don't think we read it, so therefore, you
3 shouldn't enforce the -- the waiver. We have not changed our
4 position on that. It's a waiver of a claims. Okay? That's
5 what it is.

6 So they -- they then decided to proceed with the
7 response and not a 56(d) request for additional time to find
8 essential information. So they are barred from now going back
9 for a motion for supplemental briefing because Judge, I think
10 you hit the head on -- right on the head and if you -- can I
11 draw?

12 THE COURT: Yeah. Sure.

13 MR. JENKINS: This is always scary, but I'll give it
14 a go. Here's why and you -- you were hitting the head --
15 hitting it right on the head.

16 Loan sale agreement is September of '13.

17 THE COURT: Uh-huh (affirmative).

18 MR. JENKINS: Okay? The OCC agreement with Republic
19 regarding the safety and soundness, May 13th. The examination
20 which we were the ones that told them how to go get it because
21 we couldn't give it to them, we're barred from federal law. I
22 attached to my objection --

23 THE COURT: Yeah. That --

24 MR. JENKINS: The OCC is saying don't you dare do
25 it.

1 comfortable that we had it, we did a supplemental disclosure
2 statement, listen, we were still four months out from the end
3 of discovery. So I don't want to be dealing with waiver of
4 claim arguments when no deposition on the release, now waiver
5 argument, which was a new argument in the reply.

6 THE COURT: Yeah, but they're saying it was a new
7 argument for you in your respon -- or in your -- in your
8 motion.

9 MR. JENKINS: No, it's --

10 THE COURT: That you changed it from --

11 MR. JENKINS: No.

12 THE COURT: -- waiver to release.

13 MR. JENKINS: I didn't.

14 THE COURT: And they're two different things --

15 MR. JENKINS: So --

16 THE COURT: -- and you never pled --

17 MR. JENKINS: So --

18 THE COURT: -- release.

19 MR. JENKINS: So -- so let's just -- okay. We're
20 going to -- if we're going to be technical and clear of
21 technicalities, we'll file a motion to amend, so we'll call it
22 a release, I'm not changing it, it's still -- it's a waiver,
23 but it's the sa -- I mean, we all know this; in settlement
24 agreements it's waiver, release and discharge. It says
25 release and discharge. Are you really saying it's not a dis -

1 THE COURT: Okay. So just real quickly. The other
2 thing is that -- okay. Mr. Slavin asked for supplemental
3 briefing on is this waiver of release. Right? And he --
4 because you brought it up in your reply.

5 MR. JENKINS: This is not true, so --

6 THE COURT: What? It's not true that you brought it
7 up in your reply?

8 MR. JENKINS: No, we didn't change gears. It's a
9 waiver. And they're used interchangeably.

10 THE COURT: All right.

11 MR. JENKINS: Yeah, yeah.

12 THE COURT: So all right then --

13 MR. JENKINS: Yeah.

14 THE COURT: -- it's a waiver.

15 MR. JENKINS: Right.

16 THE COURT: Okay.

17 MR. JENKINS: But to the extent --

18 THE COURT: They're -- they're used interchangeably
19 but there are some differences, right? I mean --

20 MR. JENKINS: Right, but I mean it's the intent --

21 THE COURT: -- then you're stuck with waiver.

22 MR. JENKINS: -- of the --

23 THE COURT: You're fine being stuck with waiver?

24 MR. JENKINS: Well, I mean, again, if we're talking
25 technical arguments, I -- and now that they're raising -- they

1 raised it for the first time two days ago that somehow it's a
2 release.

3 THE COURT: Raised what? You said it was a --

4 MR. JENKINS: I said it was a waiver.

5 THE COURT: Right.

6 MR. JENKINS: We're using it interchangeably. Okay?

7 THE COURT: Okay.

8 MR. JENKINS: But it's a waiver.

9 THE COURT: Well then, if you're using it
10 interchangeably, then I'll just say all you get to do is
11 waiver, okay?

12 MR. JENKINS: Well --

13 THE COURT: We're sticking to waiver then.

14 MR. JENKINS: Well --

15 THE COURT: To the extent that there's a difference
16 between waiver and release, they're saying you didn't plead
17 release.

18 MR. JENKINS: Well, we did. We actually did release
19 in a -- a release. Just to be covered on --

20 THE COURT: When?

21 MR. JENKINS: In our supplemental. In our
22 supplemental.

23 THE COURT: In your supplemental what?

24 MR. JENKINS: Disclosure statement.

25 THE COURT: When?

1 MR. JENKINS: And we would have -- in November.

2 THE COURT: Okay.

3 MR. JENKINS: Five months ago.

4 THE COURT: I'm just really --

5 MR. JENKINS: No, I know, but listen, we have no
6 doubt -- so, if -- let's just say out of an abundance of
7 caution to avoid some sort of technical argument of the
8 difference between waiver and release, we'll move to amend to
9 call them both because it's the same principles of both. I
10 mean, there's no --

11 THE COURT: But I don't know that he agrees it's the
12 same principles, because --

13 MR. JENKINS: Okay.

14 THE COURT: -- they're -- they're called different
15 things. Waiver, knowing, intentional --

16 MR. JENKINS: Right.

17 THE COURT: And so, let's -- I want -- just assume
18 for me for a minute --

19 MR. JENKINS: Sure.

20 THE COURT: -- that there's a legal difference, that
21 the elements are different, okay, for -- and I didn't go look
22 up, you know, Corbin on Contracts or whatever, but they're
23 point is you didn't even say release until your reply. And we
24 -- you wai -- we think you waived that because you never pled
25 it. And you're just trying to tell me oh, they're the same,

1 they're interchangeable. Assume for me right now that there
2 is a difference, then why shouldn't they be able to come in at
3 lea -- and be able to do supplemental briefing on that?

4 MR. JENKINS: Well then -- well then I should be
5 allowed to amend.

6 THE COURT: You will -- amend?

7 MR. JENKINS: It --

8 THE COURT: Well, you'd have to move to --

9 MR. JENKINS: Let's just say he's right.

10 THE COURT: -- amend.

11 MR. JENKINS: Move -- yeah.

12 THE COURT: I mean --

13 MR. JENKINS: Well, if he's -- if he's going to say
14 -- but here's the point. He didn't raise it in his response
15 to the summary judgment. He just raised it --

16 THE COURT: Because you didn't -- he's saying --

17 MR. JENKINS: No.

18 THE COURT: -- because you -- he's saying that you
19 didn't raise it until your reply. Is that what you're saying.

20 MR. SLAVIN: Your Honor, I can --

21 THE COURT: Is that what you're saying?

22 MR. SLAVIN: Yes, he --

23 THE COURT: Okay. I don't -- I don't -- we can't go
24 through it.

25 MR. SLAVIN: All right.

1 THE COURT: That's what he's saying. So --
2 MR. JENKINS: I understand what he's saying.
3 THE COURT: Okay. Then here's what I -- okay.
4 Let's -- we need to get off this waiver of release, because I
5 will look at that, I will make a determination.
6 MR. JENKINS: Sure.
7 THE COURT: If I think that there was a late
8 disclosure by you of relief -- release, then I would allow him
9 to supplement on that narrow issue and then you could respond.
10 And if your response is, here's my response, a motion to
11 amend, then that's what it is.
12 MR. JENKINS: Okay.
13 THE COURT: Okay?
14 MR. JENKINS: No, that -- that's fine.
15 THE COURT: Or, if you want to say okay, fine, we
16 won't do release, we'll just do waiver because there's really
17 no difference, however you want to --
18 MR. JENKINS: Okay.
19 THE COURT: -- to deal with that.
20 MR. JENKINS: As long as I have --
21 THE COURT: But I don't want to go back and forth
22 over it.
23 MR. JENKINS: I agree.
24 THE COURT: No, you -- you didn't raise it.
25 MR. JENKINS: As long -- as long as we're on the

1 THE COURT: Go ahead.

2 MR. SLAVIN: -- want to make clear that they -- in
3 their November 1st disclosure, they couch these waiver
4 release.

5 THE COURT: All right. I don't -- is that in here?

6 MR. SLAVIN: But it's not -- but they never once in
7 their amended complaint ever raised release as an affirmative
8 defense and my -- my client's position is that they had to
9 wait -- they litigated for 18 months on -- on this position,
10 they spent a lot of money, it's late in the game --

11 THE COURT: Yeah, but -- I mean, there's also the
12 issue of -- I mean, really, how much difference is there
13 between waiver and release. I mean, so it's not just saying
14 --

15 MR. SLAVIN: One's a contract.

16 THE COURT: Huh?

17 MR. SLAVIN: Release is a contract and I looked at
18 the definition before I came here today. A release is a
19 contract --

20 MR. JENKINS: Look it up.

21 MR. SLAVIN: -- a waiver is a voluntary
22 relinquishment --

23 THE COURT: Knowing and voluntary relinquishment.

24 MR. JENKINS: Yeah.

25 MR. SLAVIN: Of a known right.

1 THE COURT: Of a known right.

2 MR. SLAVIN: And so while you can technically say a
3 release could be that, the idea be -- the difference between a
4 release and waiver oftentimes is conduct. This is a contract.
5 A release is a contract. A consent is a -- if anything, could
6 be classified as a contract, it's --

7 THE COURT: Let's say I allow them to amend and say
8 okay, now, not only is this document a waiver, but it's also a
9 release, okay? So what -- what do you need to respond to
10 that, like another three pages and say --

11 MR. SLAVIN: Yeah, we could do -- I mean --

12 THE COURT: I know, but -- but my --

13 MR. SLAVIN: -- we would just like some opportunity
14 --

15 THE COURT: -- point is like do -- am I really --
16 what are the chances that I'm really going to say oh, done.
17 You don't get to say the word release any more? I mean, what
18 are the chances that I'm going to do that, given where we are?
19 As opposed to okay, he can amend it and use the word release
20 and now you get to tell me why release doesn't work.

21 MR. SLAVIN: Well, the significance would be, Your
22 Honor, is that it's a knockout punch on their motion for
23 summary judgment. If they failed to raise release in their
24 affirmative defense, it's clear, case law says in Arizona
25 done, it's done.

1 THE COURT: It's not that clear.

2 MR. SLAVIN: So -- well --

3 THE COURT: It's just not that clear.

4 MR. SLAVIN: Well, the --

5 MR. JENKINS: On -- on forum non conveniens and
6 arbitration provisions and Rule 12 stuff, they're not allowed
7 an affirmative defense. I --

8 MR. SLAVIN: It's written right into the rule.

9 MR. JENKINS: So --

10 THE COURT: It --

11 MR. SLAVIN: If we could brief it, Your Honor, at
12 least have the opportunity to brief that and at least brief
13 the rel -- the delay we've had to go through and -- and why
14 that's inequitable for them to be able to raise an affirmative
15 defense after 18 months of litigation, and be able to walk
16 away from this case and say sorry --

17 THE COURT: I get this -- all I'm saying to you is I
18 get this all the time, right? I get -- and I -- I try -- I
19 just try to be fair, okay? So waiver is close to release,
20 it's not like, you know, you never signed this contract or,
21 you know, it -- it's not -- I mean, these are -- these are
22 closely related concepts. Okay?

23 Now, if he came and -- he -- he came up with some
24 affirmative defense where you were like I gotta go to do 10
25 depositions now to address this affirmative defense, he's

1 done. That one's not going forward. But when this
2 affirmative defense is very closely related, release and
3 waiver, I understand there's a difference, and you don't need
4 to do anything except write something else, give me a few more
5 pages to be able to respond to it, and we're -- we haven't
6 even ha -- we don't even have a trial date yet, do we? Do we
7 have a trial date?

8 MR. SLAVIN: No.

9 THE COURT: We don't have a trial date yet --

10 MR. SLAVIN: Well, and you -- you brought this up
11 earlier. I'd just ask when you do the review of this, the
12 waiver was not connected to the consent document. It was
13 raised --

14 THE COURT: Okay, but it was as of --

15 MR. SLAVIN: -- as an affirmative --

16 THE COURT: -- November 1 and he explained to me --

17 MR. SLAVIN: Right. Which was a couple months ago.

18 THE COURT: Okay. All right. So I will take a look
19 at the -- let me -- let's say that I don't allow supplemental
20 briefing on whether you waived your release defense. I still
21 think that if I find that you didn't raise the release until
22 the reply, they get supplemental -- they get to respond to the
23 release argument.

24 Do you understand what I'm saying?

25 Like let's say I get to it and I go okay, well, I'm

1 whether I'm going to ex -- if I am considering excluding that
2 -- the defense of release, then I would have Mr. Slavin file a
3 motion to exclude it. I mean, if it -- if it -- if it even
4 strikes me as something reasonable. And then you would be
5 able to respond.

6 If I look at all this and I say I'm not going to
7 keep you from using the release defense for the reasons that I
8 just outlined, then I will allow supplement, just by them,
9 okay? They just get to file supplemental brief without
10 another response from you, on release and why release doesn't
11 work.

12 MR. JENKINS: Okay.

13 THE COURT: Does that make sense?

14 MR. SLAVIN: Yes.

15 THE COURT: Okay. Because I don't think I'm going
16 to be making much sense more than two minutes from now, so I
17 think we've wrapped it up and I'll get something out as soon
18 as I can. Okay?

19 MR. SLAVIN: Thank you, Your Honor.

20 MR. JENKINS: Thank you, Your Honor.

21 THE COURT: Thank you.

22 THE CLERK: All rise.

23 (Proceedings concluded at 4:34 p.m.)
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C E R T I F I C A T E

I, Kimberly C. McCright, CET, certified electronic transcriber, do hereby certify that the foregoing pages 1 through 92 constitute a full, true, and accurate transcript from electronic recording of the proceedings had in the foregoing matter.

DATED this 28th day of March, 2018.

/s/ Kimberly C. McCright
Kimberly C. McCright, CET
Certified Electronic Transcriber