ARIZONA COURT OF APPEALS

DIVISION ONE

THOMPSON/McCARTHY COFFEE CO., an Arizona corporation, Plaintiff/Appellant/ Cross-Appellee, v. REPUBLICBANKAZ, N.A. Defendant/Appellee/ Cross-Appellant.	Court of Appeals Division One No. 1 CA-CV 18-0349 Maricopa County Superior Court No. CV2014-014647

PLAINTIFF/APPELLANT/CROSS-APPELLEE'S OPENING BRIEF AND APPENDIX

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INTRODUCTION

This is a case about a bank that badly abused a borrower, lied and forged documents to cover up the abuse, and then extracted an unenforceable release when the borrower had no other options and did not know about the bank's lies and deceit.

When the borrower sued the bank, the superior court granted the bank summary judgment based on the release. It did so despite the bank having doubly waived the release defense by failing to plead it in the answer and by failing to raise it until 18 months into the case. On the merits, the superior court relied on the release even though it is unenforceable. The bank obtained the release by taking advantage of the economic duress caused by the bank's lies and abuse, and by concealing its misdeeds from the borrower through fraud and forgery until after the borrower had executed the release.

At bottom, the law cannot permit the bank to do what it did here. Any one of several doctrines required the superior court to allow this case to go to trial. The superior court erred in granting summary judgment; this Court should reverse.

STATEMENT OF FACTS AND CASE*

I. Dutch Bros.'s history with Republic.

A. Dutch Bros. self-financed seven successful coffee stores and then accepted Republic's offer to finance further expansion.

Jim Thompson and his wife Janice McCarthy own Plaintiff/Appellant/Cross-Appellee Thompson/McCarthy Coffee Company, Inc, which is the Dutch Bros. Coffee franchisee covering much of the Phoenix metropolitan area ("Dutch Bros."). [IR-50 at ¶¶ 1-2 (APP288).] Jim and Janice self-financed their first seven stores to great success; customers lined up down the street to buy their coffee. [*Id.* at ¶ 2 (APP288).]

Perhaps because of their conspicuous success, Defendant/Appellee/Cross-Appellant RepublicBankAZ ("Republic" or the "Bank") approached Dutch Bros. and offered to help fund and accelerate Dutch Bros.'s further expansion with "small business loans to [Dutch Bros.] guaranteed by the U.S. Small Business Administration ('SBA')." [*Id.* at ¶ 4 (APP288).]

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* Selected record items cited are included in the Appendix attached to the end of this brief, cited by page numbers (e.g., APP234), which also match the PDF page numbers and function as clickable links. Other record items are cited with "IR-" followed by the record number.

The SBA is a federal agency that, among other things, guarantees small business loans up to $5 million. 15 U.S.C. § 636(a)(3)(A). Businesses typically apply through a bank, which underwrites the loan. The SBA then guarantees part of the loan—a sweet deal for lenders.

Dutch Bros.'s primary contact at Republic was bank Vice President Michael Harris. Michael told Dutch Bros. in no uncertain terms that Dutch Bros. "can go to $5 million"—the maximum statutory amount—"without any issues." [IR-46, Ex. 4 (APP186); *see also* IR-36 at ¶ 2 (APP153) (Republic's Statement of Facts) ("Republic was willing to make SBA guaranteed loans to [Dutch Bros.] up to the SBA maximum amount of $5.0 million."); IR-50 at ¶ 5 (APP288).]

Dutch Bros. planned to use the SBA loans to open 10 new stores. [IR-50 at ¶ 6 (APP288).] Opening each new store required securing a 25-year lease and constructing or improving a building, drive-through lane, outdoor patio, and parking lot—a capital-intensive process. [*Id.* at ¶ 3 (APP288).] With the SBA loans Republic assured it could deliver, Dutch Bros. could grow its business much more quickly and significantly increase its overall profitability. [*Cf.* IR-49, Ex. 21 at 4 (APP283) (discussing sales growth from new stores).] Accordingly, around October 2010, Dutch Bros.

chose to work with Republic due to its claimed experience with SBA loans. [IR-50 at ¶¶ 7-8 (APP288-89).]

B. Republic delayed Dutch Bros.'s applications and repeatedly lied about it.

As banks do, Republic of course demanded collateral and required Dutch Bros. to pledge all of the assets of all seven of the self-financed existing stores, including the leases, equipment, inventory, and future cashflow. Republic also required Jim and Janice to personally guarantee the loans. [*Id.* at ¶ 9 (APP289).]

With the collateral and guarantees in place, Dutch Bros. applied for the first loan in December 2010 to develop two new stores—one in Mesa and one in Tempe. It inexplicably took Republic seven months to submit the loan application to the SBA. [*See* IR-46, Ex. 5 at 8 (APP202); IR-50 at ¶ 10 (APP289).] Although this process took longer than initially expected, Dutch Bros. applied for a second loan through Republic in November 2011 to build another store in Phoenix on Glendale Avenue. [IR-50 at ¶ 11 (APP289).] It took Republic three months to submit this loan application to the SBA. [*See* IR-46, Ex. 6 at SBA00229 (APP213) (loan application).] In

November 2011, Dutch Bros. also applied for a third loan (called "PV") to build a store near Paradise Valley Mall. [IR-50 at ¶ 11 (APP289).]

At least as early as 2012, and unbeknownst to Dutch Bros., the Comptroller of the Currency (a bureau of the U.S. Department of the Treasury) was investigating Republic in 2012. [*See* IR-63, Ex. 4 at 6 (APP310).] The Comptroller "found unsafe and unsound banking practices relating to . . . credit risk management and credit administration." [*Id.* at 1 (APP309).] Republic did not tell Dutch Bros. any of this.

Understandably concerned about the delays that had occurred with the first loan, in February 2012 Jim inquired about the status of the PV loan. Consistent with its prior delays, Republic had not yet submitted the PV loan application to the SBA. [IR-46, Ex. 7 at SBA00601 (APP220) (loan application); *see also* IR-36 at ¶ 5 (APP153) (Republic's Statement of Facts).] But Republic (through Michael) could not help but know it had an unhappy customer and understandably did not want to lose that business. So, rather than risk hurting Republic's own financial pocketbook (and even though it might come at Dutch Bros.'s expense), Michael flat out lied: He told Jim that Republic had submitted the application to the SBA when in fact it had not. [IR-50 at ¶ 13 (APP289).]

As part of this charade, and long before actually submitting the PV loan, Michael communicated with Dutch Bros.'s accountant (Kathye Pease) and said "When PV *was submitted* it was past the 90-day mark." [IR-46, Ex. 7 at TMCC002098 (APP216) (emphasis added).] Later in February 2012, when Jim asked about the status of the allegedly "submitted" loan, Michael misleadingly assured him that "I am truly expecting your authorization from them [i.e., SBA] any day at this point." [IR-46, Ex. 5 at 11 (APP205).]

Around that same time, the accountant asked "when the funds will be available." [IR-47, Ex. 13 at TMCC002107 (APP236).] Now fully committed to the big lie, Michael responded, "Any day now I am hoping we can have this done at the beginning of next week." [*Id.* at TMCC002106 (APP235).] That same day, Dutch Bros.'s accountant asked whether Republic needed anything from her. Michael responded with another lie: "Nope, we are solely waiting on the SBA right now." [*Id.* at TMCC002105 (APP234).]

Although Republic still had not even submitted the loan to the SBA, a week later, on March 6, 2012, Michael again reassured Jim and the accountant that it had: "Guys I am one step ahead of you . . . [PV] is well on its way to being authorized." [*Id.* at TMCC001978 (APP239).] A month

and a half later (with no actual progress on submitting the loan application), Michael again blamed the SBA for the delay: "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. . . ." [*Id.* at TMCC001274 (APP241).]

That summer, shortly *before* submitting the application, Michael in his effort to keep Dutch Bros. happy at all costs, claimed the impossible: that the PV application "was approve[d] at the Loan Specialist level" and that "I anticipate an approval in the next couple of days since I am calling everyday at this point." [*Id.* at TMCC000983 (APP244).] Michael told Jim that he had "spoke[n] with the SBA about 30 minutes ago. . . . It seems they like to take just long enough to approve your loan request that we have to continue to do this [provide updated financials]." [*Id.* at TMCC006199 (APP245).] In fact, no such conversation had occurred.

C. Even after submitting the PV loan, Republic lied about the loan status and delayed processing the loan.

Unbeknownst to Jim or anyone else at Dutch Bros., Republic finally submitted the PV loan application to the SBA on June 20, 2012—nearly five months after Michael had first said it had been submitted. [IR-46, Ex. 7 at SBA00601 (APP220) (loan application); *see also* IR-36 at ¶ 5 (APP153)

(Republic's Statement of Facts).] Of course, if Dutch Bros. had learned the truth at this point—that Republic had not only delayed in getting the loans processed but was now lying about it—it would have immediately switched banks to avoid the growing financial stress it was facing. Republic (Michael) likewise had to know that if the truth came out, the Bank would lose Dutch Bros.'s business. But instead of coming clean, Republic doubled-down on its fraud and did so without regard to what its deceit would do to Dutch Bros.

About a week after Republic submitted the application to the SBA, the SBA told Michael that the PV loan "has just been assigned to a loan officer for review." [IR-47, Ex. 14 at RBAZ003374 (APP267).] But because Michael had already told Jim that he had submitted the application months earlier (and Michael obviously did not want Dutch Bros. to learn the truth), Michael began altering documents to keep Dutch Bros. from discovering the Bank's fraud. Michael started by doctoring this SBA communication before forwarding it to Jim: he sloppily changed "loan officer" to "Sr.loan officer" [sic], and "for review" to "for[ ]authorization" before forwarding the email to Jim. [*Id.* at RBAZ003376 (APP268).] To prevent Dutch Bros.

from checking up, Michael even deleted the SBA representative's phone number from the email. The below images show the alterations:

Original email:

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

[*Id.* at RBAZ003374 (APP267).]

Altered email:

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 forauthorization. Please wait to hear from SBA soon.

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

[*Id.* at RBAZ003376 (APP268).]

Comparison (deletions in ~~strikethrough~~; additions in **bold-underlining**):
Your app has just been assigned to a ~~–~~**Sr.** loan officer for ~~review~~**authorization**. 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~~

It is more than fair to infer that if Dutch Bros. had learned the truth at this point, it would have immediately changed banks. But Michael's forgery kept Dutch Bros. in the dark, and misled Dutch Bros. into believing that the PV loan was much further along than it really was. And this extraordinary fraud continued.

On July 2, 2012, the SBA sent Michael its preliminary "screen out letter" dated June 28, which lists additional information requests to the applicant. [IR-46, Ex. 8 at RBAZ003384-87 (APP223-26).] Three days later, the SBA sent an essentially identical final version of the letter. [IR-46, Ex. 9 at RBAZ003389-92 (APP228-31).] On July 11, 2012, Dutch Bros.'s accountant inquired about the status of the application. Even though the SBA had sent its final questions a week earlier, Michael said it was waiting

on the SBA's "final questions, which I should have today." [IR-47, Ex. 15 at TMCC001287 (APP270).]

The next day, Michael forwarded a copy of the SBA's letter to Jim. To conceal his latest lie, Jim changed the letter's date from "June 28" to "July 12" and deleted the phrase "our credit analysis." Consistent with Michael's lies, these alterations made it look like the SBA was responsible for the delay, and concealed the fact that the SBA's credit analysis had not even begun yet. The below images show the alterations:

Original letter:



SBA

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:

[IR-46, Ex. 8 at RBAZ003385 (APP224).]

Altered letter:

SBA

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:

[IR-47, Ex. 15 at TMCC000640 (APP272).]

Comparison (deletions in ~~strikethrough~~; additions in **bold-underlining**):

~~June 28~~ **July 12**, 2012

…

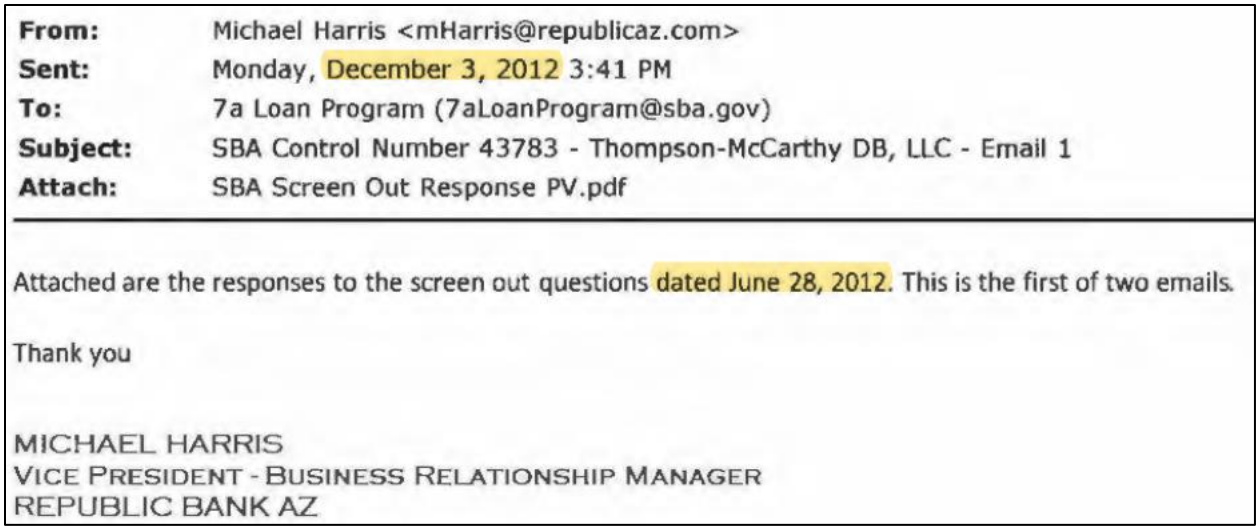
We have reviewed the information provided with your loan guarantee request, but we cannot complete ~~our credit analysis and/or~~ the Loan Authorization until we are in receipt of the following information:

Michael continued this fraud over the next couple of months. He claimed to have sent a letter to the SBA for clarification, claimed to have received an updated list of demands from the SBA, and claimed to have sent another response letter to the SBA. [IR-46, Ex. 5 at 14 (APP208).] In reality, none of that appears to have happened. [*Id.* (APP208).] In August

2012, Michael told Dutch Bros.'s accountant that "I have responded to the SBA with the financials and answered their questions[;] we are waiting on them at this point." [*Id.* (APP208).] Meanwhile, Jim asked Michael, "Are you sure we can continue to move forward with a lease on another site?" Michael reassured him "yes[,] go into the other lease." [*Id.* at 15 (APP209).]

The next month, with the loan still not funded, Jim told Michael he was "not feeling comfortable about moving forward with new locations" because he was concerned that he was "wasting [his] energy without a solid financial commitment." [IR-46, Ex. 4 at TMCC005694-95 (APP190-91).] Michael quickly reassured Jim, telling him "I am not worried at all about you reaching the $5MM limit with us and in fact we plan on it." [*Id.* at TMCC005694 (APP190).] In the same email, he emphasized, "Jim you are and have been our guy and we are going to stand behind you and get these location[s] established as quickly as we can." [*Id.* at TMCC005694 (APP190).] In November 2012, Jim emphasized to Michael that he "really need[s] this to happen quickly" because the delays are "causing me some grief." [IR-46, Ex. 5 at 16 (APP210).]

Michael did not actually respond to the SBA's questions until December 3, 2012—five months after getting them:



From: Michael Harris <mHarris@republicaz.com>
Sent: Monday, December 3, 2012 3:41 PM
To: 7a Loan Program (7aLoanProgram@sba.gov)
Subject: SBA Control Number 43783 - Thompson-McCarthy DB, LLC - Email 1
Attach: SBA Screen Out Response PV.pdf

Attached are the responses to the screen out questions dated June 28, 2012. This is the first of two emails.

Thank you

MICHAEL HARRIS
VICE PRESIDENT - BUSINESS RELATIONSHIP MANAGER
REPUBLIC BANK AZ

[IR-46, Ex. 9 at RBAZ004073 (APP232) (highlighting added).]

Around the same time, the Comptroller of the Currency finalized its Report of Examination. [*See* IR-63, Ex. 4 at 6 (APP310).] After the investigation, Republic signed an agreement with the Comptroller, which required Republic to institute "a revised loan policy" and conduct "analysis and documentation . . . for all credit relationships totaling one-hundred thousand dollars ($100,000) or more." [*Id.* at 12, 16 (APP311-12).] In addition, the Report criticized loans made to specific borrowers; the Agreement prohibited Republic from "extend[ing] credit, directly or indirectly, including renewals, extensions or capitalization of accrued interest, to" those borrowers, except under limited conditions. [*Id.* at 17 (APP313).] Republic never told Dutch Bros. about the Comptroller

investigation or whether that affected the Bank's ability to loan to Dutch Bros.

The SBA eventually "declined the PV loan application due to [Republic's] non-responsiveness." [IR-50 at ¶ 14 (APP289).]

Because of Republic's delays, Dutch Bros.'s expansion got rocky fast. Although the PV loan was supposed to fund construction, the store was "completely finished" as of January 2013. [IR-38, Ex. L (APP155).] The next month, Jim told Michael that he "may need a $500K line [of credit] to cover as we are in a cash crunch now, after no approval for [PV]. . . ." [IR-47, Ex. 18 at RBAZ004235 (APP276); *see also* IR-50 at ¶ 25 (APP291) ("In February 2013, I requested [Republic] to issue [Dutch Bros.] a $500,000 line of credit. . . .").] He emphasized that "[t]he crunch was not because of the loan payoff, but [because] Republic [was] not able to get us a promised loan approval for Paradise [Valley]." [IR-47, Ex. 18 at RBAZ004235 (APP276).]

D. With its back up against a wall, Dutch Bros. switched its business to Mutual of Omaha Bank, but Republic extracted a release before letting Dutch Bros. go.

Michael's efforts to keep Dutch Bros. in the dark (presumably to keep Dutch Bros. from switching banks) worked for more than a year. But

because of Republic's continued delays in getting the SBA loans processed, Dutch Bros. decided to switch to Mutual of Omaha Bank in 2013. [IR-38, Ex. L (APP155).] To make the switch, Mutual of Omaha essentially had to purchase the two funded loans (for the Greenfield/Rural stores and the Glendale store) from Republic, and Republic needed to assign the loan collateral to Mutual of Omaha. They accomplished the transaction through a "Loan Purchase and Sale Agreement," which was expressly between only two parties: (1) Republic, and (2) Mutual of Omaha. [IR-40, Ex. N at RBAZ07953 (APP159) (the "Agreement").] Neither Jim nor anyone associated with Dutch Bros. was a party to the Agreement, and before this lawsuit neither Jim nor Janice had ever even seen the Agreement. [IR-84, Ex. 24 at ¶¶ 4-6 (APP325).]

In light of Republic's extraordinary fraud, its primary legal duty at this point was to help Dutch Bros. mitigate the damages it was suffering due to Republic's incompetence. Republic instead made demands aimed at protecting itself (without disclosing what it was doing). In particular, Republic made Jim and Janice (and all of their various trusts and entities, including Dutch Bros.) sign a document called "Consent of Obligors and Pledgors." [IR-40, Ex. N at RBAZ07963-64 (APP169-70) (the "Consent").]

The document contained an extremely broad paragraph in which each "Obligor and Pledgor" (and various past and future affiliates) released "any and all claims" against the "Lender" (and various past and future affiliates). [*Id.* at RBAZ07963-64, ¶ e (APP169-70).] The Consent itself does not define who is the "Obligor," "Pledgor," or "Lender." When read in context with the rest of the Agreement (to which Dutch Bros. was not a party and was not provided), the paragraph essentially means that Dutch Bros. released any claims it had against Republic. The full text of paragraph (e) is:

> 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 had the opportunity to consult with legal counsel concerning the legal consequences of this release.

[*Id.* (APP169-70).]

Jim was told that he had to sign the Consent before Republic would transfer the loans to Mutual of Omaha. [IR-50 at ¶ 20 (APP290).] Neither

Jim nor anyone associated with Dutch Bros. drafted the Consent or saw a copy before they were told to sign. [*Id.* (APP290).] The Consent was presented to them "as a standalone document," without the rest of the Agreement that defined the terms. [IR-84, Ex. 24 at ¶¶ 4-6 (APP325).] That means that Dutch Bros. literally couldn't decipher what the defined terms meant or what the release covered. The release applies 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," but both "Loans" and "Collateral" are defined only in the separate Agreement. And those terms relate *only* to the loans covering the stores in Mesa and Tempe and on Glendale Ave. [IR-40, Ex. N at RBAZ07953-55, ¶¶ 1.1-1.3, 2.7 (APP159-61).] The release's identified claims do not even include the PV loan application.

As discussed below (Argument § III.C), when Dutch Bros. signed the Consent, it did not know that Republic had been lying about the loans, forging documents, etc. In addition, no one from Republic bothered to mention that the Bank's representatives were attempting to save their own skin at the expense of Jim and Janice. When Jim and Janice signed the Consent in September 2013, "[Dutch Bros.] had drained its cash operating

reserves . . . and was forced to juggle funds between and among its stores to pay operating expenses. The situation was very stressful for [Jim]." [IR-50 at ¶ 18 (APP290).]

Ultimately, Dutch Bros. could not expand as planned because of Republic's actions. Three of the ten planned stores never opened, and the delays on the remaining stores caused substantial lost sales and reduced growth. [IR-49, Ex. 21 at 4-7 (APP283-86) (damages models).]

II. This lawsuit.

A. After Dutch Bros. sued, Republic did not assert the affirmative defense of release for two years.

In late 2014, Dutch Bros. sued Republic. [IR-1.] When Republic answered the second amended complaint on May 11, 2015, it pleaded several affirmative defenses, including waiver. [IR-11 at ¶ 22 (APP137).] Republic did not plead release as an affirmative defense, nor did it mention the Consent anywhere in its answer.

Republic produced the Consent with its first document production on July 2, 2015 and disclosed the document in its initial disclosure statement on August 26, 2015. [IR-67 at 9.] But Republic still did not assert (or even mention) release as an affirmative defense or make any legal

arguments about release. Republic's litigation counsel apparently didn't recognize the Consent for what it was, instead burying it in page 7,963 (Bates No. RBAZ07963) of a document production. Republic didn't even list it properly; the disclosure statement lists the "Document Description" as "Loan File for Loan No. 826007200 in the amount of $597,100.00_(May 9, 2012 Loan)" with a date of "2011-2012" (even though the Consent was signed in late 2013). [IR-123, Ex. C at § VIII (APP343).] To top it off, Republic did not link its waiver defense to the Consent. [*See id.* at § II.C (APP338).]

Republic first mentioned the release *two years* into the case, in its third supplemental disclosure statement served on November 1, 2016. [*Id.* at § VIII (APP353); 3/9/2017 Tr. at 63:18-64:1 (APP389-90); *see also* IR-62 at 2; IR-77 at 9.] In those two years, the parties had engaged in extensive discovery, including substantial expert work. By then, Dutch Bros. had already spent well over $270,000 litigating the case and Republic had spent even more. [IR-123, Ex. B at ¶¶ 3, 5 (APP328-29); IR-77 at 9; IR-122 at 2; 3/9/2017 Tr. at 27:1-7 (APP373).] Combined, the parties had spent over $550,000 before Republic mentioned release. [IR-122 at 2.]

B. Republic moved for summary judgment based on waiver, not release.

One month after first disclosing this new release defense, Republic moved for summary judgment based on waiver, not release:

> "Paragraph (e) of the Consent constitutes a *waiver* as the language evidences the express, voluntary, intentional relinquishment of a known right by [Dutch Bros.] to fully and forever release and discharge Republic."

[IR-35 at 7 (APP145) (internal quotation marks and citation omitted; emphasis added).]

Dutch Bros. responded to the motion and rebutted the waiver defense. [IR-44 at 8-10.] When Republic filed its reply in February 2017, Republic switched horses and suggested for the first time in a court filing that it had a defense of release. But perhaps recognizing that it hadn't pleaded release in its answer and hadn't argued release in the opening motion, Republic mushed them together as "waiver/release" or "waiver and release." [IR-56 at 2-3 (APP294-95).] That reply brief cited caselaw on waiver and—for the first time—release. [*Id.* at 4-5 (APP296-97).]

Dutch Bros. objected and asked the superior court to strike release as an affirmative defense because Republic's answer didn't plead the affirmative defense at all, and because Republic hadn't disclosed the

defense until November 2015 and had substantially litigated the case for 18 months before asserting the defense for the first time in a reply brief. [IR-62 at 2 & n.1; IR-77 at 6-9; 3/9/2017 Tr. at 26:6-23 (APP372), 27:1-7 (APP373), 32:13-33:9 (APP378-79), 39:9-24 (APP381), 87:6-10 (APP393), 89:11-16, (APP395).]

Republic, meanwhile, took two positions. First, it argued that it was relying on waiver (which it pleaded) rather than release (which it hadn't pleaded): "We have it in our answer, we have it in our initial disclosure statement. . . . *It is a waiver*." [3/9/2017 Tr. at 41:21-22 (APP383).] "We have not changed our position on that. It's a waiver of a claim[]. Okay? That's what it is." [*Id.* at 44:3-5 (APP386).] Alternatively, Republic argued that waiver and release are "used interchangeably," and that Republic is "using it interchangeably." [*Id.* at 62:18 (APP388); *id.* at 63:6 (APP389).]

The superior court initially recognized that waiver and release "are two different things." [3/9/2017 Tr. at 53:14 (APP387); *see also id.* at 62:19 (APP388) ("there are some differences, right?").] But it ultimately declined to strike Republic's release defense. [IR-82 at 3 (APP110).]

C. The superior court granted summary judgment based on release, not waiver.

In addition to arguing that Republic had waived the defense of release, Dutch Bros. also argued that the release was invalid and unenforceable for several reasons. As relevant here, Dutch Bros. argued that the release was the product of economic duress and unilateral mistake. [IR-44 at 6-8; IR-83 at 3-5 (APP319-21).]

The court granted Republic's summary judgment motion based on release (not waiver). [IR-91 (APP112); IR-112 (APP119).] Despite Republic's earlier insistence that its defense was based on waiver rather than release, the superior court "f[ound] the discussion of waiver to be superfluous, as the law on release is more applicable to the circumstances here." [IR-91 at 3 n.2 (APP114).] After denying Republic's application for attorneys' fees, the superior court entered judgment in Republic's favor. [IR-125; IR-126 (APP124).]

Dutch Bros. filed a motion for new trial on the issue of unilateral mistake. [IR-127.] The superior court denied the motion. [IR-135 (APP128).] Dutch Bros. timely appealed; Republic cross-appealed. [IR-134;

IR-136; IR-138.] This Court has jurisdiction under A.R.S. §§ 12-2101(A)(1), 12-2101(A)(5)(a).

ISSUES

1. If a party fails to assert an affirmative defense in its answer or fails to timely assert the defense in litigation and instead litigates that case extensively before raising the defense, then the defense is waived and may not be asserted. Republic never pleaded release as an affirmative defense and instead litigated the case for 18 months before first asserting the defense. Did Republic waive its right to assert release?

2. The evidence in this case would permit a reasonable factfinder to conclude that Dutch Bros. had no intention to release any claims, that its reliance on Republic's misrepresentations put it in dire financial circumstances, and that it signed the Consent only because Dutch Bros. desperately needed Republic to release collateral to obtain new financing. In light of that, did the superior court err by deciding the economic duress issue as a matter of law?

3. The evidence in this case would permit a reasonable factfinder to conclude that Republic repeatedly misrepresented the status of the PV loan application and forged documents to prevent Dutch Bros. from

uncovering its lies before Dutch Bros. executed the Consent. In light of that, did the superior court err by deciding the unilateral mistake issue as a matter of law?

ARGUMENT SUMMARY

The superior court granted the Bank summary judgment based on the defense of release. The superior court erred for three independent reasons.

First, the Bank waived the release defense in two independent ways: by failing to plead it in the answer (Argument § I.B), and by failing to raise it for 18 months (Argument § I.C). The superior court incorrectly thought supplemental briefing could cure the prejudice, but that fails to appreciate the nature of the prejudice caused by untimely asserting a defense. (Argument § I.D.)

Second, a reasonable factfinder could conclude that Dutch Bros. signed the Consent under economic duress, thereby invalidating the release. Although ordinarily "one party tak[ing] advantage of the financial difficulty of the other" does not warrant voiding a contract, a contract can be voided "when the wrongful act of one party is the very thing that created the other party's financial difficulty." *Inter-Tel, Inc. v. Bank of Am.*,

195 Ariz. 111, 117, ¶ 37 (App. 1999). Republic created Dutch Bros.'s financial difficulty by shelving the PV loan while simultaneously reassuring Dutch Bros. and encouraging it to sign a new lease. Republic then took advantage of that condition by holding Dutch Bros.'s collateral hostage, effectively preventing Dutch Bros. from finding another bank unless it signed the Consent. (Argument § II.)

Third, a reasonable factfinder could conclude that Dutch Bros. was induced by Republic's misrepresentations to sign the release, and that Republic knew or should have known that Dutch Bros. did not know that Republic had intentionally stopped processing the PV loan and forged documents, etc., to conceal its fraud. (Argument § III.)

The superior court erred in granting summary judgment; this Court should reverse.

ARGUMENT

I. Republic waived the right to assert the affirmative defense of release by failing to plead it and by substantially litigating the merits of the case before asserting it.

A. Standard of review.

This Court reviews de novo whether a defendant waived a defense. *Russo v. Barger*, 239 Ariz. 100, 103, ¶ 11 (App. 2016). When, as here, "the

facts relating to waiver are uncontested, occurred after litigation began, and are wholly unrelated to the underlying facts of the claim," the Court reviews waiver as a question of law. *Jones v. Cochise Cty.*, 218 Ariz. 372, 380, ¶ 28 (App. 2008).

B. Because it failed to plead release as an affirmative defense in its answer, Republic waived that defense under Rule 8(c).

An answer must "In pleading to a preceding pleading, a party shall set forth affirmatively . . . release [and] waiver." Ariz. R. Civ. P. 8(c) (2016).[1] "Defenses omitted from an answer or Rule 12 motion are therefore waived." *City of Phoenix v. Fields*, 219 Ariz. 568, 574, ¶ 27 (2009); *accord Hegel v. O'Malley Ins. Co.*, 122 Ariz. 52, 56 (1979) (finding waived Rule 8(c)(1)(L) affirmative defense of payment because it was not included in the answer; "[f]ailure to plead an affirmative defense results in a waiver of that defense and an exclusion of the issue from the case.").

This rule serves an important purpose: "Affirmative defenses are required to be pleaded to prevent surprise." *City of Phoenix v. Linsenmeyer*, 86 Ariz. 328, 333 (1959). When affirmative "defenses are properly pleaded

[1] Rule 8 was recently amended; Dutch Bros. cites the version of Rule 8 in effect in 2014-2016, a copy of which is at APP083. The result is the same under the current version of Rule 8, which is at APP084.

the parties are informed at the outset of particular issues and what evidence will be necessary, and they have an opportunity to prepare for trial on those issues." *Id.*

Waiver and release are separate affirmative defenses that must be separately pleaded in an answer. Because the affirmative defenses are separately enumerated under Rule 8(c), "it is the defendant's duty to plead and prove each," even if they "raise similar questions of law and fact." *Jerger v. Rubin*, 106 Ariz. 114, 117 (1970).

Moreover, waiver and release require different elements. "Waiver is either the express, voluntary, intentional relinquishment of a known right or such conduct as warrants an inference of such an intentional relinquishment." *Russo*, 239 Ariz. at 103, ¶ 12. "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)).

It is undisputed that Republic pleaded waiver but not release in its answer. [IR-11 at 4 ¶ 22 ("The Bank affirmatively alleges that [Dutch

Bros.'s] claims are barred by the statute of limitations, estoppel, unclean hands, waiver and failure to mitigate damages.").] Republic therefore waived the defense.

Republic's failure to plead release is significant. Dutch Bros. vigorously litigated the merits without any indication that Republic would be asserting that the Consent was a complete and total release of Dutch Bros.'s claims against Republic. Had Republic pled the defense, Dutch Bros. could have conducted early discovery on whether the release was valid and supported by consideration, for example. Dutch Bros. could have also focused on the unique defenses to a release—defenses not relevant to a waiver affirmative defense—including mutual mistake, *Dansby v. Buck*, 92 Ariz. 1, 5-6 (1962), unilateral mistake induced by misrepresentations or contractual ambiguities, *Parrish v. United Bank*, 164 Ariz. 18, 20 (App. 1990), or public policy considerations, *Valley Nat'l Bank v. NASCAR, Inc.*, 153 Ariz. 374, 377 (App. 1987). Dutch Bros. could also have explored whether there were disputed issues of fact specifically pertaining to the release that would preclude summary judgment. *See Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, 318, ¶ 15 (App. 1998).

Alternatively, Dutch Bros. could have reviewed the Consent and determined that it had, in fact, validly released its claims against Republic and voluntarily dismissed its complaint or attempted to settle the case before incurring significant litigation costs.

By failing to comply with Rule 8(c), Republic deprived Dutch Bros. of an array of strategic options. This is precisely why Rule 8(c) requires a party to plead or waive affirmative defenses at the outset of litigation. Because Republic failed to plead release in its answer, it waived its right to assert that the Consent is a release, and the superior court should have "excluded as an issue in the case" Republic's affirmative defense that the Consent was a release. *Linsenmeyer*, 86 Ariz. at 333 (citation omitted). The superior court therefore erred in refusing to strike the defense and in granting summary judgment based on a defense that had never been pled.

C. Republic also waived the right to assert release by substantially litigating the merits of Dutch Bros.'s claims for 18 months before asserting that the Consent was a release of Dutch Bros.'s claims.

Republic waived the defense of release for another independent reason. "Even when a party preserves an affirmative defense in an answer or a Rule 12(b) motion, however, it may waive that defense by its

subsequent conduct in the litigation." *Fields*, 219 Ariz. at 574, ¶ 29. A defendant must seek "prompt resolution" of an affirmative defense or it risks waiving the defense through its litigation conduct. *Ponce v. Parker Fire Dist.*, 234 Ariz. 380, 383, ¶ 11 (App. 2014).

The Arizona Supreme Court has found even a properly pleaded affirmative defense waived "when the defendant 'has taken substantial action to litigate the merits of the claim that would not have been necessary had the entity promptly raised the defense,'" especially with "a matter that courts can quickly and easily adjudicate early in the litigation." *Fields*, 219 Ariz. at 575, ¶ 30 (quoting *Jones*, 218 Ariz. at 380, ¶ 26).

"Waiver by conduct must be established by evidence of acts inconsistent with an intent to assert" an affirmative defense. *Jones*, 218 Ariz. at 379, ¶ 22. Waiver will be found when "plaintiffs would have been spared considerable expense and the judicial system a significant expenditure of its resources" if the defendant had asserted the defense early on in the litigation. *Fields*, 219 Ariz. at 575, ¶ 33. Courts have found a defense waived when a party is forced to conduct as little as "six months of disclosure and discovery" due to another party's failure to timely assert an affirmative defense. *Jones*, 218 Ariz. at 374, ¶ 5.

For example, in *Russo v. Barger*, the defendants properly identified a forum selection clause in an answer, but then waited three years before asserting the dispositive defense in a motion. 239 Ariz. at 102-03, ¶¶ 7-9. Like here, the superior court in *Russo* nevertheless dismissed the case based on the forum selection clause. *Id.* at 103, ¶ 9. This Court vacated and remanded. *Id.* at 101, ¶ 1. The Court held that "as with arbitration clauses and notice-of-claim defenses, a party may waive reliance on an otherwise-enforceable forum selection clause by participating substantially in litigation without promptly seeking to enforce the clause." *Id.* at 104, ¶ 16. The Court noted that the defendants had participated in litigation and even moved for summary judgment on grounds other than the forum selection clause. *Id.*; *see also id.* at 102, ¶ 8.

If the defendants had "timely sought dismissal based on the forum selection clause, years of litigation and expense could have been avoided, as well as the expenditure of significant judicial resources." *Id.* at 105, ¶ 19. The Court had "no difficulty concluding here that 'waiver by conduct is apparent from the extensive litigation record below,'" where the developer had "waited more than three years to assert a defense they were well

aware of from the outset of the litigation." *Id.* at 105, ¶¶ 19-20 (citation omitted).

Russo is no outlier. Arizona courts routinely find an affirmative defense waived by litigation conduct when a party substantially litigates the merits of a case before asserting a potentially dispositive avoidance or affirmative defense, and this Court routinely reverses when the superior court permitted a party to assert such a defense. *See, e.g.*, *Fields*, 219 Ariz. at 575 ¶ 31 (vacating and remanding where defendants "substantially participated in th[e] litigation before raising their notice of claim statute defense"); *Ponce*, 234 Ariz. at 383-84, ¶ 13 (reversing and remanding where defendant "waived its notice of claim defense by failing to seek prompt judicial resolution of that defense"); *In re Cortez*, 226 Ariz. 207, 211, ¶ 6 (App. 2010) (reversing and remanding where defendant "not only failed to assert any contractual right to arbitrate in its answer, it also participated substantially in the litigation and thereby exhibited additional conduct inconsistent with enforcing the agreement"); *Jones*, 218 Ariz. at 380, ¶ 27 (reversing and remanding where defendant "actively and proactively defended the claim" before asserting notice of claim defense).

Here, Republic caused substantial prejudice by waiting at least 18 months before asserting the release defense. (And unlike in *Russo* and other similar cases, Republic did not assert the defense in its answer.) Republic first mentioned the Consent in its third supplemental disclosure statement served on November 1, 2016—two years after the lawsuit began, and 18 months after the operative answer. [IR-123 at § II.C (APP353-54); 3/9/2017 Tr. at 63:18-64:1 (APP389-90); *see also* IR-62 at 2; IR-77 at 9.] At that point, Republic cited caselaw on waiver, not release. [IR-123 at § II.C. (APP352-56).]

Republic did not assert the release defense in a court filing until 21 months after the operative answer, in February 2017—and even then Republic used the intentionally ambiguous hybrid phrases "waiver/release" or "waiver and release." [IR-56 at 2-3 (APP294-95).]

By then, the parties had engaged in significant discovery, including expert work. The parties had already expended significant time, energy, and resources litigating the merits—more than $270,000 from Dutch Bros. and $550,000, combined. [IR-123, Ex. B at ¶¶ 3, 5 (APP328); IR-77 at 9; IR-122 at 2; 3/9/2017 Tr. at 27:1-7 (APP373).] And yet Republic failed to assert

a potentially dispositive affirmative defense that it knew or should have known about from the beginning.

This Court has repeatedly emphasized that this kind of prejudice supports a finding of waiver, recognizing that litigation "expense could have been avoided, as well as the expenditure of significant judicial resources." *Russo*, 239 Ariz. at 105, ¶ 19; *accord Fields*, 219 Ariz. at 575, ¶ 33 ("[T]he plaintiffs would have been spared considerable expense and the judicial system a significant expenditure of its resources."). The superior court therefore erred by permitting Republic to raise the defense of release after Republic had waived the defense through litigation conduct.

D. The superior court's bases for accepting the defense misapply the controlling law.

The superior court "found that [Republic] did not properly disclose release." [7/10/2017 Tr. at 37:24-25 (APP427).] But the court nevertheless "decline[d] to preclude Defendant from asserting release as a defense." [IR-82 at 3 (APP110).] The court gave three reasons: because (1) "the doctrines of waiver and release are similar," (2) "the Consent repeatedly uses the term 'release,'" and (3) supplemental briefing will "ensure there is no prejudice to [Dutch Bros.]." [*Id.* (APP110).] None of those bases justify

considering a defense that had already been waived by failing to plead it in the answer or otherwise assert it in litigation for at least 18 months.

1. Despite any similarity between the affirmative defenses of waiver and release, Rule 8 lists them separately and "it is the defendant's duty to plead and prove each" defense under Rule 8. *Jerger*, 106 Ariz. at 117. Moreover, as explained above (Argument § I.B), waiver and release have different elements and defenses. Republic could not succeed on its waiver theory, which is why it needed to switch to release midway through the summary judgment briefing. Tellingly, despite permitting Republic to assert release because of the supposed similarity, in addressing the merits at summary judgment, the superior court "f[ound] the discussion of waiver to be superfluous, as the law on release is more applicable to the circumstances here." [IR-91 at 3 n.2 (APP114).]

Pleading "similar" defenses simply does not suffice to put parties on notice of a separately-enumerated defense. For example, laches and a statute of limitations are similar in many ways, but pleading laches does not put a party on notice that a defendant has a statute-of-limitations defense. A plaintiff might conclude that a 2½-year delay would not trigger laches, but that might be dispositive under a 2-year statute of limitations.

Here, for example, Dutch Bros. was confident that it could defeat a "waiver" defense, but may have altered its litigation strategy (or abandoned the case altogether) had Republic pled release from the outset.

2. As for the superior court's second basis, it doesn't matter that the Consent uses the term "release." Rule 8 and Arizona's waiver-by-litigation-conduct principles do not require a plaintiff to guess about what *potential* defenses its adversary *might* have. They focus instead on what defenses a defendant has *actually raised*. For example, in *Russo v. Barger*, the plaintiff voluntarily signed a contract with an unambiguous forum selection clause. 239 Ariz. at 101-02, ¶ 3. And the defendants even preserved the issue in their answer. *Id.* at 103, ¶ 13. The plaintiff therefore had both constructive and actual notice that the defendant *could* raise the forum selection clause. But because the defendant waited three years to raise it, this Court held that the defense was waived. *Id.* at 105, ¶¶ 19-20.

3. As for the superior court's third basis, the court looked at the wrong kind of prejudice. Republic's untimely assertion of release raised two problems, and two different kinds of prejudice. The first problem was that Republic asserted release for the first time in a reply brief. This prejudiced Dutch Bros. by depriving it of the opportunity to brief the

merits of the release defense. Supplemental briefing can address *this* kind of prejudice.

The second problem, however, was Republic's failure to plead the defense in its answer or assert it for at least 18 months. This prejudiced Dutch Bros. because if Republic had timely raised the defense, "the plaintiffs would have been spared considerable expense and the judicial system a significant expenditure of its resources." *Fields*, 219 Ariz. at 575, ¶ 33; *see also Russo*, 239 Ariz. at 105, ¶ 19 ("[Y]ears of litigation and expense could have been avoided, as well as the expenditure of significant judicial resources."). By the time Republic asserted release for the first time, Dutch Bros. had already spent $270,000 litigating the case. [IR-123, Ex. B at ¶¶ 3, 5 (APP328-29); IR-77 at 9; 3/9/2017 Tr. at 27:1-7 (APP373).] Supplemental briefing cannot cure this prejudice.

For these reasons, the superior court erred by permitting Republic to assert a new, unpleaded affirmative defense 18 months into the case. This Court should reverse the grant of summary judgment based on that waived defense.

II. There is a disputed issue of fact as to whether Dutch Bros. acted under economic duress, thereby rendering the Consent unenforceable.

A. Standard of review.

"When reviewing a grant of summary judgment, [this Court] view[s] the facts in the light most favorable to the non-moving party. [It] determine[s] de novo whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213, ¶ 14 (App. 2012) (citations omitted). The core question is, "taking the evidence in the light most favorable to [Dutch Bros.], whether a reasonable factfinder could find in its favor." *Inter-Tel*, 195 Ariz. at 116, ¶ 28.

B. A contract is voidable if it was signed under duress.

In Arizona, a contract is voidable if it was signed under duress, which "exists if one party is induced to assent to a contract by a wrongful threat or act of the other party." *Inter-Tel*, 195 Ariz. at 117, ¶ 36. "If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim." Restatement (Second) of Contracts § 175; *see also Inter-Tel*, 195 Ariz. at 117, ¶ 35 ("Arizona follows the Restatement's view of

duress.") (citing equivalent section of the older Restatement). In other words, "[a] release signed under duress is not binding." *Int'l Underwater Contractors, Inc. v. New Eng. Tel. & Tel. Co.*, 393 N.E.2d 968, 970 (Mass. App. Ct. 1979).

This English common law principle dates back nearly three centuries and has long been applied in the loan context. Even in the 1700s, courts refused to enforce agreements made when a lender unreasonably held a borrower's collateral hostage. *See Astley v. Reynolds* (1731), 93 Eng. Rep. 939, 2 Strange 915 (KB). There, the King's Bench refused to enforce a usurious interest rate paid to release goods posted as collateral. The Court characterized the plaintiff's agreement to the rate as "a payment by compulsion" because "the plaintiff might have such an immediate want of his goods" posted as collateral. *Id.*

This Court has cited with approval a three-part test for duress, which the superior court applied here: "(1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party." *Inter-Tel*, 195 Ariz. at 117, ¶ 39 (citation omitted).

On the third factor, ordinarily, "one party tak[ing] advantage of the financial difficulty of the other" does not warrant voiding a contract. But a contract can be voided "when the wrongful act of one party is the very thing that created the other party's financial difficulty." *Id.*, ¶ 37. This exception—where one party is responsible for the other party's distressed financial condition and then takes advantage of it—can arise when a bank abuses its lending relationship with a borrower.

In *Inter-Tel*, this Court addressed that exception as applied to a lender-borrower relationship. Inter-Tel's assets ("accounts receivable, inventory, equipment, and certain real property") served as collateral for several loans from Bank of America. *Id.* at 113, ¶ 2. Even though "Inter-Tel had never been late with a payment, had never suffered a net operating loss, and had always had clean audits," the bank placed the account in its "Special Assets Department" (essentially its collections department) and made it difficult for Inter-Tel to switch to another lender because the bank gave a "poor bank reference" apparently for no legitimate reason. *Id.* at 113-14, ¶¶ 12-15. In a transaction for Bank of America to give "a brief extension" of credit, the bank presented Inter-Tel with a contract amendment containing a broad release. *Id.* at 114, ¶¶ 17-19. "Inter-Tel

signed the agreement without objecting to the release provision." *Id.* at ¶ 20.

Inter-Tel sought to avoid the release on grounds of economic duress. Like here, the superior court granted summary judgment in favor of the bank, relying on the release and rejecting Inter-Tel's duress argument. *Id.* at 115-16, ¶¶ 25, 27. This Court reversed, holding that "a reasonable fact finder" could find that the bank acted wrongfully. *See id.* at 118-19, ¶¶ 41-42.

C. A reasonable factfinder could conclude that Dutch Bros. signed the Consent under economic duress.

In this case, like *Inter-Tel*, a reasonable factfinder could find all three of the economic duress factors satisfied.

1. A reasonable factfinder could find "that one side involuntarily accepted the terms of another." *Inter-Tel*, 195 Ariz. at 117, ¶ 39. Dutch Bros. presented sworn evidence that it "had no intention of releasing any claims against [Republic]" (i.e., acceptance of the Consent was involuntary). [IR-50 at ¶ 22 (APP290).] Dutch Bros. also presented sworn evidence that "[Dutch Bros.] did not negotiate or draft the Consent" (i.e.,

the Consent was "the terms of another"). [*Id.* at ¶ 20 (APP290).] Republic offered no contradicting evidence.

A reasonable factfinder could also infer involuntary acceptance in light of the highly misleading manner in which Republic presented the Consent. The document was presented as something necessary to facilitate the loan transfer between Republic and Mutual, rather than a document designed to protect Republic after it had engaged in extraordinary acts of lending fraud. It seemed as though those two parties needed the Dutch Bros. "Consent" for the deal to go through, and a reasonable factfinder could so find. Indeed, Dutch Bros. didn't even have access to the full terms necessary to place the Consent in context. [IR-84, Ex. 24 at ¶¶ 4-6 (APP325).]

2. Viewing the facts and inferences in Dutch Bros.'s favor also shows that a reasonable factfinder could find "that circumstances permitted no other alternative." *Inter-Tel*, 195 Ariz. at 117, ¶ 39. Republic had finalized $1.62 million out of the promised $5 million in SBA loans. Dutch Bros. still needed to borrow the remaining $3.38 million to avoid the financial ruin that loomed due entirely to Republic's repeated lies that the loans were imminent. Dutch Bros. had already signed leases at Michael's

express urging ("yes, go into the other lease") and had incurred substantial other expenses that urgently needed to be paid. [IR-46, Ex. 5 at 15; *see also* IR-50 at ¶¶ 18, 25 (APP290-91).] Dutch Bros. and its principals were paying expenses out-of-pocket, and planned to get "reimbursed" once the loans were funded. [IR-47, Ex. 13 at TMCC002107 (APP236); *see also* IR-46, Ex. 2 at RBAZ001490 (APP184); IR-46, Ex. 5 at 11 (APP205); IR-46, Ex. 4 at RBAZ003947 (APP193); IR-47, Ex. 18 at RBAZ004235 (APP276).] Dutch Bros. thus needed the loans it was promised, and fast.

Dutch Bros. had found another lender capable of actually finalizing the SBA loans that Republic had promised. That lender, like any reasonable lender, required collateral, both for the existing loans it would assume and for new loans to round out the $5 million statutory maximum. But Republic had all available collateral tied up—all the assets from the existing stores (and their future cash flows), plus personal guarantees from Jim and Janice. [IR-50 at ¶ 9 (APP289).] Thus, Dutch Bros. needed to assign its collateral to Mutual of Omaha. [*Id.* at ¶ 16 (APP289-90); *see also* IR-40, Ex. N at Exhibit "D" & Attachment "1" thereto (APP177-79) ("Assignment of Rights Under Loan Documents"; "Personal Property Security Documents").] Moreover, with no remaining loans to Dutch Bros.,

Republic had no basis to retain any collateral. Because of the dire financial situation Republic had caused, Dutch Bros. needed to do whatever it took to get Republic to transfer the collateral to get the loans funded through the new lender.

"Whatever it took" turned out to be signing the Consent: Jim "was informed by Mutual of Omaha Bank that [his] signature was required on the Consent in order to authorize the transfer of the SBA loans from [Republic] to [Mutual of Omaha]." [IR-50 at ¶ 20 (APP290).] And because Dutch Bros. would not be able to find another lender willing to take on the existing loans and underwrite new loans without also getting Republic to transfer the tied-up collateral, Dutch Bros. had no alternative but to sign the Consent to avoid financial ruin.

Inter-Tel held that a reasonable fact-finder could find duress under these circumstances. There, like here, "because of the bank's action, Inter-Tel would have extreme difficulty finding another lender," and therefore "was forced to sign the release of claims in order to stave off financial ruin." 195 Ariz. at 117, ¶ 34. "[A] reasonable finder of fact could conclude that Inter-Tel had to sign the release of claims or end up in default. . . ." 195 Ariz. at 119, ¶ 42.

3. A reasonable juror could also find "that said circumstances were the result of coercive acts of the opposite party." *Inter-Tel*, 195 Ariz. at 117, ¶ 39. As *Inter-Tel* held, a jury can find this third element when a lender takes advantage of the borrower's financial difficulty and "the wrongful act of [the lender] is the very thing that created the [borrower]'s financial difficulty." *Id.* at ¶ 37.

Here, Dutch Bros. urgently needed to find a new lender because of the dire financial circumstances created by Republic's wrongful actions. Michael Harris—the Bank's Vice President—urged Dutch Bros. to sign a lease and incur substantial expenses on the explicit and repeated assurances that a loan was around the corner. The assurances, however, were based on nothing more than lies and forgeries. If Dutch Bros. had known the truth, or seen the unaltered communications from the SBA, it never would have incurred the expenses on that schedule, and it would have immediately picked up and run to another bank capable of making the loans, thereby averting financial disaster. These facts alone would permit a reasonable factfinder to conclude that Republic's lies and delays were "the very thing that created [Dutch Bros.]'s financial difficulty." *Inter-Tel*, 195 Ariz. at 117, ¶ 37.

But in this case, there is more. Republic could have released Dutch Bros.'s collateral without holding Dutch Bros. hostage. *Inter-Tel* emphasized the commercially unreasonable actions of the bank that gave it particular leverage over the borrower. There, "Inter-Tel was not having difficulty paying its debts, and there is evidence that the bank thought Inter-Tel's account was in satisfactory condition." 195 Ariz. at 118, ¶ 41. The bank nevertheless transferred the account to its collections department and gave a "poor bank reference." *Id.* at 113-14, ¶¶ 12-15. Here, likewise, a reasonable juror could find that requiring Dutch Bros. to release all claims against Republic was commercially unreasonable. Republic was already getting fully paid for all of the "principal and accrued interest" owed on the loans. [IR-40, Ex. N at RBAZ07954, ¶ 2.1. (APP160).] If the loans were simply paid, Republic would not receive a release, and there was no legitimate reason to require Dutch Bros. to execute a release merely to transfer the collateral that secured the loans. Republic did this solely in an attempt to protect itself after *its* coercive acts (*its* lying and *its* falsification of documents) had caused Dutch Bros.'s "financial difficulty." *Inter-Tel*, 195 Ariz. at 117, ¶ 37.

* * *

In light of the above, the superior court was simply wrong when it held that Dutch Bros. "failed to present evidence" on these three elements. [IR-91 at 5.] Economic duress is typically a fact-intensive inquiry left to the factfinder, and multiple courts have denied summary judgment or reversed trial courts that granted summary judgment to the defendant. *See, e.g.*, *Inter-Tel*, 195 Ariz. at 119, ¶ 42 ("a reasonable finder of fact could" find duress); *ESI, Inc. v. Coastal Corp.*, 61 F. Supp. 2d 35, 76 (S.D.N.Y. 1999) ("[A] jury could find that the Release is voidable due to economic duress."); *Blumenthal v. Tener*, 227 A.D.2d 183, 183–84 (N.Y. App. Div. 1996) ("[T]here exists a genuine issue of fact as to whether these documents were executed under economic duress and are voidable as such. . . ."); *Int'l Underwater*, 393 N.E.2d at 973 ("unable to say as matter of law that the signing of the release was voluntary").

Because a reasonable juror could have concluded that Dutch Bros. signed the release under economic duress, the court erred by granting summary judgment based on release. After all, "[a] release signed under duress is not binding." *Int'l Underwater*, 393 N.E.2d at 970.

D. The superior court's bases for entering summary judgment are either squarely foreclosed by *Inter-Tel* or make no sense.

In granting summary judgment, the superior court rejected Dutch Bros.'s arguments on all three elements. But the court's reasons are either squarely foreclosed by *Inter-Tel* or make no sense.

1. On the first element ("that one side involuntarily accepted the terms of another"), the superior court focused solely on whether Dutch Bros. voiced an objection to Republic: "Plaintiff has produced no communications between Plaintiff and Republic, or between Plaintiff and MOH, asking that Consent be eliminated or withdrawn, or that it was being pressured into signing the release due to its financial difficulties." [IR-91 at 5 (APP116).]

Inter-Tel squarely foreclosed granting summary judgment on this basis: "We have not overlooked the fact that Inter-Tel executed the release without voicing its objection to the bank. While this fact supports the bank's position, *it will not justify a summary judgment in the bank's favor*." 195 Ariz. at 119, ¶ 43 (emphasis added). Likewise, here, a fact-finder may consider whether Dutch Bros. voiced an objection and weigh that fact

against Dutch Bros., but as a matter of law that fact is insufficient to warrant summary judgment.

2. On the second element ("that circumstances permitted no other alternative"), the superior court pointed out that Dutch Bros. "actually did obtain another lender." [IR-91 at 5 (APP116).] That completely misses the point. Going to another lender to complete the loans was Dutch Bros.'s only option to avoid financial ruin. Any lender would require the accompanying collateral, but Republic wouldn't release the collateral without the Consent. Mutual of Omaha was willing to lend *because it received an assignment of the rights to Dutch Bros.'s collateral*. In other words, the supposed "alternative" would materialize only if Dutch Bros. executed the release, thereby making Republic willing to assign the collateral. The superior court's stated basis on the second element is thus factually circular.

It is also a legally insufficient basis on which to grant summary judgment. *Inter-Tel* held that "The fact that some months later Inter-Tel did find other financing does not conclusively establish that Inter-Tel had a reasonable alternative when it signed the release." 195 Ariz. at 119, ¶ 42.

Thus, although Mutual of Omaha's willingness to lend may be a factor *for a factfinder to consider*, it cannot support summary judgment.

3. On the third element ("that said circumstances were the result of coercive acts of the opposite party"), the superior court relied exclusively on the fact Jim "was informed by *Mutual of Omaha Bank* that [his] signature was required on the Consent in order to authorize the transfer of the SBA loans from [Republic] to [Mutual of Omaha]." [IR-91 at 5-6 (APP116-17) (emphasis and some alterations by superior court).] This basis, too, completely misses the point. A reasonable factfinder could find that Republic had already caused Dutch Bros. to come to the brink of financial disaster, and then took advantage of that condition by offering Dutch Bros. the choice of signing the release or suffer financial ruin (no choice at all). Those are the relevant circumstances for the third element.

The superior court emphasized *who told* Dutch Bros. about the Consent-for-collateral requirement. But who delivered the message simply doesn't matter. The relevant fact is that the message was delivered: to complete the transaction and assign the collateral, Dutch Bros. had to sign the Consent. The first line of the release makes the condition explicit: "As a material inducement to Lender [Republic] to agree to sell the Loans to

Assignee [Mutual of Omaha]. . . ." [IR-40, Ex. N at RBAZ07963, ¶ e (APP169).][2] That coercion is the same even if it passes through an intermediary, whether the intermediary is Mutual of Omaha, Dutch Bros.'s accountant, or a literal messenger sent to deliver the ultimatum.

On all three elements, the superior court improperly resolved disputes about genuine issues of material fact, drew inferences in favor of the *moving* party (rather than the non-moving party), and ignored the question of "whether a reasonable factfinder could find in [Dutch Bros.'s] favor." *Inter-Tel*, 195 Ariz. at 116, ¶ 28. "Summary judgment is not designed to resolve factual issues nor is it a substitute for trial," *Ruiz v. Otis Elevator*, 146 Ariz. 98, 100 (App. 1985), even if "the trial judge believes the moving party *should* win," *Orme Sch. v. Reeves*, 166 Ariz. 301, 310 (1990).

[2] Republic's own motion for summary judgment confirmed the condition: "Republic did not have an obligation to accommodate [Dutch Bros.'s] request and certainly would not have done so if it were still subject to potential claims. . . ." [IR-35 at 7 (APP145).]

III. There is a disputed issue of fact as to whether Dutch Bros. was induced by Republic's misrepresentations to execute the release, thereby rendering the Consent unenforceable.

A. Standard of review.

This Court "review[s] orders denying motions for new trial for an abuse of discretion; a court abuses its discretion if, in reaching its decision, it applies an erroneous rule of law." *Pullen v. Pullen*, 223 Ariz. 293, 296, ¶ 10 (App. 2009). The underlying ruling here is the grant of summary judgment. As explained above (Argument § II.A), the Court reviews summary judgment de novo, taking the facts in the light most favorable to the non-moving party.

B. A release is voidable if it was induced by a party's misrepresentations or if the party knew or should have known of the other party's mistake.

In Arizona, a release may be set aside based on "a unilateral mistake induced by misrepresentations." *Parrish*, 164 Ariz. at 20. Ordinarily, one party's own mistake does not justify avoiding a release, particularly when the party seeking to avoid the release actually has "sufficient knowledge" of the true facts. *Inter-Tel*, 195 Ariz. at 116, ¶ 32. But "unilateral mistake can be grounds for avoiding a release if at the time the release was entered

into *the other party knows or should have known of the mistake*." *Parrish*, 164 Ariz. at 20 (emphasis added).

This doctrine exists for an important reason. It would be inequitable to allow a party to benefit from its own fraud—"[t]here is nothing particularly attractive in the proposition that [a party] may by misrepresentation induce a person to forego rights and then defend on the ground that the fraud is excused because the person defrauded should have known better." *Lubin v. Johnson*, 169 Ariz. 464, 464-65 (App. 1991). Consequently, this Court has refused "to endorse the idea that victimization of the ignorant has legal sanction." *Id.* at 465. For these reasons, most jurisdictions follow the rule set forth in *Parrish*:

> [T]here is practically universal agreement that, if the material mistake of one party was caused by the other, either purposely or innocently, or was known by the other or was of such character and accompanied by such circumstances that the other had reason to know of it, the mistaken party has the power to avoid the contract.

7 Corbin on Contracts § 28.41 [APP085] (collecting cases, including *Parrish*); *see also* 76 C.J.S. *Release* § 29 (Sept. 2018) (A party may avoid a release that was entered into based on a unilateral mistake of fact involving

"misrepresentations, wrongful concealment of facts, or other inequitable conduct.").

Parrish is instructive here. In that case a bank suggested that a borrower partner with a contractor that the bank (but not the borrower) knew "was experiencing financial difficulty and was behind on his loans with the bank." 164 Ariz. at 19. The partnership predictably fell apart. As part of a workout with the bank, the borrower released the bank "from any and all claims." *Id.* The borrower sued, the bank asserted the release as a defense, and (like here) the superior court granted summary judgment to the bank. *Id.* This Court reversed, holding that "there is a factual issue as to whether the bank knew or should have known that [the borrower] was mistaken as to the facts surrounding his damages." *Id.* at 20. Relying in part on the bank's concealment of the true facts from the borrower, this Court held that "this unilateral mistake may be a basis for avoiding the release." *Id.*

C. A reasonable factfinder could conclude that Dutch Bros. signed the Consent based on a unilateral mistake induced by Republic's misrepresentations.

Here, similar to *Parrish*, a reasonable factfinder could find that when Dutch Bros. signed the Consent, Republic's own fraudulent

misrepresentations and fraudulent concealment prevented Dutch Bros. from knowing that Michael had deliberately and intentionally stopped processing the PV loan, failed to respond to the SBA's questions for months on end, and forged documents to cover his tracks. Dutch Bros. did not know any of these facts when it signed the Consent. [IR-84, Ex. 24 at ¶¶ 2-3 (APP325).] Had Republic not concealed the true facts, Dutch Bros. would not have signed the Consent and instead would have "immediately" sued Republic. [*Id.* (APP325).]

A reasonable factfinder could therefore find "a unilateral mistake induced by misrepresentations." *Parrish*, 164 Ariz. at 20. Moreover, because Republic was intentionally forging documents and lying to its borrower, a reasonable factfinder could also conclude "that the bank knew or should have known that [Dutch Bros.] was mistaken as to the facts." *Id.* Like in *Parrish*, therefore, the superior court erred by granting Republic's summary judgment motion.

D. In light of *Parrish*, the superior court should not have resolved the unilateral mistake issue as a matter of law.

1. In granting summary judgment, the superior court distinguished *Parrish* on immaterial grounds and ignored Dutch Bros.'s evidence.

In rejecting Dutch Bros.'s unilateral mistake argument, the superior court distinguished this case from *Parrish* in three ways, none of which is valid.

(a) The length of the release does not justify jettisoning the unilateral mistake doctrine.

The superior court first distinguished *Parrish* on the grounds that the release in that case was "a single sentence," while the Consent was more detailed and "explicitly encompasses unknown claims," among other things. [IR-112 at 4 (APP122).] But the short release in *Parrish* unquestionably covered the claim at issue because it was "plain, evident and unambiguous." 164 Ariz. at 20. But because the other party's misrepresentation caused the mistake, the release could not be enforced. Moreover, the unilateral mistake doctrine applies to all releases whether short, long, broad, or narrow. Otherwise a party that causes a mistake through misrepresentation could avoid the consequences of the misrepresentation merely by drafting a longer release with a clever lawyer.

For this reason, multiple courts have rejected the argument the superior court relied on. For example, the District of Arizona faced a detailed release similar to the Consent, which released all claims "whether known or unknown." *Zounds Hearing Franchising LLC v. Moser*, No. CV-16-00619-PHX-DGC, 2016 WL 6476291, at *1 (D. Ariz. Nov. 2, 2016). Applying Arizona law (and looking to states with similar case law on release), Judge Campbell required "an express manifestation of . . . intent" before allowing an otherwise-valid release to discharge claims like fraudulent inducement that result from the defendant's misrepresentation in procuring the contract. *Id.* at **3-4.

The Supreme Court of Delaware likewise addressed a settlement agreement that released all claims "whether known or unknown." *E.I. DuPont de Nemours & Co. v. Fla. Evergreen Foliage*, 744 A.2d 457, 459 (Del. 1999). That court rejected the basis given here by the superior court, calling "immaterial" the disputes of "the language of the release, and whether exculpatory language should be specific or general." *Id.* at 460. Although the court acknowledged that parties signing a general release should be on notice, it recognized that "[i]t is quite another thing, however, to conclude that a person is deemed to have released a claim of which he has no

knowledge, *when the ignorance of such a claim is attributable to fraudulent conduct by the released party*." *Id.* at 461 (emphasis added). To be enforceable, "the release should include *a specific statement of exculpatory language referencing the fraud*." *Id.* (emphasis added). Moreover, "the party seeking enforcement of the release bears the burden of proving that the released fraud claim was within the contemplation of the releasing party." This is a "heavy burden," which "undoubtedly reflects a recognition that one party to the transaction was charged with deceitful conduct." *Id.* In sum, "the absence of a specific reference to the actionable fraud limits the scope of the general release in this case." *Id.* at 462.

Of course, the Consent lacks any reference to Republic's fraud or misrepresentations, let alone a specific one. Consequently, regardless of their breadth, the generic release language, warnings, disclaimers, and notices in the Consent cannot overcome the unilateral mistake doctrine on summary judgment.

(b) A party's sophistication level is irrelevant, particularly on summary judgment.

The superior court next declined to follow *Parrish* because Parrish "was not a sophisticated business person," whereas Dutch Bros. "owns and

operates multiple coffee store chains and has experience with business loans." [IR-112 at 4 (APP122).] This basis makes no sense for two reasons. First, even though the plaintiff in *Parrish* was inexperienced, he "was represented by counsel at all times when the loan agreement containing the release was negotiated," 164 Ariz. at 20, thereby negating his lack of experience.

Second, the superior court improperly acted as a factfinder by characterizing Jim as having relevant experience and sophistication. "Summary judgment is not appropriate when a trial judge must pass on the credibility of witnesses with differing versions of material facts, weigh the quality of documentary or other evidence, or choose among competing or conflicting inferences." *Margaret H. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 101, 105 ¶ 14 (App. 2006) (citation omitted). Moreover, nothing in the record shows that Jim is sophisticated in any *relevant* way—i.e., in how banks process SBA loans. Jim and Janice self-financed their existing stores until Republic convinced them to grow more quickly using SBA loans. [IR-50 at ¶¶ 2, 4 (APP288).] Jim's entrepreneurial success could not have put him on notice that Republic had forged documents and affirmatively lied about whether and when Republic had submitted the PV loan application.

(c) The superior court ignored Dutch Bros.'s contravening evidence of Republic's misrepresentations related to the PV loan application.

Finally, the superior court distinguished *Parrish* on the ground that "ample evidence exists demonstrating that Plaintiff suspected before it signed the Release that Defendant actually did not have the expertise or personnel to properly and timely obtain SBA-funded loans," unlike the borrower in *Parrish*, "who had no reason to suspect the dire financial condition of his partner." [IR-112 at 4 (APP122).]

This conclusion is an inappropriate inference to draw at the summary judgment stage, where the superior court must construe the facts in Dutch Bros.'s favor and may not weigh evidence. Moreover, this reason applies at best to only half of Dutch Bros.'s argument. Below, Dutch Bros. essentially asserted two sets of torts. The first set involved whether Republic was competent and experienced in processing SBA loans as it had represented to Dutch Bros. But the second set of torts involves Republic's misrepresentation and concealment about the fact that Michael had deliberately and intentionally stopped processing the PV loan, failed to respond to the SBA's questions, and forged documents to cover his tracks.

No evidence suggests that Dutch Bros. suspected the second set of torts before it signed the release.

For these reasons, none of the superior court's bases for granting summary judgment withstand scrutiny.

2. The superior court erred in denying Dutch Bros.'s motion for a new trial.

At the motion for new trial stage, the superior court concluded that Dutch Bros. had waived its arguments related to misrepresentations and forgeries in connection with the PV loan application "by failing to raise it in connection with the Motion for Summary Judgment." [IR-135 at 3-6 (APP130-33).] Alternatively, the court concluded that "even if Plaintiff did not waive the Second Tort argument and the Court considered it, its decision would have been the same" as its decision granting Republic summary judgment. [*Id.* at 5-6 (APP132-33).] Neither basis justifies denying the motion for new trial.

(a) Dutch Bros. properly preserved its unilateral mistake argument in its sur-response and at oral argument.

In its motion for a new trial, Dutch Bros. adopted new nomenclature for the arguments it had made in prior briefing and at oral argument. As Dutch Bros. explained, "[Dutch Bros.] sought to reframe its prior

arguments in order to provide the Court with more clarity for reviewing the Motion for New Trial, labeling and bifurcating Republic's tortious conduct as the 'First Tort' and 'Second Tort.'" [IR-132 at 7.]

Dutch Bros. used "the First Tort" to refer to its argument that Republic had "fraudulently induced [Dutch Bros.] into a lending relationship upon the false representations that it was competent and experienced in timely making SBA loans." [IR-127 at 2.] Dutch Bros. used "the Second Tort" to refer to its argument that "Republic had deceived [Dutch Bros.] into believing that its loan application for [the PV loan] was being processed with the SBA, when in reality, Republic had shelved the [PV] Loan Application." [*Id.*] In other words, the "First Tort" referred to Republic's misrepresentation about its competence and experience with SBA loans; the "Second Tort" referred to the its lying, deceit, and fraudulent concealment in connection with the PV loan.

This nomenclature did not raise any new argument, but rather helped to illustrate errors in the superior court's summary judgment analysis. Although Dutch Bros. may have suspected Republic's incompetence and inexperience before signing the Consent (although certainly not to the degree it learned in discovery), it had no reason to

suspect that Republic was actively misrepresenting facts and concealing the truth from Dutch Bros. The "First Tort"/"Second Tort" nomenclature helped to clarify that the superior court's summary judgment ruling overlooked the key evidence supporting Dutch Bros.'s unilateral mistake theory—evidence that required the case to go to trial.

The superior court, however, held that Dutch Bros. waived the so-called Second Tort issue by failing to raise it at summary judgment, at oral argument, or in its complaint. [IR-135 at 3-5 (APP130-32).] That's simply not true. Dutch Bros. raised the substance of the issue (i.e., evidence of intentional misconduct) at every appropriate opportunity, and Republic unquestionably understood what was at issue.

At the summary judgment stage, Dutch Bros. argued in its sur-response that "[b]efore the Court is evidence of Defendant's multiple misrepresentations made to [Dutch Bros.], which [Republic] failed to correct or disclose, *leaving* [*Dutch Bros.*] *with the mistaken belief that no fraud or negligent misrepresentation claim existed* against [Republic] at the time the Consent was presented for [Dutch Bros.]'s signature." [IR-83 at 4 (APP320) (emphasis added).] In support, Dutch Bros. cited to paragraphs in its statement of facts that detailed Republic's numerous fraudulent

misrepresentations made in connection with the PV loan application, including (1) its lies about when the PV loan was submitted, (2) its misrepresentations as to the loan's status, and (3) its attempt to bolster and conceal these misrepresentations by altering documents. [*See* IR-83 at 4 n.4. (APP320) (citing IR-45 at ¶¶ 14-16).][3]

If there was any doubt about Dutch Bros.'s bases for its unilateral mistake argument at that point, Republic's response to the sur-response removed it. Republic argued, "Specifically, the 'mistake' alleged by Dutch Bros. is that Dutch Bros. always believed its Loans, including the PV loan, were being timely processed thus 'leaving [Dutch Bros.] with the mistaken

[3] This sur-response was submitted and considered in connection with the main summary judgment briefing. As explained above (Argument § I.D), Republic's summary judgment motion did not raise release at all; it rested solely on waiver. [*See* IR-35 (APP139).] Republic argued release for the first time in its reply brief, after Dutch Bros. demonstrated the flaws in Republic's waiver arguments. [*See* IR-56 (APP293).] When Dutch Bros. objected to Republic raising release for the first time in a reply, the superior court granted Dutch Bros. leave to file a sur-response to address Republic's release arguments. [*See* IR-82 at 3 (APP110).] The superior court considered the sur-response when ruling on unilateral mistake on summary judgment. [IR-112 at 1 (APP119) (listing Sur-Response).] Moreover, Dutch Bros. had to list the evidence in a footnote [IR-83 at 4 n.4 (APP320)] because the superior court allowed only five pages for the sur-response, even though that was Republic's first chance to address the new release defense. [IR-82 at 3 (APP110).]

belief that no fraud or negligent misrepresentation claim existed against [Republic] at the time the Consent was presented for [Dutch Bros.]'s signature.'" [IR-100 at 9 (quoting IR-83 at 4 APP320).]

In addition, Dutch Bros. repeatedly raised the issue during oral argument. When asked by the superior court to describe the specific communications that support Dutch Bros.'s fraudulent misrepresentation claims, Dutch Bros. described the specific evidence that supports the Second Tort: "the emails illustrate quite clearly that Mr. Harris and Republic were representing that the – that the [PV] loan had been submitted when in fact it had not been submitted yet," and that Republic "went so far as to take emails that were sent by the SBA, alter those emails to make it appear as though the loan application was farther along in the process than it – than it actually was." [6/20/2017 Tr. at 4:19-5:8 (APP402-03).] Dutch Bros. specifically connected this evidence to its unilateral mistake argument, the *Parrish* case, and the sur-response. [*See id.* at 19:17-20:20 (APP406-07).] (At that point in the case, the only thing that was "remaining is this unilateral mistake" argument. [*Id.* at 9:6-7 (APP405).])

Dutch Bros. again orally advanced its Second Tort argument before the court during another hearing. Dutch Bros. once again referenced "nine,

10, 11 months" of fraudulent representations by Republic in connection with the PV loan application [6/26/2017 Tr. at 7:16-8:3 (APP413-14), 14:13-15:16 (APP420-21)], specifically connected these representations to its unilateral mistake argument and the *Parrish* case [*id.* at 10:12-11:2 (APP416-17), 11:11-13:8 (APP417-19)], and referenced the fact that it had been making this argument since its sur-response, which, as it reminded the superior court, was Dutch Bros.'s "first opportunity to respond to the release argument," [*id.* at 11:8-10 (APP417)].

As for pleading the issue in a complaint, Dutch Bros. had no obligation to plead a response to an unpleaded affirmative defense that was first raised by the opposing party in a summary judgment reply brief. Moreover, Dutch Bros. did not even know most of the facts supporting the Second Tort when it filed the operative complaint. For example, although Dutch Bros. had the *forged* versions of the SBA's letter and email to Republic, Dutch Bros. did not have the unaltered versions and could not have known that they were forged. [IR-50 at ¶ 27 (APP291).]

In sum, and contrary to the superior court's ruling, Dutch Bros. had appropriately raised the "Second Tort" and the facts supporting it, particularly in light of the Bank's delay in asserting the defense.

(b) The superior court improperly resolved a disputed issue of material fact about the PV loan.

Alternatively, the superior court held that "even if Plaintiff did not waive the Second Tort argument and the Court considered it, its decision would have been the same." [IR-135 at 5 (APP132).] The superior court essentially pointed to evidence showing that Dutch Bros. questioned whether the PV loan would ever get approved. [*Id.* (APP132).] In doing so, the superior court improperly weighed the evidence and improperly drew inferences in favor of Republic, the *moving* party. *Cf. Orme Sch.*, 166 Ariz. at 309.

The evidence cited by the superior court would not require a factfinder to find that Dutch Bros. was on notice of the Bank's misrepresentations and fraudulent concealment. *See id.* at 310 (at summary judgment, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.") (citation omitted). The superior court therefore should have granted the motion for a new trial and denied Republic's motion for summary judgment.

CONCLUSION

The Court should reverse the grant of summary judgment and the denial of the motion for new trial, vacate the judgment, and remand for further proceedings.

RESPECTFULLY SUBMITTED this 26th day of October, 2018.

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62	Plaintiff's Motion for Supplemental Briefing and Request to Continue Oral Argument (filed Feb. 20, 2017)	
63	Ex. 4: Agreement by and between Republic and the Comptroller of the Currency (dated May 31, 2013) [excerpts]	APP307 – APP316
83	Plaintiff's Sur-Response in Opposition to Defendant's Motion for Summary Judgment (filed Mar. 28, 2017)	APP317 – APP323
84	Ex. 24: Declaration of James Thompson (dated Mar. 7, 2017)	APP324 – APP326
122	Dutch Bros.'s Response to Republic's Application for Award of Attorneys' Fees and Costs (filed Nov. 4, 2017)	
123	Ex. B: Declaration of Francis J. Slavin (dated Nov. 3, 2017)	APP327 – APP329

	Ex. C: Republic's Initial Disclosure Statement (dated Aug. 26, 2016)	APP330 – APP344
	Ex. C: Republic's Third Supplemental Disclosure Statement (dated Nov. 1, 2016)	APP345 – APP368
TRANSCRIPTS		
	Superior Court Transcript (Mar. 9, 2017) [excerpts]	APP369 – APP398
	Superior Court Transcript (June 20, 2017) [excerpts]	APP399 – APP409
	Superior Court Transcript (June 26, 2017) [excerpts]	APP410 – APP423
	Superior Court Transcript (July 10, 2017) [excerpts]	APP424 – APP430

Ariz. R. Civ. P. 8(c). Affirmative defenses
(2016)

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Ariz. R. Civ. P. 8(d). Affirmative Defenses
(2018)

(1) *Generally*. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

(A) accord and satisfaction;

(B) arbitration and award;

(C) assumption of risk;

(D) contributory negligence;

(E) duress;

(F) estoppel;

(G) failure of consideration;

(H) fraud;

(I) illegality;

(J) laches;

(K) license;

(L) payment;

(M) release;

(N) res judicata;

(O) statute of frauds;

(P) statute of limitations; and

(Q) waiver.

(2) *Mistaken Designation*. If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

§ 28.41 Mistake by One Party, the Other Having Knowledge or Reason to Know of It

Although relief for unilateral mistake is not as readily given as relief for mutual mistake, there is practically universal agreement that, if the material mistake of one party was caused by the other, either purposely or innocently, or was known by the other or was of such character and accompanied by such circumstances that the other had reason to know of it, the mistaken party has the power to avoid the contract.[1] Similarly, under these circumstances, the other party can obtain reformation of the writing if the contract is reduced to writing.[2] This line of cases can be traced to Hume v. United States.[3] Hume entered into a written contract with the United States stating that the government would pay 60¢ a pound for certain goods, but the seller knew that the intended price was 60¢ a hundred-weight. The United States was relieved from its obligation to pay the excess despite the fact that the writing was on a government printed form. The action was at law, and the Supreme Court held that the unconscionability of the defendant's conduct could be raised at law. *Hume* demonstrates that relief for unilateral mistake descends from the doctrine of unconscionability.

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U.S. —*Moffett, Hodgkins & Clarke Co. v. City of Rochester, 178 U.S. 373, 20 S. Ct 957, 44 L. Ed. 1108 (1900)* (big difference in bids); *United States v. Jones, 176 F.2d 278, 285 (9th Cir. 1949)*, semble; *Tokio Marine & Fire Ins. Co. v. National Union Fire Ins. Co., 91 F.2d 964 (2d Cir. 1937)*; *Armour & Co. v. Renaker, 202 F. 901 (6th Cir. 1913)*; *Connecticut v. McGraw, 41 F. Supp. 369 (D. Conn. 1941)* (big difference in bids).

Ala. —***Ex parte Perusini Const. Co., 242 Ala. 632, 7 So. 2d 576 (1942)***.

Ariz. —*Parrish v. United Bank of Arizona, 164 Ariz. 18, 790 P.2d 304 (App. 1990)*.

Ark. —*Galloway v. Russ, 175 Ark. 659, 300 S.W. 390 (1927)*.

Cal. —*Conlan v. Sullivan, 110 Cal. 624, 42 P. 1081 (1895)* (vendor priced land supposing it to be subject to a mortgage).

Conn. —*Geremia v. Boyarsky, 107 Conn. 387, 140 A. 749 (1928)* (mistaken computation made bid 33% lower); *Town of Essex v. Day, 52 Conn. 483, 1 A. 620 (1885)*.

Fla. —*Hurst v. Nat'l Bond & Inv. Co., 96 Fla. 148, 117 So. 792 (1928)*; *Langley v. Irons Land & Development Co., 94 Fla. 1010, 114 So. 769 (1927)* (vendor's agent pointed out wrong lot to purchaser); *Crosby v. Andrews, 61 Fla. 554, 55 So. 57 (1911)*.

Ill. —*R.O. Bromagin & Co. v. City of Bloomington, 234 Ill. 114, 84 N.E. 700 (1908)*; *Morgan v. Owens, 228 Ill. 598, 81 N.E. 1135 (1907)*.

Ky. —*Bell v. Carroll, 212 Ky. 231, 278 S.W. 541 (1925)* (owner of stock directed agent to sell "at par" thinking that "par" meant "market price," which was three times par).

Me. —*Hudson Structural Steel Co. v. Smith & Rumery Co., 110 Me. 123, 85 A. 384 (1912)* (a misinterpretation of specifications that had also been made by another bidder).

If the other party's misrepresentation or other inequitable behavior was a contributing cause of the mistake, relief will be freely given.[4] Of course, the mistaken party must have relied on the misrepresentation; otherwise, relief will be denied.[5]

In *Hennig v. Ahearn*,[6] Hennig claimed that during the negotiation of an executive compensation agreement, Ahearn altered a crucial provision of the agreement at the last minute, reducing Hennig's compensation, but failed to point out the alterations, as he had done religiously during the earlier phases of the negotiation. Hennig sued Ahearn and the company for tortious misrepresentation or reformation to the higher level of compensation. The trial court dismissed Hennig's claim, concluding that Ahearn had no duty to disclose the alteration and that Hennig's negligence in failing to detect the alteration barred his claims as a matter of law. The court of appeals, however, concluded that Hennig presented credible evidence showing that the parties' conduct during the negotiations may have created a duty on Ahearn's part to disclose alterations to the agreement. Thus, in the light of the parties' conduct, Hennig's failure to discover the last-minute alteration might not bar recovery. The court remanded for a new trial.

That the other party actually knew of the mistake can be proved occasionally by that party's own statements or conduct. More often, however, it will be possible to show no more than that the party had reason to know.[7] Such reason has often been found in the fact that the mistaken party's bid was much less than the bids of competitors.[8] In these cases, the court does not say that this "reason to know" is sufficient evidence of actual knowledge. It makes no finding of such actual knowledge or of "bad faith."

An illustrative case is *C.N. Monroe Manufacturing Co. v. United States*.[9] In submitting a bid on an assembly of two items, the plaintiff carelessly overlooked the more costly of the two and made a bid at a price less than the cost of

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Minn. —*Nadeau v. Maryland Cas. Co., 170 Minn. 326, 212 N.W. 595 (1927)*; *Tyra v. Cheney, 129 Minn. 428, 152 N.W. 835 (1915)* (bid reduced about 20% by the error); ***C.H. Young & Co. v. Springer, 113 Minn. 382, 129 N.W. 773 (1911)***; *Dwinnell v. Oftedahl, 235 Minn. 383, 51 N.W.2d 93 (1952)* (excessive payment made due to defendant's misrepresentation, perhaps innocent).

Mo. —*Saline County v. Thorp, 337 Mo. 1140, 88 S.W.2d 183 (1935)*;

Frederich v. Union Elec. Light & Power Co., 336 Mo. 1038, 82 S.W.2d 79 (1935) (buyer offered large sum for a described tract, leaving out most of the land he meant to buy).

N.Y. —*City of New York v. Dowd Lumber. Co., 140 A.D. 358, 125 N.Y.S. 394 (1910)* (mistake in multiplication appeared on face of bid); *Smith v. Mackin, 4 Lans. 41 (Sup. Ct. 1871)* (mistake as to boundaries).

N.C. —*Freeman v. Croom, 172 N.C. 524, 90 S.E. 523 (1916)* (defendant said he had a mortgage, knowing it to be unregistered).

Ohio —*Butler v. Moses, 43 Ohio St. 166, 1 N.E. 316 (1885)*.

Okla. —*Scrivner v. Sonat Exploration Co., 242 F.3d 1288 (10th Cir. 2001)*.

R.I. —*Fehlberg v. Cosine, 16 R.I. 162, 13 A. 110 (1888)* (misrepresentation).

S.C. —*Blassingame v. Greenville County, 134 S.C. 324, 132 S.E. 616 (1926)*.

materials alone—a bid of $3.91, when the average of seven other bids was about $25. The defendant accepted the plaintiff's bid without actual knowledge of the plaintiff's mistake, but the variation in bids was so great as to constitute reason to know. The plaintiff completed performance after threat of suit for breach. The court decreed payment of the reasonable value of the full performance, stating:

> The defendant did not have actual knowledge of the error and no inference of bad faith exists on the part of the Government in awarding the contract. However, there is justice in plaintiff's complaint that to hold it to the severe consequences of its unilateral mistake would be harsh and inequitable. It is not believed that an honest, fair-minded and reasonable man in good conscience would seek to maintain such a gross and inequitable advantage of a mistaken bidder when as in this case he had reason to know of the mistake, and the Government is required to maintain this same standard of fairness with those who contract with it.

It is believed, therefore, that when a court also allows a party to avoid a transaction in cases such as this (prior to performance) on the ground that there was reason to know of the mistake, the court is in most cases doing so because the consequences of the mistake are serious and it is inequitable to hold the mistaken party to the contract. "Reason to know" means that the mistake, though unilateral, makes enforcement unjust. It is largely a method of distinguishing between material mistakes and less material ones. Because of the seriousness of the mistake, avoidance is not made inequitable by the fact that the other party assented in good faith, had expectations of performance, and is disappointed in not enjoying a profitable bargain. Justice requires that the party suffer this much disappointment. In these cases, as in others where nothing is said of "reason to know," avoidance is not allowed unless the status quo ante can be substantially restored. It should be observed that avoidance may be justified although reformation is not where one party knows that the other has made a material mistake but has no reason to know what the other would have agreed to if there had been no mistake.[10]

When an attorney for an accident victim offers to settle the case for $210,000 and receives a rejection and counter-offer for $215,000, the attorney has reason to know that something is amiss. The intended counter-offer was for $115,000 and the attorney's snapping up of this counter-offer resulted only in a voidable contract.[11]

Utah —*McMahon v. Tanner, 122 Utah 333, 249 P.2d 502 (1952)*.

Vt. —*Everson v. International Granite Co., 65 Vt. 658, 27 A. 320 (1893)*.

Wash. —*Buck v. Equitable Life Assurance Soc'y, 96 Wash. 683, 165 P. 878 (1917)*.

Eng.Eng. —Hartog v. Colin & Shields, [1939] 3 All Eng. 566; Faraday v. Tamworth Union, [1916] 86 L.J. Ch. (N.S.) 436 (the defendant innocently substituted other figures in plaintiff's signed agreement as to compensation); Gun v. M'Carthy, L.R. Ir. 13 Eq. 304 (1884) (rent mistakenly written at low figure, defendant must pay value of occupation, with credit for improvements); Garrard v. Frinkel, 30 Beav. 445 (1862) (rent written £100 too low, avoidance allowed unless lessee will pay the larger sum).

In settlement of a debt of $1,000, the creditor accepted a share of stock in the Hog Creek Stock Syndicate, thinking that it was a share in the Hog Creek Oil Company. The latter would have been worth $1,000; the former was worth only $15. The debtor knew, or ought to have known, that the creditor was making this mistake, though he made no false representation. On tendering a return of the stock, the creditor was allowed to recover judgment for the amount of his debt. *Rutherford v. Wilkins, 230 S.W. 1115 (Tex. Civ. App. 1921)*.

In *Shelton v. Ellis, 70 Ga. 297 (1883)*, a mistake as to a fare between two points was made in a railroad rate sheet. With knowledge of this mistake and with intent to profit by it, a person bought a large number of tickets at the low price. He was enjoined from disposing of them.

In *Independent Trading Co. v. Fougera, 192 A.D. 686, 183 N.Y.S. 431 (1920)*, aff'd, ***233 N.Y. 592, 135 N.E. 931 (1922)***, the buyer was allowed to enforce the contract, although it would seem that he had reason to know. He had inquired the price of a specified article, for which other dealers asked him $30 per pound. The seller made the price $10.50 per pound, thinking that the buyer meant a different form of the same substance that went by a different name and was much lower in price. Two judges dissented.

The parol evidence rule should not be held to bar evidence of the mistake and the other party's knowledge or constructive knowledge. Parol evidence can even establish that one party was mistaken as to the terms of a written contract and that the other party had knowledge of that fact.[12]

In some cases, one who knows of another's mistake and says nothing will find himself bound by a contract that he did not intend to make. Suppose one party assents to a writing, being mistaken as to the terms that it contains or as to the ordinary meaning of the terms, and the other, with knowledge of this mistake, likewise assents. The language of an agreement will be interpreted according to the meaning given to it by one party if the other had actual knowledge that such was the meaning so given. It is certain that such a bad actor will not be permitted to enforce the agreement according to its words in their usual meaning. The mistaken party is certainly entitled to avoid the contract but may, instead, get reformation and enforcement as reformed.[13]

It may be that reformation is not needed; the court may instead interpret the contract in accordance with the meaning of the mistaken party. Thus, in *Puget Sound National Bank v. Selivanoff*,[14] Mr. and Mrs. Selivanoff owned a corporation. The bank wanted individual guaranties before advancing money. Mr. Selivanoff told his wife to sign and put "Sec." after her name and that she would not be personally liable, as she would be signing as secretary of the corporation. He signed and put "Pres." after his name. Someone at the bank marked out the "Sec." and "Pres." and lent the money. On default, the bank sued Mr. and Mrs. Selivanoff, the appellate court affirmed the trial court's judgment for the wife. Since her signature was ambiguous, the court said that parol evidence should be allowed (as it should have been even if not ambiguous). The court cited this treatise as authority that the wife would not be liable on a contract executed by her under a unilateral mistake of fact or law if the bank knew of the mistake and concluded that the bank must have known by the "Sec." and its being marked out.

At times, reformation is a proper remedy for a nonparty to the contract. In *Line Lexington Lumber & Millwork Co. v. Pennsylvania Publishing Co.*,[15] Line leased land and a building to Pennsylvania Publishing, which covenanted to

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The circumstances may be such as to make it fraudulent to fail to correct the other party's mistake and to take advantage of it. *William Goldstein Co. v. Joseph J. & Reynold H. Greenberg, Inc., 352 Pa. 259, 42 A.2d 551 (1945)*.

In ***McCarty v. Anderson, 58 So. 2d 255 (La. App. 1952)***, the purchaser mistakenly thought that the deed conveyed an additional strip of land, the mistake being induced by the shifting of the surveyor's stake at a starting point, the shift being made in purchaser's absence. Restitution was granted.

In *Brunzell Construction Co. v. G.J. Weisbrod, Inc., 134 Cal. App. 2d 278, 285 P.2d 989 (1955)*, the defendant submitted a bid on a subcontract by telephone, expressly excluding certain "steel decking." After the execution of a written contract, the defendant discovered that by mistake the steel decking had not been excluded. At once, before any performance was begun, he requested the plaintiff to correct the mistake, and on the latter's refusal he gave notice of avoidance. The court found that the plaintiff knew of the mistake and was trying to take an unconscionable advantage. The court followed *M.F. Kemper Construction Co. v. City of Los Angeles, 37 Cal. 2d 696, 235 P.2d 7 (1951)*.

See *Ollig v. Eagles, 347 Mich. 49, 78 N.W.2d 553 (1956)*, where the plaintiff made valuable improvements on land mistakenly believing that title was in his wife. Defendant knew of the mistake and watched the making of the improvements. Restitution to the extent of reasonable value was decreed.

In *Reid v. Landon, 166 Cal. App. 2d 476, 333 P.2d 432 (1958)*, the parties, joint owners of a tract of land, agreed on a partition and executed quitclaim deeds accordingly. At the same time, but as a result of a separate negotiation, they executed a "letter agreement," in which the defendant granted to the plaintiffs an "option to buy" a specified acre and the plaintiffs granted to the defendant a right to the "first refusal" of another tract. The defendant had no desire either to buy or to sell and executed the "letter agreement" merely to please the plaintiffs, her close friends. She instructed her lawyer to draft an agreement giving each party a "first refusal." He complied and presented his draft to the plaintiffs. They told him that a mistake had been made and that

procure fire insurance on the building. After fire destroyed the building, the insurer ignored the landlord's claim of ownership and paid the value of the policy to the tenant. Line sued for reformation of the insurance contract to show it as the insured, alleging that the insurer knew of its ownership at the time of issuance of the policy. The court held that if Line could prove that the insurer knew or had reason to know of Line's ownership, the policy could be reformed to make Line an insured.

Suppose that one who buys real property assents to an instrument in which the buyer is made to promise to assume and pay the mortgage debt, the seller knowing that the buyer is unaware of the provision and intends to make no such promise. Reformation should be granted, eliminating the provision, even though the buyer may be negligent in not carefully reading the instrument.[16]

In one case, a vendor sold land, after having already sold the standing timber, mistakenly believing that the sale of the timber would reserve the timber from the deed of conveyance and make an express reservation unnecessary. Reformation was granted against a purchaser with knowledge of these facts.[17]

In *Silver Dollar City, Inc. v. Kitsmiller Construction Co. Inc.*,[18] an owner's agents prepared the final signature page of a construction contract that included only one of two contractors who were intended by the parties to be in a joint

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it was agreed that they should have an "option to buy" for $200. Relying on their statement, without consulting the defendant, the lawyer then made a second draft—the one executed by the parties. The defendant read it, observed the word "option," and signed it, erroneously believing that it had been drafted as she had directed and that "option to buy" had the same meaning and effect as "first refusal." The court held that, even though the plaintiffs' representation to the lawyer had been made without fraudulent intent, the defendant had the power to avoid the "letter agreement" by reason of her unilateral mistake so induced. The stated price ($200) was much below market value. See other notes on this case under § 28.37 note 3, § 28.51 note 4, and Vol. 8, § 35.9 note 71, and § 35.10 note 87.

In *Nolan Bros. Inc. v. United States, 266 F.2d 143 (10th Cir. 1959)*, the United States entered into a contract with Nolan as prime contractor. Nolan then entered into a subcontract with Fox, supplying the latter with the written plans and specifications but not informing him of changes that the government had made therein. After Fox had begun performance of the subcontract, he learned of the changes—these greatly increasing the work covered by the subcontract. Nolan urged Fox to proceed with performance and orally promised to pay additional compensation. Fox thereupon completed the work. Fox sued for this additional compensation (as use-plaintiff) and was given judgment. He alleged his own unilateral mistake and that Nolan knew that he was thus mistaken. The oral modification of the written contract could be enforced, because Fox had fully performed it (rendering a statute invalidating oral modifications inapplicable).

In ***Harrelson v. Raphael, 116 So. 2d 301 (La. App. 1959)***, a contractor gave to an owner an estimate listing three separate items with separate prices, but his addition of these amounts was grossly mistaken. The owner observed this fact and after the work was done sent two separate checks for the prices of two of the items. Evidence as to the amount of the third item was conflicting. The court held that there had been no "meeting of the minds," and gave judgment for the reasonable value of the third item. The price of that item had been torn off of the estimate given to the defendant.

See *Dixon v. Pacific Mutual Life Ins. Co., 268 F.2d 812 (2d Cir. 1959)*, cert. denied, ***361 U.S. 948***, where a physician executed a release of his rights under a total disability insurance policy because he was told (erroneously) by the defendant that he would have no such rights if he accepted a position in a hospital as an administrative director. The case is noted under § 28.49 note 28.

In *Twyford v. Huffaker, 324 S.W.2d 403 (Ky. 1959)*, a deed of gift was reformed to exclude a tract that the donor did not intend to convey, the grantee having contributed to the mistake.

The various facets of proof utilized to show constructive knowledge of the mistake are summarized in Grimes & Walker, *Unilateral Mistakes in Construction Bids: Methods of Proof and Theories of Recovery—A Modern Approach*, 5 B.C. IND. & COMM. L. REV. 213 (1964). The article also examines alternative methods of computing the mistaken party's recovery where performance has been partially completed prior to discovery of the mistake.

Another article which examines the methods of proving constructive knowledge, in the context of government contracts, is Doke, *Mistakes in Government Contracts—Error Detection Duty of Contracting Officers*, 18 SW. L.J. 1 (1964).

Add to footnote 1:U.S. — *Kraft Foods v. All These Brand Names, Inc., 213 F. Supp. 2d 326 (S.D.N.Y. 2002)*. Kraft Foods is a multinational corporation selling various food and beverage items through its divisions, which are not independent. For nearly a decade, Kraft supplied its products to defendant ATBN at deep discount. ATBN is in the sample food business and purchased products over the years from several Kraft divisions. When disputes arose between the parties, they negotiated a general release under which ATBN agreed to pay Kraft $409,310.80 discharging the parties, their directors, officers, employees, agents and servants from any debts, claims or causes of action of any nature. The release was signed by the president of ATBN and the chief legal officer for Kraft, who understood that the release could be construed as a general release; the possibility that the release could be understood as a general release induced him to pursue a company-wide due diligence effort to ascertain that there were no additional amounts owed by ATBN. That inquiry produced no additional invoices. Notwithstanding that effort, after the release was executed and ATBN paid Kraft $409,310.80, a $585,000 invoice that ATBN had not paid was uncovered.

In an action by Kraft, ATBN moved for summary judgment. The court held that the general release was unambiguous and thereby precluded parol evidence. Kraft, however, claimed that it was entitled to avoid the release because of unilateral mistake. The court stated the bases for such relief as a mistake as to a basic assumption on which the contract was made, diligence on the part of the mistaken party and evidence that the other party knew or should have known that the first party was making a mistake. While evidence of a high order is required to overcome the heavy presumption that a deliberately prepared and executed document manifests the true intention of the parties, the court held that Kraft had succeeded in raising an issue of fact as to whether ATBN knew or should have known that Kraft did not intend to discharge all outstanding claims in exchange for less than half of what it had been owed. Accordingly, the court denied ATBN's motion for summary judgment.

Koam Produce, Inc. v. DiMare Homestead, Inc., 213 F. Supp. 2d 314 (S.D.N.Y. 2002). Where DiMare, a produce supplier, granted price adjustments to Koam based on official certificates, not knowing that Koam had bribed inspectors to falsify them, the court found that DiMare's mistake caused by Koam's fraud presented "classic" grounds for reformation of the contract. Similarly, where a party makes a mistake as to a basic assumption on which the contract has been formed and does not bear the risk of that mistake, the contract is voidable by that party if either (a) enforcement of the contract would be unconscionable, or, as in this case, (b) the other party knew or should have known of the mistake or the other party's fault caused the mistake.

[2] *Dynamics Corp. of Am. v. United States, 5 Cl. Ct. 591 (1984)*, aff'd in relevant part, rev'd in part, *766 F.2d 518 (Fed. Cir. 1985)*; *Riley v. Northern Commercial Co., 648 P.2d 961 (Alaska 1982)*; *Fountain v. Fountain, 83 N.C. App. 307, 350 S.E.2d 137 (1986)*, review denied, ***319 N.C. 224, 353 S.E.2d 407*** (separation agreement); *Guardian State Bank v. Stangl, 778 P.2d 1 (Utah 1989)* (noted at § 28.39).

Anco v. Acco Brands USA LLC, 2012 U.S. Dist. LEXIS 30168 (N.D. Ill. 2012). Anco's first employment with Acco began in 1981 and ended with a paid severance package in 2006. Anco was rehired in 2007, and this employment ended in 2009 with another severance package. Prior to receiving the final letter stating the amounts in the package, Anco received an estimate of what he

would receive, six weeks of salary ($10,190.19) plus other benefits. When the severance agreement arrived, however, it stated that Anco's severance amounted to 26 weeks of salary ($44,157.49) plus other benefits. Anco signed the letter agreement and later receive the first severance payment. Acco then discovered the error: it had computed Anco's severance payments on the basis of his original starting employment date of 1981 instead of his subsequent starting date of 2007. It notified Anco of this error and sent a revised letter agreement to him which he refused to sign. Acco moved for summary judgment. Anco claimed that the only mistake was Acco's error; there was no mutual mistake that would give rise to reformation.

While recognizing the importance of the distinction between mutual and unilateral mistakes because of the reluctance of courts to allow a party to avoid a contract on the basis of a unilateral mistake (Restatement (Second) of Contracts § 153, cmt. a), the court also recognized that relief from a unilateral mistake was appropriate where the other party knew or had reason to know of the mistake (§ 153(b)). Acco made a unilateral mistake in choosing the wrong date to calculate severance benefits. The mistake had a material effect on the agreed exchange that was adverse to Acco, and Acco did not bear the risk of the mistake if Anco knew or had reason to know of it. When he received the estimate of severance benefits, Anco did not question their accuracy. Yet, when the letter agreement arrived stating benefits greater than four times the estimate, he simply signed the agreement. The court held that Anco was not entitled to such a windfall and granted Acco's motion for summary judgment.

[3] *132 U.S. 406, 10 S. Ct. 134, 33 L. Ed. 393 (1899)*.

[4] *Creech v. Melnik, 347 N.C. 520, 495 S.E.2d 907 (1998)* (the attorney for the parents of a child promised a physician that she would not be sued if she provided information the attorney sought; this promise was voidable because it was based on the physician's misrepresentation that she had no role in the treatment of the child at the time of the child's injury).

[5] *In re Cendant Securities Litig., 72 F. Supp. 2d 498 (D.N.J. 1999)*.

[6] *230 Wis. 2d 149, 601 N.W.2d 14 (App. 1999)*, review denied, ***230 Wis. 2d 273, 604 N.W.2d 571 (1999)***.

[7] *Monarch Marking System Co. v. Reed's Photo Mart, Inc., 16 Tex. Sup. Ct. J. 25, 485 S.W.2d 905, 907 (Tex. 1972)*, discussed at *§ 28.37*.

[8] In one case, a subcontractor's bid was 30% lower than that of the next lowest bid. Taking the evidence as a whole, the court concluded that the contractor had no reason to know that the bid was based on a miscalculation. *Heifetz Metal Crafts, Inc. v. Peter Kiewit Sons' Co., 264 F.2d 435 (8th Cir. 1959)*. The reasoning is doubtful, but the decision was justified because the general contractor had relied on the low bid in calculating its own successful bid. "Reason to know" may be a variable standard based on the time at which the bidder calls attention to its mistake.

[9] *143 F. Supp. 449 (E.D. Mich. 1956)*.

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Ill. —*Mansell v. Lord Lumber & Fuel Co., 348 Ill. 140, 180 N.E. 774 (1932)*.

Mass. —*Chute v. Quincy, 156 Mass. 189, 30 N.E. 550 (1892)* (buyer knew lot was three times larger than seller's agent realized).

Eng.Eng. —Paget v. Marshall, [1884] 28 Ch. D. 255 (reformation denied, with election to defendant between avoidance and reformation); Gun v. M'Carthy, L.R. Ir. 13 Eq. 304 (1884).

In *Russell & Pugh Lumber Co. v. United States, 290 F.2d 938, 154 Ct. Cl. 122 (1961)*, the plaintiff purchased a quantity of standing timber from the defendant, containing an estimate of the total board feet and also a stated unit rate and the total purchase price in a lump sum. After full performance and payment of the full price, the plaintiff discovered that the quantity received was 20% less than the estimated total, and he sued for a refund on the ground of mistake, asserting in good faith that he had understood the contract to be "a unit price agreement." The defendant asserted that it was a "lump sum agreement" with the risk as to quantity being on the purchaser. The court held that the plaintiff's mistake (a "mental attitude") was "an unreasonable mistake on the part of the plaintiff neither induced nor shared by the defendant and of which it had no reason to have known … This, we think, is the kind of unilateral mistake which the courts and the treatise writers believe does not permit judicial relief." The contract had been fully performed, and the defendant could not be returned to its original position. Under

these circumstances, the rule stated by the court is correct. No opinion is here offered as to whether the plaintiff's interpretation was "unreasonable" and whether the defendant had "no reason" to know that the contract would be so interpreted.

Citiroof Corp v. Tech Contracting Co., Inc., 159 Md. App. 578, 860 A. 2d 425 (2004). Tech, a general contractor, submitted a bid on a project for the City of Baltimore which included the bid of Citiroof, a subcontractor. Tech had received roofing bids from Citiroof at $32,200 and one other subcontractor who bid $62,803 for the work. Tech realized that one of the bids had to be "wrong" but did not know whether it was the bid of Citiroof or the other subcontractor. Tech then informed Citiroof that its bid was "rather low" and discussed a federal statute concerning the wage scale on government contracts. This discussion alerted Citiroof to increase its bid by $6700. The parties, however, did not discuss the square footage of the roof. Citiroof had incomplete information concerning the square footage. Tech then asked Citiroof if it was "comfortable" with its bid. Citiroof asked about its bid in comparison with other bids. Tech replied that Citiroof's revised bid was "more in line." Tech used the revised bid in its general bid for the project. After the contract was awarded to Tech, Citiroof discovered that its bid had been premised on half of the square footage and refused to perform at its bid price since even its direct costs would not be covered at the mistaken bid price. Tech contracted with the higher bidder and sought to recover the difference between that price and Citiroof's mistaken bid price. The trial court held for Tech, finding that the elements of promissory estoppel (detrimental reliance) had been met. On appeal, the instant court reviewed the elements of promissory estoppel under the Restatement, Second, of Contracts, § 90. It held that the trial court was not in error in finding a definite promise, which the promisor should have expected would induce action on the part of the promisee. The court also agreed that the trial court did not err in finding that Tech had reasonably relied on the Citiroof bid, notwithstanding the price discrepancy with the other subcontractor's bid. The court stated that Tech had told Citiroof "about the other substantially higher bid," and concluded that it is not the responsibility of a general contractor to guarantee the accuracy of a subcontractor's bid. Citiroof's argument that injustice could only be avoided by relieving Citiroof of its obligation was rejected on the footing that Citiroof's withdrawal left Tech with only one other roofing option that it had to accept to complete its general contractor obligations. The case raises an interesting question as to the kind of disclosure that is required to alert an offeror that its offer may be mistaken, but still allow an offeree to accept it. It is difficult to reconcile the court's conclusion that Tech told Citiroof "about the other substantially higher bid" with the court's description of what was "told," to Citiroof, i.e., that Citiroof's bid was "rather low." Moreover, Tech's statement that the revision of Citiroof's bid of $6700 made the bid "more in line" with the competitor's bid hardly suggested that a gross discrepancy remained. This case is also discussed at § *8.12*.

[11] *Florida Ins. Guaranty Ass'n, Inc. v. Love, 732 So. 2d 456 (Fla. App. 1999)*.

[12]

U.S. —*Gibson v. United States 268 F.2d 586, 106 U.S. App. D.C. 10 (1959)* (a criminal case).

Cal. —*Smith v. Williams, 55 Cal. 2d 617, 12 Cal. Rptr. 665, 361 P.2d 241 (1961)* (fraudulent concealment of nature of instrument signed).

Colo. —*Jackson Enterprises, Inc. v. Maguire, 144 Colo. 164, 355 P.2d 540 (1960)*.

[13]

U.S. —*Fiorito v. Clyde Equip. Co., 2 F.2d 807 (9th Cir. 1924)*.

Cal. —*Cleghorn v. Zumwalt, 83 Cal. 155, 23 P. 294 (1890)* (mutual agreement to buy one-fifth interest, buyer knowing that deed conveyed three fifths).

Conn. —*Home Owners' Loan Corp. v. Stevens, 120 Conn. 6, 179 A. 330 (1935)*.

Kan. —*Atkinson v. Darling, 107 Kan. 229, 191 P. 486 (1920)*, semble.

Neb. —*Hugo v. Erickson, 110 Neb. 602, 194 N.W. 723 (1923)* (seller knew buyer thought contract was for entire lot (130 feet deep) although abstract and deed were for only 85 feet).

Reformation for a unilateral mistake will be granted only when the other party knew of the mistake or had such reason to know it as to be estopped to deny the existence of the alleged agreement. *Eastern Freight Ways, Inc. v. United States, 257 F.2d 703 (2d Cir. 1958)*.

In *Ramseier v. Oakley Sanitary District, 197 Cal. App. 2d 722, 17 Cal. Rptr. 464 (1961)*, an antecedent oral agreement limiting the defendant's obligation to $1,500 was not, by mistake of the defendant's attorney, carried, into the final written contract. The plaintiff was aware of the mistake. It was for the trial court to determine whether the evidence was "clear and convincing," and it was not prevented from being so by the fact that the plaintiff's testimony flatly contradicted that of the defendant. In a case like this, the fact that the defendant negligently failed to read the entire written instrument does not justify refusal of reformation.

In *Union Painting Co. v. United States, 198 F. Supp. 282 (D. Alaska 1961)*, the plaintiff made a bid on a painting job knowing that rubber base paint could not be used. The contract when executed contained an option between rubber base and oil base paint. By mistake of the government officer, the rubber base option was not deleted. The plaintiff sued for extra compensation because of having to use the more expensive kind, relying on the "parol evidence rule" and asserting that the mistake was not mutual. The court held that he had no right to the extra amount claimed. The defendant would have been entitled to reformation, but had a good defense without it.

[14] *9 Wash. App. 676, 514 P.2d 175, 70 A.L.R.3d 1270*, review denied, ***83 Wash. 2d 1004 (1973)***.

In *Simcox v. San Juan Shipyard, Inc., 754 F.2d 430 (1st Cir. 1985)*, the court stated: "The language of an agreement will be interpreted according to the meaning given to it by one party if the other party had actual knowledge, or should have known, of the meaning intended." The court **cited the prior edition of this section.**

In *W.F. Magann Corp. v. Diamond Mfg. Co., 580 F. Supp. 1299 (D.S.C. 1984)*, aff'd in part, rev'd in part, *775 F.2d 1202 (4th Cir. 1985)*, on remand, *678 F. Supp. 1197 (D.S.C. 1988)*, the court stated: "There is agreement among the commentators that if the material mistake of one party was caused by the other, either purposefully or innocently, or was known to him, or was of such character that he had reason to know of it, the mistaken party has a right to rescind the contract or recover damages for the breach."

In contrast to the *Puget Sound* case, in *Charter Adjustments Corp. v. Tung, 2015 Cal. App. Unpub. LEXIS 4356 (2015)* the court held that a corporation's president could be personally liable for a contractual obligation after he signed a guaranty in his individual capacity, regardless of whether he subjectively misunderstood his obligation. In that case, Charter sued Tung for breach of contract after Tung failed to pay the outstanding balance due for dry cleaning waste recycling services provided by Pacific to Resolvent (a corporation for which Tung served as President). Resolvent's debt to Pacific had been assigned to Charter, and Tung had assumed personal liability for payment of all balances due Pacific in the event Resolvent failed to pay. Charter filed suit, and Tung denied having any intent to assume personal liability for any balance owed but not paid by Resolvent. The trial court entered judgment in favor of Charter and against Tung in the amount of $96,717.95. Tung appealed, arguing that he did not sign the contract in his individual capacity, so he cannot be liable for its obligations. The court rejected this argument. The contractual guaranty at issue was as follows: "The above information is for the purpose of obtaining credit and is warranted to be true. I (we) agree to pay all amounts due upon receipt of statement of account or as otherwise expressly agreed. If the corporation fails to make payment I (we) guarantee to pay all balances due the seller." California contract law is clear that a personal guaranty need not take any particular form. The language must be examined as a whole to determine whether the person signing personally assumed liability for payment. The question is whether the agreement established the intention of creating a contract of guaranty, the form does not matter. To determine whether a person signed a document in his or her individual capacity, it is not enough to look to the title next to his or her signature—here, Tung included the word "president" in the signature line. California law provides that even when a director, officer or other agent signs a corporate contract containing a promise for an individual, he or she is not relieved from personal liability by tacking on the word "director," "president" or the like. Rather, these terms are regarded merely as *descriptio personae*, that is, a term descriptive of the person rather than the relationship in which he signs the agreement. In the instant case, the contract expressly identifies a personal obligation to be undertaken by Tung: "If the corporation fails to make payment, I (we) guarantee to pay all balances due the seller." Accordingly, Tung may be held personally liable for his contractual obligation regardless of whether he subjectively misunderstood his obligation. The court also noted that there was consideration for the agreement: "Where, as here, the guaranty and principal obligation form one instrument and are entered into at the same time, consideration for the principal obligation also forms consideration for the guaranty." The judgment was affirmed.

venture. The contractor included on the signature page was aware of the owner's agents' error. Moreover, said the court, the owner's mistake as to the identities of the true parties to the contract involved a basic assumption under which the contract was entered into in the first place and which had a material effect on the agreed exchange of performances. The owner therefore had the power to avoid the contract. Nonetheless, the owner waived this right or ratified the contract by making no efforts to obtain the other contractor's missing signature, by making payments to the contractor whose signature appeared on the document, and by obtaining a modification of the disputed contract's original terms.

(A) The following cases cite this section or its predecessor § 641:

(1) *Zero Stage Capital, Inc. v. Harvard Clinical Tech., Inc., 2002 Mass. Super. LEXIS 184 (Mass. Super. Ct. May 10, 2002)*. The defendant, a high-tech start-up company requiring $1 million to market its product, entered into negotiations with the two venture-capitalist plaintiffs. A trade show where the defendant wanted to display its product was scheduled while the parties were negotiating the million-dollar loan. Term letters were executed under which each plaintiff made advances ("bridge loans") of $125,000 to the defendant at 10% interest, and each plaintiff also received "detachable warrants" for 2000 shares of the defendant's stock. The parties were not able to complete the $1 million loan transaction and the defendant secured financing from another investor. The defendant repaid the bridge loans with interest. The plaintiffs attempted to exercise the detachable warrants claiming they were independent obligations of the company regardless of whether the larger transaction proceeded to fruition.

The court found that a latent ambiguity existed in the term "detachable warrant." The language and grammar used by the plaintiffs in their term letters indicated that the warrants were an integral part of the overall transaction rather than separate obligations, and the 10% interest constituted the primary consideration for the

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[15] *451 Pa. 154, 301 A.2d 684 (1973)*.

[16]

N.Y. —*Kilmer v. Smith, 77 N.Y. 226 (1879)*.

[17]

N.Y. —*Welles v. Yates, 44 N.Y. 525 (1871)*.

Accord *Cleghorn v. Zumwalt, 83 Cal. 155, 23 P. 294 (1890)* (where a grantor executed a deed of all her interest, thinking it was only one-fifth when it was in fact three-fifths; the grantee, who knew these facts, had to content himself with one-fifth, without getting any of his money back). See also *Hand v. Cox, 164 Ala. 348, 51 So. 519 (1910)*; *Walker v. Bourgeois, 88 N.J. Eq. 124, 102 A. 250 (1917)*.

The prior edition of this section is cited in *Banking & Trading Corp. v. Reconstruction Finance Corp., 147 F. Supp. 193 (S.D.N.Y. 1956)*, aff'd, *257 F.2d 765 (2d Cir. 1958)*, in which the plaintiff sued for breach of a contract for the sale of Indonesian rubber. When the contract (if any) was made, the shipment of such rubber from Java was impossible in the absence of a permit by the Netherlands. The plaintiff knew this fact and knew also that the purchaser did not know it. This made the contract voidable by the purchaser; its notification of avoidance was effective. The fact was "crucial to the success of the transaction."

The prior edition of this section is quoted in ***Beatty v. Donahue, 249 S.W.2d 33 (Ky. 1952)***.

The question of mistake, in assenting to a compromise or other settlement of an unliquidated claim and in executing a release, is discussed at § 1292 (1962 ed.).

The prior edition of this section is cited in *N.L.R.B. v. International Union, United Automobile, Aircraft, Agricultural Implement Workers of America, AFL-CIO, 297 F.2d 272, 276 (1st Cir. 1961)*, as a reference on the question of a possible future reformation for mistake.

[18] *931 S.W.2d 909 (Mo. App. 1996)* **(quoting the prior edition of this treatise).**

advances. The parties' conduct also supported the defendant's interpretation, since the parties executed the warrants the day before the scheduled closing for the overall investment rather than upon delivery of the bridge loan money. The meaning of the term "detachable warrant" was not self-evident. No explanation was provided in the term letters and the defendant was unfamiliar with its meaning. Massachusetts law does not permit the incorporation of custom or trade usage where terms are missing or are otherwise vague. Since the plaintiffs had drafted the term letters, the doctrine of *contra proferentem* lent further support to the defendant's interpretation. The court held that the defendants had assigned a reasonable interpretation to "detachable warrant" in the circumstances. As there was no objectively reasonable interpretation of which the defendant should have been aware, the theory of unilateral mistake was inapplicable to interpret the term according to that meaning. Even if the defendant had been unilaterally mistaken, the mistake was excusable since the plaintiffs caused the mistake. Citing Corbin, the court held that the party at fault for a mistaken assumption must bear its consequences. This section is also cited at § 28.42.

(2) *Traggis v. Shawmut Bank Conn., N.A., 72 Conn. App. 251, 805 A.2d 105 (App. Ct.), appeal denied, 262 Conn. 903, 810 A.2d 270 (2002)*. The plaintiff trustee entered into a contract to purchase a piece of property from the defendant bank's predecessor in interest. The closing date in the original contract was on or about August 27, 1993. After a number of extensions and further negotiation, the plaintiff and his partner signed a new short form agreement with a proposed price much lower than the price in the original contract and a closing date of August 26, 1994. The bank's attorney drafted the new agreement but, unbeknownst to the bank, a secretary typed the closing date as August 15, 1995, instead of August 15, 1994. The bank's real estate agent gave the contract to the plaintiff to sign and explained that the bank had accepted the lower price because the closing would be in two weeks. The plaintiff refused to close on August 14, 1994, insisting that it had another year to close. The bank sold the property to a third party on March 31, 1995, and the plaintiff brought this action for breach of contract. The trial court granted the bank's counterclaim seeking reformation and further granted summary judgment in its favor. On appeal, the court held that reformation was proper since the evidence relied upon by the trial court supported a reasonable belief that the closing date specified in the contract was a typographical error and the plaintiff acted inequitably by insisting on that closing date while he had knowledge of the error. The court rejected the plaintiff's many claims of error on appeal, including his claim that the trial court incorrectly relied on legal authority inapplicable to his case to find inequitable conduct on his part. Among the allegedly improper authorities was a Corbin quotation stating, "[i]t is certain that such a bad actor will not be permitted to enforce the agreement according to its words," in conjunction with a citation to a case in which the Connecticut Supreme Court upheld the trial court's reformation of bonds that erroneously stated they were payable in twenty years rather than ten where the bondholder knew of the error yet insisted on interest payments for the additional ten years. This authority was proper since the Corbin cite supported the holding of the case.

(3) *Sumerel v. Goodyear Tire & Rubber Co., 2009 Colo. App. LEXIS 995*. Attorneys for the parties exchanged e-mails concerning the calculation of prejudgment interest on certain "other costs and losses" when a jury found the defendant liable for 36% of the losses sustained by certain parties and 48% of the losses sustained by other parties. The attorneys arrived at different calculated amounts. The plaintiff's lawyer recognized that the calculations made Goodyear 100% liable for these costs and losses rather than 36% and 48% under the judgment—a $550,000 error. The plaintiffs did not call this error to the attention of the defendants. The plaintiff's lawyer simply accepted this "offer."

When the defendant's lawyer discovered the error, the plaintiff's lawyer demanded that the defendant abide by its "settlement agreement." The court held that there was no offer or acceptance creating a settlement agreement since there was nothing to settle. The liability for these "other costs and losses" had already been determined by the percentages found in the jury verdict. The parties' discussions dealt only with a mathematical computation. Even assuming the defendant's erroneous e-mail containing the error amount to an offer, the court quoted Corbin's explanation from this section of the treatise: "[T]here is practically universal agreement that, if the material mistake of one party was … known by the other or was of such a character and accompanied by such circumstances that the other had reason to know of it, the mistaken party has the power to avoid the contract." The case is also discussed in *§ 1.11* to this supplement.

(B) The following cases are noteworthy:

(1) *Koam Produce, Inc. v. DiMare Homestead, Inc., 329 F.3d 123 (2d Cir. 2003)*. Koam requested the United States Department of Agriculture (USDA) to inspect tomatoes it had received from DiMare that Koam claimed were substandard. USDA inspectors examined the shipments and found the tomatoes to be substandard, with the result that Koam was entitled to a price reduction in the amount of $4,800 granted by DiMare. Six months later, nine USDA inspectors, including the three who had inspected the tomatoes, pleaded guilty to accepting bribes from wholesalers such as Koam, including a bribe received from a Koam employee. Following criminal proceedings, the USDA informed members of the produce industry of their right to seek reparations. DiMare instituted reparation proceedings to recover the $4,800 price adjustment. Though it found no showing that falsified inspections were issued with respect to the tomatoes in question, the USDA Judicial Officer held that the price modification agreement was voidable because of DiMare's unilateral mistake and Koam's misrepresentations of the inspection process. It also found that Koam had failed to prove that DiMare's tomatoes were substandard. A de novo review in the district court arrived at the same conclusion and also awarded DiMare $73,250 in attorneys' fees.

The court of appeals affirmed, holding that the basic assumption of DiMare in agreeing to adjust the price was mistaken since DiMare was laboring under a belief not in accord with the facts, and that such a situation represented the definition of "mistake" in Restatement (Second) of Contracts, § 151. DiMare, therefore, was entitled to avoid the contract either if the effect of the mistake would make enforcement of the contract unconscionable, or if the other party had reason to know of the mistake or caused the mistake (Restatement (Second) of Contracts, § 153). Enforcement under these circumstances would be unconscionable, and Koam had reason to know of DiMare's mistake. DiMare did not bear the risk of this mistake since the risk was not allocated to him by the agreement, he was totally unaware of the facts to which the mistake related, and, therefore, he did not make the agreement with the awareness that he had only a limited knowledge of such facts, and it would have been unreasonable for a court to allocate the risk to DiMare under the circumstances (Restatement (Second) of Contracts, § 154). Koam placed considerable emphasis on the USDA finding that there was no showing of falsified inspections with respect to the tomatoes in question. The instant court held that under *Uniform Commercial Code § 2-607(4)*, the burden is on the buyer to establish any breach with respect to accepted goods. Moreover, in its de novo review, the district court found that the inspections were performed by bribed inspectors who falsified such results. The district court's finding was entitled to deference by the court of appeals, while the USDA findings were not entitled to such deference. Under *7 U.S.C. § 499g(c)*, DiMare was entitled to reasonable attorneys' fees. The court of appeals will reverse such an award by the district court only if it discovers an abuse of discretion, which this court did not discover. See also *B.T. Produce v. Robert A. Johnson Sales, 2004 U.S. Dist. LEXIS 25253 (S.D.N.Y. Dec. 9, 2004)*.

(2) *Shurgard Storage Centers v. Lipton-U. City LLC, 394 F.3d 1041 (8th Cir. 2005)*. The parties entered into a lease agreement containing a purchase option for the plaintiff's storage center. When the defendant exercised the option within the first year of the ten-year lease, the plaintiff discovered that the lease terms failed to include the plaintiff's assumption that the purchase price would be based on annualized net operating income. As a result, the defendant claimed the property for half its value. The plaintiff sought reformation or rescission of the contract. While rejecting the plaintiff's mutual mistake and fraud theories, the district court ordered rescission of the contract on the footing that the facts disclosed that the defendant should have known that the plaintiff intended to annualize the net operating income, and allowing the defendant to take the property for half its value would be unconscionable. On appeal, the instant court affirmed this decision, relying on the Restatement, Second, of Contracts, Section 153 that allows a party to avoid a contract for his unilateral mistake where he does not bear the risk of the mistake and the effect of the mistake would make the enforcement of the contract unconscionable or the other party knew or had reason to know of the mistake. The defendant had received an e-mail revealing the plaintiff's assumption that the price would be based on an annualized rate. The defendant knew that the lease agreement did not reflect that assumption and informed others of his successful negotiation. While equitable enforcement of this contract for the sale of real property at half its price would have been unconscionable, the contract was voidable on the basis that the defendant knew

or should have known of the plaintiff's unilateral mistake. The plaintiff would not have entered into the contract on that mistaken assumption.

(3) *Zysk v. Baker, 2006 Mass. Super. LEXIS 591*. The seller owned a residential lot which he assumed had a market value of $195,000. Inquiries with the local building department, however, indicating that only a one-bedroom house could be constructed on the lot caused the seller to lower the price to $165,000. The plaintiff was dubious about this determination and proceeded to make inquiries resulting in knowledge that the seller was mistaken since the lot would permit the construction of a two-bedroom house. The plaintiff knew that the seller had established the price on the basic assumption that only a one-bedroom house could be built on the lot. The seller's mistake was unilateral and the plaintiff knew or had reason to know of the mistake. The court concluded that, even if the elements of a contract could otherwise be established in this case, "the unilateral mistake rendered it void." While the court's unilateral mistake analysis is otherwise sound, calling the contract "void" rather than "voidable" because of such a mistake is unfortunate since only the mistaken party has a power of avoidance. If the unilateral mistake made the contract void but the mistaken party nonetheless desired to have the contract performed, the other party who knew or should have known of the mistake would be able to claim that no contract ever existed. The case is also discussed in § *2.18*.

(4) *425 Beecher, LLC v. Unizan Bank, 2010 Ohio 412 (2010)*. A bank's ten-year loan of $840,000 was subject to a prepayment provision which, literally applied, would allow the loan to be repaid for only $626,475.37. The court recognized that a unilateral mistake as to a basic assumption on which the contract was made having a material effect on the agreed exchange allows the party making the mistake to avoid the contract where the other party had reason to know of the mistake (Restatement (Second) of Contracts § 153(b)). The instant court found that the trial court's determination that the borrower recognized the "true effect" of the agreement at the time of execution as supported by the evidence. The trial court found that rescission was not an appropriate remedy since the parties had performed their duties under the contract except for the determination of "prepayment consideration." The trial court, therefore, deemed reformation to be warranted and the instant court agreed.

(5) *Robertson v. Terry, 2013 Conn. Super. LEXIS 2552 (2013)*. A week before the statute of limitations period would expire, the defendant insurance company offered $500 in exchange for a release of its insured from all claims. The insured motorist was driving under the influence of alcohol or drugs when his car struck the plaintiff's car causing injuries, in some respects, permanent injuries. The plaintiff claimed she signed the release without any knowledge of her rights and after being informed by the insurance adjuster that it was too late for her to seek treatment for her injuries that were causing continued pain. The court recognized that either a mutual mistake or unilateral mistake can be the basis for finding an agreement to be unenforceable. There was no mutual mistake in this case since there was no basis for finding the insurer was unaware of what the plaintiff was giving up by signing the release. The court defined a unilateral mistake under Connecticut law as a mistake which induces a party to sign a contract he would not have signed absent the mistake. Noting that the standard for unilateral mistake in § 153 of the Restatement (Second) of Contracts had been approved in Connecticut, under that standard, a party may avoid a contract if he does not bear the risk of mistake and either the effect of enforcing the contract would be unconscionable, or the other party has reason to know of the mistake or his fault caused the mistake. The plaintiff's claim of unilateral mistake would be sufficient in this case to defeat the enforcement of the release. The court concluded that there was a genuine issue of material fact as to whether the insurer induced or took advantage of the mistake. Only by weighing credibility, rejecting the plaintiff's testimony and crediting the insurer's assertion that the release was mistake free, could the court enter judgment for the defendants. "That the court cannot do." The defendant's motion for summary judgment was denied.

(6) *Abdullah v. Allied Barton Sec. Servs., LLC, 2017 U.S. Dist. LEXIS 50503 (E.D. Pa. Mar. 31, 2017)*. The court denied plaintiff's motion to invalidate a settlement agreement hammered out in a court-sponsored mediation. The agreement required defendant to pay plaintiff the sum of $20,000.00 after receiving from plaintiff a fully executed release. Plaintiff refused to sign off on the release, and defendant moved to enforce the settlement. The court enforced the settlement and characterized plaintiff's position as "buyer's remorse."

Plaintiff argued the agreement was invalid due to fraud. He claimed that his attorney's purported bad advice prompted him to take the settlement, but the court held that plaintiff's argument amounted to a unilateral mistake. "A party cannot escape his obligation to the other party under a contract because of erroneous advice given to him by his own lawyer. This would constitute a unilateral mistake, not a mutual mistake. A contract cannot be voided when a non-mistaken party does not know of the mistake. … Here, the defendant did not know of counsel's advice to plaintiff."

(C) The following case cites this section:

(1) *Wyatt v. Horkley Self-Serve, Inc., 2007 U.S. App. LEXIS 521 (9th Cir. 2007)*. The defendants made a Federal Rule of Civil Procedure 68 offer of judgment (see § 2.26 of this supplement for explanations of Rule 68 offers) to the plaintiff Wyatt, who alleged that the defendants violated Title 7 and Idaho law. Wyatt accepted, knowing that defendants mistakenly did not include attorneys' fees in their offer. The district court entered judgment for Wyatt and awarded her attorneys' fees. Upon review, the court explained that the defendants' offer did not limit costs, which in civil rights cases includes attorneys' fees. Wyatt accepted the offer despite knowing that defendants mistakenly believed that it included attorneys' fees. "Such knowledge was forcefully brought home to Wyatt by the fact that defendants had filed and served … a withdrawal of offer of judgment specifically revoking and rescinding their offer the day *before* Wyatt purported to accept the offer. Unilateral mistake is grounds for rescission of an unexecuted contract." Citing Corbin, the court further explained that this is "particularly true where, as here, … the material mistake of one party was … known by the other." The judgment was vacated.

Corbin on Contracts
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35.	REPUBLICBANKAZ N.A.'S MOTION FOR SUMMARY JUDGMENT	Dec. 2, 2016
36.	(PART 1 OF 8) REPUBLICBANKAZ, N.A.'S SEPARATE STATEMENT OF FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	Dec. 2, 2016
37.	(PART 2 OF 8) REPUBLICBANKAZ, N.A.'S SEPARATE STATEMENT OF FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	Dec. 2, 2016
38.	(PART 3 OF 8) REPUBLICBANKAZ, N.A.'S SEPARATE STATEMENT OF FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	Dec. 2, 2016
39.	(PART 4 OF 8) REPUBLICBANKAZ, N.A.'S SEPARATE STATEMENT OF FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	Dec. 2, 2016
40.	(PART 5 OF 8) REPUBLICBANKAZ, N.A.'S SEPARATE STATEMENT OF FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	Dec. 2, 2016

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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
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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
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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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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
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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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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
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76.	REPUBLICBANKAZ, N.A.'S NOTICE IN COMPLIANCE WITH 12 C.F.R. 437(B)(3)(III)	Mar. 7, 2017
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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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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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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

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
03/14/2017 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2014-014647 03/09/2017

HONORABLE DAWN M. BERGIN

CLERK OF THE COURT
L. Nelson
Deputy

THOMPSON MCCARTHY D B, L L C, et al. DANIEL J SLAVIN

v.

REPUBLICBANKAZ N A ALISSA BRICE CASTANEDA

ORAL ARGUMENT

Courtroom ECB-713:

3:00 p.m. This is the time set for Oral Argument. Plaintiff, Thompson McCarthy DB, LLC, is represented by counsel, Daniel J. Slavin and Jessica Dorvinen. Defendant, RepublicBankAZ, N.A., is represented by counsel, W. Scott Jenkins and Andrea Landeen for Alissa Brice Castaneda. President of RepublicBankAZ, N.A., Ralph Tapscott, is present.

A record of the proceedings is made digitally in lieu of a court reporter.

Argument is heard on Plaintiff's February 20, 2017 Motion for Supplemental Briefing and Request for Continuance of Oral Argument on Defendant's Motion for Summary Judgment, and Defendant, RepublicBank AZ, N.A.'s Motion to Strike Plaintiff's Reply in Support of its Motion for Supplemental Briefing filed on March 8, 2017.

To put the parties' arguments and the Court's rulings in context, a brief factually summary is provided. For a period of time, Defendant made commercial real estate loans to Plaintiff that were guaranteed by the Small Business Administration ("SBA"). Due to delays in obtaining one or more SBA loans in the latter part of 2012, Plaintiff terminated its banking relationship with Defendant in early 2013 and selected Mutual of Omaha ("MOH") to replace Defendant as its lender. As part of the transition, Plaintiff requested that Defendant sell two of

its existing loans to MOH. Defendant agreed and executed a Loan Purchase and Sale Agreement (the "Sale Agreement") for the sale and assignment of the loans. In connection with the Sale Agreement, Plaintiff signed a document entitled "Consent of Obligors and Pledgors" (the "Consent").

Plaintiff later filed this action for negligent misrepresentation and fraudulent inducement, claiming that Defendant misrepresented its knowledge and expertise to timely process SBA loans and that it altered communications from the SBA to fraudulently induce Plaintiff to believe its loan was being timely processed.

In its Motion for Summary Judgment, Defendant argues that the Consent signed by Plaintiff constitutes a waiver of its claims in this action.[1] Plaintiff contends that the Consent cannot operate as a waiver because, among other things: (1) it contains no consent language; (2) it was signed by only one party (Plaintiff); (3) Plaintiff was not a party to the Sale Agreement; (4) it lacks consideration; (5) there was no voluntary and intentional waiver of a known right; and (6) even if it were otherwise enforceable, the Consent was obtained through fraud, deceit and misrepresentation (the "Fraud Defense").

Plaintiff asserts that it recently learned of an Enforcement Action & Agreement (the "EAA") executed by Defendant and the Office of the Comptroller of the Currency ("OCC"). The OCC had conducted an investigation into Defendant's banking practices and issued a Report of Examination (the "ROE"). In light of what Plaintiff views as significant adverse findings in the EAA, Plaintiff argues that it needs additional discovery in order to enhance its Fraud Defense and fully respond to Defendant's Motion for Summary Judgment.

Specifically, Plaintiff requests that the Court allow supplemental briefing on the OCC investigation, but only after: (1) Plaintiff receives the OCC's response to its Freedom of Information Act request; (2) the Court addresses any privilege claims raised by the OCC; and (3) Plaintiff receives supplemental responses from Defendant to written discovery previously propounded.

The Court expresses concern about the length of delay that would result from awaiting the OCC discovery and supplemental briefing. The Court suggests to counsel that it proceeds with a ruling on the issues raised in the Motion for Summary Judgment with the exception of the Fraud Defense. The parties agree.

[1] Defendant also argued that Plaintiff's claim for lost profits is barred, but this argument is not relevant to the Motion for Supplemental Briefing.

Plaintiff also requests supplemental briefing to preclude Defendant from asserting the affirmative defense of release due to late disclosure. It contends that Defendant first argued that the Consent constituted a release (rather than just a waiver) in its Reply in Support of the Motion for Summary Judgment.

For the reasons set forth on the record,

IT IS ORDERED denying Defendant's Motion to Strike Plaintiff's Reply in Support of its Motion for Supplemental Briefing.

IT IS FURTHER ORDERED holding in abeyance Plaintiff's Motion for Supplemental Briefing on the Fraud Defense and any summary judgment ruling on the Fraud Defense.

With respect to the affirmative defense of release, the Court will re-review the briefing. If it finds that Defendant did not timely disclose its affirmative defense of release, and that the delay precluded Plaintiff from adequately responding to the argument, it will either: (1) permit Plaintiff to file a supplemental brief seeking preclusion, with a response from Defendant; or (2) deny Plaintiff's request for supplemental briefing for the purpose of seeking exclusion, but permit a supplemental brief to respond substantively to Defendant's release argument. In the latter case, no response will be permitted.

4:35 p.m. Hearing concludes.

LATER:

The Court has now reviewed the briefing with respect to Defendant's affirmative defense of release. While it does appear that Defendant first argued that the Consent constituted a release (rather than just a waiver) in its Reply in Support of the Motion for Summary Judgment, the Court declines to preclude Defendant from asserting release as a defense. First, the doctrines of waiver and release are similar, and second, the Consent repeatedly uses the term "release." However, to ensure there is no prejudice to Plaintiff, the Court will allow it to file a Sur-Response to address Defendant's release argument.

IT IS THEREFORE ORDERED that Plaintiff may file a Sur-Response to Defendant's Motion for Summary Judgment **by March 27, 2017.** The Sur-Response shall be limited to responding to Defendant's release argument and shall not exceed 5 pages. No Sur-Reply shall be filed.

IT IS FURTHER ORDERED taking the Motion for Summary Judgment under advisement (with the exception of the Fraud Defense) as of **March 27, 2017**.

Given that the hearing on the Motion for Supplemental Briefing lasted 1.5 hours and counsel addressed their substantive arguments on the Motion for Summary Judgment during oral argument, the Court deems the oral argument to have encompassed both the Motion for Supplemental Briefing and the Motion for Summary Judgment, therefore will not schedule any additional argument.

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
06/01/2017 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2014-014647 05/30/2017

HONORABLE DAWN M. BERGIN

CLERK OF THE COURT
S. Ortega
Deputy

THOMPSON MCCARTHY D B, L L C, et al. DANIEL J SLAVIN

v.

REPUBLICBANKAZ N A ALISSA BRICE CASTANEDA

UNDER ADVISEMENT RULING

The Court has considered the following: (1) Defendant RepublicBankAZ, N.A.'s Motion for Summary Judgment and Statement of Facts filed on December 2, 2016; (2) Plaintiff's Response and Statement of Facts; (3) Defendant's Reply; (4) Plaintiff's Sur-Response filed on March 28, 2017;[1] and (5) the arguments presented by counsel at the March 9, 2017 hearing. It now makes the following findings and orders.

Factual Background

From approximately 2010 to 2013, Defendant RepublicBankAZ, N.A. ("Republic") made commercial real estate loans to Plaintiff that were guaranteed by the Small Business Administration ("SBA"). Due to delays in obtaining one or more SBA loans in the latter part of 2012, Plaintiff terminated its banking relationship with Republic in early 2013 and selected Mutual of Omaha ("MOH") to replace Republic as its lender.

As part of the transition, Plaintiff requested that MOH purchase two of its existing loans with Republic. Republic agreed to sell the loans to MOH, and on or about September 19, 2013, Republic and MOH executed a "Loan Purchase and Sale Agreement (With Consent of Obligors and Pledgors)" (the "LPSA"). In connection with the LPSA, Plaintiff signed a document entitled "Consent of Obligors and Pledgors" (the "Consent").

The Consent contains the following release provision (the "Release"):

[1] The Court allowed Plaintiff to file a Sur-Response to address Defendant's late-disclosed release defense.

> As a material inducement to Lender [Republic] to agree to sell the Loans to Assignee [MOH], each Obligor and Pledgor, on behalf of itself and its past and present officers . . . (individually and collectively, the "Obligor/Pledgor Parties") hereby fully and forever discharge Lender and all of Lender's past present and future officers . . . (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 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 about 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 representation 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.

Legal Analysis

On December 5, 2014, Plaintiff filed this action for negligent misrepresentation and fraudulent inducement, claiming that Defendant misrepresented its knowledge and expertise to

timely process SBA loans and that it altered communications from the SBA to fraudulently induce Plaintiff to believe its loan was being timely processed.

Defendant argues that it is entitled to summary judgment because the Consent/Release signed by Plaintiff constitutes a waiver/release of its claims in this action. It further argues that even if Plaintiff's claims are not barred by the Consent/Release, it is entitled to partial summary judgment on Plaintiff's claim for lost profits.

A. The Consent/Release

Plaintiff contends that the Consent cannot operate as a waiver or release because: (1) it contains no "consent" language; (2) it was not signed by Republic; (3) it was not part of the LPSA; (4) Plaintiff was not a party to the LPSA; (5) it lacked consideration; (6) Plaintiff was under economic duress; (7) there was a unilateral mistake on Plaintiff's part; and (8) it was obtained through fraud, deceit and misrepresentation (the "Fraud Defense"). The Court addresses each argument below.[2]

1. No Consent Language.

Particularly unpersuasive is Plaintiff's first argument that the Release is somehow inapplicable because the document is called a "Consent," but does not contain any "consent" language. The enforceability of a provision in a document does not turn on its title. Further, the Consent was only one and one half pages long, and the Release was prominently addressed in a separate paragraph. Thus, if Mr. Thompson had read the Consent, he could not have missed that it included a broad release of claims.

2. Lack of Signature by Defendant

Similarly unavailing is the argument that the Release is invalid because Republic did not sign it. Section 19(1) of the Restatement (Second) of Contracts, which has been adopted in Arizona,[3] provides that "[t]he manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act." Here, Plaintiff manifested its assent by signing the Consent, and Republic manifested its assent by, at a minimum: (1) signing the LPSA, which included the Consent; and (2) including a provision in the LPSA that it was entitled to the benefits of the Release. Furthermore, Republic has never disavowed or challenged the enforceability of the LPSA or the Consent.

[2] Plaintiff also argues that it did not "waive" the claims here because it did not make a voluntary and intentional relinquishment of a known right. The Court finds the discussion of waiver to be superfluous, as the law on release is more applicable to the circumstances here.

[3] *See Johnson v. Earnhardt's Gilbert Dodge,* 212 Ariz. 381384, 132 P.3d 825, 828 (2006).

3. Consent Not Part of LPSA

The Court rejects Plaintiff's argument that the Consent is not a part of the LPSA because the LPSA: (1) explicitly references the Consent and notes that the Consent is attached to the LPSA; (2) cites the Release as a benefit accruing to Republic; (3) is specifically referenced in the Consent; (4) is entitled "Loan Purchase and Sale Agreement (*With Consent of Obligors and Pledgors*)" (emphasis added); and (5) is numbered pages 1 through 8 with the Consent immediately following at pages 9 through 12.

4. Plaintiff Not a Party to the LPSA

Plaintiff claims that the Release is invalid because it was not a party to the LPSA. This argument is also unpersuasive. The first sentence of the Consent reads:

> 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"):

Paragraph (a) states that Plaintiff "acknowledges the accuracy of the recitals in Article 1 of the Agreement." Paragraph (f) states that "[t]he 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." And, in paragraph (e), Plaintiff acknowledged that it had "conducted whatever investigation [it] deemed necessary to ascertain all facts and matters related to the Agreement and this Consent," and that Plaintiff "had the opportunity to consult with legal counsel concerning the legal consequences of this release."

In short, Plaintiff requested that Republic sell the two loans subject to the LPSA to MOH. It then signed a Consent, which explicitly referred to the LPSA and contained an acknowledgement by Plaintiff to the accuracy of the recitals and an acknowledgement that it had conducted whatever investigation it deemed necessary.[4] Thus, that Plaintiff was not formally identified as a "party" to the LPSA is immaterial to whether it is legally bound by the Consent/Release.

[4] Plaintiff also complains that it was never provided with a copy of the LPSA. However, in light of the facts set forth here, this complaint falls flat. Plaintiff should have requested a copy of the LPSA, and if the request was denied, refused to sign the Consent.

5. Lack of Consideration

Plaintiff next argues that because Republic "did not make any promises to [Plaintiff] in the Consent and there is no obligation owed or agreement made by [Republic]," the release lacks consideration. Resp. at 6. But, while Republic may have had the authority under the loan documents to sell the loans, it was not required to do so. Rather, it agreed to do so as part of Plaintiff's transition to MOH. A promise for a promise constitutes adequate consideration. *Carroll v. Lee*, 148 Ariz. 10, 13, 712 P.2d 923, 926 (1986). Here, Republic promised to sell Plaintiffs' loans to MOH, and Plaintiff agreed to release any claims related to the loans. The Release was therefore supported by adequate consideration.

6. Economic Duress

Plaintiff next contends that the Consent is invalid because Plaintiff signed it under economic duress. In Arizona, "duress exists if one party is induced to assent to a contract by a wrongful threat or act of the other party." *Inter-Tel, Inc. v. Bank of America*, 195 Ariz. 111, 117, 985 P.2d 596, 602 (App. 1999). The *Inter-Tel* Court also cited to a Massachusetts case setting forth the following elements for economic duress: (1) one side involuntarily accepts the terms of another; (2) circumstances permitted no other alternative; and (3) the circumstances were the result of coercive acts of the opposite party. *Id.* (citing *International Underwater Contractors, Inc. v. New England Telephone and Telegraph Co.*, 393 N.E.2d 968, 970 (Mass. Ct. App. 1979)).

Plaintiff argues that:

> [H]ad it not been for [Republic]'s misrepresentations and wrongful conduct, TMCC would never have had to obtain a new lender. Because [Republic] refused to lend TMCC any more money and because [Republic] held the rights to all of TMCC's collateral, TMCC had no choice but to execute the Consent so that it could be able to continue to obtain loans to fund it coffee store chain.

Resp. at 7.

This argument rings hollow. First, there is no evidence that Plaintiff involuntarily accepted Republic's terms. Plaintiff has produced no communications between Plaintiff and Republic, or between Plaintiff and MOH, asking that Consent be eliminated or withdrawn, or that it was being pressured into signing the release due to its financial difficulties. It has also failed to present evidence that it had no other alternative but to sign the Release. And, it actually did obtain another lender. Finally, Plaintiff has presented no evidence of "coercive acts" by Republic. *Id.* In fact, Mr. Thompson stated in his Declaration: "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 [Republic] to [MOH]." PSOF, Ex. 3 at ¶20 (emphasis added).

7. Unilateral Mistake

Under Arizona law, a unilateral mistake induced by misrepresentation can constitute grounds for avoidance of a release. *See Parrish v. United Bank of Arizona*, 164 Ariz. 18, 20, 790 P.2d 304, 306 (1990). Plaintiff did not explicitly raise this defense in its Response to the Motion for Summary Judgment. However, based on Plaintiff's assertions that it had not received a copy of the LPSA and that it was informed that the Consent was a simple consent form to effectuate the sale of the loans, Republic inferred that Plaintiff was arguing unilateral mistake—the mistake being that it was unaware of the implications of signing the Consent/Release.

In its Sur-Response, Plaintiff took up the unilateral mistake theory, but its argument is not based on non-disclosure or misrepresentation regarding the implications of signing the Consent/Release, but rather, Republic's non-disclosure of its "tortious acts" – presumably including Republic's alleged misrepresentations regarding the SBA loans and alteration of SBA documents. Because this theory was first raised in the Sur-Response, which was to be limited to Republic's late-disclosed release argument, the Court is not willing to rule on this new theory without providing Republic an opportunity to respond.

8. The Fraud Defense

As reflected in the Court's minute entry dated March 9, 2017, the Fraud Defense will be addressed after additional discovery is completed.

B. Lost Profits

Republic argues that it is entitled to summary judgment on Plaintiff's claim for lost profits because Plaintiff has failed to provide sufficient evidence to support them, pointing to Plaintiff's expert's reliance on three hypothetical circumstances. The Court finds that to the extent Republic is challenging the reliability or methods used by Plaintiff's expert, the most efficient way of addressing that challenge is through the filing of a *Daubert* Motion. Any summary judgment rulings would then necessarily flow from the outcome of the *Daubert* Motion or hearing.

For the reasons set forth above, at this time,

THE COURT FINDS that the following arguments by Plaintiff to support its contention that the Consent/Release is invalid fail as a matter of law:

1. That the Consent contains no "consent" language;
2. That Republic did not sign the Consent;
3. That Plaintiff is not a party to the LPSA;
4. That the Consent is not part of the LPSA;
5. That the Release lacks consideration; and
6. That Plaintiff was under economic duress

IT IS ORDERED denying Defendant's Motion for Summary Judgment **with respect to lost profits** without prejudice.

IT IS FURTHER ORDERED that a status conference will be set by separate minute entry to address supplemental briefing on Plaintiff's unilateral mistake theory and the status of discovery on the Fraud Defense.

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
09/12/2017 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2014-014647 09/08/2017

HONORABLE DAWN M. BERGIN

CLERK OF THE COURT
S. Ortega
Deputy

THOMPSON MCCARTHY D B, L L C, et al. DANIEL J SLAVIN

v.

REPUBLICBANKAZ N A WILLIAM SCOTT JENKINS

UNDER ADVISEMENT RULING

The Court has considered the following: (1) Defendant RepublicBankAZ, N.A.'s Motion for Summary Judgment and Statement of Facts filed on December 2, 2016; (2) Plaintiff's Response and Statement of Facts; (3) Defendant's Reply; (4) Plaintiff's Sur-Response filed on March 28, 2017; (5) Defendant's Response to Plaintiff's Sur-Response filed on July 6, 2017; and (6) the arguments presented by counsel at the March 9 and July 10, 2017 hearings. It now makes the following findings and orders.

Factual Background

From approximately 2010 to 2013, Defendant RepublicBankAZ, N.A. ("Republic") made commercial real estate loans to Plaintiff that were guaranteed by the Small Business Administration ("SBA"). Due to delays in obtaining one or more SBA loans in the latter part of 2012, Plaintiff terminated its banking relationship with Republic in early 2013 and selected Mutual of Omaha ("MOH") to replace Republic as its lender.

As part of the transition, Plaintiff requested that MOH purchase two of its existing loans with Republic. Republic agreed to sell the loans to MOH, and on or about September 19, 2013, Republic and MOH executed a "Loan Purchase and Sale Agreement (With Consent of Obligors and Pledgors)" (the "LPSA"). In connection with the LPSA, Plaintiff signed a document entitled "Consent of Obligors and Pledgors" (the "Release"), which included a broad release of claims. It reads in relevant part:

> As a material inducement to Lender [Republic] to agree to sell the Loans to Assignee [MOH], each Obligor and Pledgor [Plaintiff]…hereby fully and forever discharge Lender and all of Lender's past present and future officers . . .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.

(Emphasis added).

Legal Analysis

In a minute entry issued on May 30, 2017, the Court found that the following arguments by Plaintiff failed as a matter of law:

1. That the Consent contains no "consent" language;
2. That Republic did not sign the Consent;
3. That Plaintiff is not a party to the LPSA;
4. That the Consent is not part of the LPSA;
5. That the Release lacks consideration; and
6. That Plaintiff was under economic duress

The remaining issue is whether the allegations forming the fraudulent inducement claim in the Complaint—*i.e.*, that Defendant falsely represented that it "would make available SBA guaranteed loans using its competent and experienced employees," constitute a "unilateral mistake" or fraud that can be used to invalidate the Release. Compl. at ¶12. *See* also ¶¶46-52. For the reasons set forth below, the Court finds that they cannot.

Plaintiff relies on *Parrish v. United Bank of Arizona*, 164 Ariz. 18, 790 P.2d 304 (App. 1990) to support its unilateral mistake argument. The *Parrish* Court held that a unilateral mistake induced by misrepresentation can constitute grounds for avoidance of a release if the other party knew or should have known of the mistake. *Id*. at 20, 790 P.2d at 306.

In *Parrish*, plaintiff sought a loan from Defendant bank to develop some property. Defendant turned him down, but suggested that he partner with another bank client to develop the business. The bank failed to disclose, however, that the client was having financial difficulty and was delinquent on his loans. Plaintiff took the suggestion, partnered with the other client, and received a substantial loan from defendant. His partner became insolvent shortly thereafter and filed bankruptcy. Plaintiff then defaulted on the loan. The bank and Plaintiff agreed to release the partner from liability on the loan and plaintiff then took out a second loan. In connection with that loan, the bank required Plaintiff to release it from all claims as of the date of the release. The project then failed, leaving plaintiff on the hook for the defaulted loans.

When plaintiff later learned that the bank knew of the partner's financial difficulties when it recommended him, he sued the bank for fraud and other claims and argued that they were not barred by the release because they were unknown at the time; the release was obtained by fraud; and the release was buried in the "indemnity" section, thereby making it ambiguous and subject to the unilateral mistake doctrine.

With very little analysis, the *Parrish* Court ruled that the bank was not entitled to summary judgment based on the release, finding that there was "a factual issue as to whether the bank knew or should have known that Parrish was mistaken as to the facts surrounding his damages and this unilateral mistake [could] be a basis for avoiding the release." *Id*. It also noted that there was "no evidence that Parrish knew or should have known of the bank's concealment of [his partner's] financial condition." *Id*.

Parrish is materially distinguishable from this case in several ways. First, the release in *Parrish* was a single sentence: "Borrower l . . . hereby releases Lender from all claims, demands, liabilities and causes of action which Borrower may have against Lender as of the date hereof." *Id*. at 19, 790 P.2d at 305. In contrast, the Release here:

(1) specifically refers to claims arising from or connected to "any and all acts, omissions or events relating to the Loans;"
(2) explicitly encompasses unknown claims;
(3) contains a representation and warranty that the parties to the Release "realize and acknowledge that factual matters now unknown to them may have given or may hereafter give rise to causes of action, claims . . . 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;"
(4) provides that Plaintiff had full knowledge its rights, was not relying upon any representations by another, assumed the risk of any mistake of facts now known or unknown; had conducted whatever investigation it deemed necessary; and had the opportunity to consult with legal counsel; and
(5) was drafted by MOH, not the Defendant.

Second, the plaintiff in *Parrish* was not a sophisticated business person, as reflected by the bank's refusal to provide a loan to him due to his inexperience as a contractor. Here, Plaintiff is a limited liability company that owns and operates multiple coffee store chains and has experience with business loans.

More importantly, unlike the plaintiff in *Parrish*, who had no reason to suspect the dire financial condition of his partner, ample evidence exists demonstrating that Plaintiff suspected before it signed the Release that Defendant actually did not have the expertise or personnel to properly and timely obtain SBA-funded loans. *See* Def.'s 7/6/17 Resp. at 8-9 (emails). In *Inter-Tel, Inc. v. Bank of America, Arizona*, 195 Ariz. 111, 116, 985 P.2d 596, 601(App. 1999), the court rejected plaintiff/borrower's attempt to void a release where "it had sufficient knowledge

of the possible motives of the bank," which formed the basis of its fraudulent inducement claim. *See also Seven Investments, LLC v. AD Capital*, 32 A.3d 391, 398 (Del. Ch. 2011).[1] The same is true here. Not only do the emails indicate Plaintiff's suspicion that Defendant misrepresented its ability to accomplish the SBA funding timely, but Defendant's failure to do so is the very reason that Plaintiff moved its business to MOH.

For these reasons,

IT IS ORDERED granting Defendant's Motion for Summary Judgment.

IT IS FURTHER ORDERED that any requests for fees and costs, and a proposed form of judgment shall **be filed within 20 days of the date this minute entry is filed.**

[1]The parties' briefs also addressed whether Defendant did or did not have a duty to disclose its alleged misrepresentations. An analysis of duty, however, is not required to resolve Defendant's Motion for Summary Judgment.

Granted with Modifications
See eSignature page

Michael K Jeanes, Clerk of Court
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S. Ortega, Deputy
1/19/2018 8:00:00 AM
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THOMPSON/McCARTHY COFFEE CO., an Arizona corporation, Plaintiff, vs. REPUBLICBANKAZ, N.A., Defendant.	Case No. CV2014-014647 **JUDGMENT**

Pursuant to the Court's minute entries dated May 30, 2017, September 8, 2017 and January 16, 2018,

IT IS HEREBY ORDERED entering judgment in favor of Defendant RepublicBankAZ, N.A. ("Republic") and against Plaintiff Thompson/McCarthy Coffee Co. on all of Plaintiff's claims.

IT IS FURTHER ORDERED awarding Republic costs in the amount of $2274.40, with interest to accrue thereon at the annual rate of 5.5% from the date judgment is entered until paid.

IT IS FURTHER ORDERED entering final judgment pursuant to Rule 54(c), Ariz. R. Civ. Pro., as no further matters remain pending before the Court.

DATED this ____ day of _____, 2018.

The Honorable Dawn Bergin
Superior Court of Arizona, Maricopa County

Quarles & Brady LLP
Phoenix

Filing ID: 9010563 Case Number: CV2014-014647
Original Filing ID: 8715655

Granted with Modifications

/S/ Dawn Bergin Date: 1/18/2018
Judicial Officer of Superior Court

ENDORSEMENT PAGE

CASE NUMBER: CV2014-014647 SIGNATURE DATE: 1/18/2018

E-FILING ID #: 9010563 FILED DATE: 1/19/2018 8:00:00 AM

DANIEL J SLAVIN

WILLIAM SCOTT JENKINS JR.

DOCKET-CIVIL-CCC

Chris DeRose, Clerk of Court
*** Filed ***

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

5-23-18 8:00A.M.

CV 2014-014647

05/21/2018

HONORABLE DAWN M. BERGIN

CLERK OF THE COURT
S. Ortega
Deputy

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

DANIEL J SLAVIN

v.

REPUBLICBANKAZ N A

WILLIAM SCOTT JENKINS JR.

MINUTE ENTRY

The Court has considered the following: Plaintiff's Motion for New Trial filed on February 5, 2018, Defendant's Response and Plaintiff's Reply. It now makes following findings and orders.

Factual and Procedural Background

From approximately 2010 to 2013, Defendant RepublicBankAZ, N.A. ("Republic") made commercial real estate loans to Plaintiff that were guaranteed by the Small Business Administration ("SBA"). Due to delays in funding SBA loans in the latter part of 2012, Plaintiff terminated its banking relationship with Republic in early 2013 and selected another bank to replace Republic as its lender. On or about September 19, 2013, as part of the transition, Plaintiff executed a document entitled "Consent of Obligors and Pledgors" (the "Consent/Release"), which included a broad release of claims.

On December 5, 2014, Plaintiff filed this action for negligent misrepresentation and fraudulent inducement, claiming that Defendant misrepresented its knowledge and expertise to timely process SBA loans to fraudulently induce Plaintiff to continue its relationship. Defendant moved for summary judgment, arguing that the claims were barred by the Consent/Release.

In its Response to the Motion for Summary Judgment, Plaintiff argued, among other things, that the Consent/Release was fraudulently obtained (the "Fraud Defense"). It did not

mention the unilateral mistake doctrine[1] in its Response, but Defendant interpreted the Fraud Defense to be based on the unilateral mistake doctrine and addressed it in the Reply.

After briefing was complete, Plaintiff filed a Motion for Supplemental Briefing on February 20, 2017, asking for leave to supplement its Response to the Motion for Summary Judgment on its Fraud Defense once it received documents related to the Office of the Comptroller of the Currency's Enforcement Action against Defendant, which Plaintiff claimed Defendant only recently disclosed. The Court heard oral argument on the Motion for Supplemental Briefing on March 9, 2017. It held that Motion and the Motion for Summary Judgment with respect to the Fraud Defense in abeyance so that additional discovery could be conducted, but took under advisement Plaintiff's remaining legal arguments regarding the alleged invalidity of the Consent/Release.

Also at the March 9, 2017 hearing, Plaintiff objected to Defendant asserting release as a defense because it was first raised in Defendant's Reply.[2] The Court therefore allowed Plaintiff to file a Sur-Response to the Motion for Summary Judgment to address the release defense. The Sur-Response was filed on March 28, 2017, but rather than focusing solely on Defendant's alleged late disclosure of the release defense, Plaintiff substantively addressed the unilateral mistake doctrine, adopting it as a defense (the "Unilateral Mistake Defense").[3] The Court therefore allowed Defendant to file a Response to Plaintiff's Sur-Response to give it an opportunity to address the new briefing on the Unilateral Mistake Defense. That Response was filed on July 6, 2017.

In a minute entry issued on May 30, 2017, the Court rejected all of Plaintiff's non-fraud related legal arguments regarding the alleged invalidity of the Consent, leaving only the Fraud and Unilateral Mistake Defenses remaining.[4]

---

[1] Under Arizona law, a unilateral mistake induced by misrepresentation can constitute grounds for avoidance of a release. *See Parrish v. United Bank of Arizona,* 164 Ariz. 18, 20, 790 P.2d 304, 306 (1990).

[2] Defendant asserted waiver as a defense from the outset of the case based on the Consent/Release, but apparently did not separately identify "release" as a defense until it filed the Reply. The Court ultimately found that Plaintiff had adequate notice of the release defense.

[3] In its Reply, Plaintiff suggests that it did not address the unilateral mistake doctrine until its Sur-Response because it had not yet discovered the emails demonstrating the alleged fraud regarding the PV Loan: "[u]pon discovering the emails and these new facts evidencing Republic's shelving of the PV Loan Application, TMCC argued unilateral mistake and Republic's concealment and abandonment of the PV Loan Application as a defense to Republic's release argument which it first raised in its MSJ reply." Reply at 5. This is not the case. Plaintiff had the emails at the time it filed its Response to the MSJ, and they were equally applicable to Defendant's waiver defense as to its release defense. Plaintiff simply failed to raise the Unilateral Mistake Defense in its Response.

[4] Specifically, the Court rejected Plaintiff's arguments that the Consent was invalid because: (1) it contained no "consent" language; (2) it was not signed by Defendant; (3) Plaintiff was not a party to the Loan Purchase and Sale Agreement; (4) the Consent was not part of the Loan Purchase and Sale Agreement; (5) the Release lacked consideration; and (6) Plaintiff was under economic duress.

On July 10, 2017, the Court held a second oral argument to address the Response and Sur-Response. The Court granted Defendant's Motion for Summary Judgment by minute entry dated September 8, 2017 (the "MSJ Ruling"), finding that under *Parrish v. United Bank of Arizona,* 164 Ariz. 18, 20, 790 P.2d 304, 306 (1990), Plaintiff had sufficient notice of Defendant's alleged misrepresentations and non-disclosures prior to executing the Consent/Release, thereby precluding Plaintiff from invalidating it.

Legal Analysis

Plaintiff brings the Motion for New Trial pursuant to Rule 59(a)(1)(H): "the verdict, decision, findings of fact or judgment is not supported by the evidence or is contrary to law." It contends that the Court failed to address a "Second Tort" related to particular loan in the MSJ Ruling and that the reasoning in the Ruling would not apply to the Second Tort. Defendant contends that Plaintiff failed to raise this argument in the briefing or at oral argument and has therefore waived it. Alternatively, Defendant contends that the reasoning in the MSJ Ruling applies with the same force and effect to the Second Tort.

A. Waiver

Arizona law provides that an argument raised for the first time in a Motion for New Trial is waived. *See Conant v. Whitney,* 190 Ariz. 290, 293-94 (App. 1997). Plaintiff contends that this case law does not apply because its "Second Tort" argument is not new.

Plaintiff defines the "First Tort" as Defendant's "fraudulent misrepresentation and fraudulent inducement as to its capabilities as a lender to timely obtain and fund SBA loans." Mot. at 2. It describes the "Second Tort" as follows: "Republic [ ] deceived Plaintiff into believing its loan application for its 4th Dutch Bros. store located in Paradise Valley Mall [the "PV Loan"] was being processed with the SBA, when in reality, Republic had shelved the [PV] Loan Application preventing it from being processed," and that Defendant made false representations regarding the status of the PV Loan to keep Plaintiff as a client. Mot. at 2. Plaintiff also contends that the Second Tort began in July 2012, and that "when [Plaintiff] was required to sign the release, Republic was still *actively* concealing the Second Tort." *Id.* (Emphasis in original).

Plaintiff characterizes the Second Tort as a "*distinctly different tort than the first,*" *id.* (emphasis in original), and distinguishes the PV Loan from the other three SBA loans as follows:

> While there were delays in the three SBA loans Republic funded, these three loans were actually processed and ultimately funded. Republic's concealment

> from TMCC that it had shelved and was not processing the PV Loan Application was a complete departure from the untimeliness complained of in TMCC's Second Amended Complaint.
>
> Not having the expertise or personnel to properly and timely obtain SBA-funded loans is entirely different from Republic intentionally shelving the PV Loan Application for months on end while deliberately concealing from [Plaintiff] the truth by providing [Plaintiff] with false statements.

Reply at 5.

Yet, despite the conduct regarding the PV Loan allegedly being "entirely" and "distinctly" different from the other SBA loans, Plaintiff never characterized it as a "Second Tort" until the filing of the Motion for New Trial, nor did it argue that the Court should differentiate between the conduct related to the PV Loan and the conduct related to the other loans in applying the law. In other words, despite the Court explicitly addressing at the July 10, 2017 hearing Defendant's argument that Plaintiff could not invalidate the Consent/Release based on non-disclosure and misrepresentation because under *Parrish* Plaintiff had reason to be suspicious, Plaintiff never argued that the conduct with respect to the PV Loan was a different tort or should be subject to a different analysis.

In an effort to prove that the Second Tort was sufficiently delineated for the Court, Plaintiff cites to a colloquy between the Court and counsel at the June 26, 2017 status conference where the Court asked whether Plaintiff was claiming that at the time the release was signed, Defendant knew it committed fraud and was concealing the fraud as a potential cause of action to induce Plaintiff to enter into the Consent/Release. Plaintiff's counsel responded in the affirmative. Tr. at 14.[5]

The Court acknowledges that Plaintiff's arguments included that Defendant fraudulently concealed information related to all of the SBA loans, including the PV Loan. However, the Court asked the question in an effort to decipher exactly what Plaintiff's Fraud and Unilateral Mistake Defenses were because they had not been clearly articulated. If Plaintiff contends that the Court should have divined from this statement that the conduct related to the PV Loan was a separate tort that should be analyzed differently when applying *Parrish*, it asks for too much.

In response to Defendant's argument that the Second Tort was not alleged in the Second Amended Complaint (the "SAC"), Plaintiff claims that it could not have included it in the SAC

[5] In its Reply, Plaintiff starts several citations to the transcript with "[the Second Tort was specifically addressed as follows]," and then adds the actual statements in the transcript. Of course, the term "Second Tort" was never used until the filing of the Motion for New Trial.

because it did not discover the Second Tort until certain disclosures were made by Defendant during discovery. Notably, however, Plaintiff apparently knew about the Second Tort by the time it filed its Response to the Motion for Summary Judgment, yet it never moved to amend the SAC to include this "distinctly different" tort. [6]

The Court also notes that Plaintiff waited until February 5, 2018 to file the Motion for New Trial, which was five months after the ruling on the Motion for Summary Judgment, two and one half months after briefing on the Motion for Attorneys' Fees was complete, and 17 days after the Judgment was entered. While Plaintiff's Motion was filed within the timeframes set forth by the Rules, the delay is further evidence that Plaintiff's claims and theories continue to evolve, as they did during the motion practice.

Plaintiff has cited to no briefing or statement at any hearing even suggesting that the Second Tort should be treated differently from the First Tort for purposes of applying *Parrish*. The Court therefore finds that the argument is new and that Plaintiff waived it by failing to raise it earlier.

B. Application of *Parrish* to the Second Tort

As set forth below, even if Plaintiff did not waive the Second Tort argument and the Court considered it, its decision would have been the same.

In the MSJ Ruling, the Court distinguished this case from *Parrish v. United Bank of Arizona*, 164 Ariz. 18, 790 P.2d 304 (App. 1990), based on evidence demonstrating that here, Plaintiff "suspected before it signed the Release that Defendant actually did not have the expertise or personnel to properly and timely obtain SBA-funded loans." Plaintiff claims that the Court must reach a different conclusion when applying this standard to the Second Tort, arguing that there was "[n]o information on which to base a belief or suspicion that Republic had (i) shelved TMCC's [PV] Loan Application, or (ii) falsely communicated with TMCC for the duplicitous purpose of tricking TMCC into staying with the bank." Mot. at 3.

The emails attached to Defendant's Response make it clear, however, that Plaintiff suspected that Defendant was not doing what it said it was going to do with respect to the PV Loan and that some shenanigans might be at play. For example, on January 8, 2013, Mr. Thompson sent an email to Mr. Harris stating, "Michael, am I hanging on to an illusion that we are really getting approved on this loan? Are the promises of upcoming new sites being approved reality?"

[6] Because the Court was having difficulty deciphering the exact nature of Plaintiff's Fraud and Unilateral Mistake Defenses, it relied on the allegations in the SAC in its ruling. MSJ Ruling at 3.

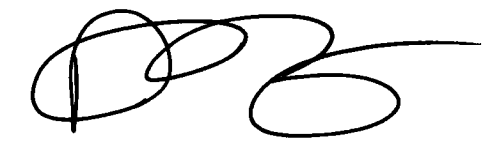
Plaintiff argues, however, that even if it did know that Defendant was not following through on the PV Loan as promised and expressed concerns about it, it would still prevail under *Parrish* as long as it did not know or have reason to know that Defendant had "shelved" the PV Loan or that it misrepresented the status of the PV Loan prior to execution of the Consent/Release. The Court declines to parse the notice standard so thinly. In *Parrish,* the plaintiff had no reason to suspect that his partner was in dire financial circumstances. Here, in contrast, Plaintiff knew Defendant was not doing what it said it would do as to all of the SBA Loans and even asked if the approval on the PV Loan was an "illusion." And, by the time Plaintiff signed the Release eight months after the referring to an illusion, it clearly had reason to suspect that the failure to ever fund the PV Loan was likely not solely based on lack of expertise or personnel. Further, characterizing Defendant's conduct as non-disclosure, misrepresentation or fraudulent concealment does not change the fact that Plaintiff was on notice that something was suspicious about Defendant's performance regarding the PV Loan.

For these reasons,

THE COURT FINDS that Plaintiff waived the "Second Tort" argument by failing to raise it in connection with the Motion for Summary Judgment.

THE COURT FURTHER FINDS that even if the Court were to consider Plaintiff's Second Tort argument, it would not change the Court's summary judgment ruling in Defendant's favor.

IT IS THEREFORE ORDERED denying Plaintiff's Motion for New Trial.



HONORABLE DAWN M. BERGIN
JUDGE OF THE SUPERIOR COURT

Michael K Jeanes, Clerk of Court
*** Electronically Filed ***
D. Sandoval, Deputy
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THOMPSON/McCARTHY COFFEE CO., an Arizona corporation, Plaintiff, v. REPUBLICBANKAZ, N.A., Defendant.	Case No. CV2014-014647 **ANSWER TO SECOND AMENDED COMPLAINT** (Assigned to the Honorable Dawn Bergin)

REPUBLICBANKAZ, N.A. (the "Bank") hereby responds to THOMPSON/MCCARTHY COFFEE CO.'S ("TMC") Second Amended Complaint ("Complaint") and affirmatively alleges, as follows:

1. The Bank admits to the allegations contained in Paragraph 1 of the Complaint. Additionally, the Bank affirmatively alleges that the parties waived the right to a jury trial in the loan documents.

2. In response to the allegations contained in Paragraph 2 of the Complaint, the Bank is without sufficient knowledge and information to admit or deny the allegations set forth therein, and therefore denies the same.

3. The Bank admits to the allegations contained in Paragraph 3 of the Complaint.

4. In response to the allegations contained in Paragraphs 4 through 12 of the Complaint, the Bank is without sufficient knowledge and information to admit or deny the allegations set forth therein, and therefore denies the same.

5. In response to the allegations contained in Paragraph 13 of the Complaint, the Bank alleges that the loan application speaks for itself.

6. In response to the allegations contained in Paragraphs 14 and 15 of the Complaint, the Bank is without sufficient knowledge and information to admit or deny the allegations set forth therein, and therefore denies the same.

7. In response to the allegations contained in Paragraph 16, the Bank denies the allegations therein.

8. In response to the allegations contained in Paragraphs 17 and 18 of the Complaint, the Bank is without sufficient knowledge and information to admit or deny the allegations set forth therein, and therefore denies the same.

9. In response to the allegations contained in Paragraph 19, the Bank admits that two loans were closed by August 2012 and the amount of the loans equaled $1,623,400.00.

10. In response to the allegations contained in Paragraph 20 of the Complaint, the Bank is without sufficient knowledge and information to admit or deny the allegations set forth therein, and therefore denies the same.

11. In response to the allegations contained in Paragraph 21, the Bank denies the allegations therein.

12. In response to the allegations contained in Paragraphs 22 through 29 of the Complaint, the Bank is without sufficient knowledge and information to admit or deny the allegations set forth therein, and therefore denies the same.

COUNT ONE

(Negligent Misrepresentation)

13. The Bank incorporates herein its answers set forth above.

14. In response to the allegations contained in Paragraphs 31 through 35 of the Complaint, the Bank is without sufficient knowledge and information to admit or deny the allegations set forth therein, and therefore denies the same.

15. In response to the allegations contained in Paragraphs 36 through 44, the Bank denies the allegations therein.

COUNT TWO

(Fraudulent Inducement)

16. The Bank incorporates herein its answers set forth above.

17. In response to the allegations contained in Paragraphs 46 through 52, the Bank denies the allegations therein.

18. The Bank denies any and all allegations not specifically admitted herein.

AFFIRMATIVE DEFENSES

19. TMC'S claims against the Bank may be barred in whole or in part by the negligent and/or intentional acts of other parties.

20. The Statute of Frauds requires that any "contract, promise, undertaking or commitment to extend, renew or modify a loan or other extension of credit involving both an amount greater than two hundred fifty thousand dollars and not made or extended primarily for personal, family or household purposes" must be in writing and signed to be valid. A.R.S. §44-101(9). The Bank affirmatively alleges that no evidence of a written contract, promise, undertaking or commitment from the Bank to TMC exists regarding certain allegations of TMC.

21. The Bank alleges that its conduct did not cause or substantially contribute to TMC's alleged loss.

22. The Bank affirmatively alleges that TMC's claims are barred by the statute of limitations, estoppel, unclean hands, waiver and failure to mitigate damages.

23. TMC fails to set forth the *prima facie* elements to establish a claim for negligent misrepresentation and/or fraudulent inducement.

24. TMC fails to state a claim against the Bank upon which an award of attorneys' fees may be granted.

25. The Bank has been forced to retain the services of attorneys to defend this action and is entitled to recover its reasonable attorneys' fees and costs in connection herewith pursuant to A.R.S. §§12-341 and 12-341.01.

26. The Bank also alleges that this action is frivolous and, therefore, the Bank is entitled to recover its attorneys' fees, costs and expenses associated with the defense of this action pursuant to A.R.S. §12-349, or otherwise provided by law.

27. The Bank has not completed its investigation or conducted discovery in this matter, and as such, is uncertain as to any additional affirmative defense that may be applicable in response to the Complaint. Accordingly, the Bank hereby places TMC and its counsel on notice that the Bank reserves the right to plead any other affirmative defenses, including but not limited to those recognized or authorized, under Rules 8 and 12, Ariz. R. Civ. P.

28. The Bank affirmatively alleges that TMC waived the right to a jury trial.

WHEREFORE, the Bank, having fully answered the Complaint, respectfully requests that this Court enter judgment in its favor and against TMC, and award the Bank its attorneys' fees, costs, and such other relief as may be just and proper.

RESPECTFULLY SUBMITTED this 11th day of May, 2015.

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By /s/ Alissa Brice
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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THOMPSON/McCARTHY COFFEE CO., an Arizona corporation, Plaintiff, vs. REPUBLICBANKAZ, N.A., Defendant.	Case No. CV2014-014647 **REPUBLICBANKAZ N.A.'s MOTION FOR SUMMARY JUDGMENT** (Assigned to Hon. Dawn Bergin)

Pursuant to Rule 56, Arizona Rules of Civil Procedure, RepublicBankAZ, N.A. ("Republic") hereby moves for summary judgment as to all counts set forth in Thompson/McCarthy Coffee Co.'s ("TMCC") Second Amended Complaint (the "Complaint") dated April 7, 2015. Because there are no genuine issues of material fact in dispute, Republic is entitled to summary judgement as a matter of law as to TMCC's counts for Negligent Misrepresentation and Fraudulent Inducement.

This Motion is supported by the following Memorandum of Points and Authorities, the Separate Statement of Facts ("SOF") filed contemporaneously herewith, and the pleadings and exhibits filed in this action, all of which are incorporated herein by reference.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PREFATORY STATEMENT.

This lawsuit arises out of a commercial lending relationship during which Republic made certain commercial real estate loans to TMCC. The loans were part of the United States Small Business Administration (the "SBA") program and were to be used by TMCC to build and open up to ten new Dutch Bros. coffee stores in the Phoenix metropolitan area.

Because the loans were part of the SBA program and involved many different entities and separate collateral, the loans were complex commercial real estate transactions. As a result, the closing of the first two loans took longer than TMCC expected. Consequently, on or about December 20, 2012, TMCC ended its business banking relationship with Republic, and by January 2013, TMCC had already selected Mutual of Omaha Bank ("Mutual of Omaha") to replace Republic as its substitute lender. As part of the substitution, TMCC requested that Republic sell its two existing loans with TMCC to Mutual of Omaha so that TMCC could consolidate its banking relationship with Mutual of Omaha. Republic accommodated TMCC's request without having any obligation to do so.

On September 19, 2013, Republic and Mutual of Omaha entered into and executed a Loan Purchase and Sale Agreement (With Consent of Obligors and Pledgors) (hereafter the "Loan Purchase Agreement") for the sale and assignment of the loans by Republic to Mutual of Omaha. As part of the Loan Purchase Agreement and as a condition of the loan sale, TMCC[1] waived any and all claims, liabilities, demands, damages and causes of action of any kind against Republic. As such, TMCC was barred from bringing any claims against Republic, but nevertheless proceeded with the filing of its Complaint

[1] The waiver of claims included TMCC and extended to all other obligors and pledgors (as defined) under the Loan Purchase Agreement.

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against Republic, seeking damages for lost profits. Moreover, even if TMCC did not waive its claims against Republic, TMCC's claims for lost profits is barred under Arizona law. For the reasons discussed more fully in the following Legal Argument, TMCC's claims must be dismissed and it is not entitled to recover any damages.

II. FACTUAL BACKGROUND.

In 2010, TMCC met with Republic for the purpose of obtaining certain commercial real estate loans to be guaranteed by the SBA in order to finance TMCC's construction and expansion of Dutch Bros. coffee stores in the Phoenix metropolitan area. [SOF ¶ 1] Republic was willing to make SBA guaranteed loans to TMCC up to the SBA maximum amount of $5.0 million. [SOF ¶ 2] Indeed, Republic made the following two loans to TMCC: 1) the first loan was a construction and permanent loan in the principal sum of $1,026,300.00 (the "2011 Loan") for the construction of two Dutch Bros. coffee shops - one on South Rural Road in Tempe, Arizona, and another on South Greenfield Road, in Mesa, Arizona; and 2) the second loan was a construction and permanent loan in the principal sum of $597,100.00 (the "2012 Loan") for the construction of a Dutch Bros. coffee shop on East Glendale Avenue in Phoenix, Arizona (the 2011 Loan and 2012 Loan shall collectively be referred to as the "Loans"). [SOF ¶¶ 3-4]

It is undisputed that TMCC was frustrated with the loan approval process, namely over the amount of time it took to obtain SBA approval and close on the Loans.[2] Nevertheless, on or around mid-June 2012, Republic submitted, and the SBA received, an application for the next SBA loan to construct a Dutch Bros. coffee shop in Paradise Valley, Arizona (the "PV Loan Application"). [SOF ¶ 5] In response to Republic's submission of the PV Loan Application, the SBA requested some additional information

[2] Republic does not admit or concede that TMCC's frustration or dissatisfaction was the result of Republic's actions, but only asserts that it is undisputed that TMCC was displeased with the time it took for the SBA to approve the Loans and to subsequently close on them.

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as late as December 2012, which was conveyed to TMCC by Republic, but TMCC ultimately never obtained a loan with Republic for the Paradise Valley location. [SOF ¶ 6]

At the request of Jim Thompson ("Thompson"), on December 20, 2012, Republic's management met with Thompson personally, wherein the parties agreed they no longer had a working relationship and that Thompson was going to use another lender going forward due to Thompson's frustration over how long it took to receive SBA authorization and to close the Loans. [SOF ¶ 10] Republic subsequently offered Thompson a personal line of credit to assist with cash flow and provide access to working capital, but Thompson declined. [SOF ¶ 11] Indeed, TMCC had already selected Mutual of Omaha as its substitute lender in place of Republic. [SOF ¶¶ 7-9]

TMCC asked Republic to sell the Loans to Mutual of Omaha so that it could it could consolidate its lending relation with Mutual of Omaha. [SOF ¶¶ 12-13] Republic agreed to accommodate TMCC's request to sell the Loans, for which TMCC included a full release of claims as to Republic and all the other parties to the Loans as a condition of the loan sale. [SOF ¶ 14]. Thus, on or about September 19, 2013, Republic and Mutual of Omaha entered into and executed the Loan Purchase Agreement for the sale and assignment of the Loans by Republic to Mutual of Omaha, for which TMCC executed the Consent of Obligors and Pledgors (the "Consent"). [SOF ¶ 15]

III. LEGAL ARGUMENT.

A. TMCC Voluntarily And Intentionally Waived Any And All Claims Against Republic.

In executing the Consent as an Obligor (defined therein), TMCC executed an express waiver of any and all claims against Republic. Specifically, the Consent provides as follows:

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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, matured or unmatured, and whether based on any contractual, tort, equitable, common law, restitution, statutory or other ground or theory of any nature whatsoever, *including, without limitation, any and all claims which in any way directly or indirectly rise out of, relate to, result from or are connected to: (i) the Loans, (ii) any and all acts, omissions or events relating to the Loans*, (iii) the sale of Lender's right, title and interest in the Loans to Assignee, and (iv) the Collateral. In this connection, *the Obligor/Pledgor Parties represent and warrant that they realize and acknowledge that factual matters now unknown to them may have given or may hereafter give rise to causes of action, claims, demands, debts, controversies, damages, costs, losses and expenses that are presently unknown*, undisclosed, unanticipated and unsuspected, *and further agree, represent and warrant that this release has been negotiated and agreed 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 thus Consent. The Obligor/Pledgor Parties represent that they have had the opportunity to consult with legal counsel concerning the legal consequences of this release.

[SOF ¶ 16] (emphasis added).

In Arizona,

> Generally, "[w]aiver is either the express, voluntary, intentional relinquishment of a known right or such conduct as warrants an inference of such an intentional relinquishment." *Russo v. Barger*, 239 Ariz. 100, 103 ¶ 12, 366 P.3d 577, 580 (App. 2016) (citing *Am. Cont'l Life Ins. Co. v. Ranier Constr. Co. Inc.*, 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980)).

Compass Bank v. Bennett, 240 Ariz. 58, 375 P.3d 950, 3–953 (Ct. App. 2016), review denied (Sept. 20, 2016).

> The [party's] "waiver" ... is his own voluntary action; and in order to be legally effective, it is not necessary that the [other party] shall have given any consideration for it or shall have changed his position in reliance upon it.
>
> ....
>
> [I]t appears that "waiver" consists of the voluntary action of the obligor alone.

3A, Arthur L. Corbin, Corbin On Contracts § 752 (1960).

The Arizona Supreme Court has held that courts must "generally attempt to enforce a contract according to the parties' intent." *Taylor v. State Farm Mut. Auto. Ins. Co.,* 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993). A contract must be construed "in its entirety and in such a way that every part is given effect." *Cardon v. Cotton Lane Holdings, Inc.,* 173 Ariz. 203, 207, 841 P.2d 198, 202 (1992). Words are "ambiguous only when [they] can reasonably be construed to have more than one meaning." *Id*. However, a contract is not ambiguous if the parties' intent is clear from the contract's language and "in view of all the circumstances." *Smith v. Melson,* 135 Ariz. 119, 121, 659 P.2d 1264, 1266 (1983). Additionally, Arizona courts interpret words "in the context in which they are used, and [considering] the purposes sought . . . by the agreement." *Employmt. Sec. Comm'n v. Amalg. Meat Cutters & Butcher Workmen of N. Am.,* 22 Ariz. App. 54, 58, 523 P.2d 105, 109 (1974); *see also United Cal. Bank v. Prudential Ins. Co.,* 140 Ariz. 238, 259, 681

P.2d 390, 411 (App. 1983) (to ascertain intent, we look at words in the context of the entire contract).

In the instant case, and consistent with the aforementioned canons of contract interpretation and construction set forth by the Arizona Supreme Court in *Taylor*, *Cardon*, *Smith*, and *United Cal. Bank*, *supra*, the Consent must be read "in its entirety and in such a way that every part is given effect." *Cardon*, 173 Ariz. at 207, 841 P.2d at 202. Paragraph (e) of the Consent constitutes a waiver as the language evidences the "express, voluntary, intentional relinquishment of a known right" by TMCC to "fully and forever release and discharge" Republic. [SOF ¶ 16]

Consequently, TMCC waived "any and all claims, liabilities, demands, damages, liens, [and] causes of action," against Republic in return for Republic agreeing to TMCC's request that it sell and assign the Loans to Mutual of Omaha. Republic did not have an obligation to accommodate TMCC's request and certainly would not have done so if it were still subject to potential claims of TMCC (regardless of the merit of such claims). Moreover, the "crux of the waiver doctrine rests upon *conduct demonstrating an intent* to relinquish a known right," and TMCC's intent was unequivocally demonstrated when it voluntarily chose to:

> 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.

31 C.J.S. Estoppel and Waiver § 109; (emphasis added).

Here, there is no ambiguity, in which case the Court must consider and "give effect to the intention of the parties at the time the contract was made if at all possible." *Taylor*, 175 Ariz. at 153, 854 P.2d at 1139 (1993) (citation omitted).

There is no dispute as to the following facts:

1. TMCC executed the Consent in favor of Republic. [SOF ¶ 15]

2. In executing the Consent, TMCC expressly agreed to:

> fully and forever release and discharge [Republic]. . . from any and all claims, liabilities, demands, damages, liens, causes of action . . . including, without limitation, any and all claims which in any way directly or indirectly rise out of, relate to, result from or are connected to: (i) the Loans, (ii) any and all acts, omissions or events relating to the Loans. . . .

[SOF ¶ 16]

3. In executing the Consent, TMCC expressly agreed 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.

[SOF ¶ 16]

In light of the foregoing facts and the unambiguous language of the Consent, TMCC voluntarily and intentionally waived its right to bring any and all claims against Republic, including those claims for Negligent Misrepresentation and Fraudulent Inducement. As such, the claims asserted in TMCC's Complaint are unenforceable and summary judgment must be granted in favor of Republic.

B. <u>Arizona Law Precludes TMCC From Recovering Lost Profits Damages</u>.

In its Complaint, TMCC seeks consequential damages for its alleged lost profits. Even if any of TMCC's claims survive the waiver found in the Consent, lost profits are not recoverable under Arizona law. Rather, recovery is limited to nominal damages.

Lost profits are a type of consequential damages. *See Flagstaff Affordable Housing Ltd. Partnership v. Design Alliance, Inc.*, 223 Ariz. 320, 323, 223 P.3d 664, 667 (2010). TMCC claims that because of Republic, it was "delayed in opening new coffee stores and suffered lost profits," and that "the resulting lost profits incurred by [TMCC]

were proximately caused by [its] reliance on [Republic's] misrepresentations." [*See* Second Amended Complaint, ¶¶ 43, 52.]

However, to date, TMCC has failed to produce any evidence of: 1) lost profits; or 2) misrepresentations by Republic that caused delays in opening new coffee stores. Indeed, TMCC's own damages expert, Leroy M. Gaintner ("Gaintner") was unable to determine TMCC's alleged damages. [SOF ¶ 18] Instead, Gaintner's expert report dated March 5, 2016 (the "Gaintner Report"), presented three different *hypothetical* situations rendering three different damage calculations ranging from $1,583,000 to $5,672,000. [SOF ¶ 18] In other words, TMCC's own expert could only speculate as to TMCC's alleged damages, yet Arizona law demands that:

> [p]roof of the fact of damages must be of a higher order than proof of the amount of damages. (*Citation omitted*). Damages that are speculative, remote or uncertain may not form the basis of a judgment. The speculations, guesses or estimates of witnesses form no better basis of recovery than the speculations of the jury themselves.

Coury Bros. Ranches v. Ellsworth, 103 Ariz. 515, 521, 446 P.2d 458, 464 (1968).

Notably, recovery of lost profits is only allowed if "*evidence* is available to furnish a reasonably certain factual basis for computation of probable losses." *Earle M. Jorgensen Co. v. Tesmer Mfg. Co.,* 10 Ariz. App. 445, 450, 459 P.2d 533, 538 (1969) (citation omitted) (emphasis added). "[R]easonable certainty may be provided when the plaintiff devises some reasonable method of computing his net loss." *Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.,* 140 Ariz. 174, 184, 680 P.2d 1235, 1245 (App.1984). Thus, claims for lost profits are rejected when they are not supported by sufficient evidence. *See Rancho Pescado,* 140 Ariz. at 186, 680 P.2d at 1247.

In this case, the Gaintner Report fails to establish "a reasonably certain factual basis for computation of probable losses," provides no evidence in support of its

assumptions on which the calculations are based, and instead, presents three wildly different computations arising from speculation and conjecture. *Earle M. Jorgensen Co.* 10 Ariz. App. at 450, 459 P.2d at 538. In fact, *neither* TMCC nor the Gaintner Report have set forth any "evidence . . . to furnish a reasonably certain factual basis" for TMCC's alleged damages. Thus, TMCC has failed to meet its burden and its claims for damages based upon lost profits are without merit under Arizona case law.

Furthermore, even if TMCC had met its burden of proof to provide a sum certain damage amount grounded in facts and supported by evidence, the measure of damages for lost profits is limited to "the difference between the contracted for interest rate and the interest rate at the time of breach." *Citibank v. McAlister*, 171 Ariz. 207, 212, 829 P.2d 1253, 1258 (App. 1992); *see also United Cal. Bank*, 140 Ariz. at 295, 681 P.2d at 447; *Inv. Serv. Co. v. Smither*, 556 P.2d 955, 959 (Or. 1976) ("Ordinarily, the damages for breach of a contract to loan money cannot be more than nominal since they money may be procured elsewhere at the same or slightly increased interest rate and without loss to the borrower.").

More specifically, TMCC is not permitted to recover consequential damages where alternative financing is available or where the loan could be obtained from another source. *Citibank*, 171 Ariz. at 212, 829 P.2d; *United Cal. Bank*, 140 Ariz. at 297, 681 P.2d at 449. In *Citibank*, the plaintiff received a half-million dollar line of credit in order to finance his development and manufacture of several new products. 171 Ariz. at 210, 829 P.2d at 1256. When the credit line became due, Citibank promised that it would renew the credit line at a competitive rate, but eventually did not follow through on its promise. *Id.* The plaintiff "applied for comparable credit lines at several other banks and was extended credit by at least [one]." *Id.* The plaintiff filed suit against Citibank, alleging, among other things, negligent misrepresentation, and alleged damages totaling $500 million as a

result of Citibank's failure to renew the line of credit. *Id*. The trial court granted Citibank's motion for summary judgment on the plaintiff's claims of consequential damages, fraud, and breach of fiduciary duty. *Id*.

On appeal, the Arizona Court of Appeals found that there was "no dispute in the evidence that [the plaintiff] could procure the loan money elsewhere." *Id*. at 212, 829 P.2d at 1258. Additionally, the Court of Appeals found that the plaintiff did indeed apply "for comparable credit lines at several other banks" and "was extended credit by at least [one]." *Id*. Accordingly, "the trial court correctly ruled as a matter of law consequential damages should not be recovered" and upheld the trial court's grant of summary judgment. *Id*.

In this case, TMCC's claims arise from alleged delays by Republic in making SBA loans sought by TMCC. There is no dispute that TMCC could have obtained the financing for its business plan through another lender. Indeed, on December 20, 2012, per his request, Thompson met with several Republic employees, including Michael Harris, Emily Chedister, and Stuart Olson. [SOF ¶ 10] At this meeting, Thompson informed Republic that he had decided to obtain the SBA loans through another lender. [SOF ¶ 10] Indeed, there is no doubt that TMCC was shopping for other lenders at least as early as August 2012 when it applied for a loan with Mutual of Omaha. [SOF ¶ 7] Likewise, on September 20, 2012, TMCC completed and delivered to Mutual of Omaha a SBA Application for Business Loan for the sum of $1,350,000. [SOF ¶ 8] As such, by December 19, 2012, just one day prior to the parties' meeting where Thompson informed Republic he would be moving forward with a different lender, TMCC was already well under way in its efforts of obtaining internal approval for loans with Mutual of Omaha. [SOF ¶ 9] Ultimately, the loan purchase and assignment between Mutual of Omaha and Republic was not complete until September 23, 2013. [SOF ¶¶ 15, 17]

Accordingly, in the instant case, it is undisputed that TMCC could, and did, obtain SBA loans through another lender in the market. Therefore, any lost profits alleged by TMCC are not recoverable as a matter of law, and summary judgment must be entered in favor of Republic. *Citibank*, 171 Ariz. at 212, 829 P.2d at 1258.

IV. CONCLUSION.

Republic does not dispute that TMCC was frustrated over the amount of time expended to obtain SBA authorization for the closing and funding of the Loans. Likewise, it is undisputed that it was TMCC who caused the parties to part ways when it pursued alternative financing with Mutual of Omaha *even before ending its relationship with Republic*, and it was TMCC who requested the sale and assignment of the Loans from Republic to Mutual of Omaha. Nonetheless, Republic accommodated TMCC's request and on September 19, 2013, Republic and Mutual of Omaha entered into and executed the Loan Purchase Agreement for the sale and assignment of the Loans by Republic to Mutual of Omaha, for which TMCC executed the Consent. In other words, Republic satisfied all obligations to TMCC when it sold the Loans it had no obligation to sell, in return for which TMCC voluntarily entered into and delivered the Consent to Republic. If Republic had known that TMCC would request the sale of the Loans only to turn around and violate the terms and conditions of the Consent by bringing claims against Republic, it would not have agreed to such sale.

Again, the language of the Consent manifests the unequivocal intent of the parties, which was for TMCC to waive any and all claims, liabilities, demands, damages and causes of action of any kind against Republic upon Republic's sale and assignment of the Loans. Once the sale of the Loans and execution of the Consent was complete on September 19, 2013, the parties had no further obligations to each other, and consequently, TMCC's claims against Republic are without merit and must be dismissed.

In light of the foregoing, summary judgment must be entered in favor of Republic and against TMCC. Republic also respectfully requests an award of its reasonable attorneys' fees and costs incurred herein.

Dated this 2nd day of December, 2016.

QUARLES & BRADY LLP

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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 TMCC[1]), 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 "L"



Dutch Bros Coffee
PO Box 7433
Chandler, AZ 85246

January 15, 2013

Corey Schimmel
Mutual of Omaha Bank
555 W Chandler Blvd
Chandler, AZ 85225

Re: Thompson McCarthy Coffee Co.
Thompson McCarthy DB LLC.
All entities associated with Thompson McCarthy Coffee Co.

Dear Mr. Schimmel:

I am very excited to be going forward with Mutual of Omaha Bank.

I am giving you and Mutual of Omaha Bank permission to work on my behalf to obtain or buy all loans associated with Thompson/McCarthy DB LLC and Thompson McCarthy Coffee Co from RepublicBank. I also give you approval to obtain any information on the pending SBA loan for the now completely finished Paradise Valley location and get that approved and funded on our behalf.

We have chosen Mutual of Omaha Bank to transfer all of our SBA loans to, and also to go forward in the future with our growth forecast.

If you have ANY questions please call me at 541-941-1152.

Sincerely,

James L. Thompson
Thompson/McCarthy Coffee Co.

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 23rd, 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, Vice President

3372030.1
09/20/13

FIRST AMENDMENT TO
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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 Schimmel, Vice President

3372030.2
09/20/13

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 Acknowledgements. 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 Chediker, VP
Emily Chediker, 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, 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, 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
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/12® 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/12®" (i) were intended to refer to TMDB and Glendale/12®, as separate entities, and (ii) shall hereafter be construed as if TMDB and Glendale/12® 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, Manager

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

_____
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, President

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

By: _____
James L. Thompson, Manager

PLEDGORS:

Rural Guadalupe DB LLC, an Oregon limited liability company

By: _____
James L. Thompson, Manager

Greenfield Southern DB LLC, an Oregon limited liability company

By: _____
James L. Thompson, Manager

McQueen/Guadalupe DB LLC, an Oregon limited liability company

By: _____
James L. Thompson, Manager

Camelback Central DB LLC, an Oregon limited liability company

By: _____
James L. Thompson, Manager

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

By: _____
James L. Thompson, Manager

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

By: _____
James L. Thompson, Manager

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

By: _____
James L. Thompson, Manager

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

By: _____
James L. Thompson, Manager

Papago Plaza DB LLC, an Oregon limited liability company

By: _____
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 29th 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./12th 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 29th 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./12th Street DB LLC
Assignment of Architect's Contracts (sake reindersma architecture pllc)	10-04-2012	TMDB DBA Glendale Ave./12th 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 29th 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	File 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 29th 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 "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.

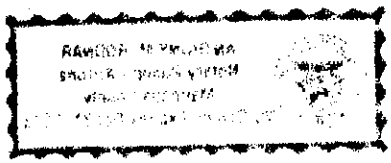


EXHIBIT "D"
(to Loan Purchase and Sale Agreement)

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 29th 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./12th 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 29th 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./12th Street DB LLC
Assignment of Architect's Contracts (sake reindersma architecture pllc)	10-04-2012	TMDB DBA Glendale Ave./12th 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 29th 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	File 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 29th 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 2

From: Michael Harris <mHarris@republicaz.com>
Sent: Thursday, November 17, 2011 9:21 AM
To: 'Accounting' <accounting@equ8ation.com>; Marla Woods <mwoods@republicaz.com>
Cc: Thompson Jim L. <dutchbrosjt@gmail.com>; Vines Dave <grapevinedave@yahoo.com>
Subject: RE: SBA for Thompson McCarthy DB LLC

The new financial request was not for the Greenfield location it was for the new locations pending, I believe they are 12th st and Glendale, 40th St and Indian School, and PV Mall.

Also please refer to your email as I have addressed your questions within the email.

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)

From: Accounting [mailto:accounting@equ8ation.com]
Sent: Thursday, November 17, 2011 8:14 AM
To: Michael Harris; Marla Woods
Cc: Thompson Jim L.; Vines Dave
Subject: SBA for Thompson McCarthy DB LLC

Michael.

I finally had the time to go over all the documents including in the "final" loan documents that were approved and effective 10/24/2011.

The Disbursement request includes all the costs associated with:
Purchasing Equipment $87,226.00 (no location specified) - This represents the combining of $43,613 for each location. Please refer to the project budget that Bill Piazza together for you as all of our fees match his costs.
Working Capital $73,849.62 (I would assume that means we can request this amount for capital)- You can request half of this immediately as this represents the allocation for both locations $36,924.81 for each location
Rural Construction $419,142.00 – Correct
Greenfield Construction $419,142.00 - Correct

It appears to me that we have *already* been approved to submit payments for funding on the Greenfield location, as this loan was for 2 sites. Rural/Guad and Greenfield and the line of credit approved was for all costs associated with both locations.

If that is the case, I am confused by your request last week for new financials to reapply for a loan for the Greenfield location – See my response above

There is a expiration date listed for the settlement and disbursement of the loan, that would make me believe that we have until 12/31/2011 to completely disburse these funds.... is this correct? Can you check on the 2 items above. As we had to make a deposit on the lease and I was told that we had to pay it and then be reimbursed which I have done – If you have made the deposit send me the receipt and I will pay it. If not send me the invoice and I will pay that.

But if we must disburse all funds by 12/31/2011, we will need to verify our schedules for the new build-out – The Bank must disburse all funds to you by 12/31/2011. We have already done than and currently keep the money in Bank Controlled account. This way you do not have to rush to meet the 12/31/2011 deadline.

I am going to come in to your office a little earlier than we scheduled. I will be there at noon. I am bringing all the copies of the receipts that I have for reimbursement and pickup a check for Thompson/McCarthy DB LLC., Additionally I did not see a payment schedule or any type of Amortization schedule on how we are to pay this loan back. If you could get that information together for me that would be most helpful.

I look forward to finally meeting you.

Kathye Pease, MBA

EQ8 Accounting & Bookkeeping, LLC

PO Box 7433
Chandler AZ 85246

480-359-4883 (office)
480-307-8412 (fax)
480-466-6589 (cellular)

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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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Dutch Bros. *Coffee*<PastedGraphic-1.tiff>

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

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

Dutch Bros. *Coffee*

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

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

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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Warning: This message is intended only for the use of the individual or entity to which it is addressed.

---------- Forwarded message ----------
From: **Thompson Jim L.** <dutchbrosjt@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" <dutchbrosjt@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

Dutch Bros. Coffee

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

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

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Dutch Bros. Coffee 

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Scottsdale, AZ 85262 |
(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"

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, adversed 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 adversed 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) Kathye 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) Kathye 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.] Kathye 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) Kathye 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 Kathye 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?" Kathye 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 Kathye 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 Kathye 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. &n 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". Kathye 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". Kathye 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 Kathye 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) Kathye 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 (TMCC005971) 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 (TMCCC005397-5398) 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".

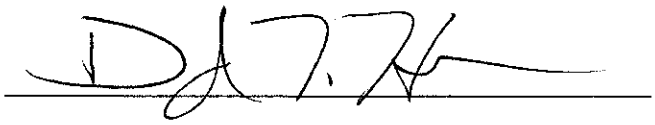
- On 9/24/12 (TMCC005318-5319) Jim T. asks Michael H. "how are we doing on the PV approval?" He responds "we are simply waiting on the appraisal". He adds "I anticipate having it back by Monday, the time frame after that is to get it over to the SBA attorney for review and it should be done within 2 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 (TMCC00S694) 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 (TMCC00S345-5347) 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.



Douglas T. Haman

EXHIBIT 6

SUMBMIT COMPLETED APPLICATIONS TO LENDERS OF CHOICE OMB Approval No. 3245-0016 Expiration Date: 11/30/2012

SBA Loan Number	U.S. SMALL BUSINESS ADMINISTRATION LENDER'S APPLICATION FOR GUARANTY OR PARTICIPATION	Loan Submitted As: ☒ Reg 7(a) ☐ CLP ☐ PLP

Business Name of Applicant	Applicant NAICS Code:	
Thompson - McCarthy DB, LLC	445120	
Name of Lender	**Telephone (Inc. A/C)**	**FIRS No. (SBA's Use)**
RepublicBankAz, N.A.	602-280-9412	
Street Address	**City**	**State / ZIP**
909 E. Missouri Avenue	Phoenix	AZ 85014

WE PROPOSE TO THE FOLLOWING LOAN TERMS:

Lender's Share Guaranteed Loan	SBA's Share	Term of Loan
25 %	75 %	25 Years
Amount of Loan	**Payment Beginning**	**Monthly Payment**
$ 597,100	1 Months from Date of Note	$ 3,666.72
Lender's Interest Rate	**If Interest Rate is to be Variable**	**Base Rate Source**
5.50 % Per Annum	Base Rate 3.25 Adjustment Period Quarterly Spread 2.25	WSJ Prime

CONDITIONS OF LENDER (e.g. Insurance requirements, standbys, other conditions. Use additional sheet(s))

The Bank will secure a $500,000 Key Man Life Insurance Policy on James Thompson

I approve this application to SBA subject to the terms and conditions outlined above. Without the participation of SBA to the extent applied for we would not be willing to make this loan, and in our opinion the financial assistance applied for is not otherwise available on reasonable terms. I certify that none of the Lender's employees, officers, directors, or substantial stockholders (more than 10%) have a financial interest in the applicant.

Lender Official (Please Type or Print Name under Signature)	Title	Date
Michael Harris	Vice President	February 24, 2012

ON PLP SUBMISSIONS ONLY: I approve and certify that the applicant is a small business according to the standards in 13 CFR 121, the loans proceeds will be used for an eligible purpose, and the owners and managers of the applicant business are of good character.

Approving/Certifying Lender Official (Please Type or Print Name under Signature)	Title	Date

FOR SBA USE ONLY

Loan Officer's Recommendations

☐ Approve ☐ Decline State Reason(s)

Signature	Title	Date

Other Recommendation if Required

☐ Approve ☐ Decline State Reason(s)

Signature	Title	Date

THIS BLOCK TO BE COMPLETED BY SBA OFFICIAL TAKING FINAL ACTION

☐ Approve ☐ Decline State Reason(s)

Signature	Title	Date

SBA FORM 4-I (9-09) PREVIOUS EDITIONS OBSOLETE

Federal Recycling Program Printed on Recycled Paper

INSTRUCTIONS: Lender will complete and enclose as part of this application package, all working papers, support material, and agreements requested herein, specifically including:

1. Balance sheet and ratio analysis - comments on trends, debt to worth, and current ratio.
2. Lender's analysis of repayment ability.
3. Management skill of the applicant.
4. Collateral offered and lien position, and analysis of collateral adequacy.
5. Lender's credit experience with the applicant. Identify weaknesses.

FINANCIAL SPREAD

In Column 1 please show the most recent balance sheet figures of an existing business or the initial equity investment of a start-up business or the purchase of a business. Columns 2 and 3 are to reflect adjusting entries, the use of loan proceeds, and loan repayment. Column 4 is to reflect the balance sheet of the business immediately following loan disbursement. Base the financial analysis on Column 4 figures.

BALANCE SHEET	As of 12/31/2011	Fiscal Year Ends	AUDITED ☐	UNAUDITED ☑
		DEBIT	CREDIT	PRO FORMA
Assets				
Cash	$ 778,806	$	$	$ 778,806
Accounts Rec.				
Inventory				
Other	5,663		127,010	132,673
Total Current Assets	784,469			911,479
Fixed Assets	2,464,315		456,665	2,920,980
Other Assets	1,710,046			1,710,046
Total Assets	$ 4,958,830	$	$	$ 5,542,505
Liabilities & Net Worth				
Accounts Payable	$ (110,345)	$	$ 110,345	$
Notes Payable				
Taxes				
Other				
SBA	19,395		11,446	30,841
Total Current Liabilities	$ (90,950)	$	$	$ 30,841
Notes Payable	$	$	$	$
SBA	1,014,854		585,654	1,600,508
Other	1,085,758			1,085,758
Total Liabilities	$ 2,009,662	$	$	$ 2,717,107
Net Worth	$ 2,949,168	$	$	$ 2,825,398
Total Liab. & Net Worth	$ 4,958,830	$	$	$ 5,542,505

Profit & Loss	PRIOR THREE YEARS			INTERIM	PROJECTIONS	
Sales	$ 386,041	$ 1,367,290	$ 2,516,878	$ 3,496,261	$ 3,636,111	$ 3,781,555
Depreciation	88,034	478,381	122,213		127,102	132,186
Income Taxes	17,989	24,566	67,751	88,582	92,125	95,810
W/D Officer Comp.						
Net Profit after Tax/Deprec.	$ -385,711	$ -630,070	$ -313,178	$ 528,388	$ 549,524	$ 571,505

PRO FORMA SCHEDULE OF FIXED OBLIGATIONS

	YEAR 1	YEAR 2	YEAR 3	YEAR 4
	$ 123,346	$ 123,346	$ 123,346	$ 123,346

Lender's Analysis:

The financial analysis in the table above displays the company's current state of growth. The large cash balances in Bank accounts represents the company's decision to reinvest earnings into the company for both financial stability and to assist with future growth plans.

The interim financial financial analysis represent the 12/31/2011 fiscal year end and is based on a CPA Compiled financial statement.

Projections represent the 12/31/2012 and 12/31/2013 fiscal year ends

The estimated burden for completing this form is 2 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 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. 30503. **OMB Approval (3245-0016)** PLEASE DO NOT SEND FORMS TO OMB.

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)

DO NOT COPY/DO NOT FORWARD

Warning: This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient or employee/agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you receive this communication in error, please notify me immediately.

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

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 7

SUMBMIT COMPLETED APPLICATIONS TO LENDERS OF CHOICE OMB Approval No. 3245-0016 Expiration Date: 11/30/2012

SBA Loan Number	U.S. SMALL BUSINESS ADMINISTRATION LENDER'S APPLICATION FOR GUARANTY OR PARTICIPATION	Loan Submitted As: ☒ Reg 7(a) ☐ CLP ☐ PLP
Business Name of Applicant Thompson McCarthy DB, LLC	Applicant NAICS Code: 445120	
Name of Lender RepublicBankAz, N.A.	Telephone (Inc. A/C) 602-280-9412	FIRS No. (SBA's Use)
Street Address 909 E Missouri Avenue	City Phoenix	State: AZ ZIP: 85014

WE PROPOSE TO THE FOLLOWING LOAN TERMS:

Lender's Share / Guaranteed Loan	SBA's Share	Term of Loan
25 %	75 %	25 Years
Amount of Loan	**Payment Beginning**	**Monthly Payment**
$ 640,400	1 Months from Date of Note	$ 4,028.80
Lender's Interest Rate	**If Interest Rate is to be Variable**	**Base Rate Source**
5.75 % Per Annum	Base Rate 3.25% Adjustment Period Quarterly Spread 2.50%	WSJ Prime

CONDITIONS OF LENDER (e.g. Insurance requirements, standbys, other conditions. Use additional sheet(s))

See Lender Credit Memorandum

I approve this application to SBA subject to the terms and conditions outlined above. Without the participation of SBA to the extent applied for we would not be willing to make this loan, and in our opinion the financial assistance applied for is not otherwise available on reasonable terms. I certify that none of the Lender's employees, officers, directors, or substantial stockholders (more than 10%) have a financial interest in the applicant.

Lender Official (Please Type or Print Name under Signature)	Title	Date
Michael Harris	Vice President	6/19/12

ON PLP SUBMISSIONS ONLY: I approve and certify that the applicant is a small business according to the standards in 13 CFR 121, the loans proceeds will be used for an eligible purpose, and the owners and managers of the applicant business are of good character.

Approving/Certifying Lender Official (Please Type or Print Name under Signature)	Title	Date

FOR SBA USE ONLY

Loan Officer's Recommendations ☐ Approve ☐ Decline State Reason(s)

Signature	Title	Date

Other Recommendation if Required ☐ Approve ☐ Decline State Reason(s)

Signature	Title	Date

THIS BLOCK TO BE COMPLETED BY SBA OFFICIAL TAKING FINAL ACTION

☐ Approve ☐ Decline State Reason(s)

Signature	Title	Date

SBA FORM 4-I (9-09) PREVIOUS EDITIONS OBSOLETE

INSTRUCTIONS: Lender will complete and enclose as part of this application package, all working papers, support material, and agreements requested herein, specifically including:

1. Balance sheet and ratio analysis - comments on trends, debt to worth, and current ratio.
2. Lender's analysis of repayment ability.
3. Management skill of the applicant.
4. Collateral offered and lien position, and analysis of collateral adequacy.
5. Lender's credit experience with the applicant. Identify weaknesses.

FINANCIAL SPREAD

In Column 1 please show the most recent balance sheet figures of an existing business or the initial equity investment of a start-up business or the purchase of a business. Columns 2 and 3 are to reflect adjusting entries, the use of loan proceeds, and loan repayment. Column 4 is to reflect the balance sheet of the business immediately following loan disbursement. Base the financial analysis on Column 4 figures.

BALANCE SHEET	As of 4/30/2012	Fiscal Year Ends	AUDITED ☐	UNAUDITED ☐
		DEBIT	CREDIT	PRO FORMA
Assets				
Cash	$ 671,653	$	$	$ 671,653
Accounts Rec.				
Inventory				
Other	5,404		75,000	80,404
Total Current Assets	677,057			750,057
Fixed Assets	2,612,116		543,700	3,155,816
Other Assets	1,795,047			1,795,047
Total Assets	$ 5,084,220	$	$	$ 5,702,920
Liabilities & Net Worth				
Accounts Payable	$ 27,879	$	$ -27,879	$
Notes Payable				
Taxes				
Other				
SBA	28,265		11,831	40,097
Total Current Liabilities	$ 56,145	$	$	$ 40,097
Notes Payable	$	$	$	$
SBA	1,014,854		628,569	1,643,520
Other	632,097		632,097	
Total Liabilities	$ 1,703,095	$	$	$ 1,683,520
Net Worth	$ 3,381,124	$	$	$ 4,019,400
Total Liab. & Net Worth	$ 5,084,220	$	$	$ 5,702,920

Profit & Loss	PRIOR THREE YEARS			INTERIM	PROJECTIONS	
Sales	$ 1,367,290	$ 2,516,878	$ 3,496,261	$ 1,030,470	$ 3,091,410	$ 3,215,066
Depreciation	478,381	122,213			150,111	160,753
Income Taxes	24,566	67,751	88,852			
W/D Officer Comp.						
Net Profit after Tax/Deprec.	$ -630,070	$ -313,178	$ 528,388	$ 115,794	$ 347,382	$ 361,277

PRO FORMA SCHEDULE OF FIXED OBLIGATIONS

	YEAR 1	YEAR 2	YEAR 3	YEAR 4
	$ 169,878	$ 169,878	$ 169,878	$ 169,878

Lender's Analysis:

The financial analysis in the table above displays the company's current state of growth. The large cash balances in the company's bank account represents the company's decision to reinvest earnings into the company for both financial stability and to assist with future growth plans.

The projected profit and loss represent the 12/31/2012 and 12/31/2013 fiscal year ends.

The estimated burden for completing this form is 2 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 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. 30503. **OMB Approval (3245-0016)** PLEASE DO NOT SEND FORMS TO OMB.

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 letterreflecting 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/lgpc/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.

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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), page151, 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

Federal Recycling Program Printed on Recycled Paper

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

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

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EXHIBIT 9

From: Beevers, Mary A. (Contractor) <mary.beevers@sba.gov>
Sent: Thursday, July 5, 2012 11:24 AM
To: Michael Harris <mHarris@republicaz.com>
Cc: Lease, Cathleen M. <cathleen.lease@sba.gov>
Subject: Screen Out Letter-Control #43783 Thompson McCarthy DB LLC
Attach: 43783-SCREENOUT.pdf

Attached is the screen out letter for the above referenced loan. If you have any questions or concerns regarding the attached letter, please direct them to the individual shown on the bottom of the letter as they are your loan specialist. **I cannot answer any questions regarding the letter.** If you have any questions regarding how to submit your response, please feel free to contact me.

When submitting your response please use one of the following methods:

There are four ways a lender can submit an application or a response to a screen out/decline letter (for 7a, CAPLine, DFP, and S/RLA loans). In order of preference they are:

1. Use "Send this File". This is the most preferred method because it is easy to use, does not have file size limitations,and can be accessed by several SBA personnel.
-To send it this way: Go tohttp://www.sba.gov/content/send-fileand click "Send a file to the LGPC - CA", enter the required information and attach the files.

2. E-mail it to the standard 7a program in box. This option works fine as long as the total file size does not approach 8 meg in size. If the file size nears or exceeds 8 megs, the e-mail may or may not go through. Often neither the sender nor SBA will be notified that it did not go through.
The e-mail address is:7aLoanProgram@sba.gov.

3. Mail it to us. Please note: You save postage and time if you email your application or response.
Standard 7a Loan Guaranty Processing Center
6501 Sylvan Road, Suite 122
Citrus Heights, CA 95610

4. Fax it to our fax server. This option will work for larger files, but it can be a bit cumbersome to work with. The fax # is:(606) 435-2400.

Thank you,

Mary Beevers
Small Business Administration
Clerk III
p. (916) 735-1951
f. (606) 435-2400
mary.beevers@sba.gov

SBA

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.)*

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    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
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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.

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

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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.

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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

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From: Michael Harris <mHarris@republicaz.com>
Sent: Monday, December 3, 2012 3:41 PM
To: 7a Loan Program (7aLoanProgram@sba.gov)
Subject: SBA Control Number 43783 - Thompson-McCarthy DB, LLC - Email 1
Attach: SBA Screen Out Response PV.pdf

Attached are the responses to the screen out questions dated June 28, 2012. This is the first of two emails.

Thank you

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

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

480-818-9736 mobile

www.piazza-az.com

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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

REPUBLIC BANK AZ

909 E. MISSOURI AVE

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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
"This email and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you have received this email in error, please notify the system manager. This message contains confidential information and is intended only for the individual named. If you are not the named addressee you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system. If you are not the intended recipient you are notified that disclosing, copying, distributing or taking any action in reliance on the contents of this information is strictly prohibited."

OMB Approval No. 3245-0016
Expiration Date 11/30/2012

U. S. Small Business Administration

APPLICATION FOR BUSINESS LOAN

Individual	Full Address
James Thompson	27915 N 100th Place Scottsdale, AZ 85282

Name of Applicant Business	Tax I.D. No. or SSN
Thompson McCarthy DB, LLC	20-8527338

Full Street Address of Business	Tel. No. (inc. Area Code)
27915 N 100th Place Scottsdale, AZ 85282	480-595-9082

City	County	State	Zip	Number of Employees (including subsidiaries and affiliates)
Scottsdale	Maricopa	AZ	85282	At Time of Application: 74

Type of Business	Date Business Established	
Coffee-Convenience Store	2006	If Loan is Approved: 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	$56,700
Working Capital (including Accounts Payable)	$75,000	Total Loan Requested	$640,400
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 Agency Loan #	Borrower's Name	Original Amount of Loan	Date of Application	Loan Status	Outstanding Balance	$ Amount of Loss to the Government.
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 159 (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.**

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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		*Gender
James Thompson 540-50-2034 Manager	27915 N 100 Place Scottsdale, AZ 85262	50%	*Veteran Status Veteran Yes☐ No☒ If yes, service-disabled? Yes☐ No☐	Male
Race * :Amer. Indian or Alaska Native☐ Asian☐ Black or African-Amer.☐ Native Haw. or Pacific Islander☐ White☒			*Ethnicity:Hispanic or Latino☐ Not Hisp or Lantino☐	
Janice L McCarthy 541-72-1057 Member	27915 N 100 Place Scottsdale, AZ 85262	50%	*Veteran Status Veteran Yes☐ No☒ If yes, service-disabled? Yes☐ No☐	Female
Race * :Amer. Indian or Alaska Native☐ Asian☐ Black or African-Amer.☐ Native Haw. or Pacific Islander☐ White☐			*Ethnicity:Hispanic or Latino☐ Not Hisp or Lantino☐	
			*Veteran Status Veteran Yes☐ No☐ If yes, service-disabled? Yes☐ No☐	
Race * :Amer. Indian or Alaska Native☐ Asian☐ Black or African-Amer.☐ Native Haw. or Pacific Islander☐ White☐			*Ethnicity:Hispanic or Latino☐ Not Hisp or Lantino☐	
			*Veteran Status Veteran Yes☐ No☐ If yes, service-disabled? Yes☐ No☐	
Race * :Amer. Indian or Alaska Native☐ Asian☐ Black or African-Amer.☐ Native Haw. or Pacific Islander☐ White☐			*Ethnicity:Hispanic or Latino☐ Not Hisp or Lantino☐	

*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.

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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

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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 _____ X _____
Signature Date

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

X _____ X _____
Signature Date

Check all that apply: [X] guarantor [X] 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.

OMB APPROVAL NO.3245-0178
Expiration Date: 2/28/2013

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: James | Middle: L | Last: 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

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

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

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	Title	Date
X	Manager	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

The following is a brief summary of the laws applicable to this solicitation of information.

Paperwork Reduction Act (44 U.S.C. Chapter 35)

SBA is collecting the information on this form to make a character and credit eligibility decision to fund or deny you a loan or other form of assistance. The information is required in order for SBA to have sufficient information to determine whether to provide you with the requested assistance. The information collected may be checked against criminal history indices of the Federal Bureau of Investigation.

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.

OMB APPROVAL NO.3245-0178
Expiration Date: 2/28/2013

United States of America
SMALL BUSINESS ADMINISTRATION
STATEMENT OF PERSONAL HISTORY

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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: Janice | Middle: L | Last: 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
Scottsdale, AZ 85262

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

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

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YOU MUST INITIAL YOUR RESPONSES TO QUESTIONS 5,7,8 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, o 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.

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Signature	Title	Date
X	Member	X

Agency Use Only

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☐ 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.)

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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

SBA Form 1624 (12/92)

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 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 deas 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

Federal Recycling Program Printed on Recycled Paper

SBA Form 1846 (8-92)

*U.S. Government Printing Office: 1993

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

Section 1. Source of Income		Contingent Liabilities	
Salary	$	As Endorser or Co-Maker	$
Net Investment Income	$	Legal Claims & Judgments	$
Real Estate Income	$	Provision for Federal Income Tax	$
Other Income (Describe below)*	$	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.)

TMCC006215
APP261

OMB Approval No.: 3245-0016
Expiration Date: 11/30/2012

U.S. SMALL BUSINESS ADMINISTRATION
SCHEDULE OF COLLATERAL
Exhibit A

Applicant: Thompson McCarthy DB, LLC		
Street Address: 27915 N 100th Place		
City: Scottsdale	State: Arizona	Zip Code: 85282

LIST ALL COLLATERAL TO BE USED AS SECURITY FOR THIS LOAN

Section I – REAL ESTATE

Attach a copy of the deed(s) containing a full legal description of the land and show the location (street address) and city where the deed(s) is recorded. Following the address below, give a brief description of the improvements, such as size, type of construction, use, number of stories, and present condition (use additional sheet if more space is required).

LIST OF PARCELS OF REAL ESTATE					
Address	Year Acquired	Original Cost	Market Value	Amount of Lien	Name of Lienholder

Description(s)

SBA Form 4, Schedule A (09-09) Previous Editions Obsolete
SUBMIT COMPLETED APPLICATION TO LENDER OF CHOICE

Section II- PERSONAL PROPERTY

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).

Description-Show Manufacturer, Model, Serial No.	Year acquired	Original Cost	Market Value	Current Lien Balance	Name of Lienholder
All Business Assets					RBAZ

All Information contained herein it 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. **OMB Approval (3245-0016).**

SBA Form 4, Schedule A (09-09) Previous Editions Obsolete

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 Janice L. McCarthy SS# 541-72-1057
Date of Birth 01-11-56 Place of Birth Spokane, WA.
Residence Telephone # 541-474-9496 Business Telephone # 541-944-9899
Residence Address 196 Westwood Dr City Grants Pass State OR Zip Code 97527
From 1975 To present date.

Previous Address: _____ City _____ State _____ Zip Code _____
From _____ to _____
Spouse's Name Janice L Thompson SS# 540-50-2034
Are you employed by the U. S. Government? _____ Yes X NO Agency / Position _____
Are you a U.S. Citizen? X Yes _____ No, If no, give Alien Registration Number _____

EDUCATION:

High School/College/Technical-Name/Location	Dates Attended	Major	Degree/Certificate
Oregon Health Sciences Univ. School Medicine	Grad 1990	M.D.	M.D.

MILTARY SERVICE BACKGROUND:

Branch of Service X 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 _____

Janice L. McCarthy MD Date X
Signature

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# 540-50-2034
Date of Birth 02-15-45 Place of Birth McAlester, OK
Residence Telephone # 480 595 9082 Business Telephone # 541 941 1152
Residence Address 2715 N. 100th Place City Scottsdale State AZ Zip Code 85262
From 2001 To present date.

Previous Address: _____ City _____ State _____ Zip Code _____
From _____ to _____
Spouse's Name Janice L. McCarthy SS# 541-72-1057
Are you employed by the U. S. Government? _____ Yes X NO Agency / Position _____
Are you a U.S. Citizen? X Yes _____ No, If no, give Alien Registration Number _____

EDUCATION:

High School/College/Technical-Name/Location	Dates Attended	Major	Degree/Certificate
Sperry Public High School	1960-1963		Graduated
University of Oklahoma	1964-1966	BUS	None

MILITARY SERVICE BACKGROUND:

Branch of Service None Dates of Service _____ to _____

WORK EXPEREINCE: List chronologically with present employer.

Company Name / Location Cascade Auto Group DBA 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 _____

X James L. Thompson Date X
Signature

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 forauthorization. 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 is 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

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

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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:
   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.

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-I, with a loan maturity that does not exceed the maximum allowed. *(Per SOP 50 10 5(E), page151, 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 buildins
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

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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 — mc

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

Sincerely,

Dan Smallhouse
Loan Specialist

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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 Kathye <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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EXHIBIT 21

LEROY M. GAINTNER, CPA, PLC
2355 E. Camelback Rd.
Suite 500
Phoenix, AZ 85016

March 5, 2016

Francis J. Slavin, Esq.
2198 E. Camelback Rd, 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 financial and other information and documentation relating to the above-named matter. Based on the information reviewed, my analysis and conclusions are reported below.

Qualifications

I am a Certified Public Accountant, licensed in Arizona. A copy of my curriculum vitae is attached to this report as Addendum 1. As reflected in it, I hold Master's Degrees in both Accounting and Mathematics. A listing of instances in which I testified as an expert witness in deposition or at trial for the past four years is included at Addendum 2. I have authored no articles or publications over the past ten years.

I am being compensated for my work and analysis at an hourly rate of $275 ($300 testimony). I am independent of Plaintiff and Defendant and my compensation is in no way dependant 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") establishes and operates various Dutch Bros Coffee franchise locations ("stores") in the greater Phoenix metropolitan area. After self-funding and successfully opening seven stores, TMC secured financing commitments from Republic Bank Arizona ("RBA") to finance and build up to ten additional stores through SBA guaranteed loans. RBA approvals/funding were not timely forthcoming, thus requiring TMC to delay completing/opening certain stores and completely delaying or stopping several other planned stores.

TMC alleges economic damages as a result.

Scope of Work

I have been asked to:

1. Review various TMC financial and store operations information, and

2. Provide analysis and prepare schedules and calculations as deemed appropriate to measure economic damage.

This report and analysis does not and is not intended to opine on liability in this matter, but is done on the assumption that economic losses were experienced from the actions or inactions of RBA.

Documents and Information

The following have been made available to me in this matter:

- TMC Profit and Loss Statements, by store, monthly and full year, 2008-2014, plus partial 2015
- TMC Balance Sheets, monthly 2008-2014
- Complaint
- Store chart of leases, construction, openings
- Chart of Stores 8,9,10,11 delays compared to model
- Sample Republic Bank/SBA Note
- Chart of Cash Balances
- Various email correspondence and transmittals

Additionally, two articles by Robert L. Dunn related to discount rates

Assumptions

1. TMC had the ability and expectation to open three stores per year.

2. Stores 8,9,10 and 11 experienced an aggregate 21 months delay (See Exhibit 1), the economic impact of which is reasonably and appropriately measured by the aggregate level of mature economic income that would have been achieved but for such delay.

3. Three new stores (designated N1, N2, N3) were completely delayed and not built. The delay might be judged to be significantly delayed, and might be judged to be permanently impacted (i.e., cannot be made up without doubling or increasing the normal expected rate of opening of three stores per year).

   Such impact is deemed to be one of the following, based on the Trier of Fact's determination. Hence all three scenarios are presented in this report.

   1) The three stores deemed to have been permanently delayed from eventually achieving mature operations and full potential store-life income, which cannot be made up.

   2) The three stores deemed to have long-term permanent delay of ten years to mature operations and income.

3) The three stores deemed to have been significantly delayed and not be able to achieve maturity as might otherwise be expected

4. Net income expected to be produced by each store is the reasonable and appropriate measure of economic loss, since each store adds its marginal or incremental income to the aggregate TMC operational results. Such expected store income should be its full net income, including interest as if financed, its depreciation, and any variable or incremental share of TMC administrative overhead.

5. Growth in net income is provided through the 10th year of each store, with matured or leveling of income assumed at that juncture.

6. Interest expense for new and ongoing stores is reasonably and appropriately the expected annual interest of a fully financed store based on the average expected building and improvements and equipment costs.

7. Depreciation expense is reasonably and appropriately the expected annual depreciation based on the average expected building and improvements and equipment costs, with depreciation of building and improvements based on 20 years and equipment on 7 years.

8. Marginal or incremental administrative overhead is based on the incremental cost of one regional manager for every three stores. Other variable or incremental administrative and overhead costs are appropriate to analyze and also allocate to the stores.

9. Stores are assumed to have an operating life of at least 20 years.

10. Present value reduction is applicable for calculations involving future lost income, with the reasonable rate based on the underlying RBA rate that would have been in place, plus subjective additional discount for other risk.

11. Operating cash reserves, required to be available to meet ongoing, scheduled payroll and other regular operating expenses, were significantly depleted due to TMC's decision to use operating cash reserves in lieu of RBA loans for funding the construction and equipment of stores which were required to meet TMC's plan to grow its chain of coffee stores.

12. A "model" or expected time frame sequence for achieving the various steps in opening a store is shown at Exhibit 2 and is deemed reasonable and appropriate as the base time-line measurement for opening stores.

Discussion and Analysis

Stores

Schedule 1 shows the existing stores opened from 2007-2014.

Schedule 2 shows the existing stores plus three unopened stores – designated N1, N2, N3.

Growth

The first step is to look at the history of revenues by store from inception of each store, to determine if there is a demonstrable and consistent trend of growth, which would lead to the assumption or validation of expected growth for any new (or delayed) store.

Historical revenues (by year by store by month) are shown at Schedule 3.

These monthly revenues by store are then re-grouped at Schedule 4 to show each store's revenues from "Month 1" opening, for comparison and graphing of the historical ramp-up and growth.

Schedules 5 and 5.1-5.14 are graphs of the Schedules 3 and 4 revenues by store. These visually demonstrate the significant and consistent growth and ramp-up from Month 1 of each store.

As seen, each new store ramps up faster (branding has occurred, demand is increasing, etc.).

Conclusion: Stores grow in volume (i.e., sales revenues) from the outset. And there is as yet no experienced "leveling off". Hence revenue growth and viability are evident.

Cash Balances

Schedule 6 is a chart of the monthly aggregate cash balances and average per store cash reserves from December 2011 through March 2015.

As seen graphically at Schedule 6.1, it is apparent that during the period of delays by RBA, TMC was forced to draw down its operating balances, which would normally be held for imminent operating use such as payroll and regular operating expenses.

More importantly, as seen graphically at Schedule 6.2, the average per store cash reserves were significantly depleted. Prior to the RBA delays and resulting utilization of its operating cash reserves, TMC reasonably and appropriately maintained store cash balances exceeding $100,000 per store, but which dropped to levels of $20,000 to $30,000 before an extended 27 month cash recovery back to the $100,000 per store level.

Income Analysis

Next is to analyze income to determine the base expected income and pattern of income growth.

TMC does its accounting by store. Income and expenses by store are shown on its monthly and yearly Profit & Loss statements ("P&L's").

However, interest expense and depreciation are not included for each store, but rather in the aggregate for all of TMC. Hence adjustment or modification of the income results is required in order to show what the stores' net profits would be if fully financed and if shown with depreciation expense and any incremental overhead or administrative costs.

Schedule 7 provides this analysis and modification of annual net income for each store.

Schedule 7 shows the stores' annual net income (or loss) by year from each store's opening. See Note (A) on Schedule 7.

Average annual interest is then subtracted in order to show each store as if fully financed (since a number were self funded, and in some years not all stores were externally financed). The average annual interest per store ($25,127) is derived at Schedule 7.1. See Note (B) on Schedule 7.

Similarly, average annual depreciation of $28,699 is derived at Schedule 7.2. See Note (C) on Schedule 7.

TMC adds a regional manager for every three stores, so 1/3 of the normal cost (including payroll taxes and benefits at 22%) aggregating $24,400 per store per year is also included on Schedule 7 as an incremental cost for each store. (Note: such regional manager costs are included in the regular administrative costs that are allocated to each store, but is added separately herein to be sure that an incremental cost for a new regional manager for three stores is taken into account.) See Schedule 7.3. See Note (D) on Schedule 7.

For overhead and administration, the TMC variable incremental administrative and overhead costs are allocated to each of the stores based on the weighted average (by number of store-years) of costs so identified. These incremental costs aggregate $11,096 per store per year. See Schedule 7.4 and Note (E) on Schedule 7.

The individual store P&L's are then reduced by the above interest, depreciation, regional manager and allocated admin/OH costs. See Note (F) on Schedule 7.

Schedule 8 is a graph of the annual adjusted net profit from each store, similar to the revenue graph at Schedule 5.

> Conclusion: Although initial start-up years for each store are net losses, the stores grow in net profits from the outset, and there is as yet no experienced "leveling off". Hence, as with revenues, net income growth and viability are evident.

Schedule 9 utilizes the adjusted/modified annual net income by store from Schedule 7 as a base to project the reasonably expected annual net income of new stores.

Stores 5 and 6 (Mill Store and Gilbert Store) serve as the expectation base for income of the new or delayed stores.

The average of Stores 5 & 6 shows the average of the first 6 years of operational results. Years 7 through 10 are projected based on an average of $75,000 net income growth per year. Net income is then, for purposes of the remaining analysis, assumed to level off at that point at $471,600 per store per year. See Schedule 9.

The average increase of $75,000 per year is also derived on Schedule 9 – from the last two years' average actual increases ranging from $72,642 to $90,250. An assumed average growth of $75,000 is taken from the lower end of this range. See Schedule 9.

For purposes of comparison, the same calculation is done for Stores 7 and 8 – which also precede the RBA delays. Had these Store 7&8 income figures been used, the Year 10

mature annual net income would have been significantly higher at $623,188 per store per year.

Conclusion: The average of Stores 5&6 with growth through Year 10 of $75,000 per year, maturing at $471,600, is reasonable and conservative for use in subsequent analysis of damages.

Present Value Discount Rate

The discount rate for determination of present value of future losses is shown at Schedule 10.

The aggregate discount rate at Schedule 10 is comprised of TMC's base borrowing rate with additional subjective discount for potential risks that might be encountered.

An argument reasonably can be made that the present value rate in this circumstance should simply be the TMC borrowing rate. TMC had demonstrated its ability to open profitable stores, to manage those stores, to grow its brand and hence enjoy increasing revenues and profit at all of its stores, and that such growth took place regardless of the economic climate. If this approach were used, then the PV discount rate would be the RBA borrowing rate of Prime + 2.5% - aggregating 5.75% (Prime of 3.25% + 2.50%).

However potential effects from the market, from the general environment, etc., could be experienced. Hence additional subjective risk is reflected in several accepted categories, to an overall discount rate of 14.75%.

Conclusion: A Present Value Discount Rate of 14.75% is both reasonable and appropriate to utilize in subsequent analysis.

Damages

Damages, as indicated at the outset, are done under several alternative scenarios

Scenario 1: Three stores – designated in this report as N1, N2, and N3 – are first assumed to be permanently unable to be replaced without going over and above three openings per year. This scenario is shown graphically at Schedule 11.1 and analyzed at Schedule 11.

N1 would have been built/opened in 2013. Thus the expected income and startup loss would commence in 2013 and are the amounts shown at Schedule 9, maturing at full profit in 2022, and staying level from that point forward for an assumed store life of 20 years.

Likewise, N2 and N3 would commence in 2014, with the same sequence of net profits from Schedule 9, but starting in 2014, maturing in 2023, and staying level from that point forward for assumed lives of 20 years.

The yearly profits (and early year losses) for N1, N2 and N3 are added together, then reduced to present value at the 14.75% discount rate from Schedule 10.

If the Trier of Fact determines that the impact is to preclude TMC from having done these three stores as contemplated, and that such disruption would not be able to be rectified in the TMC's three-stores-per-year plan, then the collective damage is $5,311,000.

Scenario 2: If the Trier of Fact determines that the impact is a permanent delay without recovery of additional stores, but is to be measured by the growth of profits only to maturity (ten years), then the analysis at Schedule 12 shows the cumulative economic loss from the inability to rectify the permanently delayed openings to be $2,440,000. This is shown graphically at Schedule 12.1

Scenario 3: If the Trier of Fact determines that the impact is a shorter term delay than Scenarios 1 or 2, then such temporary delay is shown graphically at Schedule 13.1 and analyzed at Schedule at Schedule 13 as being the effective delay experienced as measured by the delay in reaching the mature levels of volume and profit. Under this scenario, the economic damage from the three unbuilt stores is $1,222,000.

Additional Delay Damage: As indicated at the outset of this report, there was an aggregate 21 month delay of Stores 8,9,10, and 11. The economic effect of this aggregate delay is measured by the delay in reaching their mature levels of volume and profits. As shown at Schedule 14, this 21 month delay translates to economic damage of $361,000.

Summary: Schedule 14 summarizes these damage calculations. Each of the three above scenarios of delay or permanent impact are shown, together with the additional 21 month delay impact.

Such damages, depending on the Trier of Fact determination, are (including the 21 month delay damage):

Scenario 3	$ 1,583,000
Scenario 2	$ 2,801,000
Scenario 1	$ 5,672,000

Conclusions

Based on the documentation and analysis, stated to a reasonable degree of certainty, TMC suffered economic damage of either $1,583,000 or $2,801,000 or $5,672,000 depending on the Trier of Fact's determination of the nature of the delays.

I reserve the right to modify or supplement my report and analysis if additional information becomes available which, after review and consideration, should cause me to modify my analysis or conclusions.

I also reserve the right to make use of demonstratives and visual aids at trial that may not be included in this report.

Respectfully,

LEROY M. GAINTNER, CPA, PLC

LeRoy M. Gaintner, CPA

Schedules:

Schedule 1 – Chart of Store Openings
Schedule 2 – Chart of Expected but Unopened Stores
Schedule 3 – Monthly Revenues by Store – by Month/Year
Schedule 4 – Monthly Revenues by Store – by Month from Each Opening
Schedule 5 – Revenue Chart – All Stores
- Schedule 5.1 – Revenue Chart – Store 1
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- Schedule 5.3 – Revenue Chart – Store 3
- Schedule 5.4 – Revenue Chart – Store 4
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- Schedule 5.6 – Revenue Chart – Store 6
- Schedule 5.7 – Revenue Chart – Store 7
- Schedule 5.8 – Revenue Chart – Store 8
- Schedule 5.9 – Revenue Chart – Store 9
- Schedule 5.10 – Revenue Chart – Store 10
- Schedule 5.11 – Revenue Chart – Store 11
- Schedule 5.12 – Revenue Chart – Store 12
- Schedule 5.13 – Revenue Chart – Store 13
- Schedule 5.14 – Revenue Chart – Store 14

Schedule 6 –Cash Balances
- Schedule 6.1 – Chart of Month End Cash
- Schedule 6.2 – Chart of Average Cash Reserve Per Store

Schedule 7 – Net Income by Store – Full Year
- Schedule 7.1 – Interest Analysis
- Schedule 7.2 – Store Fixed Assets and Depreciation
- Schedule 7.3 – Regional Manager Analysis
- Schedule 7.4 – Admin Analysis – Variable/Incremental Costs

Schedule 8 – Chart of Net Income (Adjusted) from Inception of Each Store
Schedule 9 – Net Adjusted Profits Per Year from Year of Opening
Schedule 10 – Present Value Discount Rate
Schedule 11 – Economic Loss Analysis – Three Stores Not Able to be Built/Opened – Permanent Loss – Full Lives
- Schedule 11.1 – Chart of Three Store Permanent Delay – Full Lives

Schedule 12 – Economic Loss Analysis – Three Stores Not Able to be Built/Opened – Permanent Loss – to Maturity
- Schedule 12.1 – Chart of Three Store Permanent Delay – to Maturity – Ten Years

Schedule 13 – Economic Loss Analysis – Three Stores Delayed
- Schedule 13.1 – Chart of Three Store Temporary Delay

Schedule 14 – Four Stores (8,9,10,11) Delayed Cumulative 21 Months
Schedule 15 – Economic Loss Summary

Exhibits:

Exhibit 1 – Total Delay in Stores Opened
Exhibit 2 – Model and Expected Time Frames – Stores 8,9,10,11

Addenda:

Addendum 1 – Curriculum Vitae
Addendum 2 – Listing of Testimony

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

Michael K Jeanes, Clerk of Court
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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THOMPSON/McCARTHY COFFEE CO., an Arizona corporation, Plaintiff, vs. REPUBLICBANKAZ, N.A., Defendant.	Case No. CV2014-014647 **REPUBLICBANKAZ, N.A.'s REPLY TO THOMPSON/MCCARTHY COFFEE CO.'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** **(Oral Argument Requested)** (Assigned to Hon. Dawn Bergin)

Pursuant to Rule 56, Arizona Rules of Civil Procedure, RepublicBankAZ, N.A. ("Republic") hereby replies to Thompson/McCarthy Coffee Co.'s ("TMCC") *Response to Defendant's Motion for Summary Judgment* (the "Response") dated January 17, 2017, and *Response to Defendant's Statement of Facts Supporting Its Motion for Summary Judgment and Plaintiff's Separate Statement of Facts* (collectively "PSOF") dated January 17, 2017. Although TMCC's Response attempts to distract this Court with unsupported assertions disguised as "facts," in actuality, TMCC has still failed to raise any **genuine** issues of material fact in dispute, thus Republic is entitled to summary judgement as a matter of law as to TMCC's counts for Negligent Misrepresentation and Fraudulent Inducement.

This Reply is supported by the following Memorandum of Points and Authorities, and the pleadings and exhibits filed in this action, all of which are incorporated herein by reference.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PREFATORY STATEMENT.

In a last-ditch effort to derail the Court from the fact that TMCC entered into a binding waiver/release in favor of Republic, TMCC's Response is replete with unsupported, barbed statements intended to cast doubt upon the indisputable material facts of the instant case, which are, at the very least: (i) on September 19, 2013, Republic and Mutual of Omaha Bank ("Mutual of Omaha") entered into and executed a *Loan Purchase and Sale Agreement (With Consent of Obligors and Pledgors)* (the "Loan Purchase Agreement") for the sale and assignment of the Loans[1] by Republic to Mutual of Omaha; (ii) the Loan Purchase Agreement contained a waiver/release of all claims against Republic within the *Consent of Obligors and Pledgors* (the "Consent"); and (iii) TMCC executed the Consent in favor of Republic.

Again, Republic does not deny that the relationship between Republic and TMCC was strained at times, and that both parties had their respective differences. However, that does not entitle TMCC to cloud the record of this case with unsubstantiated claims of fraud and deceit against Republic, or to assert **for the first time in this lawsuit** that the Consent was executed by TMCC mistakenly and under duress. TMCC's principals are Jim Thompson ("Thompson") and his wife, Janice McCarthy ("McCarthy"). Both Thompson and McCarthy (who is a radiologist), are educated and sophisticated

[1] All capitalized terms that are undefined in this Reply shall have the same definition as set forth in Republic's *Motion for Summary Judgment* and *Separated Statement of Facts In Support of Motion for Summary Judgment*, dated December 2, 2016.

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entrepreneurs[2], and yet part of TMCC's defense is that neither of them read the language of the Consent before executing it, which is no defense at all.

Simply put, TMCC breached the express terms and conditions of the Consent by the filing of its Complaint against Republic. **At the request of TMCC**, Republic sold its performing Loans with substantial collateral to Mutual of Omaha, in consideration for TMCC's waiver and release of any and all claims against Republic. But despite the unambiguous language of the waiver and release in the Consent, TMCC proceeded to file its claims for Negligent Misrepresentation and Fraudulent Inducement against Republic.

As there exist no genuine issues of material facts as to the existence, authenticity, or execution of the Consent, which is indisputably a written contract, Republic is entitled to summary judgment as a matter of law as to TMCC's claims which are effectively barred by the Consent.

II. LEGAL ARGUMENT.

A. The Consent is a valid, binding, unambiguous, and enforceable contract between Republic and TMCC.

Republic agrees with TMCC that a release is a contract. *Parrish v. United Bank of Ariz.*, 164 Ariz. 18, 20, 790 P.2d 304, 306 (App. 1990); *see* Response at pg. 5, line 2; *see also Spain v. General Motors Corp., Chevrolet Motor Div.*, 171 Ariz. 226, 227, 829 P.2d 1272, 1273 (App. 1992), *citing Parrish , supra*, 164 Ariz. 18, 790 P.2d 304. Generally, "in Arizona, a court will attempt to enforce a contract according to the parties' intent." *Taylor v. State Farm Mut. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993). In order to ascertain what the parties intended, Arizona courts will "first consider the plain meaning of the words in the context of the contract as whole." *Grosvenor Holdings, L.C.*

[2] Plaintiff has made clear that at the very least, Thompson is a very competent and experienced businessman, "self-funding and successfully opening seven stores" on his own before seeking financing from Republic. [*Expert Report of Leroy M. Gaintner* dated March 5, 2016 at pg. 1]

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v. *Figueroa*, 222 Ariz. 246, ¶ 9, 218 P.3d 1045, 1050 (App. 2009). Furthermore, "[a] contract is not ambiguous simply because the parties disagree about the meaning of its terms." *In re Estate of Lamparella*, 210 Ariz. 246, ¶ 21, 109 P.3d 959, 963 (App. 2005).

Incredibly, **not once** does TMCC's Response actually address the terms of the Consent or even dispute the "plain meaning of the words" of the Consent, whose waiver and release of claims are attached hereto as "**Exhibit A**" for the Court's convenience. But under Arizona law, contractual releases resulting in the relinquishment of a right or claim are enforceable, so long as they are unambiguous. *Cumis Ins*. *Soc'y v*. *Merrick Bank Corp*., 680 F.Supp.2d 1077, 1091 (D. Ariz. 2010). This includes releases for future, unknown claims. *See, e.g*., *Dansby v*. *Buck*, 92 Ariz. 1, 7 373 P.2d 1, 5 (1962) (holding that "[p]arties may preclude recovery for all injuries, whether known or unknown, if it is their intention at the time to do so") (quoting 45 Am. Jur. *Release* §19.); *Zounds Hearing Franchising LLC v*. *Moser*, No. CV-16-00619-PHX-DGC, 2016 WL 6476291 (D. Ariz. Nov. 2, 2016) (noting that "[t]he very broad language of the Release makes clear that the parties intended to release all claims that arose before the date of the signing, even unknown claims"); *Merrill Lynch Bank USA v*. *Wolf*, No. CV-09-734-PHX-JAT, 2010 WL 4959950 at *5 (D. Ariz. Dec. 1, 2010) ("A valid contractual release results in the relinquishment of a right or claim, and bars any action on a claim which is the subject of the release. . . . If a contractual release is unambiguous, a court must enforce it according to its terms.") (internal citations omitted).

To that end, so long as "a release is unambiguous and there is no allegation that it was entered into by mistake or procured by fraud or other improper means, the release is to be interpreted like any other contract ***and the release is enforceable based on its plain language, without reference to extrinsic evidence***." *Cumis*, 680 F.Supp.2d at 1091, *citing Parrish, supra*, 164 Ariz. at 20, 790 P.2d at 306 (emphasis added); *see also Amfac*

Distribution Corp. v. J.B. Contractors, Inc., 146 Ariz. 19, 24-25, 703 P.2d 566, 571-72 (App. 1985) ("Like other contracts, the obvious meaning of the provisions of a release must be given effect.").

Similar to a release, in Arizona,

> Generally, "[w]aiver is either the express, voluntary, intentional relinquishment of a known right or such conduct as warrants an inference of such an intentional relinquishment." *Russo v. Barger*, 239 Ariz. 100, 103 ¶ 12, 366 P.3d 577, 580 (App. 2016) (citing *Am. Cont'l Life Ins. Co. v. Ranier Constr. Co. Inc.*, 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980)).

Compass Bank v. Bennett, 240 Ariz. 58, 375 P.3d 950, 3–953 (Ct. App. 2016), review denied (Sept. 20, 2016); *see also Wood v. Milyard*, 132 S. Ct. 1826, 182 L. Ed. 2d 733 (2012) (A "waived" ***claim or defense*** is one that a party has knowingly and intelligently relinquished) (emphasis added)). There is no ambiguity to the waiver/release set forth in the parties' Consent and more importantly, TMCC cannot and has not provided any evidence to the contrary. Instead, it is undisputed that TMCC executed the Consent which released all claims against Republic, *whether known or unknown at the time of executing the Consent*, and because TMCC has never asserted that the language therein is ambiguous in any way, "the release is enforceable based on its plain language, without reference to extrinsic evidence." *Cumis*, 680 F.Supp.2d at 1091, *citing Parrish, supra*, 164 Ariz. at 20, 790 P.2d at 306 (emphasis added). Yet, TMCC still argues that the Consent is somehow unenforceable simply because: (i) Republic did not sign it, or "[o]nly the signature of TMCC appears on the Consent . . . The name of RBAZ appears nowhere on the Consent." [*See* Response at pg. 5, lines 9-12]; (ii) TMCC is not a party to the Loan Purchase Agreement thus it is not bound thereunder; and (iii) the Consent is not supported by consideration.

i. <u>The Consent is still binding upon TMCC irrespective of whether Republic executed it.</u>

The general rule is that "for an enforceable contract to exist requires the signature of all parties to be bound." *In re Gaynes*, 27 B.R. 161, 162 (9th Cir. BAP 1983). Here, "all parties to be bound" signed an enforceable contract in that TMCC signed the Consent which is part of the Loan Purchase Agreement signed by Republic.

TMCC relies upon *Moore v. Smotkin*, 79 Ariz. 77, 80, 283 P.2d 1029, 1031 (1955), for the proposition that because Republic did not execute the Consent, it is not a party thereto, thus there is no contractual relationship between Republic and TMCC. However, TMCC has misinterpreted and misapplied the *Moore* case, which merely states that "it takes at least two parties to establish a contractual relationship; that one person must agree with the other." 79 Ariz. at 80, 283 P.2d at 1031. Nothing in the *Moore* case remotely implies that a party's signature must appear on a document in order for there to exist a contract.

Under Arizona law, "an exception to this general rule is that if the parties, by their actions, recognize the validity of the agreement and acquiescence in its performance." *ASARCO LLC v. England Logistics Inc.*, 71 F.Supp.3d 990, 1002 (D. Ariz. 2014); *see also Ercanbrack v. Crandall-Wallker Motor Co.*, 550 P.2d 723, 725 (Utah 1976) (holding that "it is a principal of 'contract law that the parties may become bound by the terms of a contract even though they did not sign the contract, where they . . . have otherwise indicated their acceptance of the contract, or led the other party to so believe that they have accepted the contract.'").

Here, in signing the Consent:

> the Obligor/Pledgor Parties ***represent and warrant*** that they ***realize and acknowledge*** that factual matters now unknown to them . . . and further agree, ***represent and warrant*** that this release has been negotiated and agreed upon in light of that

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> 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.

[SOF ¶ 16] (emphasis added).

In light of the fact that TMCC repeatedly "represents," "warrants, "realizes," and "acknowledges," the nature of the waiver/release of claims against Republic, it is entirely irrelevant that "[t]he name of RBAZ appears nowhere on the Consent," because TMCC's execution of the same is evidence of the fact that TMCC "recognize(s) the validity of the agreement and acquiescence in its performance." *ASARCO LLC*, *supra*, 71 F.Supp.3d at 1002. Accordingly, the Consent remains binding upon TMCC, the claims asserted in TMCC's Complaint are unenforceable, and summary judgment must be granted in favor of Republic.

ii. <u>The Consent is part of the Loan Purchase Agreement thus Republic is a beneficiary thereof and TMCC remains bound thereunder.</u>

In its Response, TMCC argues that because it is not a party, or a third party beneficiary, to the Loan Purchase Agreement between Republic and Mutual of Omaha, it is not bound by the Consent. TMCC's arguments are not only fatally flawed, but also inaccurate.

Specifically, TMCC's Response erroneously cites the Loan Purchase Agreement by stating that it contains a provision that "there are no third party beneficiaries to this Agreement." [Response at pg. 5, lines 16-18] The precise provision is § 5.8 of the Loan Purchase Agreement, provides:

> **<u>Binding Effect</u>**. 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***).

[SOF ¶ 16] (emphasis added).

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Thus, not only does TMCC misquote the language of the Loan Purchase Agreement, but it also conveniently omits the second half of the very sentence it cites to, which coincidentally happens to be favorable to Republic in that § 5.8 shows that the parties certainly intended that the "Lender Parties will be beneficiaries . . . of the attached Consent of Obligors and Pledgors)." Thus, the Consent is binding upon TMCC and all other Obligors and Pledgors.

TMCC also contends that the Consent is not enforceable because the "consent of borrowers was not required under the [Loan Purchase Agreement]," and that the Consent "is not integrated into the [Loan Purchase Agreement.]" [Response at pg. 5, lines 18-22] Again, TMCC is wrong. The entire document is entitled *Loan Purchase and Sale Agreement (With Consent of Obligors and Pledgors*), thus the Consent itself does not have to be separately integrated into the Loan Purchase Agreement for the simple reason that it is *already* part of the Loan Purchase Agreement.[3] Furthermore, the Consent constitutes pages 9-12 of the Loan Purchase Agreement and is a continuation thereof. As such, TMCC's assertion that the Consent was neither required nor integrated into the Loan Purchase Agreement is without merit and must be dismissed.

iii. <u>The Consent is supported by consideration and is thereby valid.</u>

Despite the fact that the waiver/release in the Consent begins with the language: "As a material inducement to Lender to agree to sell the Loans to Assignee, each Obligor and Pledgor . . . hereby fully and forever release . . . " TMCC maintains that "Defendant RBAZ did not make any promises to TMCC in the Consent and there is no obligation owed or agreement made by RBAZ." (Response at pg. 5, line 11] Yet the language is unambiguous - TMCC agreed to the terms and conditions of the Consent in consideration

[3] ". . . the true import of an agreement and the mutual rights and obligations of the parties thereto, can only be gleaned from a review of the terms and conditions of the contractual agreement, and not by the label of the agreement alone." *Giovanelli v. First Fed. Sav. & Loan Ass'n of Phoenix*, 120 Ariz. 577, 582, 587 P.2d 763, 768 (App. 1978).

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for Lender's agreement to sell the Loans to Mutual of Omaha when it was under no obligation to do so.

It is also noteworthy that TMCC repeatedly and erroneously states that Republic "negotiated and drafted" or "prepar[ed] and present[ed]" the Loan Purchase Agreement. [Response at pg. 5, lines 5, 9, 12; pg. 8, line 14] To be clear, it was, in fact, TMCC's new lender, Mutual of Omaha and not Republic, who drafted the Loan Purchase Agreement, including the Consent. It is disingenuous for TMCC to independently seek alternate financing with Mutual of Omaha, request that Republic sell its performing Loans to Mutual of Omaha, execute the Loan Purchase Agreement and Consent drafted by Mutual of Omaha, and then claim the Consent is unenforceable against TMCC.

B. <u>There was no duress when TMCC executed the Consent, but rather, TMCC executed the Consent intentionally and voluntarily.</u>

TMCC filed its initial Complaint on December 5, 2014, alleging Negligent Misrepresentation and Promissory Estopped. Subsequently, on April 3, 2015, TMCC filed an Amended Complaint to allege Negligent Misrepresentation and Fraudulent Inducement. Finally, TMCC filed its Second Amended Complaint on April 7, 2015, continuing to allege Negligent Misrepresentation and Fraudulent Inducement. At present, TMCC has also submitted eight (8) Supplemental Disclosure Statements.

<u>Not once</u> has TMCC ever alleged economic duress until its Response to Republic's Motion for Summary Judgment on January 17, 2017. At a bare minimum, TMCC has been fully aware of Republic's defenses regarding the Consent when it received Republic's *Initial Disclosure Statement Pursuant to Rule 26.1* dated August 26, 2015 (to which the Consent was attached at RBAZ07963), as well as Republic's *Third Supplemental Disclosure Statement*,[4] but TMCC remained silent as to its new claim of economic duress,

[4] Upon receiving Republic's Third Supplemental Disclosure Statement, TMCC submitted three (3) additional disclosure statements (namely its Sixth, Seventh and Eighth Supplemental Rule 26.1 Disclosure Statements), and

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until now. Likewise, in addition to its new claims, TMCC also introduced new evidence with its Response, namely Exhibit 16 to PSOF 17, to which Republic objects pursuant to Rules 56(c)(4), and 7.1(f)(2), Ariz. R. Civ. P. Specifically, Exhibit 16 to PSOF 17 is an unsigned document, and without the entire, executed document as a whole, Republic objects to Exhibit 16 to PSOF in that it is not a true, correct, and genuine copy of what it purports to be.

But more importantly, TMCC once again fails to examine or address the plain language of the Consent, which states in pertinent part:

> . . . ***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 represent that they have had the opportunity to consult with legal counsel concerning the legal consequences of this release.***

[SOF ¶ 16] (emphasis added).

TMCC, or rather, Thompson, claims that neither he nor McCarthy were ever:

> . . . presented any drafts of the [Loan Purchase] Agreement or Consent or extended an opportunity to negotiate the release language in the Consent. They had never seen the document before it was presented to them for their signatures, and they were informed it was a simple consent form to allow RBAZ to assign and transfer the [Loans] to [Mutual of Omaha].

[Response at pg. 9, lines 18-24]

In other words, neither Thompson nor McCarthy bothered to actually *read* the Consent which is comprised of only a page and a half of text. Thus it appears that Defendant is now arguing unilateral mistake as a defense to the enforceability of the

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never asserted economic duress or any evidence in support thereof.

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Consent, which, incidentally, is also the first time that Republic has ever heard this argument. But the Court of Appeals' decision in *Parish*, held:

> The rule in Arizona is that a general release can be avoided on the ground of **mutual** mistake. *Dansby v. Buck,* 92 Ariz. 1, 373 P.2d 1 (1962). Arizona also recognizes that a unilateral mistake induced by misrepresentations or contractual ambiguities may constitute grounds for avoiding a release. *Hendricks v. Simper,* 24 Ariz.App. 415, 539 P.2d 529 (1975); *Balmer v. Gagnon,* 19 Ariz.App. 55, 504 P.2d 1278 (1973). ***. . . contrary to Parrish's assertions, the release is plain, evident and unambiguous*** . . .
> A unilateral mistake can be grounds for avoiding a release ***if at the time the release was entered into the other party knows or should have known of the mistake.*** See *Basin Paving, Inc. v. Port of Moses Lake,* 48 Wash.App. 180, 737 P.2d 1312 (1987).

164 Ariz. at 20, 790 P.2d at 306 (App. 1990)(emphasis added).

Similarly, here, "the release is plain, evident and unambiguous," TMCC presumably "was represented by counsel at all times when the loan [purchase] agreement containing the release was negotiated[5]," and "at the time the release was entered into," Republic did not, could not, and should not have known of TMCC's mistake in failing to read the Consent, and TMCC has failed to provide any evidence in support thereof. Indeed, Thompson is a seasoned, sophisticated entrepreneur, thus even assuming, *arguendo*, that TMCC's claims are true insofar as having been deprived of an opportunity to "negotiate the release language in the Consent," the express language of the Consent and the signatures of both Thompson and McCarthy (who executed the Consent on behalf of TMCC an TMDB respectively) are evidence of the contrary and serve to confirm that the Consent was entered into by TMCC both voluntarily and intentionally. As such, TMCC's newly added claims of unilateral mistake and economic duress both fail in their entirety.

[5] Or at the very least, TMCC "represent[ed] that [it] had the opportunity to consult with legal counsel concerning the legal consequences of this release." [SOF ¶ 16]

Specifically, TMCC cites to *Inter-Tel v. Bank of America, Arizona*, 195 Ariz. 111, 985 P.2d 596 (App.1999) in support of its argument that that waiver/release in the Consent is avoidable because TMCC acted under economic duress at the time of its execution. However, *Inter-Tel* is clearly distinguishable from the facts of the instant case in that in *Inter-Tel*, the trial court granted Bank of America's ("BOA") motion for summary judgment based on its conclusion that Inter-Tel had released all claims against BOA. In connection with Inter-Tel's execution of the release, Court in *Inter-Tel* explained that, under Arizona law, "duress exists if one party is induced to assent to a contract by a wrongful threat or act of the other party." *Id*. Furthermore, "duress does not exists merely because one party takes advantage of the financial difficulty of the other" unless "the wrongful act of one party is the very things that created the other party's financial difficulty." *Id*., *citing Fridenmaker v. Valley Nat'l Bank*, 23 Ariz. 565, 534 P.2d 1064 (App. 1975) and *Republic Nat'l Life Ins. Co. v. Rudine*, 137 Ariz. 62, 668 P.2d 905 (App. 1983).

Ultimately, the Arizona Court of Appeals held that Inter-Tel "raised a dispute as to whether the bank acted wrongfully by placing its account into the Special Assets Department in violation of standard banking procedures and the covenant of good faith and fair dealing." *Id*. at 118. The appellate Court also found that there was a dispute "as to whether Inter-Tel had a reasonable alternative to signing the release of claims," based on the fact that Inter-Tel was having difficulty finding an alternate lender, and that the fact that Inter-Tel did indeed find financing "months later" "does not conclusively establish that Inter-Tel had a reasonable alternative when it signed the release. *Id*.

These facts are clearly distinguishable from our case - here, the Consent was not signed by TMCC because it felt pressured to continue working with Republic in the face of being unable to find alternative financing. TMCC was not "induced to a contract by a

wrongful threat or act" of Republic when it signed the Consent, and TMCC has not made any such allegations. *Inter-Tel*, 195 Ariz. 111. Rather, the Consent was signed *after* TMCC voluntarily sought and secured alternate financing, and requested that Republic sell the Loans to TMCC's new lender, Mutual of Omaha. Neither was TMCC induced to sign the release due to the wrongful acts of Republic - rather, TMCC itself initiated the change in lenders which ultimately resulted in the signing of the Consent. Accordingly, TMCC's argument of economic duress is baseless and must be dismissed.

III. CONCLUSION.

TMCC has failed to present any **genuine** issues of **material** fact in support of its Response. Instead, TMCC's Response is riddled with irrelevant, immaterial factual disputes and arguments intended to distract this Court[6] from the unambiguous language of the Consent clearly manifesting the parties' intent, and the **undisputed** fact that TMCC intentionally and voluntarily entered into the Consent. If the Court were to deny summary judgment to Republic based upon the defenses presented in TMCC's Response, then *any* borrower or party to a contract could execute a release, fail to read said release, and breach their obligations in direct contravention of the terms and conditions therein, thereby eviscerating the longstanding canons of contract law. In effect, this case is very straightforward once the undisputed facts are identified - (i) TMCC executed the Consent; (ii) Republic fulfilled its commitment to sell the Loans to Mutual of Omaha; (iii) the Consent is unambiguous; (iv) the Consent is binding under Arizona law; and (v) TMCC is in breach of the Consent and Republic has been damaged as a result. Here, Republic respectfully requests that this Court grant its Motion for Summary Judgment deny

[6] In fact, Republic's Reply does not address many of the alleged "facts" and arguments presented by TMCC as to altered emails, untimely loan submissions, unsigned and unauthenticated documents, and damages because the express terms and conditions of the Consent render these issues moot. Specifically, TMCC unequivocally agreed to release all known and unknown claims when it executed the Consent.

TMCC's Response. Republic further requests an award its reasonable attorneys' fees and costs incurred herein.

DATED this 6th day of February, 2017.

QUARLES & BRADY LLP

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

Attorneys for Defendant

ORIGINAL e-filed and COPY emailed
this 6th day of February, 2017 to:

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/s/ Cecily N. Benson

EXHIBIT 4

Office of the Comptroller of the Currency

Washington, DC 20219

CERTIFICATE OF AUTHENTICITY

I, Thomas J. Curry, Comptroller of the Currency, do hereby certify that:

The Office of the Comptroller of the Currency, pursuant to 12 USC 5412(b)(2)(B) and 5433(a) and (b)(1), Revised Statutes 324, et seq, as amended, and 12 USC 1, et seq, as amended, has possession, custody, and control of all records pertaining to the chartering, regulation, and supervision of all federal savings associations and national banking associations, including documents pertaining to the Agreement by and Between RepublicBankAz, N.A., Phoenix, Arizona, date May 31, 2013 (EA No. 2013-073).

Attached hereto is a true copy of the above described document, located in the files of the Office of the Comptroller of the Currency, Washington, District of Columbia.

IN TESTIMONY WHEREOF, today, February 8, 2017, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents at the U.S. Department of the Treasury, in the City of Washington, District of Columbia.

Comptroller of the Currency

#2013-073

AGREEMENT BY AND BETWEEN
RepublicBankAz, N.A
Phoenix, Arizona
and
The Comptroller of the Currency

RepublicBankAz, N.A., Phoenix, Arizona ("Bank") and the Comptroller of the Currency of the United States of America ("Comptroller") wish to protect the interests of the depositors, other customers, and shareholders of the Bank, and, toward that end, wish the Bank to operate safely and soundly and in accordance with all applicable laws, rules and regulations.

The Comptroller has found unsafe and unsound banking practices relating to Board and Management oversight, credit risk management and credit administration.

In consideration of the above premises, it is agreed, between the Bank, by and through its duly elected and acting Board of Directors ("Board"), and the Comptroller, through his authorized representative, that the Bank shall operate at all times in compliance with the articles of this Agreement.

Article I

Jurisdiction

(1) This Agreement shall be construed to be a "written agreement entered into with the agency" within the meaning of 12 U.S.C. § 1818(b)(1).

(2) This Agreement shall be construed to be a "written agreement between such depository institution and such agency" within the meaning of 12 U.S.C. § 1818(e)(1) and 12 U.S.C. § 1818(i)(2).

(3) This Agreement shall be construed to be a "formal written agreement" within the meaning of 12 C.F.R. § 5.51(c)(6)(ii). *See* 12 U.S.C. § 1831i.

(b) a written statement of the Board's reasons for selecting the proposed officer; and

(c) a written description of the proposed officer's duties and responsibilities.

Article V

Board Oversight

(1) Within ninety (90) days of this Agreement, the Board shall take the necessary steps to eliminate the deficiencies in management leadership and Board oversight as described in the Report of Examination conducted as of December 31, 2012 (the "ROE"), to include specific actions for attaining the necessary management expertise and Board involvement to return the Bank to a safe and sound condition.

(2) Within thirty (30) days of this Agreement, the Board shall employ an independent outside management consultant ("Consultant").

(3) Prior to the appointment or employment of any consultant or entering into any contract with a consultant, the Board shall submit the name and qualifications of the proposed consultant and the proposed terms of employment to the Assistant Deputy Comptroller for a prior written determination of no supervisory objection.

(4) Within sixty (60) days of the receipt of the written determination of no supervisory objection to the proposed consultant, the Consultant shall complete a study of current management and Board supervision presently being provided to the Bank, the Bank's management structure, and its staffing requirements, including a staffing plan for the Bank's loan function, in light of the Bank's present condition. The findings and recommendations of the Consultant shall be set forth in a written report (the "Management Study") to the Board. At a minimum, the Management Study shall contain:

Article VII

Credit Underwriting and Administration

(1) Effective as of the date of this Agreement, the Board shall ensure that all lending officers comply with all laws, rules, regulations, Bank policies and procedures, safe and sound banking practices, and fiduciary duties.

(2) Within sixty (60) days of this Agreement, the Board shall prepare and submit to the Assistant Deputy Comptroller for a prior written determination of no supervisory objection, a revised loan policy. The revised loan policy shall incorporate the guidelines set forth in Loan Portfolio Management, A-LPM, of the *Comptroller's Handbook* and shall incorporate, but not be limited to, the following:

(a) current individual lending limits;

(b) authority and approval procedures for purchasing and selling participations;

(c) maximum periods for loan approval from application date;

(d) detailed guidance on loan terms and amortizations;

(e) supporting exhibits as referenced in Bank policies;

(f) a system for measuring exceptions against the Board approved limits;

(g) measures to correct the deficiencies in the Bank's lending procedures noted in any Report of Examination; and

(h) guidelines for periodic review of the Bank's adherence to the revised lending policy.

(3) Upon receiving a written determination of no supervisory objection from the Assistant Deputy Comptroller, the Board shall immediately implement and thereafter ensure adherence to the program, policies and procedures required by this Paragraph (2) of this Article.

(b) the Bank's loans and other assets are timely placed on nonaccrual by the lending officers in accordance with the guidelines set forth in the Call Report;

(c) lending officers conduct periodic, formal reviews for determining the appropriate risk rate and accrual determination;

(d) appropriate analysis and documentation are maintained in the credit files to support the current and previous risk rating or accrual determination for all credit relationships totaling one-hundred thousand dollars ($100,000) or more;

(e) the President, Senior Loan Officer, and all lending officers receive immediate training with respect to the application of Subparagraphs (a) through (d) of this Article;

(f) the lending officers and senior management are assigned responsibility and held accountable (to include, at a minimum, consideration in periodic performance reviews and compensation) for ensuring that the Bank's loans and other assets are appropriately and timely risk rated, charged off and/or placed on nonaccrual; and

(g) management information systems that periodically provide feedback about the effectiveness of the program by senior management and the individual lending officers.

(2) Upon receiving a written determination of no supervisory objection from the Assistant Deputy Comptroller, the Board shall immediately implement and thereafter ensure adherence to the program required by this Article.

Article IX

Problem Loan Management

(1) Effective as of the date of this Agreement, the Board shall take immediate and continuing action to protect its interest in those assets criticized in the ROE, in any subsequent Report of Examination, by internal or external loan review, or in any list provided to management by the National Bank Examiners during any examination.

(2) The Board's compliance with Paragraph (1) of this Article shall include the development of procedures for the quarterly submission and review of reports of all criticized asset relationships totaling two-hundred and fifty thousand dollars ($250,000) or above, that require, at a minimum, analysis and documentation of the following:

(a) an identification of the expected sources of repayment;

(b) the appraised value of supporting collateral and the position of the Bank's lien on such collateral where applicable, as well as other necessary documentation to support the collateral valuation;

(c) an analysis of current and satisfactory credit information, including cash flow analysis where loans are to be repaid from operations;

(d) the proposed action to eliminate the basis of criticism and the time frame for its accomplishment;

(e) trigger dates for positive borrower actions or for loan officers to reassess the strategy and enact collection plans; and

(f) documented support for accrual status.

(3) Effective as of the date of this Agreement, the Bank may not extend credit, directly or indirectly, including renewals, extensions or capitalization of accrued interest, to a borrower whose loans or other extensions of credit are criticized in the ROE, in any subsequent

(b) require the timely reporting by Bank management of such actions directed by the Board to be taken under the terms of this Agreement;

(c) follow-up on any non-compliance with such actions in a timely and appropriate manner; and

(d) require corrective action be taken in a timely manner of any non-compliance with such actions.

(6) This Agreement is intended to be, and shall be construed to be, a supervisory "written agreement entered into with the agency" as contemplated by 12 U.S.C. § 1818(b)(1), and expressly does not form, and may not be construed to form, a contract binding on the Comptroller or the United States. Notwithstanding the absence of mutuality of obligation, or of consideration, or of a contract, the Comptroller may enforce any of the commitments or obligations herein undertaken by the Bank under his supervisory powers, including 12 U.S.C. § 1818(b)(1), and not as a matter of contract law. The Bank expressly acknowledges that neither the Bank nor the Comptroller has any intention to enter into a contract. The Bank also expressly acknowledges that no officer or employee of the Office of the Comptroller of the Currency has statutory or other authority to bind the United States, the U.S. Treasury Department, the Comptroller, or any other federal bank regulatory agency or entity, or any officer or employee of any of those entities to a contract affecting the Comptroller's exercise of his supervisory responsibilities. The terms of this Agreement, including this Paragraph, are not subject to amendment or modification by any extraneous expression, prior agreements or prior arrangements between the parties, whether oral or written.

IN TESTIMONY WHEREOF, the undersigned, authorized by the Comptroller, has hereunto set his hand on behalf of the Comptroller.

Steven D. Jacobs
Assistant Deputy Comptroller
Phoenix Field Office

5/31/2013
Date

IN TESTIMONY WHEREOF, the undersigned, as the duly elected and acting Board of Directors of the Bank, have hereunto set their hands on behalf of the Bank.

Camala Bailey — 5-31-13
Camala Bailey — Date

Chad E. Cline — 5/31/13
Chad E. Cline — Date

Donald E. Cline — 5-31-13
Donald E. Cline — Date

Bette F. DeGraw — 5-31-13
Bette F. DeGraw — Date

Regina Edwards — 5/31/13
Regina Edwards — Date

Luther W. Goehring — 6/3/13
Luther W. Goehring — Date

Rodney Larson — 5/31/13
Rodney Larson — Date

Judith A. Lynn — 5/31/2013
Judith A. Lynn — Date

Robert Sparks — 5/31/2013
Robert Sparks — Date

Michael K Jeanes, Clerk of Court
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Attorneys for Plaintiff Thompson/McCarthy Coffee Co.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THOMPSON/McCARTHY COFFEE CO., an Arizona corporation, Plaintiff, v. REPUBLICBANKAZ, N.A., an Arizona corporation, Defendant.	Case No. CV2014-014647 **PLAINTIFF'S SUR-RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** (Assigned to the Honorable Dawn Bergin)

Plaintiff deems it important at the outset of its sur-response, in an effort to place the accurate factual context out of which the 2-page "Consent" was prepared and presented to Plaintiff, to provide a January 9, 2013 e-mail from Defendant's bank officer to Plaintiff's principal James Thompson:

> Jim, I just spoke with Cory at Mutual of Omaha Bank the conversation was extremely positive and now its up to his Bank to decide how they want to proceed. We spoke about them simply purchasing the note from us. Or we could do what is called an inter-creditor agreement in which we both share in the business assets. I think this is going to happen fairly quickly either way and I will make sure Republic does their part to keep the ball rolling for you. Thank you. /s/ Michael Harris

See **Exhibit 22** (Emphasis added.) Approximately 1 month later, it was decided between Mutual of Omaha Bank ("MOH") and Defendant (not Plaintiff) that MOH would present Defendant with an "offer" to purchase Plaintiff's promissory notes: "I am working with our legal counsel to draft a formal proposal to purchase Thompson/McCarthy's notes from

Republic Bank. /s/ Corey Schimmel of MOH." *See* **Exhibit 23**. Defendant responded with: "What do you think your time frame will be on presenting the offer? /s/ Michael Harris" *See id*. (Emphasis added). Without question, with regard to TMCC's promissory notes, at all times Defendant acted purely out of its own financial interests in maximizing its pecuniary gain and not pursuant to any request made by Plaintiff. MOH's purchase and Defendant's sale of TMCC's promissory notes was nothing more than a business deal that each bank negotiated between themselves.

Nine months after Defendant struck its deal with MOH, Plaintiff was presented with a document prepared and approved by MOH and Defendant which was *perplexingly* titled "Consent." As an undisputed material fact, the 8-page purchase and sale agreement between MOH and Defendant (the "PSA") was never provided to Plaintiff.[1] As an undisputed material fact, only the 2-page Consent was provided to Plaintiff for its signature.[2] The Court is required to make all factual inferences in Plaintiff's favor. *See Orme Sch. v. Reeves*, 166 Ariz. 301, 309-10, 820 P.2d 1000, 1008-09 (1990)("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.")

I. RBAZ IS NOT A PARTY TO THE CONSENT AND THE CONSENT IS NOT VALID

RBAZ has agreed with TMCC that, under Arizona law, a release is a contract. *See* RBAZ's Reply to its Motion for Summary Judgment at p.3, lines 16-17; *see also Parrish v. United Bank of Arizona*, 164 Ariz. 18, 20, 790 P.2d 304, 306 (App. 1990). RBAZ does not disagree with TMCC that the law in Arizona is that "it takes at least two parties to establish a contractual relationship." *Moore v. Smotkin*, 79 Ariz. 77, 80, 283 P.2d 1029, 1030 (1955).

The opening paragraph of Defendant's and MOH's PSA recites as follows:

---

[1] In response to Ariz.R.Civ.P. 36 requests for admissions, Defendant admits under oath that it neither presented the Consent directly to Plaintiff nor did it receive the Consent directly from Plaintiff. Plaintiff's principal Jim Thompson testified by affidavit that he was never presented with a copy of the PSA. *See* James Thompson Declaration dated March 7, 2017 ("Declaration") at par.4, **Exhibit 24**.

[2] *See* Declaration at pars. 5 and 6 at **Exhibit 24.** *See also* Jeffrey Wentzel of MOH e-mail dated June 4, 2015 attaching the Consent obtained by MOH from Plaintiff which contains only the 2-page document at pgs.1, 18-19 of the .pdf at **Exhibit 25**.

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> "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 federal chartered thrift ("Assignee")… ."

Page 8 of the Agreement contains the signature page of the parties: "IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year set forth above." The signature block is for Defendant and MOH. *See* PSA at **Exhibit 26**.

Throughout the PSA, RBAZ is referred to only as the "Lender" as it was defined in the opening paragraph. On page 7 of the Agreement, it states RBAZ's intention that RBAZ will be a third-party intended beneficiary of the Consent of Obligors and Pledgors: "…there are otherwise no third party beneficiaries to this Agreement (provided, however, that the Lender Parties [sic] will be beneficiaries [sic] of paragraph (e) of the attached Consent of Obligors and Pledgors). Clearly, and unmistakably, RBAZ by contract, set forth its intention that it was a "beneficiar[y]" of the Consent.

A third-party beneficiary is: "[o]ne for whose benefit a promise is made in a contract but who is not a party to the contract." Third Party Beneficiary, Black's Law Dictionary (6th ed. 1990), *see also,* Intended Beneficiary, Black's Law Dictionary (10 ed. 2014) ("A third-party beneficiary who is intended to benefit from a contract and thus acquires rights under the contract as well as the ability to enforce the contract once those rights have vested"), *see also Maricopa-Stanfield Irr. & Drainage Dist. v. Robertson*, 211 Ariz. 485, 491 (2005) ("A third-party beneficiary is a non-party who has the right to enforce a contract.")

Since RBAZ intended to be a third-party beneficiary of the Consent, then by definition, RBAZ cannot also be a party to the Consent. Without 2 parties, the Consent cannot be legally construed as a valid contract.

II. KNOWN BY DEFENDANT BUT UNKNOWN TO PLAINTIFF WERE THE TORTS IT COMMITTED AGAINST PLAINTIFF WHEN THE CONSENT WAS PRESENTED

"Arizona law also recognizes that a unilateral mistake induced by misrepresentations …may constitute grounds for avoiding a release." *Parrish v. United Bank of Arizona*, 164 Ariz. 18, 20, 790 P.2d 304, 306 (1990).[3] Assuming arguendo that the Consent were capable

[3] Notably, in the factual pattern of the *Parrish* case, there was a 21-month lapse between the misrepresentation/concealment and the release.

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of being construed as valid release, then regardless of the release language, the parties thereto owed one another a duty of good faith and fair dealing. "The law implies a covenant of good faith and fair dealing in every contract." *Rawlings v. Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986) *citing to Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 383, 710 P.2d 1025, 1038 (1985). "The duty not to act in bad faith or deal unfairly thus becomes a part of the contract… ." *Wagenseller*, 147 Ariz. at 383, 710 P.2d at 1038. Thus, Defendant would have owed TMCC a duty to disclose facts material to the Consent.

Before the Court is evidence of Defendant's multiple misrepresentations made to TMCC, which RBAZ failed to correct or disclose, leaving TMCC with the mistaken belief that no fraud or negligent misrepresentation claim existed against Defendant at the time the Consent was presented for Plaintiff's signature.[4] These were material facts that RBAZ would have been under a duty to disclose to Plaintiff before obtaining TMCC's signature on the Consent. Under the Restatement (Second) of Contracts § 161:

> A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist …(b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

See also Restatement (Second) of Contracts § 161 cmt. b (1981) ("If a fact is intentionally withheld for the purpose of inducing action, this is equivalent to a fraudulent misrepresentation."); *see also Hill v. Jones,* 151 Ariz. 81, 84, 725 P.2d 1115, 1118 (Adopting the Restatement (Second) of Contracts § 161). Clearly, RBAZ failed to admit its tortious acts to Plaintiff because it knew Plaintiff likely would not sign the Consent if Plaintiff were aware of its right to sue RBAZ for negligent misrepresentation and fraudulent inducement. In other words, RBAZ continued to deceive Plaintiff by failing to correct its prior statements to Plaintiff as to RBAZ's actual course of conduct throughout their lending relationship.

[4] *See* **PSOF 14-16** to its Response to Defendant's Statement of Facts Supporting its Motion for Summary Judgment and Plaintiff's Separate Statement of Facts Supporting its Response incorporated herein by reference.

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To the extent Defendant were to assert that it had been acting as a party to the Consent, and to the extent the Consent were to be construed as a valid release, then RBAZ owed a good faith duty to disclose RBAZ's tortious conduct to Plaintiff to correct its prior misrepresentations to Plaintiff regarding the actions RBAZ did (or did not) take as its lender.

III. CASES CITED BY DEFENDANT IN ITS REPLY BRIEF AID PLAINTIFF'S OPPOSITION

Defendant cites to the *Dansby v*. *Buck*, 92 Ariz. 1, 373 P.2d 1 (1962) case in its Reply, but *Dansby i*s inapplicable to our case because it deals with (1) a mutual release; (2) arising out of a settlement agreement between 2 parties, (3) which was signed by both parties, (4) heavily couched in the context of personal injury law and related cases, (5) where there was compensation exchanged, (6) the defendant pleaded an affirmative defense of release, and (7) the plaintiff conceded the release was valid and binding. Not one of those factors is present in our case. Furthermore, the *Dansby* court found that intent of the parties as to what injuries are covered by the release is a question of fact which requires the court to look at all circumstances surrounding the release, such as the negotiations, consideration paid for release, haste or lack thereof with which release is obtained and the conduct and intelligence of both releaser and releasee.

With regard to Defendant's quotations to the *Cumis Ins. Soc'y v. Merrick Bank Corp.* case on both pgs. 4 and 5 of its Reply brief, Defendant is quoting not what the Court found or held but rather what the Court recognized was the *position the defendant was attempting to advance*. RBAZ had removed from its quotation "[Defendant] Merrick assert[s] that where…" leaving the remainder of the quotation making it appear as though it was what the Court was holding rather than the defendant's position. Republic cites to this misquoted cite to *Cumis* twice. The Court should disregard Republic's use of the *Cumis* case. *Similarly*, Republic pincites to *Cumis* for the proposition that, under Arizona law contractual relinquishments of a right or claim are enforceable so long as they are unambiguous, but no language for its reference is found in *Cumis* or at the pincite. The *Cumis* case does not use the term "relinquishment" anywhere in the opinion - likely because it deals with a release and not a waiver.

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Defendant cites to the *Zounds Hearing Franchise* case in its Reply, which held that Arizona 's insurance-release case law, which adopts the approach of Delaware, Texas and Washington to reviewing releases which contain clauses releasing "claims known and unknown." Arizona finds that while supporting parties' freedom to contract, it does not find "waiver of fraudulent inducement" to be contemplated within manifestation of intent in a release absent "an express manifestation of such intent." *Zounds*, WL 6476291, at *4. In reaching this holding, *Zounds* quotes a Delaware Supreme Court case that held "while expansive, a release of 'claims known and unknown' without direct reference to fraudulently induced claims did not reach claims unknown to the releasing party 'when the ignorance of such a claim is attributable to the fraudulent conduct by the released party." *Id*. at *3. *Zounds* also include the following quote from *Lubin v*. *Johnson*, 820 P.2d 328-329 (Ariz.Ct.App. 1991) ("There is nothing particularly attractive in the proposition that an insurer, or anyone else, may by misrepresentation induce a person to forego rights and then defend on the ground that the fraud is excused because the person defrauded should have known better.")

RESPECTFULLY SUBMITTED this 27th day of March, 2017.

FRANCIS J. SLAVIN, P.C.

By: */s/ Daniel J. Slavin*
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Attorneys for Plaintiff

ORIGINAL of the foregoing electronically filed with the Clerk of the Maricopa County Superior Court this 27th day of March, 2017.

COPY of the foregoing e-served this 27th day of March, 2017:

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Attorneys for Defendant

/s/ Daniel J. Slavin

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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”

FRANCIS J. SLAVIN, P.C.
Francis J. Slavin, #002972
Daniel J. Slavin, #024780
Jessica L. Dorvinen, #028351
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Attorneys for Plaintiff Thompson/McCarthy Coffee Co.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THOMPSON/McCARTHY COFFEE CO., an Arizona corporation, Plaintiff, v. REPUBLICBANKAZ, N.A., Defendant.	Case No. CV2014-014647 DECLARATION OF FRANCIS J. SLAVIN (Standard Case) (Assigned to the Honorable Dawn Bergin)

I, Francis J. Slavin, counsel for Plaintiff Thompson/McCarthy Coffee Co., hereby declare under penalty of perjury as follows:

1. I am the President of the law firm of Francis J. Slavin, P.C.

2. I have reviewed the time entries of firm employees for legal services rendered by Francis J. Slavin, P.C., on behalf of the plaintiff, Thompson/McCarthy Coffee Co., in the above action.

3. Legal services rendered from the outset of this matter through November 1, 2016, the date Defendant RepublicBankAZ, N.A. raised the affirmative defense of Release, are $241,845.80.

4. I have also reviewed the entries for costs incurred by Francis J. Slavin, P.C. on behalf of the plaintiff Thompson/McCarthy Coffee Co. in the above action.

5. Costs incurred by Francis J. Slavin, P.C., including expert witness costs from the outset of this matter through November 1, 2016, the date Defendant RepublicBankAZ, N.A. raised the affirmative defense of Release, are $29,304.19.

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

The Law Offices of
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EXHIBIT “C”

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THOMPSON/McCARTHY COFFEE CO., an Arizona corporation, Plaintiff, vs. REPUBLICBANKAZ, N.A., Defendant.	Case No. CV2014-014647 **INITIAL DISCLOSURE STATEMENT PURSUANT TO RULE 26.1** (Assigned to the Honorable Dawn Bergin)

RepublicBankAZ, N.A. ("Republic") hereby discloses the following information to Thompson/McCarthy Coffee Co. ("TMCC"). Republic reserves the right to supplement and amend this Initial Disclosure Statement as appropriate during the course of discovery should further research or investigation reveal the existence of other facts, legal theories, witnesses, documents, or other information subject to disclosure.

I. FACTUAL BACKGROUND

1. On or about December 23, 2010, TMCC executed a U.S. Small Business Administration ("SBA") Application for Business Loan, requesting funds for construction of and acquisition of equipment for a coffee/convenience store.

2. On or about July 12, 2011, TMCC executed a U.S. Small Business Administration ("SBA") Application for Business Loan, requesting funds for construction

of and acquisition of equipment for a coffee/convenience store.

3. On or about July 13, 2011, Republic submitted, and the SBA received, an application for the SBA to guarantee a loan in the amount of $1,026,300.00 ("2011 SBA Application") to Thompson/McCarthy DB LLC ("TMDB," now TMCC[1]), James L. Thompson ("Thompson") and Janice L. McCarthy ("McCarthy") (collectively, the "2011 Loan Borrowers").

4. On or about August 3, 2011, the SBA approved the 2011 SBA Application, evidenced by a U.S. Small Business Administration Authorization (SBA 7(A) Guaranteed Loan) dated August 3, 2011 (the "2011 Authorization").[2]

5. After receiving and signing the 2011 Authorization, Republic continued working with the 2011 Loan Borrowers to close the 2011 Loan (defined below).

6. On or about October 24, 2011, TMDB, Thompson, and McCarthy entered into a Construction Loan Agreement (the "2011 Loan Agreement") with Republic for a loan in the maximum principal amount of $1,026,300.00 (the "2011 Loan"). The purpose of the 2011 Loan was to construct Dutch Brothers coffee shops on real property located at 6461 South Rural Road, Tempe, Arizona 85283 (the "Rural Property"), and 1122 South Greenfield Road, Mesa, Arizona 85208 (the "Greenfield Property").

7. In connection with the 2011 Loan Agreement, TMDB, Thompson, and McCarthy executed and delivered a U.S. Small Business Administration Note (the "2011 Note"), dated October 24, 2011, in the maximum principal amount of $1,026,300.00 in favor of Republic.

8. The 2011 Loan was also secured by, among other things, a Construction Deed of Trust granted by TMDB in favor of Republic, and recorded on November 4, 2011, at Recorder's No. 20110918231, records of Maricopa County, Arizona, related to the Rural Property (the "Rural Deed of Trust").

9. The 2011 Loan was secured by, among other things, a Construction Deed of

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

[2] All documents defined in this Initial Disclosure Statement were previously produced on July 2, 2015.

Trust granted by Greenfield Southern DB LLC, TMDB, Thompson and McCarthy in favor of Republic, and recorded on July 17, 2012, at Recorder's No. 20120626574, records of Maricopa County, Arizona (the "Greenfield Deed of Trust") related to the Greenfield Property. (Hereinafter, the 2011 SBA Application, 2011 Authorization, 2011 Loan Agreement, 2011 Note, Rural Deed of Trust, Greenfield Deed of Trust and any other documents executed and delivered in connection with the 2011 Loan are called the "Loan Documents.")

10. On or about November 4, 2011, the 2011 Loan was fully funded.

11. On or about January 23, 2012, TMDB executed a U.S. Small Business Administration Application for Small Business Loan, requesting funds for construction of and acquisition of equipment for a coffee/convenience store.

12. On or about March 9, 2012, Republic submitted, and the SBA received, an application for the SBA to guarantee a loan in the amount of $597,100.00 (the "2012 SBA Application") to TMDB.

13. On or about March 14, 2012, the SBA approved the 2012 SBA Application, evidenced by a U.S. Small Business Administration Authorization (SBA 7(A) Guaranteed Loan) dated March 14, 2012 ("the 2012 Authorization").

14. After receiving and signing the 2012 Authorization, Republic continued working with TMDB to close the 2012 Loan (defined below).

15. On or about May 9, 2012, TMDB dba Glendale Ave./12 Street DB LLC entered into a Construction Loan Agreement (the "2012 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 Brothers coffee shop on real property located at 1201 East Glendale Avenue, Phoenix, Arizona 85020 ("Glendale Property").

16. In connection with the 2012 Loan Agreement, TMCC executed and delivered a U.S. Small Business Administration Note (the "2012 Note"), dated May 9, 2012, in the maximum principal amount of $597,100.00 in favor of Republic.

17. In connection with the 2012 Loan, Thompson, McCarthy, TMCC, James L.

Living Trust Dated June 16, 1997, and Janice L. McCarthy Trust dated September 28, 2005 (collectively, "Guarantors") executed and delivered to Republic a Guaranty of Completion and Performance ("2012 Guaranty"), whereby the Guarantors unconditionally guarantied that the construction of the Glendale Project would be completed and to pay such amounts as necessary to complete it.

18. The 2012 Loan was secured by, among other things, a Construction Leasehold Deed of Trust granted by TMCC in favor of Republic, and recorded on June 6, 2012, at Recorder's No. 20120489027, records of Maricopa County, Arizona (the "Glendale Deed of Trust") related to the Glendale Property. (Hereinafter, the 2012 SBA Application, 2012 Authorization, 2012 Loan Agreement, 2012 Note, 2012 Guaranty, Glendale Deed of Trust and any other documents executed and delivered in connection with the 2012 Loan are called the "2012 Loan Documents." The 2011 Loan and the 2012 Loan are collectively, the "Loans." The 2011 Loan Documents and the 2012 Loan Documents are collectively, the "Loan Documents.")

19. On or around May 14, 2012, the 2012 Loan was fully funded.

20. In or around mid June 2012, Republic submitted, and the SBA received, an application for an SBA loan to construct a Dutch Brothers in Paradise Valley, Arizona ("PV Loan Application").

21. On December 20, 2012, Thompson met with several Bank employees, including Michael Harris, Emily Chedister and Stuart Olson. The parties agreed that they no longer had a working relationship and Thompson would look for another bank.

22. In or around January 2013, Republic offered Thompson a personal line of credit to assist with cash flow and provide access to working capital.

23. In or around late January 2013, the SBA denied approval of the PV Loan Application because the construction costs for the Dutch Brothers store in Paradise Valley had already been paid.

24. In or around early February 2013, Republic was contacted by Mutual of Omaha regarding purchasing the Loans from Republic.

25. In or around May 2013, Mutual of Omaha approved the purchase of the Loans from Republic.

26. In or around August 2013, Mutual of Omaha finally obtained SBA approval for the purchase and assignment of the Loans.

27. On or about September 20, 2013, the purchase of the Loans closed.

28. In 2011, Republic closed 27 SBA loans in the total amount of $26.12 million.

29. In 2012, Republic closed 30 SBA loans in the total amount of $42.38 million.

30. The approval process for an SBA loan takes longer than the approval process for a standard loan due to SBA requirements.

31. The Loans were more complex than the typical or standard SBA loan. The Loans, along with the contemplated future loans of TMCC, were unusual because there were multiple real properties as collateral, all of which had complex title issues. Each TMCC loan grew more complex as additional collateral was required. Due to the complexity of the Loans, the amount of time required to obtain SBA approval was increased.

II. LEGAL THEORIES

A. Negligent Misrepresentation

Plaintiff's first cause of action is for negligent misrepresentation. Arizona follows the Restatement (Second) of Torts § 552 for claims of negligent misrepresentation:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to

supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

...

Restatement (Second) of Torts, § 552.

The Arizona Supreme Court has held that negligent misrepresentation requires a misrepresentation or omission of a fact. However, "[a] promise of future conduct is not a statement of fact capable of supporting a claim of negligent misrepresentation." *McAlister v. Citibank*, 171 Ariz. 207, 215 (1992).

Because a claim for negligent misrepresentation is governed by the principles of negligence, there must be a duty owed and a breach of that duty in order to be charged with the negligent violation of that duty. *KB Home Tucson, Inc. v. Charter Oak Fire Ins. Co.*, 236 Ariz. 326, 332 (2014).

Arizona case law holds that a relationship between a Bank and an ordinary depositor, absent a special agreement, is that of creditor and debtor, and there is no fidicuiary duty in a debtor/creditor relationship. *Gould v. M & I Marshall & Isley Bank*, 860 F.Supp.2d 985, 989 (2012). Thus, there is no special duty of care here other than the standard debtor/creditor relationship.

Here, TMCC has failed to satisfy the elements of negligent misrepresentation in that it has failed to provide any evidence of a duty of care other than the standard debtor/creditor relationship; therefore there can be no breach. Additionally, although the Bank denies that it made a promise or guaranteed that TMCC would receive $5 million in SBA approved loans, even if such a promise were made, it would be a promise of future conduct, which is not a statement of fact capable of supporting a claim of negligent misrepresentation.

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;

(4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury. *Nielson v. Flashberg*, 101 Ariz. 335, 338-39 (1966).

TMCC has failed to satisfy the elements of fraud in that it has failed to provide any evidence that it promised it would make SBA-guaranteed loans up to the SBA maximum of $5.0 million between 2011 and 2014. There is no evidence of any promises by Republic to complete any loans within a certain timeframe, or that Republic promised the SBA would approve every loan for which TMCC applied. Furthermore, TMCC has failed to provide any evidence that any representations made by Republic were false, or that Republic knew such representations were false at the time they were made. Even if such statements were made, TMCC had no right to rely on them, as it was aware that SBA approval was also required for any SBA loan. Finally, TMCC has failed to prove any damages and therefore cannot demonstrate a proximate injury.

C. Affirmative Defenses

TMCC's claims against Republic may be barred in whole or in part by the negligent and/or intentional acts of other parties.

TMCC's claims are barred by the Statute of Frauds. Arizona's Statute of Frauds, A.R.S. § 44-101(9), states:

> No action shall be brought in any court in the following cases unless the promise or agreement upon which the 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:
>
> . . .
>
> Upon a contract, promise, undertaking or commitment to loan money or to grant or extend credit, or a contract, promise, undertaking or commitment to extend, renew or modify a loan or other extension of credit involving both an amount greater than two hundred fifty thousand dollars and not made or extended primarily for personal, family or household purposes.

Here, there is nothing in writing to evidence that Republic promised or guaranteed

that TMCC would receive SBA approval for $5 million of loans, or promised it would have SBA approval for any loans by a certain date, and in the absence of such a writing between the parties, TMCC's claims must fail. Republic could not and did not promise anything other than its willingness to work with TMCC to try to obtain SBA loans up to the $5 million limit.

Republic alleges that its conduct did not cause or substantially contribute to TMCC's alleged loss. TMCC has not alleged losses with any particularity at this time and Republic is unaware of the amount of damages that TMCC believes are attributed to Republic's conduct. There were many other factors which may have caused or contributed to any losses sustained by TMCC, if any losses are actually proven.

Republic alleges that TMCC's claims are barred by the statute of limitation, estoppels, unclean hands, and/or waiver.

Republic alleges that TMCC's claims are barred by failure to mitigate damages. A party's failure to mitigate damages may negate and reduce damages where the party, through its own voluntary activity, has unreasonably exposed itself to damage or increased its injury. *See Life Investors Ins. Co v. Horizon Resources Bethany, Ltd.*, 182 Ariz. 529, 534, 898 P.2d 478, 483 (Ct. App. 1995). TMCC's own conduct may have unreasonably exposed TMCC to damage or increased its damages (assuming any damages are actually proven by TMCC). First, TMCC was well aware of the timeline for SBA approval, having applied for and received approval for two other SBA loans with Republic. If TMCC believed that the amount of time it took to obtain SBA approval with Republic was inadequate and could cause TMCC to sustain damage, then TMCC should have used a different lender to apply for the SBA loan for construction of the Paradise Valley store. Furthermore, after approval of the Paradise Valley loan was denied by the SBA, Republic offered Thompson a personal line of credit to assist with finances, and Thompson's failure to pursue such line of credit was further failure to mitigate damages.

TMCC also fails to state a claim against the Bank upon which an award of attorneys' fees may be granted. TMCC has alleged negligent misrepresentation and

fraudulent inducement, both of which are tort claims. There is no contractual basis for either of TMCC's claim. A.R.S. §§ 12-341 and 12-341.01 provide that the successful party in any action arising out of a contract may be awarded attorney's fees and costs. Here, there was no express or implied contract that was the basis for either of TMCC's claims, and therefore, TMCC has failed to state a claim upon which an award of attorneys' fees can be granted.

Also, as discussed in subsections A. and B. above, TMCC fails to set forth the prima facie elements to establish a claim for negligent misrepresentation and/or a claim or fraudulent inducement.

D. Attorneys' Fees

Republic alleges that this action is frivolous, and therefore, Republic is entitled to attorneys' fees for defense of this action pursuant to A.R.S. § 12-349 or as otherwise provided by law.

III. WITNESSES EXPECTED TO TESTIFY AT TRIAL

Republic is unable to determine yet all of the persons it may call to testify at trial. In addition to any witnesses identified in Section II and IV, Plaintiff may call as a witness any individual identified in any Disclosure Statement of any other party now or subsequently named in this action. Republic may also call as a witness any and all persons necessary to authenticate or lay sufficient foundation for documentary evidence. Republic reserves the right to supplement this list of witnesses.

IV. PERSONS WHO MAY HAVE RECENT KNOWLEDGE OR INFORMATION

1. **Michael Harris**
   c/o W. Scott Jenkins, Jr.
   Two North Central Avenue
   Phoenix, Arizona 85004
   Telephone: (602) 229-5200

Mr. Harris was formerly a Vice President at Republic and was a Business Relationship Manager and the loan officer for TMCC's two loans. Mr. Harris was in

frequent communication with Mr. Thompson and his accountant/bookkeeper Kathye Pease ("Pease") regarding the Loans. Mr. Harris attended a meeting with Ms. Pease and Mr. Thompson on December 20, 2012, at which the parties agreed they no longer had a working relationship. As a result, Mr. Harris may have information, related to, among other things, the facts and circumstances pertaining to TMCC's claims for negligent misrepresentation and fraudulent inducement, including what representations were or were not made to TMCC relating to the Loans.

2. **Emily Chedister**
RepublicBankAZ, N.A.
c/o W. Scott Jenkins, Jr.
Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

Ms. Chedister is a Vice President at Republic and was a Loan Administrator and then Loan Operations Manager during the relevant period. Ms. Chedister worked on both of the Loans, was in frequent communication with Ms. Pease and Mr. Thompson, and attended a meeting with Ms. Pease and Mr. Thompson on December 20, 2012 at which the parties agreed they no longer had a working relationship. As a result, Ms. Chedister may have information, related to, among other things, the facts and circumstances pertaining to TMCC's claims for negligent misrepresentation and fraudulent inducement, including what representations were or were not made to TMCC relating to the Loans.

3. **Stuart Olson**
c/o W. Scott Jenkins, Jr.
Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

Mr. Olson was a Executive Vice President at Republic and was the Chief Credit 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

misrepresentation and fraudulent inducement, including what representations were or were not made to TMCC relating to the Loans.

4. **Marla Woods**
   c/o W. Scott Jenkins, Jr.
   Two North Central Avenue
   Phoenix, Arizona 85004
   Telephone: (602) 229-5200

Ms. Woods was a Loan Document Specialist at Republic during the relevant time period. Ms. Woods assisted with the loan application and SBA approval process on the Loans, and was in frequent communication with Mr. Harris regarding the status of the Loans and additional documentation. Ms. Woods was in frequent communication with the title companies relating to the Loans. Ms. Woods also e-mailed frequently with Mr. Thompson and Ms. Pease regarding information and documents Republic needed. As a result, Ms. Woods may have information, related to, among other things, the facts and circumstances pertaining to TMCC's claims for negligent misrepresentation and fraudulent inducement, including what representations were or were not made to TMCC relating to relating to the Loans, and the particular circumstances regarding the approval of the Loans.

5. **Kimberly Pappas**
   c/o W. Scott Jenkins, Jr.
   Two North Central Avenue
   Phoenix, Arizona 85004
   Telephone: (602) 229-5200

Ms. Pappas was a Vice President at Republic and was the Loan Operations Manager during part of the relevant time period. As a result, Ms. Pappas may have information, related to, among other things, the facts and circumstances pertaining to TMCC's claims for negligent misrepresentation and fraudulent inducement, including what representations were or were not made to TMCC relating to the Loans.

6. **James Thompson**
   c/o Francis J. Slavin, Esq.
   Francis J. Slavin, P.C.
   2198 East Camelback Road, Suite 285
   Phoenix, Arizona 85016

Telephone: (602) 381-8700

Mr. Thompson is the principal and owner of TMCC. As a borrower and guarantor of the Loans, Mr. Thompson was involved in the application and approval process and communicated frequently with Mr. Harris and other Republic employees. As a result, Mr. Thompson may have information, related to, among other things, the facts and circumstances pertaining to TMCC's claims for negligent misrepresentation and fraudulent inducement.

7. **Kathye Pease**
EQ8, LLC
P.O. Box 7433
Chandler, Arizona 85246
Telephone: (480) 359-4883

Ms. Pease is a manager of EQ8 A&B, LLC, and was/is Mr. Thompson's accountant/bookkeeper. Ms. Pease provided and discussed financials documents and information with Republic, had frequent communications with multiple employees of Republic during the entire loan application, Republic approval, SBA approval, and funding process, and was in attendance at the December 20, 2012 meeting with Mr. Thompson, Mr. Harris, Mr. Olson and Ms. Chedister. As a result, Ms. Pease may have information, related to, among other things, the facts and circumstances pertaining to TMCC's claims for negligent misrepresentation and fraudulent inducement.

V. IDENTITY OF PERSONS WHO HAVE GIVEN STATEMENTS

No statements have been given yet in this matter.

VI. EXPERT WITNESSES EXPECTED TO TESTIFY

Republic has not yet identified its expert witnesses. The areas of expert testimony that Republic expect to provide an opinion, if necessary, include expert testimony related to SBA procedures and policies relating to the loan application and approval process, TMCC's damages (or lack thereof), and rebuttal expert testimony in response to any and 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.

3. All documents attached to or referenced in the parties' disclosure statements.

4. All deposition transcripts from any deposition taken in this case.

5. All exhibits to any deposition taken in this case, or documents referred to during any deposition taken in this case.

6. All documents or information produced in response to any discovery response in this case.

7. All documents or information produced by any third party in response to a subpoena in this case.

8. All documents informally exchanged between the parties' attorneys in this case.

DATED this 26th day of August, 2015.

QUARLES & BRADY LLP
Renaissance One
Two North Central Avenue
Phoenix, AZ 85004-2391

By _____
W. Scott Jenkins, Jr.
Alissa A. Brice

Attorneys for Defendant RepublicBankAZ, N.A.

ORIGINAL mailed this and COPY emailed
this 26th day of August, 2015 to:

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Heather N. Dukes
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THOMPSON/McCARTHY COFFEE CO., an Arizona corporation, Plaintiff, vs. REPUBLICBANKAZ, N.A., Defendant.	Case No. CV2014-014647 **THIRD SUPPLEMENTAL DISCLOSURE STATEMENT** (Assigned to the Honorable Dawn Bergin)

RepublicBankAZ, N.A. ("Republic") hereby discloses the following information to Thompson/McCarthy Coffee Co. ("TMCC"). Republic reserves the right to supplement and amend this **Third** Supplemental Disclosure Statement as appropriate during the course of discovery should further research or investigation reveal the existence of other facts, legal theories, witnesses, documents, or other information subject to disclosure.

I. FACTUAL BACKGROUND.

1. On or about December 23, 2010, TMCC submitted to Republic a U.S. Small Business Administration ("SBA") Application for Business Loan, requesting funds for construction of and acquisition of equipment for a coffee/convenience store.

2. On or about July 12, 2011, TMCC submitted to Republic a U.S. Small Business Administration Application for Business Loan, requesting funds for construction of and acquisition of equipment for a coffee/convenience store.

3. On or about July 13, 2011, Republic submitted to the SBA, and the SBA received, an application for the SBA to guarantee a loan in the amount of $1,026,300.00 (**the** "2011 SBA Application") to Thompson/McCarthy DB LLC ("TMDB," now TMCC[1]), James L. Thompson ("Thompson") and Janice L. McCarthy ("McCarthy") (collectively, the "2011 Loan Borrowers").

4. On or about July 27, 2011, the SBA sent a "screen out" letter to Republic relating to the 2011 SBA Application.

5. On or about August 3, 2011, the SBA approved the 2011 SBA Application, evidenced by a U.S. Small Business Administration Authorization (SBA 7(A) Guaranteed Loan) dated August 3, 2011 (the "2011 Authorization").[2]

6. After receiving and signing the 2011 Authorization, Republic continued working with the 2011 Loan Borrowers to close the 2011 Loan (defined below).

7. On or about October 24, 2011, TMDB, Thompson, and McCarthy entered into a Construction Loan Agreement (the "2011 Loan Agreement") with Republic for a loan in the maximum principal amount of $1,026,300.00 (the "2011 Loan"). The purpose of the 2011 Loan was to construct Dutch Brothers coffee shops on real property located at 6461 South Rural Road, Tempe, Arizona 85283 (the "Rural Property"), and 1122 South Greenfield Road, Mesa, Arizona 85208 (the "Greenfield Property").

8. In connection with the 2011 Loan Agreement, TMDB, Thompson, and McCarthy executed and delivered a U.S. Small Business Administration Note (the "2011 Note"), dated October 24, 2011, in the maximum principal amount of $1,026,300.00 in favor of Republic.

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

[2] All documents defined in this Initial Disclosure Statement were previously produced on July 2, 2015.

9. The 2011 Loan was also secured by, among other things, a Construction Deed of Trust granted by TMDB in favor of Republic, and recorded on November 4, 2011, at Recorder's No. 20110918231, records of Maricopa County, Arizona, related to the Rural Property (the "Rural Deed of Trust").

10. The 2011 Loan was secured by, among other things, a Construction Deed of Trust granted by Greenfield Southern DB LLC, TMDB, Thompson and McCarthy in favor of Republic, and recorded on July 17, 2012, at Recorder's No. 20120626574, records of Maricopa County, Arizona (the "Greenfield Deed of Trust") related to the Greenfield Property. (Hereinafter, the 2011 SBA Application, 2011 Authorization, 2011 Loan Agreement, 2011 Note, Rural Deed of Trust, Greenfield Deed of Trust and any other documents executed and delivered in connection with the 2011 Loan are called the "Loan Documents.")

11. On or about November 4, 2011, the 2011 Loan **closed and** was fully funded **on that same day**.

12. On or about January 23, 2012, TMDB submitted to Republic a U.S. Small Business Administration Application for Small Business Loan, requesting funds for construction of and acquisition of equipment for a coffee/convenience store.

13. In or about February 2012, Republic submitted to the SBA, and the SBA received, an application for the SBA to guarantee a loan in the amount of $597,100.00 (the "2012 SBA Application") to TMDB.

14. On or about February 29, 2012, the SBA sent a "screen out" letter to Republic relating to the 2012 SBA Application.

15. On or about March 14, 2012, the SBA approved the 2012 SBA Application, evidenced by a U.S. Small Business Administration Authorization (SBA 7(A) Guaranteed Loan) dated March 14, 2012 (the "2012 Authorization").

16. After receiving and signing the 2012 Authorization, Republic continued working with TMDB to close the 2012 Loan (defined below).

17. On or about May 9, 2012, TMDB dba Glendale Ave./12 Street DB LLC entered into a Construction Loan Agreement (the "2012 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 Brothers coffee shop on real property located at 1201 East Glendale Avenue, Phoenix, Arizona 85020 (**the** "Glendale Property").

18. In connection with the 2012 Loan Agreement, TMCC executed and delivered a U.S. Small Business Administration Note (the "2012 Note"), dated May 9, 2012, in the maximum principal amount of $597,100.00 in favor of Republic.

19. In connection with the 2012 Loan, Thompson, McCarthy, TMCC, James L. Living Trust Dated June 16, 1997, and Janice L. McCarthy Trust dated September 28, 2005 (collectively, **the** "Guarantors") executed and delivered to Republic a Guaranty of Completion and Performance (**the** "2012 Guaranty"), whereby Guarantors unconditionally guarantied that the construction of the Glendale Project would be completed and to pay such amounts as necessary to complete it.

20. The 2012 Loan was secured by, among other things, a Construction Leasehold Deed of Trust granted by TMCC in favor of Republic, and recorded on June 6, 2012, at Recorder's No. 20120489027, records of Maricopa County, Arizona (the "Glendale Deed of Trust") related to the Glendale Property. (Hereinafter, the 2012 SBA Application, 2012 Authorization, 2012 Loan Agreement, 2012 Note, 2012 Guaranty, Glendale Deed of Trust and any other documents executed and delivered in connection with the 2012 Loan are called the "2012 Loan Documents." The 2011 Loan and the 2012 Loan are collectively, the "Loans." The 2011 Loan Documents and the 2012 Loan Documents are collectively, the "Loan Documents.")

21. On or around **May 11, 2012, the 2012 Loan closed and** was fully funded **on May 14, 2012**.

22. In or around mid-June 2012, Republic submitted, and the SBA received, an application for an SBA loan to construct a Dutch Brothers in Paradise Valley, Arizona (**the** "PV Loan Application").

23. On or about July 5, 2012, the SBA sent a "screen out" letter to Republic relating to the PV Loan Application.

24. The SBA had multiple additional requests for documentation and information relating to the PV Loan Application, which were timely relayed to TMCC. The SBA was still requesting additional information as late as December 27, 2012.

25. On December 20, 2012, Thompson met with several Bank employees, including Michael Harris, Emily Chedister and Stuart Olson. The parties agreed that they no longer had a working relationship. Thompson told Republic he had decided to use another lender going forward.

26. In or around January 2013, Republic offered Thompson a personal line of credit to assist with cash flow and provide access to working capital.

27. Ultimately the PV Loan "timed out" of the SBA's system because the SBA did not receive the additional information or documents it had requested.

28. In or around early February 2013, Republic was contacted by Mutual of Omaha **Bank ("Mutual of Omaha")** regarding purchasing the Loans from Republic.

29. In or around May 2013, Mutual of Omaha approved the purchase of the Loans from Republic.

30. In or around August 2013, Mutual of Omaha finally obtained SBA approval for the purchase and assignment of the Loans.

31. **On or about September 19, 2013, Republic and Mutual of Omaha entered into and executed a Loan Purchase and Sale Agreement (With Consent of Obligors and Pledgors) (hereafter the "Loan Purchase Agreement") for the sale and assignment of the Loans by Republic to Mutual of Omaha. As part of the Loan Purchase Agreement, a Consent of Obligors and Pledgors (as defined therein) was executed.**

32. On or about September 23, 2013, the purchase of the Loans closed.

33. In 2011, Republic closed 27 SBA loans in the total amount of $26.12 million.

34. In 2012, Republic closed 30 SBA loans in the total amount of $42.38 million.

35. The approval process for an SBA loan takes longer than the approval process for a standard loan due to SBA requirements.

36. The Loans were more complex than the typical or standard SBA loan. The Loans, along with the contemplated future loans of TMCC, were unusual because there were multiple real properties as collateral, all of which had complex title issues. Each TMCC loan grew more complex as additional collateral was required. Due to the complexity of the Loans, the amount of time required to obtain SBA approval was increased.

II. LEGAL THEORIES.

A. Negligent Misrepresentation.

Plaintiff's first cause of action is for negligent misrepresentation. Arizona follows the Restatement (Second) of Torts § 552 for claims of negligent misrepresentation:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> >
> > (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> ...

Restatement (Second) of Torts, § 552.

The Arizona Supreme Court has held that negligent misrepresentation requires a misrepresentation or omission of a fact. However, "[a] promise of future conduct is not a statement of fact capable of supporting a claim of negligent misrepresentation." *McAlister v. Citibank*, 171 Ariz. 207, 215 (1992).

Because a claim for negligent misrepresentation is governed by the principles of negligence, there must be a duty owed and a breach of that duty in order to be charged with the negligent violation of that duty. *KB Home Tucson, Inc. v. Charter Oak Fire Ins. Co.*, 236 Ariz. 326, 332 (2014).

Arizona case law holds that a relationship between a Bank and an ordinary depositor, absent a special agreement, is that of creditor and debtor, and there is no fiduciary duty in a debtor/creditor relationship. *Gould v. M & I Marshall & Isley Bank*, 860 F.Supp.2d 985, 989 (2012). Thus, there is no special duty of care here other than the standard debtor/creditor relationship.

Here, TMCC has failed to satisfy the elements of negligent misrepresentation in that it has failed to provide any evidence of a duty of care other than the standard debtor/creditor relationship; therefore there can be no breach. Additionally, although the Bank denies that it made a promise or guaranteed that TMCC would receive $5 million in SBA approved loans, even if such a promise were made, it would be a promise of future conduct, which is not a statement of fact capable of supporting a claim of negligent misrepresentation.

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; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely

thereon; and (9) his consequent and proximate injury. *Nielson v. Flashberg*, 101 Ariz. 335, 338-39 (1966).

TMCC has failed to satisfy the elements of fraud in that it has failed to provide any evidence that it promised it would make SBA-guaranteed loans up to the SBA maximum of $5.0 million between 2011 and 2014. There is no evidence of any promises by Republic to complete any loans within a certain timeframe, or that Republic promised the SBA would approve every loan for which TMCC applied. Furthermore, TMCC has failed to provide any evidence that any representations made by Republic were false, or that Republic knew such representations were false at the time they were made. Even if such statements were made, TMCC had no right to rely on them, as it was aware that SBA approval was also required for any SBA loan. Finally, TMCC has failed to prove any damages and therefore cannot demonstrate a proximate injury.

C. Affirmative Defenses.

TMCC's claims against Republic may be barred in whole or in part by the negligent and/or intentional acts of other parties.

TMCC's claims are barred by the Statute of Frauds. Arizona's Statute of Frauds, A.R.S. § 44-101(9), states:

> No action shall be brought in any court in the following cases unless the promise or agreement upon which the 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:
>
> . . .
>
> Upon a contract, promise, undertaking or commitment to loan money or to grant or extend credit, or a contract, promise, undertaking or commitment to extend, renew or modify a loan or other extension of credit involving both an amount greater than two hundred fifty thousand dollars and not made or extended primarily for personal, family or household purposes.

Here, there is nothing in writing to evidence that Republic promised or guaranteed that TMCC would receive SBA approval for $5 million of loans, or promised it would have SBA approval for any loans by a certain date, and in the absence of such a writing between the parties, TMCC's claims must fail. Republic could not and did not promise

anything other than its willingness to work with TMCC to try to obtain SBA loans up to the $5 million limit.

Republic alleges that its conduct did not cause or substantially contribute to TMCC's alleged loss. TMCC has not alleged losses with any particularity at this time and Republic is unaware of the amount of damages that TMCC believes are attributed to Republic's conduct. There were many other factors which may have caused or contributed to any losses sustained by TMCC, if any losses are actually proven.

Republic alleges that TMCC's claims are barred by the statute of limitations, estoppel, unclean hands, and waiver.

TMCC's claims against Republic are barred in whole by the doctrines of waiver/release. Specifically, the Consent of Obligors and Pledgors (the "Consent"), executed on or about September 19, 2013 as part of the Loan Purchase Agreement by TMCC as an Obligor, expressly states:

> **(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, matured or unmatured, and whether based on any contractual, tort, equitable, common law, restitution, statutory or other ground or theory of any nature whatsoever, *including, without limitation, any and all claims which in any way***

> ***directly or indirectly rise out of, relate to, result from or are connected to: (i) the Loans, (ii) any and all acts, omissions or events relating to the Loans,*** **(iii) the sale of Lender's right, title and interest in the Loans to Assignee, and (iv) the Collateral. In this connection,** ***the Obligor/Pledgor Parties represent and warrant that they realize and acknowledge that factual matters now unknown to them may have given or may hereafter give rise to causes of action, claims, demands, debts, controversies, damages, costs, losses and expenses that are presently unknown,*** **undisclosed, unanticipated and unsuspected,** ***and further agree, represent and warrant that this release has been negotiated and agreed 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 thus Consent. The Obligor/Pledgor Parties represent that they have had the opportunity to consult with legal counsel concerning the legal consequences of this release.**

(Emphasis added).

In the instant case, TMCC executed a waiver/release in signing the Consent. As such, in executing and delivering the Consent to Republic, TMCC was and is under a contractual obligation to "fully and forever release and discharge [Republic] . . . from any and all claims, liabilities, demands, damages, liens, [and] causes of action," among other things, thus rendering TMCC's Second Amended Complaint and all claims therein, unenforceable. *See* **Consent at Paragraph (e).**

Under Arizona law, TMCC waived any all claims against Republic by virtue of executing the Consent.

> **Generally, "[w]aiver is either the express, voluntary, intentional relinquishment of a known right or such conduct as warrants an inference of such an intentional relinquishment." *Russo v. Barger*, 239 Ariz. 100, 103 ¶ 12, 366 P.3d 577, 580 (App. 2016) (citing *Am. Cont'l Life Ins. Co. v. Ranier Constr. Co. Inc.*, 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980)).**

***Compass Bank v. Bennett*, 240 Ariz. 58, 375 P.3d 950, 3–953 (Ct. App. 2016), review denied (Sept. 20, 2016).**

Here, TMCC expressly, voluntarily, and intentionally relinquished its known right to bring "any and all claims, liabilities, demands, damages, liens, [and] causes of action," against Republic once it executed and delivered the Consent to Republic, thus rendering TMCC's Second Amended Complaint and all claims therein, unenforceable. *See* Consent at Paragraph (e).

Republic alleges that TMCC's claims are barred by failure to mitigate damages. A party's failure to mitigate damages may negate and reduce damages where the party, through its own voluntary activity, has unreasonably exposed itself to damage or increased its injury. *See Life Investors Ins. Co v. Horizon Resources Bethany, Ltd.*, 182 Ariz. 529, 534, 898 P.2d 478, 483 (Ct. App. 1995). TMCC's own conduct may have unreasonably exposed TMCC to damage or increased its damages (assuming any damages are actually proven by TMCC). First, TMCC was well aware of the timeline for SBA approval, having applied for and received approval for two other SBA loans with Republic. If TMCC believed that the amount of time it took to obtain SBA approval with Republic was inadequate and could cause TMCC to sustain damage, then TMCC should have used a different lender to apply for the SBA loan for construction of the Paradise Valley store. Furthermore, **even after Thompson informed Republic that TMCC was going to use another lender going forward**, Republic offered Thompson a personal line of credit to assist with finances **during the transition to another lender**, and Thompson's failure to pursue such line of credit was further failure to mitigate damages.

TMCC also fails to state a claim against the Bank upon which an award of attorneys' fees may be granted. TMCC has alleged negligent misrepresentation and fraudulent inducement, both of which are tort claims. There is no contractual basis for either of TMCC's claim. A.R.S. §§ 12-341 and 12-341.01 provide that the successful party in any action arising out of a contract may be awarded attorney's fees and costs. Here, there was no express or implied contract that was the basis for either of TMCC's claims, and therefore, TMCC has failed to state a claim upon which an award of attorneys' fees can be granted.

Also, as discussed in subsections A. and B. above, TMCC fails to set forth the prima facie elements to establish a claim for negligent misrepresentation and/or a claim or fraudulent inducement.

D. TMCC's Damages.

TMCC is not entitled to recover those damages, if any, that are remote, speculative, or uncertain. TMCC's own damage expert, Leroy M. Gaintner ("Gaintner"), was unable to determine any sum certain damage amount allegedly suffered by TMCC as a result of Republic's actions. Instead, Gaintner's expert report as to TMCC's claimed damages, dated March 5, 2016, presents three different *hypothetical* situations and corresponding conjectural damage amounts. Furthermore, TMCC's alleged damages are based upon delays purported to be caused by Republic for which no evidence exists. However, Republic's SBA lending expert, Lisa G. Lerner, has determined that in light of the complex nature of the Loans and collateral securing the Loans, Republic's actions were reasonable and there were no delays. As such, without any delays suffered by TMCC, Republic's damage expert, Peter S. Davis, asserts that there can be no damages accrued to TMCC, and that Gaintner's damage calculations are entirely speculative, unsupported, and baseless.

Furthermore, TMCC seeks damages that allegedly arise from consequential lost profits. *See Flagstaff Affordable Housing Ltd. Partnership v. Design Alliance,*

Inc., 223 Ariz. 320, 323, 223 P.3d 664, 667 (2010) (holding that lost profits are a type of consequential damages.) However, the measure of damages for breach of contract to loan money limited to "the difference between the contracted for interest rate and the interest rate at the time of breach," and it is impermissible for a plaintiff to recover consequential damages where alternative financing is available or where the loan could be obtained from another source. *McAlister v. Citibank*, 171 Ariz. 207, 212, 829 P.2d 1253, 1258 (Ariz. Ct. App. 1992). Here, as TMCC could have and in fact, did, obtain financing through another source - Mutual of Omaha - it is not entitled to recover any damages resulting from lost profits.

E. Attorneys' Fees.

Republic alleges that this action is frivolous **and in violation of the contractual obligations pursuant to the Consent**, and therefore, Republic is entitled to attorneys' fees for defense of this action pursuant to **the Consent, A.R.S. §§ 12-341, 12-341.01,** and 12-349 or as otherwise provided by law.

III. WITNESSES EXPECTED TO TESTIFY AT TRIAL.

Republic is unable to determine yet all of the persons it may call to testify at trial. In addition to any witnesses identified in Section II and IV, TMCC may call as a witness any individual identified in any Disclosure Statement of any other party now or subsequently named in this action. Republic may also call as a witness any and all persons necessary to authenticate or lay sufficient foundation for documentary evidence. Republic reserves the right to supplement this list of witnesses.

IV. PERSONS WHO MAY HAVE RECENT KNOWLEDGE OR INFORMATION.

1. Michael Harris
c/o W. Scott Jenkins, Jr.
Quarles & Brady, LLP
Renaissance One
Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

Mr. Harris was formerly a Vice President at Republic and was a Business Relationship Manager and the loan officer for TMCC's two loans. Mr. Harris was in frequent communication with Mr. Thompson and his accountant/bookkeeper Kathye Pease ("Pease") regarding the Loans. Mr. Harris attended a meeting with Ms. Pease and Mr. Thompson on December 20, 2012, at which the parties agreed they no longer had a working relationship. As a result, Mr. Harris may have information, related to, among other things, the facts and circumstances pertaining to TMCC's claims for negligent misrepresentation and fraudulent inducement, including what representations were or were not made to TMCC relating to the Loans.

2. Emily Chedister
RepublicBankAZ, N.A.
c/o W. Scott Jenkins, Jr.
Quarles & Brady, LLP
Renaissance One
Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

Ms. Chedister is a Vice President at Republic and was a Loan Administrator and then Loan Operations Manager during the relevant period. Ms. Chedister worked on both of the Loans, was in frequent communication with Ms. Pease and Mr. Thompson, and attended a meeting with Ms. Pease and Mr. Thompson on December 20, 2012 at which the parties agreed they no longer had a working relationship. As a result, Ms. Chedister may have information, related to, among other things, the facts and circumstances pertaining to TMCC's claims for negligent misrepresentation and fraudulent inducement, including what representations were or were not made to TMCC relating to the Loans.

3. Stuart Olson
c/o W. Scott Jenkins, Jr.
Quarles & Brady, LLP
Renaissance One
Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

Mr. Olson was an Executive Vice President at Republic and was the Chief Credit 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 misrepresentation and fraudulent inducement, including what representations were or were not made to TMCC relating to the Loans.

4. Marla Woods
c/o W. Scott Jenkins, Jr.
Quarles & Brady, LLP
Renaissance One
Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

Ms. Woods was a Loan Document Specialist at Republic during the relevant time period. Ms. Woods assisted with the loan application and SBA approval process on the Loans, and was in frequent communication with Mr. Harris regarding the status of the Loans and additional documentation. Ms. Woods was in frequent communication with the title companies relating to the Loans. Ms. Woods also e-mailed frequently with Mr. Thompson and Ms. Pease regarding information and documents Republic needed. As a result, Ms. Woods may have information, related to, among other things, the facts and circumstances pertaining to TMCC's claims for negligent misrepresentation and fraudulent inducement, including what representations were or were not made to TMCC relating to relating to the Loans, and the particular circumstances regarding the documentation and closing of the Loans.

5. Kimberly Pappas
c/o W. Scott Jenkins, Jr.
Quarles & Brady, LLP
Renaissance One
Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

Ms. Pappas was a Vice President at Republic and was the Loan Operations Manager during part of the relevant time period. As a result, Ms. Pappas may have information, related to, among other things, the facts and circumstances pertaining to TMCC's claims for negligent misrepresentation and fraudulent inducement, including what representations were or were not made to TMCC relating to the Loans, and the particular circumstances surrounding the documentation and closing of the Loans.

6. Anthony Bodnar
c/o W. Scott Jenkins, Jr.
Quarles and Brady, LLP
Renaissance One
Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

Mr. Bodnar was an Assistant Vice President at Republic and was a Loan Administrator during the relevant time period. As a result, Mr. Bodnar may have information, related to, among other things, the facts and circumstances pertaining to TMCC's claims for negligent misrepresentation and fraudulent inducement, including what representations were or were not made to TMCC relating to relating to the Loans, and the particular circumstances regarding the approval of the Loans.

7. James Thompson
c/o Francis J. Slavin, Esq.
Francis J. Slavin, P.C.
2198 East Camelback Road, Suite 285
Phoenix, Arizona 85016
Telephone: (602) 381-8700

Mr. Thompson is the principal and owner of TMCC. As a borrower and guarantor of the Loans, Mr. Thompson was involved in the application and approval process and communicated frequently with Mr. Harris and other Republic employees. As a result, Mr. Thompson may have information, related to, among other things, the facts and circumstances pertaining to TMCC's claims for negligent misrepresentation and fraudulent inducement.

8. Kathye Pease
EQ8 A&B, LLC
P.O. Box 7433
Chandler, Arizona 85246
Telephone: (480) 359-4883

Ms. Pease is a manager of EQ8 A&B, LLC, and was Mr. Thompson's accountant/bookkeeper. Ms. Pease provided and discussed financials documents and information with Republic, had frequent communications with multiple employees of Republic during the entire loan application, Republic approval, SBA approval, and funding process, and was in attendance at the December 20, 2012 meeting with Mr. Thompson, Mr. Harris, Mr. Olson and Ms. Chedister. As a result, Ms. Pease may have information, related to, among other things, the facts and circumstances pertaining to TMCC's claims for negligent misrepresentation and fraudulent inducement.

9. Corey Schimmel
Mutual of Omaha Bank
c/o Janet Ryan, Esq.
Janet.Ryan@mutualofomaha.com

Mr. Schimmel was a Vice President in Business Banking at Mutual of Omaha and was the loan officer for the two loans acquired by Mutual of Omaha from Republic. As a result, Mr. Schimmel may have information related to, among other things, the facts and circumstances pertaining to the acquisition of the loans by Mutual of Omaha, including the process and timeframe.

10. Any persons disclosed by TMCC as persons who may be called as witnesses at trial.

V. IDENTITY OF PERSONS WHO HAVE GIVEN STATEMENTS.

No statements have been given yet in this matter.

VI. EXPERT WITNESSES EXPECTED TO TESTIFY.

The areas of expert testimony that Republic expects to provide an opinion include expert testimony related to SBA procedures and policies relating to the loan application and approval process, TMCC's damages (or lack thereof), and rebuttal expert testimony in

response to any and all opinions, facts and data contained in expert testimony provided by TMCC.

1. SBA Loans, Procedures, Policies, and Approval Process.

Republic **will** call **Lisa G. Lerner as an expert witness,** who is qualified to testify **as to** SBA loans in general, policies and procedures for SBA loans, the different types of SBA-qualified lenders, the SBA application process, the SBA approval process, and Republic's handling of the SBA loan applications of TMCC. Republic may also call an expert for rebuttal testimony in response to any SBA loan testimony by any expert called by TMCC.

Lisa G. Lerner
Enhanced Consultive Solutions, LLC
c/o W. Scott Jenkins, Jr.
Quarles & Brady, LLP
Renaissance One
Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

Ms. Lerner is an expert in the area of SBA lending procedures and processes. Ms. Lerner is expected to testify regarding: the overall procedures as between the SBA and lenders like Republic who participate in SBA loan programs; the SBA 7a loan program that provides an SBA guaranty to a lender like Republic; the various programs for which various lenders qualify, such as the General Lenders Program, the Preferred Lenders Program, or the Certified Lenders Program; and the variables and complexities that affect the closing and funding of a loan. Ms. Lerner's opinion is that due to the complex nature of the Loans and the related Collateral, Republic acted within normal and reasonable timeframes to close and fund the Loans, thus there was no improper delay on the part of Republic. Ms. Lerner's opinion is based upon her professional training, practice, and experience, as well as her review, analysis, and comparison of documents as set forth in her expert report disclosed contemporaneously herewith and dated November 1, 2016.

2. Lost Profits and Other Damages.

Republic **will** call **Peter S. Davis as an expert witness,** who is qualified to testify **as** to the standards for determining whether there were lost profits, how to calculate lost profits, whether TMCC suffered any lost profits, whether Republic's representations or actions were the proximate cause of such lost profits (if there were any), and the amount of any lost profits and/or other damages of TMCC. Republic may also call an expert for rebuttal testimony in response to any lost profits/damages testimony by any expert called by TMCC.

Peter S. Davis
Simon Consulting, LLC
c/o W. Scott Jenkins, Jr.
Quarles & Brady, LLP
Renaissance One
Two North Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 229-5200

Mr. Davis is an expert in the area of forensic accounting, commercial damages and valuations in connection with complex litigation, and forensic economics, including analyses and determinations of loss profits and lost earnings related to tort and contract matters. Mr. Davis is expected to testify regarding: the assumptions and analyses presented in the Gaintner Report; the methodology relied upon in the Gaintner Report and related damage calculations asserted therein; the conflicting and irreconcilable assertions set forth in the Gaintner Report; the absence of proximate cause to the damages asserted by TMCC; and the absence of actual damages incurred by TMCC. Mr. Davis' opinion is based upon his professional training, practice, and experience, as well as his review, analysis, and comparison of documents as set forth in his expert report disclosed contemporaneously herewith and dated November 1, 2016.

Republic reserves the right to call the following witnesses designated as experts by TMCC:

1. Leroy M. Gaintner
c/o Francis J. Slavin, Esq.
Francis J. Slavin, P.C.
2198 East Camelback Road, Suite 285
Phoenix, Arizona 85016
Telephone: (602) 381-8700

Mr. Gaintner is a certified public accountant and the expert retained by TMCC to provide an analysis of TMCC's claimed damages (e.g. the Gaintner Report). Mr. Gaintner is expected to testify regarding the substance and contents of his report, including but not limited to his opinion that "RBA approvals/funding were not timely forthcoming,"; that Republic "require[d] TMC to delay completing/opening certain Stores and completely delay[ed] or stop[ed] several other planned stores,"; and the assumptions and analyses asserted in the Gaintner Report; and the various damage calculations set forth under Scenario 1, Scenario 2, and Scenario 3 as defined within the Gaintner Report. Mr. Gaintner is also expected to testify regarding his professional training, practice, and experience, as well as his review, analysis, and comparison of documents as set forth in the Gaintner Report.

2. Douglas T. Haman
c/o Francis J. Slavin, Esq.
Francis J. Slavin, P.C.
2198 East Camelback Road, Suite 285
Phoenix, Arizona 85016
Telephone: (602) 381-8700

Mr. Haman is a Senior Vice President of Seacoast Commerce Bank and the expert retained by TMCC to provide an analysis of SBA lending procedures and processes (hereafter, the "Haman Report"). Mr. Haman is expected to testify regarding the substance and contents of his report, including but not limited to his opinion that "RBA/approvals/funding were not timely forthcoming, thus requiring TMC to delay completing/opening certain stores." Mr. Haman is also expected to testify regarding his professional training, practice, and experience, as well as his review, analysis, and comparison of documents as set forth in the Haman Report.

Republic reserves its right to supplement this **Third** Supplemental Disclosure Statement to identify expert witnesses and matters upon which such expert witnesses are expected to testify.

VII. COMPUTATION AND MEASURE OF DAMAGES.

TMCC claims damages of between $1,583,000 to $5,672,000 based upon three different scenarios. Republic asserts that TMCC has not suffered any damages**, and that TMCC fully waived and released Republic from any and all claims, liabilities, and damages by virtue of executing the Consent in favor of Republic.**

VIII. TANGIBLE EVIDENCE AND RELEVANT DOCUMENTS THAT MAY BE USED AT TRIAL.

Republic is unaware at this time which documents it intends to use at trial, but may use the following documents at trial. Republic reserves its right to further timely supplement this list as discovery proceeds.

DOCUMENT DESCRIPTION	DATE	BATES NUMBERS
E-mail correspondence relating to loans-internal, with Thompson, Kathy Pease, SBA, and Mutual of Omaha	02/2008 – 12/2008	RBAZ 000001 - RBAZ 004890.011
Later supplemented e-mails with redactions removed	Various	RBAZ 002980 - 2981 and RBAZ 002984
Documents with redactions removed produced by Republic on September 9, 2016 subject to Stipulated Protective Order filed September 9, 2016	2011 - 2012	RBAZ 00163, 00164, 00165 - 00170, 00260-00261, 00262 - 00263, 00268 - 00271, 00272 - 00275, 00285, 00754 - 00755, 00766 - 00768, 01223, 01224, 01225 - 01226, 01504, 01833, 01853 - 01854, 01858, 01859 - 01860, 02171, 02978, 02980 - 02981, 02982, 02984, 02996, 03035, 03088, 03089, 03361, 03394, 03925, 03928
Organizational Documents of TMCC and related entities	01/2009 – 12/2009	RBAZ 04891 - RBAZ 05649

Loan File for Loan No. 826005400 in the amount of $1,026,300.00 (October 24, 2011 Loan)	2010-2012	RBAZ 05650 - RBAZ 06619
Loan File for Loan No. 826007200 in the amount of $597,100.00_(May 9, 2012 Loan)	2011-2012	RBAZ 06620 - RBAZ 08351
Additional e-mails, SBA correspondence, and memoranda	2011 - 2013	RBAZ 08352 - RBAZ 08428
Documents produced by TMCC with Initial Disclosure Statement and as later supplemented with redactions removed		TMCC00001 - TMCC02848
Documents produced by TMCC with Fourth Supplemental Disclosure Statement		TMCC002849 - TMCC006375
Documents provided by the SBA to Republic	2011 - 2013	SBA 00001 - 00969
Documents provided by the SBA to Republic	2012	SBA2 00001 - 00194
Documents provided by the SBA to TMCC	Various	SBA000001 - SBA000029
Documents produced by Mutual of Omaha in response to TMCC's subpoena	**2012-2015**	MB000102 - 009483
TMCC's expert report dated March 5, 2016 prepared by Leroy M. Gaintner, CPA, PLC and schedules, exhibits, and addenda	3/5/2016	n/a
File of Leroy M. Gaintner, CPA, PLC	Various	GA000001 - GA000437 and other documents without bates labels
TMCC's expert report dated September 20, 2016 prepared by Douglas T. Haman and addendum	**9/20/2016**	n/a
Documents produced by Nationwide Valuations in response to TMCC's subpoena	Various	NV000001 - 001197
Documents produced by First Arizona Title Agency in response to TMCC's subpoena	Various	FAZT000001 - 000167
Documents produced by Thomas Title & Escrow in response to TMCC's subpoena	Various	TT000001 - 000578
Expert Report of Peter S. Davis of Simon Consulting, LLC, dated November 1, 2016	**11/1/2016**	**n/a**
Expert Report of Lisa G. Lerner of Enhanced Consultive Solutions, LLC, dated November 1, 2016	**11/1/2016**	**n/a**

IX. OTHER RELEVANT DOCUMENTS.

1. All documents listed above in Section VIII.

2. All documents disclosed pursuant to any subpoena issued in this case.

3. All documents attached to or referenced in TMCC's Second Amended Complaint, Republic's Answer to the Second Amended Complaint, and any other pleadings filed by the parties in this case.

4. All documents attached to or referenced in the parties' disclosure statements.

5. All deposition transcripts from any deposition taken in this case.

6. All exhibits to any deposition taken in this case, or documents referred to during any deposition taken in this case.

7. All documents or information produced in response to any discovery response in this case.

8. All documents or information produced by any third party in response to a subpoena in this case.

9. All documents informally exchanged between the parties' attorneys in this case.

DATED this 1st day of November, 2016.

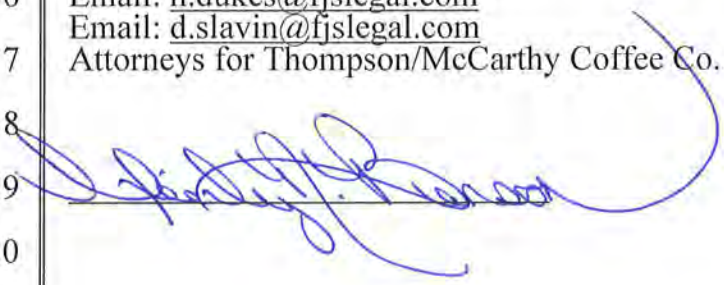
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THOMPSON MCCARTHY DB, LLC, et al. Plaintiff, v. REPUBLIC BANK AZ, NA, Defendant.	CASE NO. CV2015-053369

Maricopa County Superior Court
Phoenix, Arizona

BEFORE THE HONORABLE DAWN M. BERGIN
SUPERIOR COURT JUDGE

TRANSCRIPT RE: ORAL ARGUMENT

March 9, 2017
3:00 p.m.

TRANSCRIPT PREPARED BY:

VERBATIM REPORTING & TRANSCRIPTION, LLC

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

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

THE COURT: Sure.

MR. SLAVIN: -- point and I'll try to be quick. When Republic filed their motion for summary judgment, they were arguing this was a waiver. And in fact, in their motion itself it said this consent constitutes a waiver.

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

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

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

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

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

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

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

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

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

MR. SLAVIN: Right. It was disclosed --

THE COURT: But -- but --

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

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

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

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

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

THE COURT: Oh.

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

THE COURT: Okay.

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

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

THE COURT: Uh-huh.

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

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

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

MR. SLAVIN: Correct.

THE COURT: Okay.

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

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

MR. SLAVIN: Correct.

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

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

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

MR. SLAVIN: That's right.

MR. JENKINS: I'm trying.

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

MR. SLAVIN: Right.

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

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

THE COURT: Right.

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

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

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

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

MR. SLAVIN: They don't.

THE COURT: Okay.

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

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

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

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

THE COURT: They didn't know about what?

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

THE COURT: But they had it --

MR. SLAVIN: They had it.

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

MR. SLAVIN: They never tied it together.

THE COURT: Okay. All right.

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

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

MR. SLAVIN: The connection was made November 1,

2016.

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

MR. SLAVIN: Right.

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

MR. SLAVIN: That's correct.

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

MR. SLAVIN: That's correct.

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

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

THE COURT: Because it wasn't raised before?

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

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

THE COURT: Okay.

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

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

MR. SLAVIN: Correct.

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

MR. SLAVIN: Yes, Your Honor.

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

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

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

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

legal argument --

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

MR. SLAVIN: Hmm.

THE COURT: Right?

MR. SLAVIN: Right.

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

MR. SLAVIN: Right.

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

MR. SLAVIN: Correct.

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

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

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

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

THE COURT: Right.

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

THE COURT: Okay.

MR. SLAVIN: -- any of that --

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

MR. JENKINS: Can I be heard?

THE COURT: Yeah, go ahead.

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

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

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

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

THE COURT: Uh-huh (affirmative).

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

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

THE COURT: Uh-huh (affirmative).

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

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

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

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

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

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

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

THE COURT: Okay.

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

THE COURT: Uh-huh.

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

THE COURT: Uh-huh.

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

THE COURT: Okay.

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

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

THE COURT: Uh-huh.

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

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

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

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

THE COURT: Yeah. Sure.

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

Loan sale agreement is September of '13.

THE COURT: Uh-huh (affirmative).

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

THE COURT: Yeah. That --

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

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

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

MR. JENKINS: No, it's --

THE COURT: That you changed it from --

MR. JENKINS: No.

THE COURT: -- waiver to release.

MR. JENKINS: I didn't.

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

MR. JENKINS: So --

THE COURT: -- and you never pled --

MR. JENKINS: So --

THE COURT: -- release.

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

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

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

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

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

THE COURT: All right.

MR. JENKINS: Yeah, yeah.

THE COURT: So all right then --

MR. JENKINS: Yeah.

THE COURT: -- it's a waiver.

MR. JENKINS: Right.

THE COURT: Okay.

MR. JENKINS: But to the extent --

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

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

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

MR. JENKINS: -- of the --

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

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

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

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

MR. JENKINS: I said it was a waiver.

THE COURT: Right.

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

THE COURT: Okay.

MR. JENKINS: But it's a waiver.

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

MR. JENKINS: Well --

THE COURT: We're sticking to waiver then.

MR. JENKINS: Well --

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

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

THE COURT: When?

MR. JENKINS: In our supplemental. In our supplemental.

THE COURT: In your supplemental what?

MR. JENKINS: Disclosure statement.

THE COURT: When?

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

THE COURT: Okay.

MR. JENKINS: Five months ago.

THE COURT: I'm just really --

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

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

MR. JENKINS: Okay.

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

MR. JENKINS: Right.

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

MR. JENKINS: Sure.

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

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

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

THE COURT: You will -- amend?

MR. JENKINS: It --

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

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

THE COURT: -- amend.

MR. JENKINS: Move -- yeah.

THE COURT: I mean --

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

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

MR. JENKINS: No.

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

MR. SLAVIN: Your Honor, I can --

THE COURT: Is that what you're saying?

MR. SLAVIN: Yes, he --

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

MR. SLAVIN: All right.

THE COURT: That's what he's saying. So --

MR. JENKINS: I understand what he's saying.

THE COURT: Okay. Then here's what I -- okay. Let's -- we need to get off this waiver of release, because I will look at that, I will make a determination.

MR. JENKINS: Sure.

THE COURT: If I think that there was a late disclosure by you of relief -- release, then I would allow him to supplement on that narrow issue and then you could respond. And if your response is, here's my response, a motion to amend, then that's what it is.

MR. JENKINS: Okay.

THE COURT: Okay?

MR. JENKINS: No, that -- that's fine.

THE COURT: Or, if you want to say okay, fine, we won't do release, we'll just do waiver because there's really no difference, however you want to --

MR. JENKINS: Okay.

THE COURT: -- to deal with that.

MR. JENKINS: As long as I have --

THE COURT: But I don't want to go back and forth over it.

MR. JENKINS: I agree.

THE COURT: No, you -- you didn't raise it.

MR. JENKINS: As long -- as long as we're on the

THE COURT: Go ahead.

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

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

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

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

MR. SLAVIN: One's a contract.

THE COURT: Huh?

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

MR. JENKINS: Look it up.

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

THE COURT: Knowing and voluntary relinquishment.

MR. JENKINS: Yeah.

MR. SLAVIN: Of a known right.

THE COURT: Of a known right.

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

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

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

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

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

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

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

THE COURT: It's not that clear.

MR. SLAVIN: So -- well --

THE COURT: It's just not that clear.

MR. SLAVIN: Well, the --

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

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

MR. JENKINS: So --

THE COURT: It --

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

THE COURT: I get this -- all I'm saying to you is I get this all the time, right? I get -- and I -- I try -- I just try to be fair, okay? So waiver is close to release, it's not like, you know, you never signed this contract or, you know, it -- it's not -- I mean, these are -- these are closely related concepts. Okay?

Now, if he came and -- he -- he came up with some affirmative defense where you were like I gotta go to do 10 depositions now to address this affirmative defense, he's

done. That one's not going forward. But when this affirmative defense is very closely related, release and waiver, I understand there's a difference, and you don't need to do anything except write something else, give me a few more pages to be able to respond to it, and we're -- we haven't even ha -- we don't even have a trial date yet, do we? Do we have a trial date?

MR. SLAVIN: No.

THE COURT: We don't have a trial date yet --

MR. SLAVIN: Well, and you -- you brought this up earlier. I'd just ask when you do the review of this, the waiver was not connected to the consent document. It was raised --

THE COURT: Okay, but it was as of --

MR. SLAVIN: -- as an affirmative --

THE COURT: -- November 1 and he explained to me --

MR. SLAVIN: Right. Which was a couple months ago.

THE COURT: Okay. All right. So I will take a look at the -- let me -- let's say that I don't allow supplemental briefing on whether you waived your release defense. I still think that if I find that you didn't raise the release until the reply, they get supplemental -- they get to respond to the release argument.

Do you understand what I'm saying?

Like let's say I get to it and I go okay, well, I'm

whether I'm going to ex -- if I am considering excluding that -- the defense of release, then I would have Mr. Slavin file a motion to exclude it. I mean, if it -- if it -- if it even strikes me as something reasonable. And then you would be able to respond.

If I look at all this and I say I'm not going to keep you from using the release defense for the reasons that I just outlined, then I will allow supplement, just by them, okay? They just get to file supplemental brief without another response from you, on release and why release doesn't work.

MR. JENKINS: Okay.

THE COURT: Does that make sense?

MR. SLAVIN: Yes.

THE COURT: Okay. Because I don't think I'm going to be making much sense more than two minutes from now, so I think we've wrapped it up and I'll get something out as soon as I can. Okay?

MR. SLAVIN: Thank you, Your Honor.

MR. JENKINS: Thank you, Your Honor.

THE COURT: Thank you.

THE CLERK: All rise.

(Proceedings concluded at 4:34 p.m.)

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

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THOMPSON MCCARTHY DB, LLC, et al. Plaintiff, v. REPUBLIC BANK AZ, NA, Defendant.	CASE NO. CV2015-053369

Maricopa County Superior Court
Phoenix, Arizona

BEFORE THE HONORABLE DAWN M. BERGIN
SUPERIOR COURT JUDGE

TRANSCRIPT RE: CONTINUATION OF STATUS CONFERENCE

June 20, 2017
8:29 a.m.

TRANSCRIPT PREPARED BY:

VERBATIM REPORTING & TRANSCRIPTION, LLC

A P P E A R A N C E S

On Behalf of the Plaintiffs:

Daniel J. Slavin, Esq.
Jessica Dorvinen, Esq.
(Appearing telephonically)

On Behalf of the Defendant:

W. Scott Jenkins Jr., Esq.
(Appearing telephonically)

P R O C E E D I N G S

THE COURT: Okay. Good morning. This is the time set for a continued status conference in CV2014-014647. Could I have appearances, please?

MR. SLAVIN: Good morning, Your Honor. This is Daniel Slavin and Jessica Dorvinen for the Plaintiffs.

MR. JENKINS: Good morning, Your Honor. Scott Jenkins on behalf of the Defendant, Republic Bank.

THE COURT: Okay. Thank you.

All right. So if I recall, when Mr. Jenkins was dropped off the call, I believe we were talking about the fraud claim. And Mr. Slavin, I'm not sure if you were addressing that; is that right?

I was asking -- let me back up. I was asking questions about whether you in fact needed all of this discovery from the Office of the Comptroller of the Currency to actually proceed with a response to the motion for summary judgment on that claim, because, based on what was being outlined for me, it appeared that you at least would be able to allege a material question of fact. And I think I had then turned to Mr. Jenkins, because there were questions about well, they might object to this or that and I turned to Mr. Jenkins and asked him essentially that question regarding objections and that's when we learned that he was off the call.

So Mr. Slavin, is -- is that where we were?

MR. SLAVIN: Yes, that is a pretty good recollection, Your Honor. I -- I believe there was some discussion, I think by my father who's not with us today, he's in New York, but there was a question as to whether or not there would be objections to emails. There was -- there were emails that are in the record and -- and you had questions of whether or not Republic would be objecting to the admission of that evidence based on authenticity. And so I think you were going to ask Mr. Jenkins if his client would be agreeable for purposes of the motion for summary judgment to accept those.

I think that's what you were saying.

THE COURT: Right. And as I recall, the -- we were talking about documents that were produced by the Defendant. So maybe if you could -- since I'm not sure when Mr. Jenkins dropped off the call, maybe if you could just outline for us what specific communications or documents that you were talking about, at least by category.

MR. SLAVIN: Okay. Well, briefly, there were -- there were some emails that were exchanged that have been presented in the draft that's before the Court now, emails that were sent by Michael Harris who worked for Republic Bank at the time. And he was an officer at the bank and he interfaced with the Plaintiff and the emails illustrate quite clearly that Mr. Harris and Republic were representing that

the -- that the Paradise Valley loan had been submitted when in fact it had not been submitted yet.

And so those facts -- there's a pretty clear outline in what's been -- been presented of a clear misrepresentation. They went so far as to take emails that were sent by the SBA, alter those emails to make it appear as though the loan application was farther along in the process than it -- than it actually was.

And -- and so the PV loan application, just to give a quick background on that, it's now been destroyed because according to Republic, they don't have a retention policy on loans that don't fund. So we're -- we're left with some emails and we also want to take some depositions to find out more information about the Paradise Valley loan, but essentially, the emails that we have of record do show the bank to have been misrepresenting the loans and trying to -- it -- it appeared to be an overt attempt by the bank to encourage the Plaintiffs to keep with the bank because they're pushing the loan along, it'll soon be funded, you know, things like -- well, just one thing around the corner, and the loan was sitting screened out by the SBA for months.

So, you know, I understand Republic may have a different version of -- of those facts, but those are the emails that we have in the record. So we do believe to a certain extent that we have enough in the record to create a

question of fact as to whether or not there was a fraud going on. But I think overall here, what we're -- what we're trying to do and where the case sits, is that we have the OCC, which we believe is imminently going to -- we believe, obviously Plaintiff believes, that they're going to release the privilege.

We had some communications with the attorney who's working with -- who's handling this matter, her name's Ashley Walker, and she let us know that they're going to be expeditiously providing resolution as to whether or not they're going to release privilege or not. So we expect that to be forthcoming.

We wanted to use -- and what we argued in our motion for supplemental briefing, is that we wanted additional time to take the OCC report and measure that against what we were being told by the bank as to what was going on, so that we could illustrate for the Court further indicia of the fraud.

So at the oral argument we called it the enhanced fraud defense I think is the term you perhaps came up with, but that's essentially what it is. It's we have things in the record that do illustrate indicia of fraud, we believe enough to avoid a motion for summary judgment, but we want to have all that in the record so at least we would have the best chance of -- of prevailing against the Defendants.

THE COURT: Okay. So Mr. Jenkins, I have two

THE COURT: Well, all right. Let's back up.

MR. JENKINS: Well, it --

THE COURT: I mean, we've still got that unilateral mistake thing out, but I did make what I hope were helpful some findings as a matter of law.

MR. JENKINS: Absolutely. So what's remaining is this unilateral mistake.

THE COURT: Right.

MR. JENKINS: Okay. Which you've invited us to briefing, which I would really like to brief. Because under Arizona law, the only way you get out of a unilateral mistake is if my client knew that there was being -- a mistake being made. Okay. There's absolutely no evidence whatsoever and the OCC's not going to have any information as to my client's, you know, intent on that issue. And so I -- I really want to brief that issue.

But -- but it gets back to the point of -- and I think you kind of hit on this in your minute entry, that if the fraudulent induc -- so they have to find a way to get around the release is our position. And if they can't get around the lease -- or the release, it was a full release of any and all claims known and unknown. And so what Mr. Slavin is -- and so we're sort of arguing about two different things. If their fraudulent inducement angle was I need discovery to -- from the OCC, because all the other discovery's out there.

need to argue the unilateral mistake because I will -- I am going to have additional briefing on that, you know, and we can talk about that later, but it doesn't make sense to argue the merits of the unilateral mistake at this point.

MR. SLAVIN: No, I --

THE COURT: What I would like to do is figure out what we're doing going forward, so go ahead.

MR. SLAVIN: Excuse me, Your Honor, and thank you. I was not going there.

THE COURT: Okay.

MR. SLAVIN: Where I was going was simply this. That what -- there was a 21 month period between the misrepresentation, the concealment and the release. Same --

THE COURT: Okay.

MR. SLAVIN: -- similar fact pattern. We have a time period between the misrepresentations and the concealment from the bank and when the release was signed. The Parrish case deals right on point with that.

So this idea that we have to look right at the time that the release was signed for this unilateral mistake or this concealment, that is not the case law in Arizona. The case law is simply this; were there facts in the record that Republic knew that they concealed and omitted from -- from the Plaintiff's knowledge, the -- and then asked them to sign a release, still omitting those facts? And so what we're asking

for now, and this is why I'm bringing this up, we want to have the OCC report and to look what was going on from a third party, to say what was really happening with the bank, because again, we have this PV loan. We don't have the file.

And we want to be able to take the OCC report, compare it against what they were telling us, provide the Court with the evidence of all the concealment and misrepresentation that was occurring, because under the Parrish case as a defense of their release, we would have the right to show the Court, you know, and the Court would want to know, what was the bank saying and what were they omitting, so they can determine under the Parrish case whether or not this release can be valid.

And -- and really to -- I want the Court to understand, we did argue that fraudulent inducement into the release. It's at page five and six of our surresponse. And again, we raised it in the surresponse because they raised -- raised the release defense for the first time in their reply. And it's always been Plaintiff's position that they failed to raise release.

And I understand the Court has already ruled release and waiver, you know, in the Court's opinion are essentially the same thing. You know, from Plaintiff's perspective they're separately enumerated in -- in the -- in the affirmative defense section of the civil rules under 8(C), and

THE COURT: Okay. All right.

MR. JENKINS: Can we -- can we limit -- and just to respond, we did -- we did file the response with the OCC yesterday by their deadline. And can we put a page limit? I mean, what are you looking for on the joint report? I don't want to, you know, redo another summary judgment round. Are you looking for two pages each?

THE COURT: Yeah. I mean, the question I'm asking you is, you know, what is your position on how we proceed with the motions for summary judgment and related discovery.

MR. JENKINS: Got it.

THE COURT: Okay?

MR. JENKINS: Thank you.

THE COURT: All right. Thank you.

MR. SLAVIN: Thank you.

THE COURT: Oh, I'm sorry. Can you email -- make sure you email that joint report to my judicial assistant?

MR. SLAVIN: Yes, we will.

MR. JENKINS: Happy to.

THE COURT: Okay. Thank you.

MR. JENKINS: Thanks.

(Proceedings concluded at 8:58 a.m.)

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 24 constitute a full, true, and accurate transcript from electronic recording of the proceedings had in the foregoing matter.

DATED this 27th day of March, 2018.

/s/ Kimberly C. McCright
Kimberly C. McCright, CET
Certified Electronic Transcriber

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THOMPSON MCCARTHY DB, LLC, et al. Plaintiff, v. REPUBLIC BANK AZ, NA, Defendant.	CASE NO. CV2015-053369

Maricopa County Superior Court
Phoenix, Arizona

BEFORE THE HONORABLE DAWN M. BERGIN
SUPERIOR COURT JUDGE

TRANSCRIPT RE: CONTINUATION OF STATUS CONFERENCE

June 26, 2017
8:42 a.m.

TRANSCRIPT PREPARED BY:

VERBATIM REPORTING & TRANSCRIPTION, LLC

A P P E A R A N C E S

On Behalf of the Plaintiffs:

Daniel J. Slavin, Esq.
Francis J. Slavin, Esq.
(Appearing telephonically)

On Behalf of the Defendant:

W. Scott Jenkins Jr., Esq.
(Appearing telephonically)

P R O C E E D I N G S

THE COURT: Okay. Good morning. This is the time set for a status conference in CV2014-146 -- I'm sorry, 014647. Could I have a appearances, please?

MR. SLAVIN: Good morning, Your Honor. This is Daniel Slavin and Francis Slavin for Plaintiff Thompson/McCarthy Coffee Company.

MR. JENKINS: Good morning, Your Honor. Scott Jenkins on behalf of the Defendant Republic Bank AZ.

THE COURT: Okay. So I have read the Plaintiffs' portion of the joint report and Defendant's portion of the joint report. And here's my assessment of the situation.

That I had previously ruled that this additional discovery could be done with respect to the OCC, understanding that Plaintiff anticipating getting discovery that would -- when we talk about the enhanced fraud defense, that would essentially buttress any argument that it had that the release was invalid due to fraud, which of course, overlaps with the unilateral mistake because the terminology used by the Court with unilateral mistake is misrepresentation.

So -- but I understand the Defense position to be that any information that would be obtained from the OCC is not going to add anything to the fraud defense claims, meaning the defense to the release based on fraud.

Now, to me I -- I think that the defense was taking

THE COURT: Yeah.

MR. SLAVIN: -- the OCC. What we expect to get on that is there's a report of examination and report of examination is essentially the bank's audit of what was going on at the bank that culminated into the enforcement action. So the report of examination should detail the reasons why the -- the OCC felt it was necessary to -- to -- to lodge an enforcement action against Republic and require them to basically go through a bunch of new policies, adopted a different procedure. They had to address such things as understaffing. We think there'll be detail in the report of examination that will highlight what was going on at the bank and provide background as to why the bank was telling the Plaintiff that it was moving forward with it's Paradise Valley loan application when it actually was not.

So we have -- when you -- when you reference the email communication, we have emails in the record that discuss from the bank's perspective, Michael Harris is the one that was essentially the communicator on behalf of the bank, saying that the loan was applied for, that it was submitted to the SBA, that they were just waiting from the SBA. This went on for nine, 10, 11 months.

And so the issue here is that by the continuing inducement of the bank to make the Plaintiff believe that the bank was moving forward with its application when it was not,

that caused the Plaintiff to remain with the bank and -- and one other thing to keep in mind here, is the bank had all of the collateral. And I'm not trying to make an argument, but I'm just trying to highlight for you why this information is important. Because the Plaintiff couldn't go anywhere without collateral. And if the bank had tied up all the collateral that the bank could -- or that the Plaintiff could use to go secure new lending, then there was nowhere for the Plaintiff to go.

So Plaintiff was hamstrung, it was in a bad situation. So that's what we expect to get from the OCC. There's a report and the report has been seen when these cases come before the OCC, these requests, the case law has come out that these report -- the report of examination is largely factual. And for those reasons, I believe that the OCC will turn over this information.

I want to address quickly one thing that was written in the Defendant's portion of the joint report and I'm scratching my head to find out what they're referring to. But they say that the OCC has twice turned down a request for production of documents.

I looked everywhere. I can't find that anywhere. The -- the truth is, is the OCC has yet to make a determination on releasing the privilege. They're being very cautious, but I would assume that if they felt that they were

going to deny this, they would have done it already.

So that's what we're expected to -- to obtain from the OCC. I think it's important and why -- why we're here, is that when -- when they were briefing the motion for summary judgment, we then discovered that there was this enforcement action, so it --

THE COURT: But let me -- I'm sorry. If I could ask you the scope of this enforcement action, I mean, are there other customers for whom there may be information? I guess I'm trying to understand; is this just related to your client or is it related to multiple clients? Because it sounds like it's broader than just your client.

MR. SLAVIN: It is, Your Honor. I -- I think it -- actually what happened is in -- in one -- one possibility that we're thinking on our end, is that -- that the SBA shut them down from doing their SBA lending.

THE COURT: But I mean, are you actually --

MR. SLAVIN: And --

THE COURT: -- expecting to find something specific to your client?

MR. F. SLAVIN: Yes.

MR. SLAVIN: Well, ye -- there could be. There's two possibilities. One, they could have found that the -- the credit risk for TMCC did not fit the profile for SBA lending. They could find that they didn't qualify for SBA lending

and/or we could find out that just generally on the whole, that the SBA did not -- that the OCC did not want them doing any more SBA lending. But how that factors into what the fraud is here, is that the bank all along was -- was gilding Mr. Thompson and the Plaintiffs into believing that oh, we're -- we're just go -- we'll get you this loan. And what actually happened is they delayed them, and so this case is about delay damages.

So they delayed them --

THE COURT: But that --

MR. SLAVIN: -- by --

THE COURT: What you're telling me right now all goes to fraudulent inducement and fraud related to the actual business relationship and contract between the parties with respect to the SBA loans. How does that impact the release argu -- the fraud defense to the validity of the release?

MR. SLAVIN: Okay. In that I would turn to Parrish v. United Bank. Parrish v. United Bank is a case that United Bank had told the borrower that this contractor had -- was going to be a good business partner for the borrower not -- and the bank had withheld the fact that this contractor was struggling financially. And then -- then later on, there was I believe some foreclosure or something happened with a loan and the bank wanted the borrower to sign a release.

And what the Court in Arizona found is that the

fraud occurred at the beginning at the outset. And there is no -- by the way, there is no contract that was entered into.

THE COURT: Well, relationship. Whatever.

MR. SLAVIN: I'm sorry?

THE COURT: The relationship.

MR. SLAVIN: Yeah. Yeah.

THE COURT: Okay.

MR. SLAVIN: And so they -- so they withheld information and -- and if you look at our surresponse, that was our first opportunity to respond to the release argument.

THE COURT: Well, and I -- I actually have the Parrish case in front of me right now. And I mean, we need -- I -- I also need to determine whether the parties have some view that unilateral mistake, which is what the Parrish court talks about, is different from fraud. I mean, well, it is generally speaking, right? But in this context, whether it's different.

MR. SLAVIN: Your Honor, it's -- oh, I'm --

THE COURT: Go ahead. Go ahead.

MR. SLAVIN: It's all overlapping. What we have here is essentially a bank who was -- was lying to Plaintiff, just to be straightforward. They were lying to Plaintiff for a long period of time and at the end of the lie, they wanted to get a release. And so they induced them into signing a release and now they want to be -- they want to be released

from their fraud. And, you know, just to point out one thing, the Zounds case, the District Court case in 2017, says that fraudulent inducement cannot be released in a release unless it's expressly stated there.

So --

THE COURT: You mean fraudulent inducement to enter the release?

MR. SLAVIN: That's right. And there's no difference. It's -- this bifurcation of -- as to the -- as to the original loan and as to this release, it's all one. It's a continuation of the fraud. There was no up-front contract that they -- I mean, to the extent that they secured collateral under a UCC agreement perhaps, but -- but what we're looking at is this continuation of fraud.

So it's not like oh, fraud on day one, not day -- day 365, this fraud was continuing. And the final act of the fraud was trying to get a release from the Plaintiff here to let them out of the fraud. And they never disclosed anything that -- that was going on.

And so we have -- we have emails, and this should -- I would believe this would be important to look at, where we have them changing the communication from SBA. And it's -- it's just right in there. They're lying. It's not even questionable. And they're not coming back and saying oh, that's not true. They don't oppose this on a statement of

fact. We have actual concrete evidence of the fraud, of the misrepresentations, going through this PV loan. And what happens is they constructively terminated the relationship because they stopped -- they stopped lending. So what -- I mean, at what point does the Plaintiff say oh, I -- I really expect this bank to lend me money when a year goes by and they're -- they've done nothing except keep telling them we'll get it to you, we'll get it to you.

So I think if you look at -- I mean, this unilateral mistake theory is tied in to the fraud defense which, you know, we asked in our motion for supplemental briefing to have additional time to get their interrogatory responses, and they're objecting, even to the interrogatory responses, because they're claiming the OCC privilege. And I -- I believe we drafted it in such a way where it doesn't rely on a privilege.

We asked them such things as did the bank become aware that any of TMCC's loans or applications for SBA guaranteed loans to be weak. We asked them, you know, did you become aware that there was any -- any of Republic's guaranteed loans that could threaten the validity of the government guarantee program during the years 2011 through 2013. They're objecting.

So we're getting this no -- they're not turning over information that would help support the fraud defense, we have

yet to take the depositions of the bank employees, we have yet to receive, which we believe is imminent, and you -- you should have seen the -- we attached the email from Ashley Walker, saying they're going to work on this expeditiously. We should have the additional time under the 56(D) relief to get this discovery to present everything to you.

But yes, your question about unilateral mistake, it does tie in to the fraud defense and it does tie in to the inducement. Essentially, they withheld important information that we would want to have known at the time that they presented the release. So it goes it -- it -- the fraud is continuing.

THE COURT: So you're saying that when they -- when your client signed the release, that the Defendant knew that they had committed fraud and they were concealing that potential cause of action from you and induced you into the release, not obviously disclosing that information. Am I understanding correctly?

MR. SLAVIN: Yes, Your Honor. And -- and -- that is correct. There -- there's a duty of good faith woven into every contract in Arizona. And -- and this information, and I cited to you restatement 161, the comment B there, and it talks about this situation, where was -- you're withholding information knowing that the other party would want to know that for the purpose of getting them to act. And that's what

we have here.

And we -- and if you -- if you look back in the records, this isn't a question of did they or did they not. Did they know? Absolutely they knew. And how do I -- how can I say that?

If you look at the emails that -- that they were taking from the SBA, and they were taking documents and they were -- they were -- they were editing them and saying that they were farther along than they were, they were omitting certain information and misleading the Plaintiff into believing that, they knew. I mean, if Michael Harris was working in the scope of his employment, they're charged with that. And Michael Harris knew it. But we have yet to depose these people yet.

But absolutely, did they know that they had -- were committing a fraud and lying, yes.

THE COURT: Okay. Thank you. Mr. Jenkins?

MR. JENKINS: Judge, you just heard -- your -- your assessment of the situation is absolutely spot on. You just heard all you needed to hear to rule on the summary judgment. They have failed to provide one even fact of any potential misrepresentation, let alone fraudulent misrepresentation, regarding the inducement to enter into the relief.

You asked him a very specific question about what -- what facts do you have supporting the fraudulent inducement as

THE COURT: All right. How many pages do you need? Is 10 enough?

MR. JENKINS: That's fine.

THE COURT: Okay. So 10 pages. And I'm sorry, we said it was due when, July --

MR. JENKINS: 6th.

THE COURT: -- 6th. And we have the hearing on July 10th. Okay. Anything else then, Mr. Slavin?

MR. SLAVIN: No, Your Honor. Thank you.

THE COURT: Okay. Mr. Jenkins?

MR. JENKINS: Thank you, Your Honor. Appreciate it.

THE COURT: All right. Thank you.

MR. JENKINS: Bye.

(Proceedings concluded at 9:14 a.m.)

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 25 constitute a full, true, and accurate transcript from electronic recording of the proceedings had in the foregoing matter.

DATED this 27th day of March, 2018.

/s/ Kimberly C. McCright
Kimberly C. McCright, CET
Certified Electronic Transcriber

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THOMPSON MCCARTHY DB, LLC, et al. Plaintiff, v. REPUBLIC BANK AZ, NA, Defendant.	CASE NO. CV2014-014647

Maricopa County Superior Court
Phoenix, Arizona

BEFORE THE HONORABLE DAWN M. BERGIN
SUPERIOR COURT JUDGE

TRANSCRIPT RE: STATUS CONFERENCE

July 10, 2017
8:32 a.m.

TRANSCRIPT PREPARED BY:

VERBATIM REPORTING & TRANSCRIPTION, LLC

A P P E A R A N C E S

On Behalf of the Plaintiffs:

Daniel J. Slavin, Esq.
Francis J. Slavin, 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: (Indiscernible) -- -647. Could I have appearances, please?

MR. F. SLAVIN: Francis and Daniel Slavin, for Plaintiff Thompson/McCarthy Coffee Co.

THE COURT: Good morning. Thank you.

MR. F. SLAVIN: Good morning.

MR. JENKINS: Good morning, Your Honor. Scott Jenkins and Andi Landeen with Quarles & Brady on behalf of Republic Bank, and I'd also just like to introduce two of our summer clerks, our star summer clerks that are at ASU, Alexa and Madeline.

THE COURT: Good morning. Thank you. Okay. So I have reviewed -- I'm not sure whether -- where we are. I think a Sur -- a response to the Sur-Response, I think was the way it was titled, from Republic, and I guess I'd like to hear from you, Mr. Slavin, or one of Mr. Slavins, as to where we stand on this. And, you know, I have to say this -- I'm having trouble like nailing down the exact theory that the Plaintiff is asserting here because I understand its unilateral mistake, but then because unilateral mistake can form the basis for invalidating a release if there are fraudulent misrepresentations. I'm sort of, you know, looking at fraudulent concealment. Is that the argument or is it non-disclosure? Which, of course, you know, one requires a duty,

motion, you know, re- -- refile their motion where we can get this thing debated based upon what actually happened

THE COURT: Okay.

MR. SLAVIN: Thank you.

THE COURT: Thank you. Okay. So let's talk about where we're going from here. I'll go ahead, Laura, and take the notice for summary judgment under advisement today. What is your position, Mr. Jenkins, on discovery moving forward?

MR. JENKINS: I -- I -- well, our position is, again, because we have believe this is dispositive, that the party should have some sort of -- keep discovering -- some limited advance to give the court. Again, you -- you have five briefs on both parties. We filed our --

THE COURT: And I got 30 under advisements, right? So --

MR. JENKINS: I -- no, I -- and I -- trust me -- I --

THE COURT: So, I -- I mean, if you're expecting a ruling next week, it's not going to happen, so.

MR. JENKINS: And I -- I would not even dream to imagine what your calender's like, but, you know, in fairness to us, we did file this in December and --

THE COURT: Right. But --

MR. JENKINS: We're still not done --

THE COURT: I mean, I also found that you did not properly disclose release. Okay? Which was why -- and I know

you disagree with that, --

MR. JENKINS: Okay.

THE COURT: -- but that's is what I found and that was part of the reason that the briefing has taken so long.

MR. JENKINS: I understand.

THE COURT: Okay.

MR. JENKINS: And I'm not blame -- there's no blame on anybody. It's just --

THE COURT: Okay. All right.

MR. JENKINS: But it's not like we just filed this, you know, last month.

THE COURT: All right. I understand.

MR. JENKINS: So, again, keeping in the spirit of, you know, multiple times I've been in front of you with, you know, the whole purpose of the commercial court --

THE COURT: Right.

MR. JENKINS: -- is to keep cost down low. I'm not saying delay it forever. I understand it may take you 30, 60 days to -- to rule on this issue. But again, going to his issues on the -- the facts that he wants to discover, I'm -- I'll assume that it's true, but our position's still the same, that the release is dispositive of, you know, again, look in the specific language of the release, admissions regarding the loans.

And so again, we'd invite the Court to just look at

THE COURT: Okay. So right now, I'm just holding all of the pretrial deadlines in abeyance to be addressed after the summary judgment motion is ruled on, and discovery will be limited to continuing to work with the OCC to get documents and the deposition of Mr. Harris. Okay? Anything else? All right. Thank you.

(Proceedings concluded at 9:31 a.m.)

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 46 constitute a full, true, and accurate transcript from electronic recording of the proceedings had in the foregoing matter.

DATED this 25th day of April, 2018.

/s/ Kimberly C. McCright
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