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COMMISSIONERS

GARY PIERCE, Chairman  
BOB STUMP  
SANDRA D. KENNEDY  
PAUL NEWMAN  
BRENDA BURNS

IN THE MATTER OF THE FORMAL  
COMPLAINT OF SWING FIRST GOLF,  
LLC, AGAINST JOHNSON UTILITIES,  
LLC.

**DOCKET NO. WS-02987A-08-0049**  
**JOHNSON UTILITIES' REQUEST FOR**  
**ORAL ARGUMENT**  
**AND**  
**SUPPLEMENTAL RESPONSE IN**  
**OPPOSITION TO SWING FIRST**  
**GOLF'S WITHDRAWAL OF**  
**COMPLAINT**

On September 27, 2011, Swing First Golf, LLC, ("SFG") filed a pleading captioned "Withdrawal of Complaint" purporting to unilaterally withdraw its amended formal complaint ("Amended Formal Complaint") in this docket with prejudice. On October 4, 2011, Johnson Utilities, LLC ("Johnson Utilities" or the "Company") filed its Response in Opposition to Swing First Golf's Pleading Captioned Withdrawal of Complaint (the "Company Response"). On October 7, 2011, SFG filed its Reply to Johnson Utilities' Response, and on October 11, 2011, Utilities Division Staff ("Staff") filed its Response to Swing First Golf's Motion to Withdraw (the "Staff Response"). There has been no ruling on SFG's filing and Johnson Utilities is in need of clarification regarding the current status of this complaint case. Therefore, Johnson Utilities requests that a procedural conference be scheduled to allow the parties to present oral argument on SFG's Withdrawal of Complaint. In addition, the Company desires to supplement the Company Response to address certain arguments raised by Staff in its Staff Response, as discussed below.

Brownstein Hyatt Farber Schreck, LLP  
One East Washington Street, Suite 2400  
Phoenix, AZ 85004

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1 **I. SFG DOES NOT HAVE AN ABSOLUTE RIGHT TO A VOLUNTARY**  
2 **DISMISSAL OF ITS AMENDED FORMAL COMPLAINT WITH PREJUDICE,**  
3 **AND UNDER THE CIRCUMSTANCES OF THIS CASE, THE COMMISSION**  
4 **SHOULD REJECT THE WITHDRAWAL OF COMPLAINT.**

5 In the Staff Response, Staff quotes the case of *Damron v. Sledge*, 105 Ariz. 151, 154,  
6 460 P.2d 997, 1000 (1969), in which the Arizona Supreme Court stated:

7 Any time a plaintiff offers to dismiss with prejudice, the attorney for the party  
8 against whom the dismissal is sought has no grounds for objecting when his  
9 client's rights are protected. In fact, when a lawyer is retained by a client to  
10 defend a lawsuit, his ultimate aim is to procure a dismissal with prejudice or a  
11 favorable verdict. We therefore hold a plaintiff has an absolute right to a  
12 voluntary dismissal of his complaint with prejudice.

13 The *Damron* court cited as authority the Michigan case of *Smoot v. Fox*, 340 F.2d 301  
14 (6th Cir. 1964). In the *Smoot* case, the United States Court of Appeals for the Sixth Circuit  
15 concluded that a lower federal district court erred in denying the plaintiff's motion to dismiss  
16 with prejudice, reasoning as follows:

17 New counsel for the plaintiff said that he advised his client that on authority of  
18 *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, he  
19 would have to show malice on the part of the defendants in order to succeed in his  
20 litigation. It was counsel's view that this could not be shown, or, at least, it could  
21 not be developed in the limited time available for preparation. We know of no  
22 power in a trial judge to require a lawyer to submit evidence on behalf of a  
23 plaintiff, when he considers he has no cause of action or for any reason wishes to  
24 dismiss his action with prejudice, the client being agreeable. A plaintiff should  
25 have the same right to refuse to offer evidence in support of his claim that a  
26 defendant has.

27 Of course, if he declines to offer evidence, he must suffer the consequences,  
28 which in this case would be judgment against him and a judgment in favor of the  
29 defendants. Dismissal of an action with prejudice is a complete adjudication of  
30 the issues presented by the pleadings and is a bar to a further action between the  
31 parties. An adjudication in favor of the defendants, by court or jury, can rise no  
32 higher than this. (Citations omitted).<sup>1</sup>

33 There are at least two reasons why the *Damron* and *Smoot* cases should be rejected as  
34 inapplicable in the case of SFG. First, the cases are substantively distinguishable from this case  
35 because SFG intends to continue forward with its claims against Johnson Utilities in the  
36 Maricopa County Superior court case (Docket CV 2008-000141) (the "Superior Court Case").

37  
38 <sup>1</sup> *Smoot v. Fox*, 340 F.2d 301, 302-303 (6th Cir. 1964).

1 Thus, the dismissal of the Amended Formal Complaint pending before the Arizona Corporation  
2 Commission ("Commission") would not be "a complete adjudication of the issues presented by  
3 the pleadings," as was the case between plaintiffs Clyde and Eileen Damron and defendant Ples  
4 Sledge in the *Damron* case and between the plaintiff and the defendants in the *Smoot* case.

5 Second, other courts have held that the better approach to *Damron* and *Smoot* is to  
6 consider the effect of a dismissal on the defendant in the case before automatically granting a  
7 motion to dismiss with prejudice. As one example, the United States District Court for the  
8 Eastern District of Virginia explained as follows in *Samsung Electronics Co., Ltd v. Rambus,*  
9 *Inc.* 440 F.Supp 2d 495 (E.D. Virginia 2006):

10 Some courts have held that district courts lack discretion to deny a Rule 41(a)(2)  
11 dismissal when the plaintiff seeks dismissal with prejudice. *See Smoot v. Fox,*  
12 340 F. 2d 301, 303 (6th Cir. 1964); *Shepard v. Egan,* 767 F.Supp. 1158, 1165 (D.  
13 Mass. 1990). However, the better approach is that adopted by the Tenth Circuit,  
14 which has rejected such a blanket rule given that a dismissal with prejudice might  
15 still have an adverse effect on the defendant or other parties to the litigation. *See*  
16 *County of Santa Fe v. Public Service Co. of N.M.,* 311 F.3d 1031, 1049 (10th Cir.  
17 2002). Moreover, the Supreme Court stated in *Semtek Int'l, Inc. v. Lockheed*  
18 *Martin Corp.,* 531 U.S. 497, 505, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001), that a  
19 dismissal with prejudice under Rule 41 generally has "the consequence of not  
20 barring the claim from other courts," but rather refiling in the district court that  
21 issued the dismissal with prejudice. If a dismissal with prejudice under Rule 41 is  
22 not sufficient for claim preclusion, then there are myriad circumstances under  
23 which even a dismissal with prejudice would prejudice the defendant.  
24 Consequently, the district court has discretion in determining whether to grant a  
25 Rule 41(a)(2) dismissal. (Emphasis added).<sup>2</sup>

26 The dismissal of SFG's Amended Formal Complaint before the Commission will not  
27 preclude the claims asserted by SFG from proceeding in the Superior Court Case. In fact, SFG  
28 has specifically told the Commission that "many of the issues raised in this Commission  
complaint are also at issue in the Superior Court case."<sup>3</sup> SFG identified these "common issues"  
in its September 20, 2011, Motion for Continuance in this docket:

- Water Overcharges/Appropriate Refunds
- Oasis Management Water Credits
- Effluent Withholding
- Minimum Bill Overcharges

<sup>2</sup> *Samsung Electronics Co., Ltd v. Rambus, Inc.* 440 F.Supp 2d 495, 509, fn 11 (E.D. Virginia 2006).

<sup>3</sup> Swing First Golf Motion for Continuance dated September 20, 2011.

- 1           •       Overcharges for Flooding
- 2           •       Line-Break Overcharges

3           Rather than allowing the automatic dismissal of SFG's Amended Formal Complaint, the  
4 Commission should follow the better approach articulated in *Samsung Electronics* and consider  
5 whether there would be an adverse impact on Johnson Utilities. There are at least four.

6           First, because the Commission is best situated with the requisite specialized expertise to  
7 address the claims raised by SFG and the Counterclaims raised by Johnson Utilities, the  
8 Company would be adversely impacted if these claims are addressed in any other forum. Article  
9 15, Section 3, of the Arizona Constitution imbues the Commission with authority to prescribe  
10 just and reasonable rates and charges:

11           Section 3. The corporation commission shall have full power to, and shall,  
12 prescribe just and reasonable classifications to be used and just and reasonable  
13 rates and charges to be made and collected, by public service corporations within  
14 the state for service rendered therein, and make reasonable rules, regulations, and  
15 orders, by which such corporations shall be governed in the transaction of  
16 business within the state, and may prescribe the forms of contracts and the  
17 systems of keeping accounts to be used by such corporations in transacting such  
18 business, and make and enforce reasonable rules, regulations, and orders for the  
19 convenience, comfort, and safety, and the preservation of the health, of the  
20 employees and patrons of such corporations.... (Emphasis added).

21           The Commission's institutional knowledge and expertise pertaining to the regulation of  
22 public utilities cannot be matched by the courts. The Commission has its own utilities division  
23 staff with broad expertise in evaluating, approving, interpreting and enforcing utility tariffs, one  
24 of the central issues in this complaint case. The Commission has a consumer services section  
25 which daily addresses customer complaints regarding rates and charges on utility bills and  
26 service quality questions, and which interacts with the regulated utilities in addressing issues  
27 raised by customers. The Commission has its own legal staff with key knowledge regarding the  
28 legal requirements that apply to regulated utilities, including Title 14 of the Arizona  
Administrative Code and Title 40 of the Arizona Revised Statutes, as well as the case law  
interpreting the provisions of Title 40. The Commission has its own hearing division which  
regularly addresses disputes between utilities and customers. All of these critical resources will

1 be brought to bear in this complaint case to reach the correct rulings on SFG's claims. The  
2 Superior Court simply does not have the depth of background and resources that are available to  
3 the Commission.

4 Because of the Commission's expertise in the specialized area of public utility regulation,  
5 it is best positioned to address the claims raised by SFG and the counterclaims raised by Johnson  
6 Utilities. By way of illustration, each of the following claims asserted by SFG in its Amended  
7 Formal Complaint requires special agency expertise that is only found at the Commission:

- 8 • SFG claims that it has the right to the first effluent generated by Johnson  
9 Utilities in its service area. The Commission is the proper authority to  
10 determine the relative priority among competing customers for a particular  
11 type of water or service. For example, how should limited quantities of  
12 effluent be allocated between SFG and other effluent users such as the San  
13 Tan Heights Homeowners Association?
- 14 • SFG claims that it should be charged \$0.62 per thousand gallons of water  
15 delivered by Johnson Utilities regardless of whether the water is effluent  
16 or Central Arizona Project ("CAP") water. In its Reply to Johnson  
17 Utilities' Response, SFG argues that: (i) "we now know the appropriate  
18 tariff rates for all water sales at issue;" (ii) "[t]he Commission need not set  
19 rates or determine the appropriate rates to be charged;" and (iii) "[t]he  
20 Court can now do its work."<sup>4</sup> To the contrary, the resolution of this claim  
21 by SFG goes well beyond merely applying the approved tariff rates for  
22 effluent water or CAP water. Rather, the Commission must evaluate  
23 SFG's claim that it is entitled to pay the effluent rate for water even where  
24 Johnson Utilities has delivered CAP water. This is an issue that falls  
25 squarely within the Commission's jurisdiction and expertise.
- 26 • SFG claims that Johnson Utilities has overcharged SFG on its minimum  
27 monthly bills. Specifically, SFG claims that Johnson Utilities should have  
28 charged a single monthly meter charge based upon a three-inch meter,  
instead of two monthly minimum charges based upon two six-inch meters.  
It is unclear how a court would ever resolve this claim without direction  
from the Commission.

It is unclear how the court would properly resolve these claims without direction from the  
Commission.

A second way that Johnson Utilities would be adversely affected by the withdrawal of  
SFG's Amended Formal Complaint is the likelihood of a ruling in the Superior Court Case

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<sup>4</sup> Swing First Golf Reply to Johnson Utilities' Response (October 7, 2011) at 3, lines 1-3.

1 which is inconsistent with the obligations imposed on the Company under its approved tariffs or  
2 inconsistent with other requirements imposed on the Company under applicable Commission  
3 rules, practices, policies or decisions. Because the court lacks the specialized agency expertise  
4 that would be brought to bear by the Commission in evaluating the claims of SFG and the  
5 counterclaims of Johnson Utilities, there is a significant risk of a ruling by the court that is  
6 inconsistent with the Company's tariffs or the rules, practices, policies or decisions of the  
7 Commission. Thus, Johnson Utilities could become what one court has described as a "victim  
8 of uncoordinated and conflicting requirements."<sup>5</sup>

9 A third way that Johnson Utilities would be adversely affected by the withdrawal of  
10 SFG's Amended Formal Complaint without a complete and final resolution of the issues raised  
11 is lost and wasted time and resources. Johnson Utilities has already expended tremendous  
12 amounts of time and money addressing SFG's claims in this complaint proceeding (and in the  
13 Company's rate case proceeding where SFG actively participated and pursued its claims),  
14 including responding to multiple sets of data requests, preparing motions and responding to  
15 motions, filing briefs, attending procedural conferences, and preparing to go to hearing. At this  
16 point, the most efficient path forward is to complete the case at the Commission, and Johnson  
17 Utilities would be prejudiced if the complaint is withdrawn without a complete adjudication of  
18 the claims presented in SFG's Amended Formal Complaint.

19 A fourth way that Johnson Utilities would be adversely affected by the withdrawal of  
20 SFG's Amended Formal Complaint without a complete and final resolution of the issues raised  
21 is the inequity that would result by virtue of from the Commission Staff's standing directive that  
22 the Company not disconnect utility service to SFG for non-payment of the disputed portion of  
23 the bills until the dispute has been resolved. Johnson Utilities has asserted counterclaims against  
24 SFG because it has not received payment for water that was delivered to SFG years ago. The  
25 Company would certainly be adversely affected if the Commission were to permit the  
26 withdrawal of SFG's complaint with prejudice without also releasing Johnson Utilities' from the

27 \_\_\_\_\_  
28 <sup>5</sup> See *infra* *Campbell v. Mountain States Tel. & Tel. Co.* 120 Ariz. 426, 430, 586 P.2d 987, 991 (App. 1978).

1 prohibition against disconnecting water service to SFG for non-payment of the disputed bills.  
2 This is yet another reason why the Commission should retain primary jurisdiction over this  
3 complaint case, and it highlights the fact that SFG's withdrawal of the Amended Formal  
4 Complaint will not result in a "complete adjudication of the issues presented."

5 In summary, there can be no question that the Commission is the appropriate and best  
6 forum to resolve each of the issues raised by SFG in its Amended Formal Complaint and the  
7 issues raised by Johnson Utilities in its associated counterclaim. The Commission should bear  
8 in mind that the withdrawal of SFG's Amended Formal Complaint with prejudice in this case  
9 will not lead to "a complete adjudication of the issues presented by the pleadings," but instead,  
10 will only transfer the issues to the Superior Court for resolution, where there is a realistic risk of  
11 a ruling which is inconsistent with the Company's tariff and other Commission rules, practices,  
12 policies or decisions. For all of the reasons discussed above, Johnson Utilities would be  
13 adversely affected if SFG's Amended Formal Complaint is withdrawn at this late juncture.  
14 Thus, the Commission should exercise its discretion and reject SFG's Withdrawal of Complaint.

15 **II. THE COMMISSION HAS ALREADY ASSERTED PRIMARY JURISDICTION**  
16 **TO HEAR THE CLAIMS RAISED BY SFG AND THE COUNTERCLAIMS**  
17 **RAISED BY JOHNSON UTILITIES IN THIS DOCKET.**

18 Staff asserts in its Staff Response that there "may be concurrent jurisdiction with the  
19 Superior Court,"<sup>6</sup> and then goes on to discuss the judicial doctrine of primary jurisdiction.  
20 However, an analysis of what forum has primary jurisdiction is not relevant in this case because  
21 the Commission already asserted primary jurisdiction over SFG's complaint several years ago in  
22 2008 and has since exercised that jurisdiction by holding oral arguments, issuing procedural  
23 orders and rulings on discovery disputes and Johnson Utilities' motion for summary judgment,  
24 and prohibiting the Company from disconnecting water service to SFG for non-payment of the  
25 disputed bills. In addition, the administrative law judge stayed the complaint case for a time  
26 while SFG aggressively pursued its claims in the Johnson Utilities rate case which concluded  
27 last year. Thus, the time for evaluating which forum—the Commission or the Maricopa County

28 <sup>6</sup> Staff's Response to Swing First Golf Motion to Withdraw (October 11, 2011) at 2, line 9.

1 Superior Court—has primary jurisdiction in this case has long since passed, and is moot at this  
2 point.

3 However, if any analysis of primary jurisdiction was relevant in this case, there is no  
4 question the Commission has primary jurisdiction to address the claims raised by SFG in its  
5 Amended Formal Complaint and by Johnson Utilities in its counterclaims, and the Commission  
6 should retain primary jurisdiction over those claims. Citing *Campbell v. Mountain States Tel. &*  
7 *Tel. Co.* 120 Ariz. 426, 430, 586 P.2d 987, 991 (App. 1978), Staff states that "[t]he doctrine of  
8 primary jurisdiction is a discretionary rule created by the courts to effectuate the efficient  
9 handling of cases in specialized areas where agency expertise may be useful." In the *Campbell*  
10 case, the Arizona Court of Appeals quoted an administrative law treatise in describing the  
11 purpose behind the doctrine of primary jurisdiction:

12 The principal reason behind the doctrine of primary jurisdiction is not and never  
13 has been the idea that "administrative expertise" requires a transfer of power from  
14 courts to agencies, although the idea of administrative expertise does to some  
15 extent contribute to the doctrine. The principal reason behind the doctrine is  
16 recognition of the need for orderly and sensible coordination of the work of  
17 agencies and of courts. Whether the agency happens to be expert or not, a court  
18 should not act upon subject matter that is peculiarly within the agency's  
specialized field without taking into account what the agency has to offer, for  
otherwise parties who are subject to the agency's continuous regulation may  
become the victims of uncoordinated and conflicting requirements. (Emphasis  
added).<sup>7</sup>

19 In the *Campbell* case, the plaintiff brought tort claims and a contract claim against  
20 Mountain States Telephone & Telegraph Company in the Superior Court arising out of the  
21 telephone company's repeated failure to provide unintercepted and uninterrupted telephone  
22 service. The plaintiff sought substantial compensatory damages for loss of income and business,  
23 aggravation, mental and physical suffering, inconvenience, distress, and aggravation of a  
24 physical condition. The plaintiff also sought punitive damages. The telephone company moved  
25 to dismiss the complaint on the grounds that the plaintiff had failed to exhaust her administrative  
26 remedies by first going to the Commission, and the Superior Court agreed with the telephone  
27 company.

28 <sup>7</sup> *Campbell v. Mountain States Tel. & Tel. Co.* 120 Ariz. 426, 430, 586 P.2d 987, 991 (App. 1978).

1 On appeal, the Arizona Court of Appeals reversed and remanded. The court began by  
2 clarifying that while the telephone company's motion to dismiss raised the failure to exhaust  
3 administrative remedies, the real argument was that the case should be dismissed because  
4 exclusive primary jurisdiction lies with the Commission. The Court of Appeals rejected this  
5 argument, reasoning as follows:

6 In this case, appellees [telephone company] have consistently argued that  
7 appellant's [Campbell] complaint is concerned only with the technical manner and  
8 means of providing telephone service. Were appellees' contentions supported by  
9 the complaint, we would have no trouble in affirming dismissal of the complaint  
10 on the ground of primary jurisdiction since questions involving only the manner  
11 and means of providing telephone service raise "issues of fact not within the  
conventional experience of judges," *Far East Conference, supra*, 342 U.S. at 574,  
72 S.Ct. at 494, but within the duties and expertise of the Corporation  
Commission.

12 Despite appellees' contentions, however, appellant's complaint deals with much  
13 more than the mere manner and means of providing telephone service. As our  
14 summary of the complaint above indicates, appellant has proffered three claims in  
15 tort for tortious interference with telephone service, intentional infliction of  
16 emotional distress, and invasion of privacy and one claim for breach of contract.  
17 Obviously, each of these claims is elementally based on the manner and method  
18 of providing service, and other matters within the particular expertise of the  
19 Corporation Commission. However, the claims' most important aspects involve  
20 facts and theories of tort and contract far afield of the Commission's area of  
21 expertise and statutory responsibility. Indeed, appellant's tort and contract claims  
22 are the type of traditional claims with which our trial courts of general jurisdiction  
23 are most familiar and capable of dealing. *See Trico Electric Cooperative v.*  
24 *Ralston, supra; General Cable Corp. v. Citizens Utilities Co., supra; Gregg v.*  
25 *Delhi-Taylor Oil Corp.*, 162 Tex. 26, 344 S.W.2d 411 (1961).

26 Thus, while it is undeniable that appellant's claims do involve the adequacy and  
27 method of telephone service and that such issues are within the Commission's  
28 jurisdiction under A.R.S. § 40-203 and § 40-321(A), these issues are not  
predominant. This case, as determined by the complaint, does not involve the  
question of whether appellees are adequately providing telephone service to the  
public. Further, appellant is not seeking injunctive relief to establish broad public  
doctrines, or rights to service or levels of service. In short, appellant's case  
involves relatively simple tort and contract issues revolving around a central  
inquiry: whether, under traditional judicial principles, appellees committed a civil  
wrong against appellant. Because these issues predominate, it is clearly not  
essential for the courts to "refrain from exercising (their) jurisdiction until after"  
the specialized administrative agency "has determined some question or some  
aspect of some question arising in the proceeding before the court." *Davis, supra*,  
§ 19.01, at 3. As a result, we decline to apply the discretionary doctrine of

1 primary jurisdiction so as to vest exclusive primary jurisdiction in the Corporation  
2 Commission. (Emphasis added).<sup>8</sup>

3 Unlike the plaintiff in *Campbell*, the claims raised by SFG in its Amended Formal  
4 Complaint are precisely the type "involving only the manner and means of providing [water]  
5 service," raising "issues of fact not within the conventional experience of judges." Further,  
6 SFG's claims are "elementally based on the manner and method of providing service, and other  
7 matters within the particular expertise of the Corporation Commission." SFG's claims do not  
8 have as their "most important aspects ... facts and theories of tort and contract far afield of the  
9 Commission's area of expertise and statutory responsibility." Thus, the *Campbell* case cited by  
10 Staff supports the exercise of primary jurisdiction by the Commission in this case.

11 Staff cites *Tucson Gas, Electric & Power Co. v. Trico Electric Coop., Inc.*, 2 Ariz. App.  
12 105, 406 P.2d 740 (1965), as an example of a case where a "Court refused to find primary  
13 jurisdiction in the Commission, and affirmed the jurisdiction of the court to enjoin the invasion  
14 by one public service corporation of the certificated area of another."<sup>9</sup> In the *Tucson Gas* case,  
15 the Arizona Court of Appeals considered an argument by Tucson Gas, Electric Light and Power  
16 Company pertaining to A.R.S. §40-281(B) and concluded that the statute does not "vest  
17 exclusive primary jurisdiction in the corporation commission, to the exclusion of the court's  
18 inherent jurisdiction to enjoin an illegal act."<sup>10</sup> The court continued:

19 That section provides that the corporation commission, on complaint of the  
20 corporation injuriously affected, *may* make an order and prescribe the terms and  
21 conditions for the location of lines. Such language is a far cry from that necessary  
22 to vest exclusive primary jurisdiction in the corporation commission, to the  
23 exclusion of the court's power to grant injunctive relief, when, as contended by  
24 Trico Electric Cooperative Inc., there is an invasion by one public service  
25 corporation of the certificated area of another public service corporation.  
(Emphasis in original).<sup>11</sup>

26 The *Tucson Gas* case is distinguishable from the complaint filed by Swing First Golf in  
27 at least two important respects. First, unlike SFG's Amended Formal Complaint which was filed

28 <sup>8</sup> *Id.* at 431-432, 586 P.2d at 992-993.

<sup>9</sup> Staff's Response to Swing First Golf Motion to Withdraw (October 11, 2011) at page 2, lines 12-15.

<sup>10</sup> *Tucson Gas, Electric & Power Co. v. Trico Electric Coop., Inc.*, 2 Ariz. App. 105, 108, 406 P.2d 740,  
743 (1965).

<sup>11</sup> *Id.*

1 in the first instance with the Commission, Trico Electric Cooperative filed its petition for an  
2 injunction against Tucson Gas, Electric Light and Power Company in the Pima County Superior  
3 Court. *Tucson Gas* did not involve a situation where a Commission complaint had already been  
4 moving forward for a period of years. Second, the court's analysis in *Tucson Gas* turned upon  
5 its interpretation of A.R.S. §40-281(B). Because Commission authority to issue certificates of  
6 convenience and necessity derives from a grant of power from the State legislature, the  
7 Commission's jurisdiction under A.R.S. §40-281(B) is concurrent with that of the courts. By  
8 comparison, the Commission's jurisdiction to "prescribe just and reasonable classifications to be  
9 used and just and reasonable rates and charges to be made and collected by public service  
10 corporations" derives from Article 15, Section 3 of the Arizona Constitution, and such power is  
11 exclusive and plenary.<sup>12</sup> There is a clear distinction between cases raising issues related to the  
12 accuracy and reasonableness of rates and charges, on the one hand, and cases seeking injunctive  
13 relief related to statutory rights under a certificate of convenience and necessity, on the other.

14 In *Qwest Corporation v. Kelly*, 204 Ariz. 25, 59 P.3d 789 (App. Div. 2, 2002), the  
15 Arizona Court of Appeals described the Commission's exclusive jurisdiction under Article 15,  
16 Section 3, as follows:

17 [I]t "has full and exclusive power in the field of prescribing rates which cannot be  
18 interfered with by the courts, the legislature or the executive branch of state  
19 government." *Morris v. Arizona Corp. Comm'n*, 24 Ariz. App. 454, 457, 539  
20 P.2d 928, 931 (1975); *see also Southwest Gas Corp. v. Arizona Corp. Comm'n*,  
21 169 Ariz. 279, 283, 818 P.2d 714, 718 (App. 1991) (with respect to ratemaking  
22 decisions that affect public services corporations, "the Commission is given full  
23 and exclusive powers to the preclusion of interference by the other branches of  
24 government"); *Arizona Pub. Serv. Co. v. City of Phoenix*, 149 Ariz. 61, 64, 716  
25 P.2d 430, 433 (App. 1986) ("[C]ommission has exclusive ratemaking authority,  
26 not to be invaded by any branch of government."). **Thus, as part of its executive  
27 and legislative function, the Commission has the exclusive, plenary authority  
28 to determine what is just and reasonable in terms of services offered by a  
public service corporation and the rates charged for such services.** *Tucson  
Elec. Power Co. v. Arizona Corp. Comm'n*, 132 Ariz. 240, 645 P.2d 231 (1982).  
(Emphasis added).<sup>13</sup>

<sup>12</sup> *State v. Tucson Gas, Elec. Light and Power Co.*, 15 Ariz. 294, 138 P. 781 (1914).

<sup>13</sup> *Qwest Corporation v. Kelly*, 204 Ariz. 25, 30, 59 P.3d 789, 794 (Ariz. App. Div. 2, 2002).

1 Further, the Court of Appeals added that the Commission's power to prescribe reasonable  
2 rates and charges extends to the resolution of customer complaints involving the reasonableness  
3 of services, rates and charges:

4 As this court stated in *State ex rel. Corbin v. Arizona Corp. Comm'n*, 174 Ariz.  
5 216, 218, 848 P.2d 301, 303 (App. 1992), "[t]he [C]ommission's power goes  
6 beyond strictly setting rates and extends to enactment of the rules and  
7 regulations that are reasonably necessary steps in ratemaking." In addition  
8 to this executive and legislative authority, the Commission has the judicial  
9 jurisdiction to hear grievances and consumer complaints. *State ex rel. Woods;*  
10 *Southwest Gas Corp.* Not only does the Commission have judicial powers that  
11 are "inherent in its responsibility to make those decisions necessary to regulate  
12 public service corporations, pursuant to Article 15, Section 3, of the Arizona  
13 Constitution," *Southwest Gas Corp.*, 169 Ariz. at 284, 818 P.2d at 719, as  
14 previously noted, the legislature has expanded that authority by expressly  
15 authorizing it to address consumer complaints, including those that involve  
16 allegations of deceptive business and marketing practices. A.R.S. §§ 40-110, 40-  
17 202(C). With respect to matters solely and directly involving questions of the  
18 reasonableness of services, rates, and the classification of services, the  
19 Commission's authority is exclusive and plenary. See *Tucson Elec. Power Co.*,  
20 132 Ariz. at 242, 645 P.2d at 233. But, claims such as McMahan's that are  
21 unrelated to or attenuated from those matters over which the Commission has  
22 express constitutional or statutory authority do not fall within the Commission's  
23 exclusive jurisdiction. Campbell supports our conclusion. (Emphasis added).<sup>14</sup>

24 Staff cites *U S West Communications, Inc. v. Arizona Corp. Comm'n*, 197 Ariz. 16, 3  
25 P.3d 936 (App. 1999) as "at least one court [that] has held that billing does not implicate  
26 ratemaking."<sup>15</sup> In *U S West Communications*, the Arizona Court of Appeals considered a  
27 challenge by U S West Communications to the Commission's adoption of the Competitive  
28 Telecommunications Services rules set forth in A.A.C. R14-2-1101 *et seq.* The court ruled, in  
relevant part, that the Commission had improperly bypassed the statutory requirement of  
attorney general review and approval for those competitive rules that were not reasonably  
related to service classification and ratemaking. While some of the competitive rules were  
upheld as part of the Commission's ratemaking and classification authority, other rules were not.  
However, Johnson Utilities takes issue with Staff's characterization of the ruling in the *U S West*  
*Communications* case (as set forth in footnote 1 of the Staff Response), which implicitly

<sup>14</sup> *Id.*

<sup>15</sup> Staff's Response to Swing First Golf Motion to Withdraw (October 11, 2011) at page 2, lines 20-21.

1 broadens the ruling from a specific case where the Commission's authority to bypass the  
2 attorney general's certification of a competitive telecommunications rule is being considered to a  
3 general statement that billing and collection issues do not implicate ratemaking. What the court  
4 said specifically was as follows:

5 We also disagree with the Commission's argument that the provisions of Rule  
6 R14-2-1114 relating to billing and collection from customers implicate  
7 ratemaking. Billing and payment terms apply after the rates have already been  
8 established.<sup>16</sup>

9 The *U S West Communications* case considered the bounds of the Commission's  
10 authority in the context of the adoption of new administrative rules for competitive  
11 telecommunications providers. Specifically, Rule R14-2-1114 (*Service Quality Requirements*  
12 *for the Provision of Competitive Services*) was considered in the abstract, without the benefit of  
13 an actual claim arising under the rule. In contrast, SFG's Amended Formal Complaint raises  
14 claims requiring that the Commission construe Johnson Utilities' tariff and possibly other  
15 Commission rules, practices, policies and decisions to determine whether the rates and charges  
16 imposed upon SFG by the Company were just and reasonable. The two cases are  
17 distinguishable. The better view is that announced in *Qwest Corporation v. Kelly*, where the  
18 court stated as follows:

19 As this court stated in *State ex rel. Corbin v. Arizona Corp. Comm'n*, 174 Ariz.  
20 216, 218, 848 P.2d 301, 303 (App. 1992), "[t]he [C]ommission's power goes  
21 beyond strictly setting rates and extends to enactment of the rules and regulations  
22 that are reasonably necessary steps in ratemaking." In addition to this executive  
23 and legislative authority, the Commission has the judicial jurisdiction to hear  
24 grievances and consumer complaints.<sup>17</sup>

25 Johnson Utilities submits that the *U S West Communications* case does not prevent the  
26 Commission from exercising primary jurisdiction to address the claims raised by SFG and the  
27 counterclaims raised by Johnson Utilities in this case.

28 In the Staff Response, Staff also cited the case of *Trico Electric Cooperative v. Ralston*,  
67 Ariz. 358, 196 P.2d 470 (1948) for the proposition that "the construction of a contract and the

<sup>16</sup> *U S West Communications, Inc. v. Arizona Corp. Comm'n*, 197 Ariz. 16, 25, 3 P.3d 936, 945 (App. 1999).

<sup>17</sup> *Qwest Corporation v. Kelly*, 204 Ariz. 25, 30, 59 P.3d 789, 794 (App. Div. 2, 2002).

1 determination of its validity are judicial functions for the courts, not the Commission."<sup>18</sup>  
2 Presumably, Staff raised the issue of the construction and validity of contracts because SFG has  
3 raised arguments pertaining to the Agreement Regarding Utility Service dated September 17,  
4 1999, between Johnson Ranch Holdings, LLC, and Johnson Utilities, a copy of which is  
5 attached as Exhibit A to SFG's Amended Formal Complaint. Until recently, SFG has asserted  
6 that the Agreement Regarding Utility Service confers upon SFG a priority right to effluent from  
7 Johnson Utilities as well as a right to purchase all water delivered by Johnson Utilities at the  
8 effluent rate, regardless of the type of water actually delivered. However, as a result of  
9 discovery in this case and the recent deposition of David Ashton, Johnson Utilities and SFG now  
10 know that the Agreement Regarding Utility Service was never assigned to SFG, and that it was  
11 never intended that the agreement be assigned to SFG. Thus, the applicability and interpretation  
12 of the Agreement Regarding Utility Service are not issues in this complaint proceeding. Staff  
13 did not have this information at the time it prepared its Staff Response, and therefore, could not  
14 have known that the construction and interpretation of the agreement are not at issue in this  
15 proceeding. Some additional explanation may be helpful.

16 SFG purchased the Johnson Ranch Golf Club from Johnson Ranch Holdings, LLC,  
17 pursuant to a Purchase and Sale Agreement dated June 10, 2004 (the "Purchase Agreement").  
18 Section 8.22 of the Purchase Agreement, a portion of which is attached hereto as Attachment 1,  
19 contains the following representation and warranty from the seller, Johnson Ranch Holdings,  
20 LLC:

21 8.22 Water Documents.

22 Seller represents and warrants to Buyer that (a) Seller has delivered to Buyer true,  
23 correct, and complete copies of all documents, agreements, instruments,  
24 certifications, registrations, and permits evidencing Seller's entitlement to a water  
25 supply adequate for the continued operation and maintenance of the Property in  
26 the same manner as the Property is being operated and maintained as of the  
27 Escrow Opening Date (collectively, the "**Water Documents**"), (b) there are no  
28 other agreements or documents concerning the supply of water to irrigate the Golf  
Course or any other portion of the Property, (c) there are no amendments,  
modifications, and supplements delivered to Buyer, (d) Seller is not in default  
under or in breach of any of the Water Documents, and Seller is current in any

<sup>18</sup> Staff's Response to Swing First Golf Motion to Withdraw at page 2, lines 15-18.

1 payments that it is obligated to make under any of the Water Documents, and (e)  
2 Seller has not previously assigned or transferred any of its rights or interests under  
3 the Water Documents. The Water Documents include that certain Agreement  
4 Regarding Utility Service dated September 17, 1999 by and between 1580 Santan  
5 Mountain, L.L.C., George H. Johnson, The George H. Johnson Revocable Trust  
6 dated July 9, 1987, and Johnson Utilities, L.L.C. dba Johnson Utilities Company  
7 (collectively, the "**Johnson Entities**"), for the benefit of Seller, which applies to  
8 the provision of water service and effluent to the Golf Facilities and the provision  
9 of water and other utility services to other property in the Johnson Ranch project.  
10 Prior to expiration of the Due Diligence Period, Buyer and Seller shall determine  
11 the manner in which the foregoing Agreement will be handled at Closing (i.e.,  
12 whether (and the terms on which) it will be partially assigned to Buyer at Closing  
13 or whether Buyer and Seller will document a new separate agreement with some  
14 or all of the Johnson Entities applicable only to the Golf Facilities (with Seller to  
15 retain the existing Agreement)). (Emphasis Added).

16 There were four subsequent amendments to the Purchase Agreement. The Fourth  
17 Amendment to Purchase and Sale Agreement dated October 14, 2004, a copy of which is  
18 attached hereto as Attachment 2 (without the exhibits), included the following Section 7 which  
19 addressed the Agreement Regarding Utility Service:

20 7. Utility Agreement. With respect to Section 8.22 of the Purchase  
21 Agreement, Buyer and Seller have determined that there will be no  
22 assignment by Seller to Buyer of any existing agreements between Seller  
23 and any of the Johnson Entities, that Seller and Buyer will not jointly enter  
24 into any new agreement with any of the Johnson Entities for service to the  
25 Property, and that Buyer will be responsible for obtaining water service  
26 and effluent to the Property after the Closing.

27 Mr. Ashton submitted to a deposition as the representative of SFG on November 1, 2011.  
28 The relevant excerpt from the deposition transcript is attached hereto as Attachment 3. In the  
following exchange between Mr. Ashton of SFG and Mike Kitchen, the attorney representing  
Johnson Utilities in the Superior Court Case, Mr. Ashton acknowledged that the Agreement  
Regarding Utility Service was never assigned to SFG:

BY MR. KITCHEN:

Q. "Utility Agreement"—I'm reading from page 4, paragraph 7 of the Fourth  
Amendment, Exhibit 6—it says, "With respect to Section 8.22 of the  
Purchase Agreement"—Section 8.22 being on page 25 of Exhibit No. 5  
that we previously discussed—"Buyer and Seller have determined that  
there will be no assignment by seller to buyer of any existing agreements  
between seller and any of the Johnson entities, that seller and buyer will

1 not join and enter into any new agreements with any of the Johnson  
2 entities for service to the property, and that buyer will be responsible for  
obtaining water service and effluent to the property after the closing."

3 Do you see that?

4 A. Yes, I do.

5 Q. Okay. So there were presumably actual discussions as to whether or not  
6 the Johnson Utilities agreement would be assigned to the Swing First, and  
7 the choice was made that that agreement would not be assigned.

8 Isn't that what the document reflects?

9 MR. MARKS: Form.

10 THE WITNESS: It appears to reflect that there was no assignment by seller to  
11 buy[er].

12 BY MR. KITCHEN:

13 Q. Okay. Why did the parties choose not to assign the Johnson Utilities  
14 agreement as reflected in this document?

15 A. I don't know.

16 Q. Okay. You were the person that you identified as having negotiated this  
17 sale.

18 So you were present during that time; correct?

19 A. Yes, I was.

20 Q. What—why did you choose not to have the Johnson Utilities agreement  
21 assigned to the Swing First?

22 MR. MARKS: Form.

23 THE WITNESS: I don't know.<sup>19</sup>

24 Based upon the facts set forth above, the Agreement Regarding Utility Service is neither  
25 applicable or nor relevant in this complaint case. Thus, Staff's discussion of *Trico Electric*  
26 *Cooperative* as a basis for conferring primary jurisdiction upon the Superior Court is misplaced.

27  
28 <sup>19</sup> Transcript of Deposition of David Ashton, November 1, 2011 (Maricopa County Superior Court Cause  
No. CV2008-000141) pages 77-78.

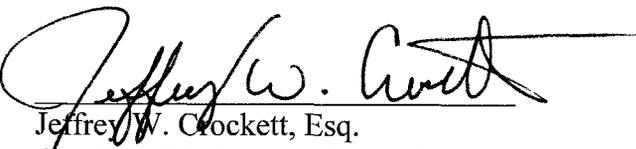
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**III. CONCLUSION.**

For all of the reasons set forth above, the Commission should retain primary jurisdiction over SFG's Amended Formal Complaint (including the asserted counterclaims of Johnson Utilities) and reject SFG's Withdrawal of Complaint. Johnson Utilities requests that the Hearing Division schedule a procedural conference at the earliest opportunity for the purpose of oral argument on the Withdrawal of Complaint.

RESPECTFULLY submitted this 30<sup>th</sup> day of November, 2011.

BROWNSTEIN HYATT FARBER SCHRECK,  
LLP



Jeffrey W. Crockett, Esq.  
One East Washington Street, Suite 2400  
Phoenix, Arizona 85004  
Attorneys for Johnson Utilities LLC

ORIGINAL and thirteen (13) copies of the foregoing filed this 30<sup>th</sup> day of November, 2011, with:

Docket Control  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, Arizona 85007

Copy of the foregoing hand-delivered this 30<sup>th</sup> day of November, 2011, to:

Yvette B. Kinsey, Administrative Law Judge  
Hearing Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, Arizona 85007

Robin Mitchell, Chief Counsel  
Legal Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, Arizona 85007

**Brownstein Hyatt Farber Schreck, LLP**  
One East Washington Street, Suite 2400  
Phoenix, AZ 85004

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Steve Olea, Director  
Utilities Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, Arizona 85007

COPY of the foregoing sent via e-mail and first  
class mail this 30<sup>th</sup> day of November, 2011, to:

Mr. Craig A. Marks  
Craig A. Marks, PLC  
10645 North Tatum Boulevard, Suite 200-676  
Phoenix, Arizona 85028

  
\_\_\_\_\_  
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# **Attachment 1**

**PURCHASE AND SALE AGREEMENT**

between

**JOHNSON RANCH HOLDINGS, L.L.C.,**  
a Delaware limited liability company, as Seller

and

**SWING FIRST GOLF LLC,**  
an Arizona limited liability company, as Buyer

**Johnson Ranch Golf Club**  
**Pinal County, Arizona**

Course or the condition, financial or otherwise, of the Property, nor has Seller incurred any liabilities or obligations (contingent or otherwise) outside of the ordinary course of business, and none of the ordinary course liabilities or obligations incurred by Seller could have a material adverse effect on the business of the Seller or the Property.

#### **8.20 Correct and Complete Documentation.**

The documents delivered to Buyer pursuant to **Article 6** of this Agreement are true, correct, and complete in all material respects. Seller has provided to Buyer or made available to Buyer at the Golf Course all documents and information in Seller's possession or control regarding matters which affect the operation of the Property or the physical and environmental condition of the Property, including without limitation all documents, studies, reports, work plans, agreements, or other information relating to compliance with all applicable local, state, and federal environmental laws and the testing, monitoring, clean up, or remediation of any existing environmental condition on the Property.

#### **8.21 This Agreement Not in Conflict**

Neither this Agreement nor the consummation of the transactions contemplated by this Agreement will result in a breach of or constitute a default under any other agreement, commitment or obligation to which Seller or the Property is bound, nor will it violate any law, rule, regulation, restriction, judicial or administrative order, judgment or decree applicable to Seller or the Property.

#### **8.22 Water Documents.**

Seller represents and warrants to Buyer that (a) Seller has delivered to Buyer true, correct, and complete copies of all documents, agreements, instruments, certifications, registrations, and permits evidencing Seller's entitlement to a water supply adequate for the continued operation and maintenance of the Property in the same manner as the Property is being operated and maintained as of the Escrow Opening Date (collectively, the "**Water Documents**"), (b) there are no other agreements or documents concerning the supply of water to irrigate the Golf Course or any other portion of the Property, (c) there are no amendments, modifications, or supplements to the Water Documents except such amendments, modifications, and supplements delivered to Buyer, (d) Seller is not in default under or in breach of any of the Water Documents, and Seller is current in any payments that it is obligated to make under any of the Water Documents, and (e) Seller has not previously assigned or transferred any of its rights or interests under the Water Documents. The Water Documents include that certain Agreement Regarding Utility Service dated September 17, 1999 by and between 1580 Santan Mountain, L.L.C., George H. Johnson, The George H. Johnson Revocable Trust dated July 9, 1987, and Johnson Utilities, L.L.C. dba Johnson Utilities Company (collectively, the "**Johnson Entities**"), for the benefit of Seller, which applies to the provision of water service and effluent to the Golf Facilities and the provision of water and other utility services to other property in the Johnson Ranch project. Prior to expiration of the Due Diligence Period, Buyer and Seller shall determine the manner in which the foregoing Agreement will be handled at Closing (i.e., whether (and the terms on which) it will be partially assigned to Buyer at Closing or whether Buyer and Seller will document a new separate agreement with some or

all of the Johnson Entities applicable only to the Golf Facilities (with Seller to retain the existing Agreement)).

### **8.23 Payment of Taxes.**

Seller has filed all federal, state, municipal, county, and local tax returns and reports required by law and has paid all taxes, assessments, penalties, and other charges due and payable relating to the Property or the use and operation thereof, including sales and transaction privilege taxes. There are no pending lawsuits, actions, claims, proceedings, disputes, examinations, or audits as to taxes or assessments of any nature relating to the Property or the use and operation thereof. No tax due and owing by Seller on account of business transactions by Seller through the Closing Date will become a lien on the Property, nor shall Buyer have any liability for such taxes.

### **8.24 Seller's Financial Condition.**

Seller has not (a) filed any voluntary petition in bankruptcy (liquidation or reorganization) or suffered the filing of any involuntary petition by its creditors, (b) made a general assignment for the benefit of creditors, (c) suffered the appointment of a receiver or trustee to take possession of all or substantially all of Seller's assets, (d) suffered the attachment or other judicial seizure of all or substantially all of its assets, or (e) admitted in writing its inability to pay its debts as they come due.

### **8.25 Knowledge Definition.**

To the extent that any of the representations and warranties made by Seller pursuant to this **Article 8** are made to Seller's knowledge (or lack thereof), such representations and warranties are based on the actual (not constructive or imputed) knowledge of Curtis E. Smith and John W. Graham as of the Escrow Opening Date and as of the Closing, based solely upon a review of Seller's internal files relating to the Property, without any further investigation or inquiry; and, notwithstanding any contrary provision of this Agreement, in no event shall any of the foregoing individuals have any personal liability or obligation hereunder.

### **8.26 Warranty Limitations.**

**8.26.1 Buyer Notice of Changes.** In the event that, prior to the Closing, Buyer receives notice or obtains knowledge of any information which indicates that any of Seller's representations and warranties in this **Article 8** is untrue, Buyer shall promptly advise Seller in writing of such notice, information or knowledge. Buyer shall be deemed to have waived such representation and warranty to the extent Buyer fails to advise Seller of such notice, information or knowledge pursuant to the preceding sentence and thereafter consummates the transaction contemplated hereby. In the event Buyer knowingly waives any representation or warranty, then Seller shall have no liability under this **Article 8** for such representation or warranty to the extent waived

**8.26.2 Seller Notice of Changes.** As to Seller's warranties and representations under this **Article 8** that are based upon a lack of knowledge of Seller, if, after the Escrow Opening Date and prior to the Closing, Seller obtains knowledge (as defined in

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first written above.

**"SELLER"**

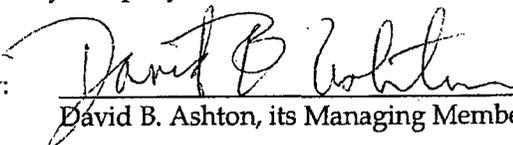
**JOHNSON RANCH HOLDINGS, L.L.C.**, a  
Delaware limited liability company

By: Johnson Ranch Associates, LLC, a Delaware  
limited liability company, its Manager

By: \_\_\_\_\_  
Curtis E. Smith, its Authorized  
Representative

**"BUYER"**

**SWING FIRST GOLF LLC**, an Arizona limited  
liability company

By:   
\_\_\_\_\_  
David B. Ashton, its Managing Member

**ACCEPTANCE BY ESCROW AGENT:**

First American Title Insurance Company hereby (i) acknowledges that it has received a fully executed counterpart of the foregoing for Purchase and Sale Agreement and Joint Escrow Instructions, (ii) acknowledges receipt of the Deposit; (iii) agrees to act as Escrow Agent hereunder and to be bound by and perform the terms thereof as such terms apply to Escrow Agent, and (iv) declares that the Opening of Escrow has occurred this \_\_\_\_ day of \_\_\_\_\_, 2004.

**FIRST AMERICAN TITLE INSURANCE COMPANY**, a  
California corporation

By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Dated: \_\_\_\_\_

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first written above.

"SELLER"

**JOHNSON RANCH HOLDINGS, L.L.C.**, a  
Delaware limited liability company

By: Johnson Ranch Associates, LLC, a Delaware  
limited liability company, its Manager

By: Curtis E. Smith  
Curtis E. Smith, its Authorized  
Representative

"BUYER"

**SWING FIRST GOLF LLC**, an Arizona limited  
liability company

By: \_\_\_\_\_  
David B. Ashton, its Managing Member

**ACCEPTANCE BY ESCROW AGENT:**

First American Title Insurance Company hereby (i) acknowledges that it has received a fully executed counterpart of the foregoing for Purchase and Sale Agreement and Joint Escrow Instructions, (ii) ~~acknowledges receipt of the Deposit~~, (iii) agrees to act as Escrow Agent hereunder and to be bound by and perform the terms thereof as such terms apply to Escrow Agent, and (iv) declares that the Opening of Escrow has occurred this 10<sup>th</sup> day of June, 2004.

**FIRST AMERICAN TITLE INSURANCE COMPANY**, a  
California corporation

By: Carol Peterson  
Title: Escrow Officer  
Dated: June 10, 2004

# **Attachment 2**

**FOURTH AMENDMENT  
TO  
PURCHASE AND SALE AGREEMENT  
(Johnson Ranch Golf Club)**

**Date:** October 14, 2004  
**Seller:** Johnson Ranch Holdings, L.L.C., a Delaware limited liability company  
**Buyer:** Swing First Golf LLC, an Arizona limited liability company  
**Escrow No:** NCS-771-98668

**Recitals:**

- A. Seller and Buyer previously entered into that certain Purchase and Sale Agreement (Johnson Ranch Golf Club) dated as of June 9, 2004, as amended by a First Amendment dated as of July 26, 2004, and a Second Amendment dated as of August 16, 2004, and a Third Amendment (the "Third Amendment") dated as of August 31, 2004 (the "Purchase Agreement").
- B. Pursuant to the Purchase Agreement, the parties established the above-referenced Escrow with First American Title Insurance Company.
- C. Seller and Buyer now desire to amend the Purchase Agreement as hereinafter provided in this Amendment.

**Agreement:**

THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Buyer and Seller agree as follows:

1. Schedules to Purchase Agreement. Schedules 2.3, 8.8, 8.10 and 12.2 as approved by the parties are attached to this Amendment (provided, however that, as contemplated by Section 12.2 of the Purchase Agreement, Schedule 12.2 may not be an exhaustive list of the Easements (as defined in Section 12.2 of the Purchase Agreement), and additional Easements may be necessary or appropriate prior to or after Closing in accordance with the terms and provisions of Section 12.2 of the Purchase Agreement). The Due Diligence Period shall not be extended as the result of the date of Seller's delivery to Buyer of Schedules 2.1, 2.5, 4.8.2, 6.9 and 8.16 to the Purchase Agreement (the "Outstanding Schedules"), it being agreed and confirmed by the parties that the Due Diligence Period shall expire on the date specified therefor in the Third Amendment (or such later date as the parties have specified or may specify for the expiration of the Due Diligence Period pursuant to written agreement). The Outstanding Schedules shall be delivered by Seller to Buyer no later than five (5) business days prior to the Closing Date, subject to revision no later than two (2) business days prior to the Closing Date to the extent of any changes after delivery of such Outstanding Schedules.

2. **Survey Delivery.** That certain ALTA/ACSM Land Title Survey - Johnson Ranch Golf Course prepared by Wood/Patel (Job No. 042169.81) dated October 8, 2004, has been delivered by Seller to Buyer and Escrow Agent pursuant to Section 5.3 of the Purchase Agreement, and constitutes the "Survey" as referenced in the Purchase Agreement subject to the following: Buyer and Seller acknowledge that the Survey may be modified after the date of this Amendment by the mutual consent of the parties, and agree to cooperate in good faith to complete such modifications no later than October 21, 2004.
3. **Title Review Procedure.** Section 7.5 of the Purchase Agreement is hereby deleted in its entirety and replaced by the following:

**7.5 Title and Survey Review.**

**7.5.1 Objection by Buyer; Amendments.** Buyer and Seller hereby acknowledge that an amended Title Commitment will be issued by Escrow Agent after delivery of the Survey to Escrow Agent. Buyer shall be entitled to object to any matters disclosed by the Title Commitment or the Survey by delivering written notice of objection (an "**Objection Notice**") to Seller and to Escrow Agent on or before fifteen (15) days after the date on which Buyer has received *both* the Title Commitment and the Survey. Any Objection Notice delivered by Buyer pursuant to this Section shall specify in reasonable detail any matter to which Buyer objects. If Escrow Agent subsequently issues any amendment to the Title Commitment showing any additional exception to title, other than the Permitted Encumbrances, Buyer shall be entitled to object to any such additional exception by delivering an Objection Notice to Seller and to Escrow Agent on or before five business days after Buyer's receipt of the amendment to the Title Commitment. If Buyer fails to deliver an Objection Notice objecting to any matter set forth in the Survey, the Title Commitment, or any subsequent amendment thereto, within the relevant time period prescribed above, then Buyer shall be conclusively deemed to have approved such matters. Notwithstanding any contrary provision contained in this Agreement, in no event shall any mortgages, deeds of trust or other financial encumbrance(s) be deemed to be Permitted Encumbrances, and any such mortgages, deeds of trust or other financial encumbrance(s) affecting the Golf Facilities shall be released at Seller's expense, at or prior to Closing. Except as provided in the preceding sentence, Seller shall have no obligation to cure or remove any title matter that Buyer finds objectionable.

**7.5.2 Effect of Objection.** If Buyer timely delivers any Objection Notice pursuant to **Section 7.5.1** above, then Seller shall deliver a written notice (a "**Response**") to Buyer and to Escrow Agent within three (3) business days after receipt of such Objection Notice, which Response shall state any actions which Seller intends to take and their anticipated effect on the matters to which Buyer has objected. If Seller fails to deliver a Response within such three (3) business day period, then Seller shall be deemed to have delivered a Response indicating that it will not remove any of the matter(s) objected to by Buyer. If the Response does not state an intention to fully remove each matter to which Buyer has objected, Buyer shall deliver to Seller and Escrow Agent within three (3) business days after Buyer receives the Response a written notice (a "**Reply**") stating Buyer's election either (i) to terminate this Agreement, or (ii) to waive Buyer's objection (on the condition that Seller accomplishes any objectives committed to by Seller in its Response). If Buyer fails to make

a timely election pursuant to the preceding sentence, Buyer shall be deemed conclusively to have elected to proceed according to clause (ii) of the preceding sentence. If Buyer has waived an objection on the condition that Seller accomplish any objectives committed to in its Response, and the condition is not satisfied by Closing, then Buyer shall have the right, as its sole remedy therefor, either to (i) terminate this Agreement, or (ii) proceed with this transaction and waive such objection. In the event that Buyer waives an objection, Buyer shall be deemed to have approved the exception with respect to which the objection was made and such exception shall be part of the "Permitted Encumbrances" hereunder. If Buyer exercises its termination right set forth above, then neither party shall have any further rights or obligations under this Agreement and the Deposit shall be immediately returned to Buyer. Notwithstanding any contrary provision of this Section 7.5, if any exception to title to the Golf Facilities arises as a result of any breach by Seller of its obligations under Section 10.5, then Buyer shall have its rights and remedies as provided in Section 14.3.1.

**7.5.3 Amendment to Title Commitment Issued Shortly Before Closing.** In the event that an amendment to the Title Commitment is issued shortly before the Closing (i.e., a number of days prior to the Closing Date that would not accommodate the time periods for review and response set forth in Section 7.5.1 and Section 7.5.2), and the amendment reveals an additional exception (other than the Permitted Encumbrances) not reflected in the Title Commitment and all amendment(s) thereto previously issued by Escrow Agent, then the Closing Date shall be extended if (and to the minimum extent) necessary: (a) to provide Buyer the period contemplated by Section 7.5.1 hereof to deliver an Objection Notice; (b) to provide Seller the period contemplated by Section 7.5.2 hereof to deliver a Response, if Buyer delivers an Objection Notice; and (c) to provide Buyer the period contemplated by Section 7.5.2 hereof to deliver a Reply, if Seller delivers (or is deemed to have delivered) a Response which does not include a commitment to remove all of the matters to which Buyer has objected.

**7.5.4 Conflict with Due Diligence Period.** The provisions of this Section 7.5 (including, but not limited to, Buyer's termination rights under Section 7.5.2) shall govern notwithstanding the fact that the Due Diligence Period may expire prior to the time for delivery of an Objection Notice, Reply, or Response pursuant to the provisions of this Section 7.5.

4. **Approved Estoppel List and Contract Termination List.** Sections 7.3.1 and 7.3.2 of the Purchase Agreement are hereby deleted in their entirety and replaced by the following:

**7.3.1 Delivery of Buyer's Notice.** Within three (3) business days after Buyer's receipt of Schedule 6.9 from Seller (the "Objection Period"), Buyer shall deliver written notice to Seller designating (a) the Contracts that Buyer it is not willing to accept (the "Contract Termination List"), and (b) the parties from whom Seller will be required to deliver estoppel certificates at Closing as provided in Section 4.4.1(h) (the "Estoppel List"). If Buyer fails to deliver a Contract Termination List to Seller prior to expiration of the Objection Period, then Buyer shall be deemed to have elected to accept all of the Contracts. If Buyer fails to deliver an Estoppel List to Seller prior to expiration of the Objection Period, then Seller shall

not be required to deliver any estoppel certificates at Closing pursuant to Section 4.4.1(h).

**7.3.2 Approval by Seller.** The Contract Termination List and the Estoppel List shall be subject to Seller's approval, which approval shall not be unreasonably withheld. On or before five (5) business days after Seller's receipt of the Contract Termination List (or the Estoppel List, as applicable) as provided in Section 7.3.1 (the "Seller Disapproval Period"), Seller may deliver written notice to Buyer disapproving any item contained in such Contract Termination List (or Estoppel List, as applicable), such notice to specify the reason(s) for such disapproval. If Seller fails to deliver such disapproval notice prior to the expiration of the Seller Disapproval Period, then Seller shall be deemed to have approved the Contract Termination List (or the Estoppel List, as applicable) in the form delivered by Buyer. If Seller delivers such disapproval notice prior to the expiration of the Seller Disapproval Period, then the parties shall thereafter negotiate in good faith to resolve all disapproved item(s) on or before five (5) business days prior to the Closing Date (the "List Negotiation Period"). If the parties are unable to resolve all such disapproved item(s) prior to the expiration of the List Negotiation Period, then Buyer shall have the right to terminate this Agreement by delivering written notice thereof to Seller and Escrow Agent prior to expiration of the List Negotiation Period (and, if Buyer fails to so terminate this Agreement, then Buyer shall be deemed to have approved the Estoppel List (or the Contract Termination List, as applicable) in the form as last approved or proposed by Seller). In the event that the parties agree upon the Contract Termination List and the Estoppel List in accordance with this Section 7.3.2 then Schedule 7.3.2 shall be delivered by Seller to Buyer prior to the Closing Date to reflect the items set forth in such agreed-upon lists.

In the event the number of days prior to the Closing Date would not accommodate the time periods set forth in the foregoing Sections 7.3.1 and 7.3.2, then the Objection Period, the Seller Disapproval Period and the List Negotiation Period shall be shortened by an equal number of days such that Buyer's right to terminate the Purchase Agreement pursuant to the last sentence of Section 7.3.2 shall expire no later than five (5) business days prior to the Closing Date.

5. **Purchase Price Allocation.** In accordance with Section 3.2 of the Purchase Agreement, the allocation of the Purchase Price among the real property, tangible personal property and intangible personal property comprising the Property shall be as set forth in Schedule 3.2 attached to this Amendment.
6. **WARN Act Notification.** Pursuant to Section 7.4 of the Purchase Agreement, Buyer and Seller agree that no WARN Act notification shall be required in connection with the transaction described in the Purchase Agreement.
7. **Utility Agreement.** With respect to Section 8.22 of the Purchase Agreement, Buyer and Seller have determined that there will be no assignment by Seller to Buyer of any existing

agreements between Seller and any of the Johnson Entities, that Seller and Buyer will not jointly enter into any new agreement with any of the Johnson Entities for service to the Property, and that Buyer will be responsible for obtaining water service and effluent to the Property after the Closing.

8. **Construction of Effluent Line.** Seller agrees to construct or cause to be constructed, at its sole cost and expense, in a good, workmanlike and lien-free manner, and in accordance with the requirements of applicable governmental authorities and the reasonable requirements of the Johnson Entities, an 8-inch underground line that ties into the effluent main line adjacent to the Property and extends to the lake located within the Property (the "**Effluent Line**") in order to permit delivery of effluent from such effluent main line to such lake if and when effluent for the Property is available from the Johnson Entities, together with a water meter as required by the Johnson Entities and a backflow device if required by applicable governmental authorities or the Johnson Entities. The availability (if any) and cost of effluent for delivery through the Effluent Line are matters not within Seller's control, and Seller shall have no liability or responsibility with respect thereto. Construction of the Effluent Line shall be in substantial accordance with plans prepared by Wood Patel & Associates, entitled Johnson Ranch Reclaimed Waterline, and shall be substantially completed on or before November 30, 2004 (subject to Seller Uncontrollable Events (as that term is defined in the Third Amendment)). Seller shall give Buyer written notice of a Seller Uncontrollable Event on or before ten days after Seller obtains actual knowledge or actual notice of the existence thereof. At least one (1) business day prior to the Closing Date, if construction of the Effluent Line has not then been completed, Buyer and Seller agree to execute, acknowledge and deliver to Escrow Agent, for recordation at the Closing, a temporary construction easement in substantially the form of **Exhibit "J"** attached to this Fourth Amendment, relating to installation and construction of the Effluent Line. The provisions of this paragraph 8 shall survive the Closing.
9. **Golf Course CC&Rs.** In accordance with **Section 12.1** of the Purchase Agreement, Buyer and Seller confirm that they have approved the form of Golf Course CC&Rs to be recorded at Closing. The approved form of Golf Course CC&Rs is attached hereto as **Exhibit "M"** and incorporated herein by this reference.
10. **Delivery of Due Diligence Items.** Buyer hereby acknowledges that Seller has delivered to Buyer or made available to Buyer at the Golf Course all of the due diligence items listed on **Exhibit "I"** attached to the Purchase Agreement, including without limitation all of the documents listed in Article 6 of the Purchase Agreement.
11. **Additional Closing Documents.** The following are hereby added to **Section 4.4.1** of the Purchase Agreement, as new subsections (n) and (o) thereof:
  - (n) A resolution of the Board of Directors (the "Board") of the Johnson Ranch Community Association, Inc., an Arizona nonprofit corporation (the "Association"), in the form of **Exhibit "K"** attached hereto and incorporated herein.
  - (o) A certification in the form of **Exhibit "L"** attached hereto and incorporated herein, executed by Seller, in its capacity as the Declarant under the Master Declaration (as that term is defined in **Exhibit "L"**), and by the Association.

12. **Forms of Easements.** The form of each type of Easement listed on Schedule 12.2 attached to this Amendment shall be delivered by Seller to Buyer on or before ten (10) days after Seller's and Buyer's receipt of both the Title Commitment and Survey, for Buyer's review and approval (not to be unreasonably withheld or conditioned). In the event that Buyer fails to deliver written notice to Seller of Buyer's disapproval of the form of any Easement (such notice to specify in reasonable detail the matter of objection) on or before ten (10) days after Buyer's receipt of such form of Easement, then Buyer shall be conclusively deemed to have approved such form of Easement. If Buyer timely delivers a written notice disapproving of the form of any Easement, then the parties shall thereafter negotiate in good faith to resolve Buyer's objection with respect to such form of Easement no later than the end of the fourth business day prior to the Closing Date (the "Easement Negotiation Period"). If the parties are unable to resolve all such disapproved forms of Easement by the expiration of the Easement Negotiation Period, then Buyer shall have the right to terminate the Purchase Agreement by written notice delivered to Seller and Escrow Agent prior to expiration of the Easement Negotiation Period (and if Buyer fails to so terminate the Purchase Agreement, then Buyer shall be deemed to have approved the form of each disapproved Easement as last approved or proposed by Seller as of the expiration of the Easement Negotiation Period). In the event that the number of days prior to the Closing Date would not accommodate the time periods set forth in the first two sentences of this Section 12, then each such period shall be shortened by an equal number of days such that Buyer and Seller shall have two (2) business days prior to the expiration of the Easement Negotiation Period in which to negotiate a resolution if Buyer timely delivers objections to any Easement; in no event shall Buyer's right to terminate the Purchase Agreement pursuant to this Section 12 extend beyond the end of the Easement Negotiation Period. Any form of Easement delivered to Buyer in accordance with this Section which is not the subject of a timely written objection by Buyer shall be deemed conclusively to have been approved by Buyer.
13. **Cart Path Repair.** Seller agrees to repair or cause to be repaired prior to the Closing Date, at its sole cost and expense, in a good, workmanlike and lien-free manner, the one section of cart path located beside the sixth hole of the Improvements that has buckled.
14. **Relocation of Thirteenth Hole Improvements.** Paragraph 4 of the Third Amendment is hereby deleted in its entirety and replaced by the following:
4. **Thirteenth Hole Improvements.** Seller agrees to construct or cause to be constructed, at its sole cost and expense, a restroom facility for patrons of the Golf Facilities on the thirteenth hole of the Improvements, in a good, workmanlike and lien-free manner and in substantial accordance with plans to be reasonably approved by Buyer and Seller prior to commencement of construction (the "Thirteenth Hole Improvements"), such construction to be substantially completed by March 31, 2005 (subject to extension by the period of time equal to any period that progress in Seller's construction is delayed due to strikes, riots, acts of war, acts of violence, unseasonable and intemperate weather, material shortages, acts of God, delays by utility companies or any governmental agencies having jurisdiction or any similar act, occurrence or non-occurrence beyond Seller's reasonable control, financial inability being hereby excluded (the "Seller Uncontrollable Events"). Seller shall give Buyer written notice of a Seller

Uncontrollable Event on or before ten days after Seller obtains actual knowledge or actual notice of the existence thereof. At least one (1) business day prior to the Closing Date, Buyer and Seller agree to execute, acknowledge and deliver to Escrow Agent, for recordation at the Closing, a temporary construction easement in the form of Exhibit "J" attached hereto and incorporated herein by this reference, relating to installation and construction of the Thirteenth Hole Improvements. The provisions of this paragraph 4 shall survive the Closing.

15. Replacement Exhibit "J". Exhibit "J" attached to the Third Amendment is hereby deleted in its entirety and replaced by Exhibit "J" attached to this Amendment and incorporated herein by this reference.
16. Counterparts; Facsimile Signatures. This Amendment may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Any or all parties may execute this Amendment by facsimile signature, and any such facsimile signature shall be deemed an original signature and Escrow Agent is hereby authorized and instructed to rely thereon.
17. Effect of Amendment. The Purchase Agreement, as amended and supplemented hereby, is hereby ratified by the parties and shall remain in full force and effect.

[No further text on this page]

IN WITNESS WHEREOF, Buyer and Seller have executed this Amendment as of the date first set forth above.

**SELLER:**

**JOHNSON RANCH HOLDINGS, L.L.C.,**  
a Delaware limited liability company

By: Johnson Ranch Associates, LLC, a  
Delaware limited liability company,  
its Manager

By:   
Curtis E. Smith, its Authorized  
Representative

**BUYER:**

**SWING FIRST GOLF LLC, an Arizona**  
limited liability company

By: \_\_\_\_\_  
David B. Ashton, its Managing Member

IN WITNESS WHEREOF, Buyer and Seller have executed this Amendment as of the date first set forth above.

**SELLER:**

**JOHNSON RANCH HOLDINGS, L.L.C.,**  
a Delaware limited liability company

By: Johnson Ranch Associates, LLC, a  
Delaware limited liability company,  
its Manager

By: \_\_\_\_\_  
Curtis E. Smith, its Authorized  
Representative

**BUYER:**

**SWING FIRST GOLF LLC,** an Arizona  
limited liability company

By:   
David B. Ashton, its Managing Member

# **Attachment 3**

Page 1		Page 3			
(1)	IN THE SUPERIOR COURT OF THE STATE OF ARIZONA	(1)			
(2)	COUNTY OF MARICOPA	(2)	INDEX TO EXHIBITS	MARKED	IDENTIFIED
(3)		(3)	NO.		
(4)	JOHNSON UTILITIES, LLC; THE CLUB )	(4)	Exhibit 7	101	102
(5)	AT OASIS, LLC; GEORGE H. JOHNSON; )	(5)			
(6)	JANA S. JOHNSON; BRIAN F. )	(6)	Exhibit 8	125	125
(7)	TOMPSETT, )	(7)			
(8)	Plaintiffs, )	(8)			
(9)	v. )	(9)	Exhibit 9	136	136
(10)		(10)			
(11)	No. CV2008-000141	(11)	Exhibit 10	138	138
(12)		(12)	Exhibit 11	141	141
(13)		(13)			
(14)	SWING FIRST GOLF, LLC; DAVID )	(14)	Exhibit 12	143	143
(15)	ASHTON, )	(15)			
(16)	Defendants. )	(16)	Exhibit 13	144	144
(17)		(17)			
(18)	AND ALL RELATED COUNTERCLAIMS. )	(18)	Exhibit 14	145	145
(19)		(19)			
(20)	DEPOSITION OF DAVID ASHTON	(20)	Exhibit 15	146	146
(21)	Scottsdale, Arizona	(21)			
(22)	November 1, 2011	(22)	Exhibit 16	165	165
(23)		(23)			
(24)	ARIZONA REPORTING SERVICE, INC.	(24)	Exhibit 17	170	170
(25)	Court Reporting	(25)			
	Suite 502				
	2200 North Central Avenue				
	Phoenix, Arizona 85004-1481				
	By: Kate E. Baumgarth, RPR				
	Certified Reporter				
	Certificate No. 50582				
	Prepared for:				

Page 2		Page 4			
(1)	INDEX TO EXAMINATIONS	(1)			
(2)	WITNESS	(2)			
(3)		(3)			
(4)	DAVID ASHTON	(4)	DEPOSITION OF DAVID ASHTON was taken on November 1,		
(5)	Examination by Mr. Kitchen	(5)	2011, commencing at 9:00 a.m., at the law offices of		
(6)	Examination by Mr. Marks	(6)	MARGRAVE CELMINS, P.C., 8171 East Indian Bend Road,		
(7)	Further Examination by Mr. Kitchen	(7)	Suite 101, Scottsdale, Arizona 85250, before		
(8)	Further Examination by Mr. Marks	(8)	KATE BAUMGARTH, RPR, Certificate Reporter No. 50582 for		
(9)		(9)	the State of Arizona.		
(10)		(10)	APPEARANCES:		
(11)		(11)			
(12)		(12)	For the Plaintiffs:		
(13)	INDEX TO EXHIBITS	(13)	MARGRAVE CELMINS		
(14)	NO.	(14)	By: Mr. Michael Kitchen		
(15)	DESCRIPTION	(15)	8171 East Indian Bend Road, Suite 101		
(16)	MARKED	(16)	Scottsdale, Arizona 85250		
(17)	IDENTIFIED	(17)			
(18)		(18)	SANDERS & PARKS, P.C.		
(19)		(19)	By: Mr. Anoop Bhatheja		
(20)		(20)	3030 North Third Street, Suite 1300		
(21)		(21)	Phoenix, Arizona 85012-3099		
(22)		(22)	For the Defendants:		
(23)		(23)	CRAIG A. MARKS PLC		
(24)		(24)	By: Mr. Craig A. Marks		
(25)		(25)	10645 North Tatum Boulevard, Suite 200-676		
			Phoenix, Arizona 85028		
			ALSO PRESENT:		
			Mr. Brian Tompsett		
			Mr. Daniel Hodges		

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(1) going to read it, and then you have interjected something  
(2) here.  
(3) **MR. KITCHEN:** If you have a reason to disagree  
(4) with that interjection, let me know.  
(5) **MR. MARKS:** It would be clearer if you could  
(6) read -- start at the beginning and read what it is you  
(7) intend to ask on the record.  
(8) **BY MR. KITCHEN:**  
(9) **Q.** "Utility Agreement" -- I'm reading from page 4,  
(10) paragraph 7 of the Fourth Amendment, Exhibit 6 -- it says,  
(11) "With respect to Section 8.22 of the Purchase  
(12) Agreement" -- Section 8.22 being on page 25 of the Exhibit  
(13) No. 5 that we previously discussed -- "Buyer and Seller  
(14) have determined that there will be no assignment by seller  
(15) to buyer of any existing agreements between seller and any  
(16) of the Johnson entities, that seller and buyer will not  
(17) join and enter into any new agreements with any of the  
(18) Johnson entities for service to the property, and that  
(19) buyer will be responsible for obtaining water service and  
(20) effluent to the property after the closing."  
(21) Do you see that?  
(22) **A.** Yes, I do.  
(23) **Q.** Okay. So there was -- there were presumably  
(24) actual discussions as to whether or not the Johnson  
(25) Utilities agreement would be assigned to the Swing First,

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(1) **BY MR. KITCHEN:**  
(2) **Q.** Johnson Ranch Holdings.  
(3) **A.** Not that I'm aware of.  
(4) **Q.** Okay. So you have no recollection whatever why  
(5) you chose not to obtain an assignment; correct?  
(6) **A.** I don't recall.  
(7) **Q.** Okay. In paragraph 8 on page 5, it references  
(8) the construction of an effluent line, and about one, two,  
(9) three, four -- six lines down, it references what that  
(10) intent was. "In order to permit delivery of effluent from  
(11) such effluent main line to such lake if and when effluent  
(12) for the property is available from the Johnson entities."  
(13) Do you see that?  
(14) **A.** Can you repeat it? How many lines down?  
(15) **Q.** Six lines down, "In order to permit delivery of  
(16) effluent from such effluent main line to such lake if and  
(17) when effluent for the property is available from the  
(18) Johnson entities."  
(19) **A.** Yes, I see that.  
(20) **Q.** Okay. So if and when indicates that there was no  
(21) guarantees when you purchased -- when Swing First  
(22) purchased the golf course that effluent would ever be  
(23) available; correct?  
(24) **A.** At the time of the purchase, effluent was not  
(25) available.

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(1) and the choice was made that that agreement would not be  
(2) assigned.  
(3) Isn't that what this document reflects?  
(4) **MR. MARKS:** Form.  
(5) **THE WITNESS:** It appears to reflect that there  
(6) was no assignment by seller to buy.  
(7) **BY MR. KITCHEN:**  
(8) **Q.** Okay. Why did the parties choose not to assign  
(9) the Johnson Utilities agreement as reflected in this  
(10) document?  
(11) **A.** I don't know.  
(12) **Q.** Okay. You were the person that you identified as  
(13) having negotiated this sale.  
(14) So you were present during that time; correct?  
(15) **A.** Yes, I was.  
(16) **Q.** What -- why did you choose not to have the  
(17) Johnson Utilities agreement assigned to the Swing First?  
(18) **MR. MARKS:** Form.  
(19) **THE WITNESS:** I don't know.  
(20) **BY MR. KITCHEN:**  
(21) **Q.** Did they want additional consideration for such  
(22) assignment that Swing First was not willing to pay, for  
(23) example?  
(24) **MR. MARKS:** Form.  
(25) **THE WITNESS:** Who?

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(1) **Q.** Okay. And then a couple of lines down from  
(2) there, it says, "The availability, if any, and cost of  
(3) effluent for delivery through the effluent line are  
(4) matters not within the seller's control."  
(5) Do you see that?  
(6) **A.** I see that.  
(7) **Q.** Okay. So, again, there was no representations to  
(8) you that effluent would ever be made available, at least  
(9) as reflected in this document; correct?  
(10) **A.** That's correct.  
(11) **Q.** Okay. And there was -- we already established  
(12) that there was no assignment of the Johnson Utilities 1999  
(13) Service Agreement to Swing First; correct?  
(14) **A.** By the seller, there was no assignment, that is  
(15) correct.  
(16) **Q.** Okay. And you never obtained a written  
(17) assignment of that agreement from Johnson Utilities, did  
(18) you?  
(19) **A.** I do not have a document that -- a signed  
(20) document that assigns that agreement.  
(21) **Q.** Okay. Why didn't you ever obtain a written --  
(22) either assignment or enter into a new agreement with  
(23) Johnson Utilities for the provision of water and  
(24) wastewater services?  
(25) **MR. MARKS:** Form.

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- (1) **THE WITNESS: I don't know why.**
- (2) **BY MR. KITCHEN:**
- (3) **Q.** Okay. But you told Mr. Tompsett, or you may have
- (4) told Mr. Tompsett, that you had actually received an
- (5) assignment of the 1999 agreement; correct?
- (6) **MR. MARKS: Form.**
- (7) **THE WITNESS: I don't know that I told that to**
- (8) **Mr. Tompsett. I know that Mr. Tompsett and Mr. Larsen and**
- (9) **I had multiple conversations about the applicability of**
- (10) **that agreement.**
- (11) **BY MR. KITCHEN:**
- (12) **Q.** Okay. Did you ever show this fourth amendment to
- (13) the Purchase and Sales Agreement to Mr. Tompsett or to
- (14) anybody at Johnson Utilities?
- (15) **A.** I don't recall.
- (16) **Q.** Okay. Is it possible you may not have?
- (17) **A.** It's possible that I may not have, yes.
- (18) **Q.** Okay. Do you recall ever having discussed the
- (19) terms of this fourth amendment to the Purchase and Sale
- (20) Agreement to Mr. Tompsett or to anybody else at Johnson
- (21) Utilities?
- (22) **A.** The terms of this fourth amendment in this
- (23) document?
- (24) **Q.** Yes.
- (25) **A.** I do not recall that I formally did discuss this

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- (1) document nor this document with the -- with Mr. Tompsett.
- (2) **Q.** Why not?
- (3) **MR. MARKS: Form.**
- (4) **THE WITNESS: Why not? These are very long**
- (5) **documents. We tend to focus in our discussions as related**
- (6) **to the effluent, the terms of this Agreement Regarding**
- (7) **Utility Service. Given that, that is where the -- that is**
- (8) **what we were focused on, was delivery of effluent or**
- (9) **delivery of water at the effluent rate. This was the**
- (10) **document that we tended to focus on, rather than on the**
- (11) **much larger document, I'm assuming.**
- (12) **BY MR. KITCHEN:**
- (13) **Q.** Okay. Now, I think we already discussed, absent
- (14) the Utility Service Agreement from 1999, there is no
- (15) contractual right that Swing First would have to receive
- (16) effluent at all; isn't that correct?
- (17) **MR. MARKS: Form -- objection; form.**
- (18) **THE WITNESS: Mr. Tompsett and I and Mr. Larsen**
- (19) **and I had multiple conversations about this document and**
- (20) **the applicability of it between our two parties, and I**
- (21) **was -- and we had agreement, as evidenced by the utility's**
- (22) **behavior, that the terms, or the effective terms, of this**
- (23) **agreement were being followed by both parties.**
- (24) **BY MR. KITCHEN:**
- (25) **Q.** But you are still referencing that agreement.

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- (1) My question was, absent that agreement, you are
- (2) not claiming that you would have any contractual right to
- (3) purchase effluent at all, are you?
- (4) **A.** I don't know.
- (5) **Q.** Okay. Can you -- is there anything you can tell
- (6) me today that would give you a contractual right to
- (7) purchase effluent from Johnson Utilities absent that
- (8) agreement, the 1999 agreement?
- (9) **A.** If -- there is nothing that I can -- if there is
- (10) no contract, then by nature, there can be no contractual
- (11) right.
- (12) The utility consistently behaved in a manner that
- (13) demonstrated that they orally agreed to the effluent rate
- (14) for this -- for -- governing our relationship, and
- (15) certainly at no time did we have an agreement that the
- (16) utility would bill at \$3.75 per thousand gallons.
- (17) So the contractual right or otherwise does not --
- (18) the written contractual right or otherwise does not appear
- (19) in multiple cases to have governed Utility's behavior.
- (20) **Q.** Again, I will reask my question: Absent that
- (21) agreement, can you point to anything else, any other
- (22) document, any other e-mail, that absent that agreement
- (23) would give Swing First the right to purchase effluent from
- (24) Johnson Utilities?
- (25) **A.** There are multiple -- in this document, in the

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- (1) response to Johnson Utilities' Second Set of Requests For
- (2) Production of Documents, Exhibit 4, on page 2, No. 4, the
- (3) response includes the words "there are numerous other
- (4) documents evidencing this agreement as it applies to
- (5) Utility and Swing First as successor in interest,
- (6) including Utility's second amended complaint pleadings in
- (7) the Corporation Commission documents and e-mail
- (8) correspondence between the parties."
- (9) **Q.** And that specifically indicates referencing "this
- (10) agreement," which is referring to the 1999 agreement;
- (11) correct?
- (12) **A.** It refers to this agreement, I believe.
- (13) **Q.** And, again, I don't want to spend all day on
- (14) this, other than the 1989 Utility Service Agreement.
- (15) Is there any -- are you claiming any contractual
- (16) right completely independent of the 1999 Utility Service
- (17) Agreement that gives Swing First the right to purchase
- (18) effluent from Johnson Utilities?
- (19) **A.** I'm unaware.
- (20) **Q.** I'm not talking about the e-mails that might
- (21) reference the 1999 agreement. I'm talking about a
- (22) completely independent source of that contractual right
- (23) other than the 1999 agreement.
- (24) **MR. MARKS: Form.**
- (25) **THE WITNESS: I'm unaware of any other written**