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COMMISSIONERS

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ARIZONA CORPORATION COMMISSION
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Arizona Corporation Commission

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JAN 31 2012

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

DOCKET NO. WS-02987A-08-0049

NOTICE OF FILING
PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

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

Pursuant to the request of the Administrative Law Judge at the July 17, 2011, oral argument on Swing First Golf's Withdrawal of Complaint, Johnson Utilities, LLC, is filing a copy of its January 27, 2012, Reply in Support of Motion for Summary Judgment filed in *Johnson Utilities, LLC, et al. v. Swing First Golf, LLC, et al.* (Cause No. CV2008-000141).

RESPECTFULLY submitted this 31st day of January, 2012.

BROWNSTEIN HYATT FARBER SCHRECK,
LLP

Jeffrey W. Crockett, Esq.
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Attorneys for Johnson Utilities, LLC

ORIGINAL and thirteen (13) copies of the foregoing filed this 31st day of January, 2012, with:

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

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Phoenix, AZ 85004

- 1 Copy of the foregoing hand-delivered
- 2 this 31st day of January, 2012, to:

- 3 Yvette B. Kinsey, Administrative Law Judge
- 4 Hearing Division
- 5 ARIZONA CORPORATION COMMISSION
- 6 1200 West Washington Street
- 7 Phoenix, Arizona 85007

- 8 Robin Mitchell, Chief Counsel
- 9 Legal Division
- 10 ARIZONA CORPORATION COMMISSION
- 11 1200 West Washington Street
- 12 Phoenix, Arizona 85007

- 13 Steve Olea, Director
- 14 Utilities Division
- 15 ARIZONA CORPORATION COMMISSION
- 16 1200 West Washington Street
- 17 Phoenix, Arizona 85007

- 18 COPY of the foregoing sent via e-mail and first
- 19 class mail this 31st day of January, 2012, to:

- 20 Mr. Craig A. Marks
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18 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
19 **IN AND FOR THE COUNTY OF MARICOPA**

20 JOHNSON UTILITIES, LLC; THE CLUB
21 AT OASIS, LLC; GEORGE H.
22 JOHNSON; JANA S. JOHNSON; BRIAN
23 F. TOMPSETT,

24 Plaintiffs,

25 v.

26 SWING FIRST GOLF, LLC; DAVID
27 ASHTON,

28 Defendants.

AND RELATED COUNTERCLAIMS.

No. CV2008-000141

**PLAINTIFFS' REPLY IN SUPPORT
OF THE MOTION FOR SUMMARY
JUDGMENT**

*(Assigned to the Honorable
Dean Fink)*

Plaintiffs/Counterdefendants, Johnson Utilities, LLC, The Club at Oasis, LLC,

George H. Johnson and Brian F. Tompsett ("Plaintiffs") hereby Reply in support of their

1 November 23, 2011 Motion for Summary Judgment.¹ For the reasons set forth below, and
2 as set forth in Plaintiffs' Motion and accompanying Statement of Facts, Defendants'
3 counterclaims are baseless and are subject to summary dismissal.
4

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I CONTRACT CLAIMS**

7 Defendants' contract counterclaims are based entirely on the application of the
8 Utility Services Agreement between Johnson Utilities and Johnson Ranch Holdings
9 ("Agreement"). Absent the application of that Agreement to this case, it is undisputed that
10 Defendants have no contract counterclaims. Defendants do not dispute that they were
11 never a party to this Agreement. Defendants also do not dispute that the rights under this
12 Agreement were never assigned to them. Instead, Defendants rely entirely upon their
13 assertion that the parties "acted" as if the Agreement were in effect. Defendants essentially
14 assert that this Court should ignore Arizona Corporation Commission ("ACC") Rules and
15 Tariffs, violate the law and the Arizona Constitution concerning discrimination among
16 utilities customers, and should apply the terms of a contract which the Defendants have no
17 claim because of the Defendants' assertions that the parties acted as if the Agreement
18 applied.
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24 ¹ As the Rule 56(c)(2) does not contemplate a reply to a controverting separate statement of facts,
25 none has been filed herewith. This should not be deemed to constitute an agreement on Plaintiff's
26 part with any of the statements in Defendants' controverting Separate Statement of Facts, many of
27 which Plaintiff strenuously disputes. Should the Court deem it helpful to a full understanding of
28 the issues, Plaintiffs will provide a Reply to the Controverting Statement of Facts.

1 Even assuming the Defendants' assertion was correct, their claims fail. Defendants
2 utterly fail to address the fact that David Ashton ("Ashton") misrepresented to
3 representatives of Johnson Utilities ("JU") that the Agreement had been assigned, when in
4 fact it had not. Indeed, based upon the Defendants' own admissions under oath in this
5 case, there can be no reasonable dispute that to the extent that JU believed that the
6 Agreement applied, that belief was based entirely upon the misrepresentations of the
7 Defendants. As set forth in Plaintiffs' Motion, one cannot benefit from one's own
8 misrepresentations.

9
10
11 **A. It is Defendants who are ignoring the ACC tariff rates.**

12 Defendants assert without any basis whatsoever² that JU has "breached its
13 commission authorized tariffs." That statement is not only false, but is a complete reversal
14 of the truth. Indeed, it is Defendants who are attempting to have this Court enforce an
15 illegal agreement that they claim permits them to receive water at far less than the lawful
16 tariff rate.

17
18
19 It is undisputed in this case that based upon the tariff rates, and assuming the
20 Agreement does not apply, Defendants owe over \$145,000.00 for water that was delivered
21 but never paid for. Plaintiffs sought payment based on the ACC tariff rates. Defendants
22 attempt to ignore the ACC mandated tariffs, by attempting to obtain CAP water at the
23

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26 ² This section is based on nothing more than arguments of counsel, which cannot form the basis
27 for a proper Motion. "Argument of counsel is not evidence and may not be considered by
28 the Court." *See Cimino v. Alway*, 18 Ariz. 271, 501 P.2d 447 (1972).

1 effluent water rate in violation of the law, and attempt to obtain other water and related
2 services for free. If the ACC mandated tariffs are applied, Defendants have no contract
3 claims whatsoever. As this Court must enforce the ACC tariff rates, Defendants' contract
4 claims must be dismissed.
5

6 ***B. The Agreement was never assigned, Defendants have no rights to enforce***
7 ***its terms, and Defendants Misrepresented these Facts to JU.***

8 The Agreement was never assigned by Johnson Ranch Holdings to Swing First.
9
10 Indeed, the sale agreements specifically indicated that the Agreement would not be
11 assigned, and that SFG would have to enter into a separate agreement. Notwithstanding,
12 Ashton misrepresented to JU' representative Brian Tompsett that the Agreement had in fact
13 been assigned. *See* Plaintiff's Motion, p. 7, lines 2-11. At his deposition, Ashton admitted
14 under oath that he had no reason to disagree with the statement that he had represented that
15 the Agreement had been assigned. *Id.* JU trusted Ashton's statements, and believed that
16 the Agreement had in fact been assigned. As set forth in Plaintiff's Motion, Defendants
17 are not entitled to misrepresent the truth, and then rely upon the other parties' reliance on
18 those statements as a matter of law. *See* RESTATEMENT (2D) OF CONTRACTS, SECTION 164.
19 The fact that JU' representatives referenced the Agreement in a few emails as a result of
20 Defendants' misrepresentations is completely irrelevant.
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24 Defendants attempt to get around this fatal defect by manufacturing a story that
25 "Mr. Johnson ultimately proposed that the parties would continue to operate as if the USA,
26 particularly Paragraph 9, was in effect." *See* Defendants' Response, p. 4 lines 17-19. It is
27

1 notable that Defendants never disclosed any such fact in its disclosures in this case, and did
2 not see fit to mention this story in Ashton's deposition. It is obvious that these new "facts"
3 were included simply to get around Ashton's clear, unambiguous and fatal testimony that
4 he had told JU that the contract had been assigned and that he "didn't know" if the contract
5 had been assigned by Johnson Ranch Holdings as of his deposition in this case. See
6 Plaintiff's Motion, p. 7, lines 7-13. A self-serving affidavit that contradicts deposition
7 testimony must not preclude the entry of summary judgment. See *MacLean v. State*
8 *Department of Public Education*, 195 Ariz. 235, 241, 986 P.2d 903 (App. 1999) ("A
9 party's affidavit which contradicts his own prior deposition testimony must be disregarded
10 on a motion for summary judgment.")
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14 Defendants also assert that Plaintiffs "own contract claims in this case are based
15 solely on the Utility Services Agreement." As set forth above, this statement is false.
16 While JU did reference the Agreement in its initial Complaint, its claims against
17 Defendants exist independent of any agreement and are based upon the water that was
18 actually delivered coupled with the ACC tariff water rate. Plaintiff did not discover the
19 fact that Ashton's representations that the Agreement had been assigned were false until
20 well after this case was instituted. Had Ashton the truth prior to the filing of this case, no
21 reference to the Agreement would have been made in the initial Complaint. As it stands,
22 JU intends to file a timely motion to amend the pleadings to conform to the evidence.
23
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25

26 **C. THE AGREEMENT IS UNENFORCEABLE, ILLEGAL, AND AGAINST PUBLIC**
27 **POLICY.**

1 Defendants' contract counterclaims are based entirely upon their assertion that the
2 (unassigned) Agreement allowed them to purchase effluent at the CAP water rate. This
3 interpretation, if given effect, would be illegal under clear and unambiguous Arizona law.
4 Arizona law provides that utility service providers cannot discriminate between customers,
5 and cannot provide utilities at a rate other than as set by the ACC. *See Steele v. General*
6 *Mills, Inc.*, 329 U.S. 433, 67 S.Ct. 439, 91 L.Ed. 402 (1947); *Arizona Public Service Co. v.*
7 *ACC*, 155 Ariz. 263, 267, 746 P.2d 4 (App. 1987) (*overruled on other grounds*). Likewise,
8 the Arizona Constitution expressly prohibits discrimination among utility customers.
9 ARIZONA CONSTITUTION, ART. 15, SECTION 12. ("[N]o discrimination in charges, service,
10 or facilities shall be made.") *See also Marco Crane and Rigging v. ACC*, 155 Ariz. 292,
11 297, 746 P.2d 33 (App. 1987) ("A public service corporation must treat all similarly
12 situated customers alike. It cannot extend a privilege to one and refuse the same privilege
13 to another.") The counterclaims, which are based entirely upon their desire to obtain water
14 and services at less than the ACC mandated rates, are based upon illegal interpretations and
15 are unenforceable, even assuming the Agreement applied.³

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21 Defendants argue that "utility can lawfully sell effluent or other water at the contract

22
23 ³ Defendants argue that because JU mentioned the Agreement in its Complaint, this
24 mention somehow transforms an illegal agreement into a valid agreement. As set forth
25 above, Plaintiffs' claims are not based on the Agreement but are rather based on
26 Defendants' failure to pay the ACC mandated rates. Even assuming Defendants were
27 correct that Plaintiff "ratified" the Agreement, parties cannot "ratify" their way around the
28 law. Defendants have cited to no authority suggesting that such ratification turns an illegal
contract into a legal contract, and such argument must be disregarded.

1 price to Swing First provided that the Johnson Parties pay utility the difference."
2 Defendants cite to no portion of the Agreement that could conceivably support such an
3 interpretation, and nowhere does the Agreement provide for or infer any such mechanism.
4 Additionally, Defendants fail to cite to any authority supporting such a suggestion. This is
5 because this suggestion violates the law. Arizona law does not allow parties to circumvent
6 ACC tariffs through payments made by related individuals and/or organizations. The
7 question of whether or not such an agreement would be valid was squarely addressed in
8 *Arizona Public Service Co.*, 155 Ariz at 267 (“[W]e agree that the cases cited by the
9 Commission stand for the proposition that the Commission may prohibit parent/subsidiary
10 companies from evading regulation . . .”)
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14 Indeed, at a recent ACC hearing, **the Commission specifically indicated that it**
15 **would not have approved of this Agreement.** “My view [is] that there is not a valid
16 service agreement, and that the ACC never approved an agreement.” Chairman Pierce,
17 January 17, 2012 ACC hearing, p. 89, lines 11-13. *See* Transcript, attached hereto as
18 Exhibit “A.”
19
20

21 Defendants next argue that “an innocent party may enforce an otherwise illegal
22 contract.” Defendants argue that they are the “innocent party” in this transaction, and
23 should be entitled to circumvent the ACC’s mandated tariffs and obtain a windfall from
24 JU. They are not correct. As a preliminary matter, the exceptions to the doctrine of *in pari*
25 *delicto* to which Defendants repeatedly cite do not apply only where the “public interest” is
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1 not threatened. See Defendants' cited case of *In Re Leasing Consultants, Inc.*, 592 F.2d
2 103, 110 (C.A.N.Y. 1979). It is undisputed that Arizona law has set very high importance
3 in preventing discrimination among utility customers, and the public interest is set against
4 any such discrimination.
5

6 Also, SFG was never assigned any rights under the Agreement, and has no basis to
7 assert the provisions therein. Defendants misrepresented this fact to JU, telling it that the
8 Agreement had in fact been assigned. Defendants cannot misrepresent the facts concerning
9 the non-assignment of the Agreement, and then claim they are the "innocent party."
10

11 Defendants also fail to identify any "malfeasance" on the part of JU relating to the
12 formation of the parties relationships or relating to the amounts charged. JU is attempting
13 to enforce the ACC mandated tariffs with respect to the water and services provided, which
14 every other golf course in the State is required to pay. Indeed, it is Defendants who have
15 committed malfeasance by attempting to circumvent these same rules.
16
17

18 Defendants cite *Burner v. Lozano*, 730 F.2d 1319 (1984) in arguing that "an
19 innocent party" that enters into an agreement in reliance on another party's
20 misrepresentations may under certain circumstances enforce that agreement. The holding
21 of that case is irrelevant. In that case, the court simply found that a Plaintiff who benefitted
22 from insider trading was not necessarily estopped from seeking the return of money where
23 the money was invested as a result of fraudulent misrepresentations on the broker's part.
24 That holding has nothing to do with this case. It is undisputed that JU is the designated
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1 utility to provide water to SFG. SFG has to purchase water from JU, as there is no other
2 utility serving the area. SFG was not tricked into dealing with JU as a result of any fraud,
3
4 as it either had to purchase its water from JU at the tariff rates or go without. This case
5 therefore has no application whatsoever to the present matter.

6 Defendants citation to *In re Leading Consultants* is similarly misplaced. That case
7
8 held under certain circumstances, the extremely broad powers granted to bankruptcy
9 trustees may supersede certain legal impediments to contract formation where those
10 impediments do not impact public policy. Obviously, this case is not instructive when
11 dealing with a non-trustee attempting to enforce contract provisions directly opposed to
12 stated policy.

14 Defendants also rely upon *Ryley v. Kline*, 27 Ariz. 432, 234 P. 35 (1925) in arguing
15
16 that they should get the benefit of an illegal contract and illegal rates. This case is not
17 helpful to Defendants. In that case, a purchaser of stock which was purchased in violation
18 of blue-sky laws sought to rescind the contract and reacquire his money. The court found
19 that (1) where an agreement was not illegal per se but merely prohibited, (2) where the law
20 of prohibition was enacted to protect the party seeking to rescind the contract, (3) where
21 the party seeking rescission did nothing wrong, and (4) where the public interest would not
22 be affected a contract can be rescinded. *Id.* at 444-446. In this case, (1) the Defendants'
23 asserted interpretation is illegal per se, (2) the illegality is designed to protect Swing First's
24 competitors and other similarly situated persons – not Swing First, (3) Swing First is acting
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1 improperly in attempting to get water at illegal rates, and (4) it is not attempting to rescind
2 the contract, but is rather attempting to enforce illegal terms. *Riley* is actually fatal to
3 Defendants' position.
4

5 Defendants can make no serious argument as to the illegality of their interpretation
6 of the Agreement. The Defendants' contract claims must be dismissed.
7

8 ***D. DEFENDANTS HAVE NO CLAIM FOR ANY "LINE BREAK OVERCHARGES."***

9 Defendants claim without any support that Plaintiff falsely claimed the existence of
10 "line breaks" in order to sell CAP water rather than effluent. Defendants never provided
11 evidence whatsoever suggesting that Plaintiff "broke" the lines or did anything improper in
12 delivering CAP water. Defendants' claim is instead, once again, based entirely on their
13 assertion that they should be given illegal discounts and rebates regarding said water in
14 violation of ACC regulations. Defendants are not correct.
15

16 The Agreement does not apply to the parties' relationship, and even if it did,
17 Defendants' interpretation would be illegal. Defendants are simply not permitted to
18 purchase CAP water at anything other than CAP rates. Nothing in the Agreement provides
19 for or permits such a result, and such a result is expressly precluded by ACC regulations.
20
21

22 ***E. DEFENDANTS ARE OBLIGATED TO PAY FOR ALL WATER DELIVERED TO THE***
23 ***GOLF COURSE.***

24 Defendants next argue that they should not have to pay for the water that was
25 delivered which they claim flooded the golf course. It is undisputed that Defendants
26 ordered the water, and it is undisputed that SFG is obligated to pay for all water that was
27

1 delivered. Nor is it disputed that Defendants have no idea how much water that was
2 delivered they should not have to pay for, other than completely unsupported guesses.
3
4 Regardless of any unfounded damages claimed as a result of the flooding, the water that
5 was delivered was available for use and was in fact used to water the remainder of the
6 course. Defendants fail to provide admissible evidence permitting such a claim to go
7
8 before a jury, and any claim for contract damages related to any such incident must fail.

9 Defendants have filed claims for negligence and trespass relating to the flooding
10 incident. The claim for trespass is subject to dismissal for the reasons set forth below, but
11 any damages suffered as a result of any flooding can be fully addressed in the claim for
12 negligence, which Plaintiff has not moved to dismiss. The claim for breach of contract is
13 not only utterly unfounded, but is also unnecessary as any legitimate issue is properly
14 addressed in the negligence claim.
15

16
17 ***F. DEFENDANTS HAVE NO LEGITIMATE CLAIM BASED UPON THE SIZE OF METER***
18 ***TO BE USED.***

19 Defendants assert that they have a claim against JU based on the size of the meter
20 that was installed.⁴ Defendants fail to point to any contractual provision establishing the
21 size of meter to be installed, as there is none. The Agreement is completely silent as to the
22 meter size. Any issues relating to meter size and whether or not the correct meter was
23 installed are matters solely for the ACC, and not matters of breach of contract.
24

25
26 ⁴ Defendants admit that the utility has discretion to determine the proper size of the meter,
27 and do not dispute that the six inch meter was appropriate for the golf course.
28

1 **G. *THE OASIS MANAGEMENT AGREEMENT IS INVALID, ILLEGAL AND***
2 ***UNENFORCEABLE.***

3 As set forth in the Motion, an entity related to a utility may not engage in a
4 transaction designed to circumvent the rules governing the utility. *See Arizona Public*
5 *Serv.* 155 Ariz. at 267, 746 P.2d 4 (Div.1, 1987)(overruled on other grounds). It is
6 undisputed that the Parties never entered into any written agreement relating to the Oasis
7 Golf Course, and it is undisputed that Plaintiffs refused to sign the proposed agreement
8 presented by Ashton. *See Defendants' Response*, p. 10, lines 15-18. It is also undisputed
9 that the alleged Oasis Management Agreement asserted by Defendants was designed to
10 circumvent the ACC rules regarding the delivery and payment of water provided.

11 **Amazingly, Defendants admitted under oath that this alleged Agreement is illegal.**

12 *See Plaintiffs' Motion*, p. 13, line 20 through p. 14, line 12. Defendants make no attempt
13 to argue that it is legal for water to be sold at less than the tariff rate, and instead simply
14 cite to boilerplate indicating that a contract should where possible be interpreted to give
15 lawful and effective meaning to its provisions. However, in a case such as this, where the
16 *entire purpose* of the alleged contract is to circumvent the law, there is no interpretation
17 that a court can give to render it enforceable.

18 Defendants make the completely unsupported assertion that “[e]ven if it is arguably
19 illegal for a utility to sell water at less than its tariffed rate, it is not illegal to contract to
20 purchase water at less than its tariffed rate.” In fact, this absurd argument is baseless. The
21 whole point of enforcing utility tariffs is to prevent certain customers from receiving an

1 unfair advantage over other users, which is fundamentally unfair where utility monopolies
2 are granted. Preventing illegal contracts such as those sought by Defendants are intended
3 to benefit the public at large, which intent would be entirely frustrated if Defendants'
4 unsupportable assertion were correct.
5

6 Defendants lastly argue that because Ashton "will testify concerning the extensive
7 benefits provided to Oasis," they should be entitled to seek the \$74,832.82 claimed as the
8 contract price in the admittedly illegal contract. However, this amount exactly equals the
9 amount claimed as the illegal contract price. One cannot circumvent the law precluding the
10 enforcement of illegal contracts by simply restyling one's claim as "unjust enrichment."
11 Contrary to Defendants' assertion that Ashton "testified extensively during his deposition
12 concerning services provided and the costs incurred by Swing First," the benefits allegedly
13 provided and costs allegedly incurred by SFG have *never* been disclosed in this case.
14 Notably, Defendants have failed to quote any portions of the transcript containing any such
15 calculations. This claim likewise must be dismissed.
16

17
18
19 **H. SWING FIRST'S BREACH OF GOOD FAITH AND FAIR DEALING CLAIM FAILS .**

20 It is undisputed that if the Agreement was not validly assigned, and if its terms are
21 illegal and unenforceable, SFG's claim must be dismissed. Defendants refuse to
22 acknowledge that it is JU that is attempting to enforce the lawful ACC tariffs, and
23 Defendants are attempting to violate the law by receiving water at far less than the legal
24 rate. Defendants have no legitimate expectation to receive water at a rate less than its
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1 competitors, and therefore, this claim must fail.

2 SFG also argues that it is entitled to tort damages because of the "special
3 relationship" it had with JU regarding the tariffed rates. First, bad faith damages are not
4 available where there is no contract between the parties. Here, the USA does not apply or
5 is otherwise unenforceable. Additionally, the tariff rates were not breached. SFG is suing
6 to recover amounts that it believes it should have been charged that were *lower* than the
7 tariff rates (i.e., SFG is hoping to compel JU to breach the tariff rates). Accordingly, its
8 breach of good faith and fair dealing claim stems from its desire to force JU to charge rates
9 lower than are legally allowed.

10 Even if the Court were to allow the claim to proceed, Defendants are limited to
11 seeking contract damages. Generally, the remedy for breach of the implied covenant of
12 good faith and fair dealing is by action on the contract. *Burkons v. Ticor Title Ins. Co. of*
13 *California*, 168 Ariz. 345, 355 (1991). Courts have held that tort damages should only be
14 available where there is a special relationship between the parties. *Id.* Moreover, "the
15 special relationships in which such tort damages for breach of contract may be available
16 are those undertaken for something more than or other than commercial advantage, such as
17 the procurement of service, professional help, security, or other intangibles." *Id.* Here,
18 SFG is a water customer. It receives tangible goods, not professional help, security or
19 intangibles. It cannot be entitled to seek tort remedies on such a contract claim. If the
20 claim is allowed, Defendants should be restricted to only contract damages.

1 **II. TORT CLAIMS.**

2 **A. SWING FIRST'S TRESPASS CLAIM FAILS.**

3
4 In trying to establish JU' alleged intent, SFG basically restates a number of
5 conclusory and unsupported allegations from its counterclaims. SFG tries to contort facts
6 to support its claim. Regardless of the timing of when SFG filed its ACC complaint, that
7 fact does not give rise to any inference that the alleged flooding was intentional.
8
9 Moreover, Mr. Tompsett's email that SFG cites as "damning" evidence provides absolutely
10 no support regarding JU' intent to flood SFG's golf course. SFG has essentially engaged
11 in rank speculation to concoct a story as to JU' intent. SFG's speculation is not competent
12 or admissible evidence that can work to defeat summary judgment.
13

14 The undisputed facts are that: 1) water service was discontinued to SFG for failure
15 to make payment; 2) water was reinstated after SFG claimed that its business would fail if
16 water deliveries stopped; 3) there was a severe rainstorm during the week of the alleged
17 flooding; and 4) water deliveries ceased after Ashton requested them to stop from Mr.
18 Tompsett. None of these facts give rise to an inference that JU intentionally flooded the
19 course. Moreover, SFG makes no attempt to distinguish the facts of this case from *Taft*,
20 cited by JU. *Taft* held that in the absence of explicit evidence of intent that a flooding
21 claim must proceed in negligence only, not trespass.
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24
25 Second, SFG makes no attempt to calculate its damages related to the alleged
26 flooding. This provides a separate basis to enter summary judgment on the claim. Courts
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1 have long held that damages must be calculated with reasonable certainty and that damages
2 based on speculation or conjecture are not allowed. *County of La Paz v. Yakima Compost*
3 *Co., Inc.*, 224 Ariz. 590, 607, 233 P.3d 1169, 1186 (Ariz.App. Div. 1,2010) (holding that
4 plaintiff is “required to demonstrate the amount of damages with ‘reasonable certainty’”
5 and that damages cannot be established through “conjecture or speculation”). Here, SFG
6 admitted that its damage calculations were speculative. In testifying regarding the damages
7 related to the alleged flooding, Ashton specifically testified:
8

10 Q. So how much did it cost you to fix the problems?
11 A. Well --
12 MR. MARKS: Form.
13 THE WITNESS: -- I'm not going to speculate on that.

14 (Ashton Depo. 122:21-25, Plaintiff's SOF ¶ 53)

15 Ashton's purported “expert” report provides a \$10,000 damage figure that is not
16 supported by any receipts, lost sales figures, repair bills, or a single other fact or amount
17 that can be tested. Rather, Ashton estimates that \$10,000 is a reasonable value. Ashton's
18 damage figure is speculative and unsupported and the trespass claim fails.

19 SFG does not dispute that JU holds an easement to enter SFG's property. SFG's
20 easement specifically trumps SFG's trespass claim. SFG's only argument is unsupported
21 and is a conclusory statement that the easement does not preclude a trespass claim. SFG
22 provides no evidence or legal authority to support its position.

23 Finally, SFG, in three short sentences, summarily concludes that by virtue of their
24 roles within JU, Mr. Johnson and Mr. Tompsett should be held personally liable for the
25 alleged flooding. SFG's basis for the statement is the unsupported assertion that either Mr.
26 Johnson or Mr. Tompsett “had to [have] ordered the flooding.” First, SFG provides no
27 evidence regarding Mr. Johnson's or Mr. Tompsett's roles in directing the alleged
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1 flooding. SFG has provided no evidence whatsoever proving the requisite intent to
2 maintain a trespass claim. They cannot be personally liable for another reason: Arizona
3 law is clear that an officer or director of a company cannot be held personally responsible
4 just by virtue of his role in a company. *Bischofshausen, Vasbinder, and Luckie v. D.W.*
5 *Jaquays Min. and Equipment Contractors Co.*, 145 Ariz. 204, 210, 700 P.2d 902, 908
6 (Ariz.App.,1985); *Ferrarell v. Robinson*, 11 Ariz.App. 473, 475, 465 P.2d 610, 612 (App.
7 1970). SFG would have this Court reject the long-standing and well-understood law
8 insulating officers and directors from personal liability for corporate obligations. Again,
9 SFG's claim fails.

10 **B. SFG'S DEFAMATION CLAIM FAILS.**

11 The judicial privilege defense is absolute in that the speaker's motive, purpose or
12 reasonableness in uttering a false statement does not affect the defense. *Green Acres Trust*
13 *v. London*, 141 Ariz. 609, 613, 688 P.2d 617, 621 (Ariz., 1984). Whether the privilege
14 exists is a question of law for the court that is properly resolved on summary judgment. *Id.*
15 "To fall within the privilege, the defamatory statement need not be 'strictly relevant' to the
16 judicial proceeding, but it must relate to, bear on, or be connected with the judicial
17 proceeding and have 'some reference to the subject matter of the proposed or pending
18 litigation.'" *Id.*; *Yeung v. Maric*, 224 Ariz. 499, 502, 232 P.3d 1281, 1284 (Ariz.App. Div.
19 1, 2010).

20 Here, Mr. Johnson's statements regarding Mr. Ashton and SFG related to the ACC
21 and Superior Court cases between JU and SFG. Accordingly, statements i, ii, and iii in the
22 letter are absolutely judicially privileged. There is no dispute that the matters raised in the
23 letter concerning the ACC and Superior Court complaints obviously have "some reference
24 to the subject matter" of the ACC and Superior Court complaints. That is enough to have
25 the statements fall into the judicial privilege. As such, his statements in the letter regarding
26 Ashton's and SFG's ACC action are privileged and not subject to recovery in defamation.
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1 SFG's characterization of the *Hall v. Smith* case is inaccurate. *Hall* held that a
2 statement to a third party is privileged, even where the third party is not in the litigation
3 itself, but has some relationship to the litigation. *Hall v. Smith*, 214 Ariz. 309, 312, 152
4 P.3d 1192, 1195 (App. 2007). By SFG's own concessions, the purported recipients of the
5 allegedly defamatory letter were SFG's investors, who have a direct financial stake in the
6 performance and activities of SFG. As such, they are not tenuously related to the case.
7 They are the specific persons that will be benefitted or harmed from the litigation(s)
8 between SFG and JU. Statements i, ii and iii all are covered by the litigation privilege.

9 The remaining statements are statements of hyperbole, opinion or truthful. Ashton
10 was charged for assaulting a minor in 2005. Ashton was also a defendant in a civil lawsuit
11 brought by the assaulted minor and his parents. Those statements relating to Ashton's
12 assault charge and resulting criminal and civil liability are truthful statements, not
13 defamation.

14 The remaining statements in the letter are opinion and/or hyperbole. Mr. Johnson
15 explicitly states in the letter that the complaints arising out of Ashton's assault on a minor
16 "in my humble opinion show 'the nature of the beast' we are all dealing with in Ashton."
17 Mr. Johnson's letter could not have been more clear. He explicitly notes that Ashton's
18 assault of a minor, in his opinion, shows the greater character of Ashton. Based on that
19 opinion, Mr. Johnson suggests that SFG's investors take certain actions.

20 At no point in the letter does Mr. Johnson assert any facts that have been shown to
21 be untrue. Moreover, any of his opinions are those that cannot be tested as truthful or
22 untruthful, because they are statements of opinion or hyperbole. Thus, the remaining
23 statements, iv, v, and vi are not actionable. Mr. Johnson and JU are entitled to summary
24 judgment on Defendants' defamation claims.

25 **CONCLUSION**

26 For the reasons set forth, the Motion for Summary Judgment should be granted.
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Respectfully submitted this 27th day of January, 2012.

SANDERS & PARKS, P.C.
/s/ Anoop Bhatheja

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/s/ Michael L. Kitchen

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Original of the foregoing electronically filed this 27th day of January, 2012 with:

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Phoenix, Arizona 85003

Copy of the foregoing e-delivered this 27th day of January, 2012 to:

Honorable Dean M. Fink
MARICOPA COUNTY SUPERIOR COURT

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1 BEFORE THE ARIZONA CORPORATION COMMISSION

2

3 SWING FIRST GOLF, LLC,)
4 COMPLAINANT,) DOCKET NO.
5 VS.) WS-02987A-08-0049
6 JOHNSON UTILITIES, LLC,)
7 RESPONDENT.)
8) ORAL ARGUMENTS

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11 At: Phoenix, Arizona
12 Date: January 17, 2012
13 Filed:

14

15 REPORTER'S TRANSCRIPT OF PROCEEDINGS

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20 ARIZONA REPORTING SERVICE, INC.
21 Court Reporting
22 Suite 502
23 2200 North Central Avenue
24 Phoenix, Arizona 85004-1481

25

26 Prepared for: By: COLETTE E. ROSS
27 Certified Reporter
28 Certificate No. 50658

29

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1 attention to address this.

2 Now, with regard -- I want to get back to the
3 effluent issue and San Tan HOA and correct something
4 that Mr. Marks either didn't get right or doesn't
5 understand. Yes, the plant produces more effluent in a
6 year and there is more total effluent than there is
7 total demand. But that's because in the wintertime the
8 plant is producing a lot of effluent and there is no
9 demand for effluent. In the summer there is all kinds
10 of demand for the effluent, and it is limited. So when
11 he says, when he quotes figures that the company has
12 only sold 43 percent, whatever it is, of the effluent,
13 in the summer months the golf course wants about as much
14 effluent as we can produce and the San Tan HOA wants
15 about as much effluent we can produce. And there is not
16 enough for everybody during those summer months, there
17 just isn't.

18 ALJ KINSEY: Okay. Commissioner Pierce, did you
19 have any additional questions?

20 CHMN. PIERCE: How much longer do you think this
21 is going to take, Your Honor?

22 ALJ KINSEY: I don't know. I don't think we --
23 I don't have any other questions, but...

24 CHMN. PIERCE: Well, I just, I have been making
25 notes. I thought, you know, just depends on whether you

1 are pitching or catching on some of these issues. One
2 side makes a statement and there is a response. And
3 some things we forget about. But that's right, the
4 seasons, you know, supply and demand. You know, I
5 believe in climate change: winter, spring, summer, and
6 fall. And it is, it is different than the demand on
7 water. And we talk about that all the time. When we
8 look at rates and think, well, we want, we want rates to
9 go in place, we want them to go in winter when there is
10 not as much demand for the water.

11 I recognize that, in my view, that there is not
12 a valid service agreement and that the ACC never
13 approved an agreement. And I suspect that if all that
14 would have happened when Swing First brought this, if
15 there had been a negotiation and talk, we wouldn't be
16 here today. See, this would have all been figured out
17 between the parties, because I suspect there wasn't a
18 problem with the previous owner of the golf course. I
19 don't know.

20 But this issue between us and the Superior Court
21 is the one that has me concerned. I would hate to think
22 that through this process that both the court and us,
23 the ACC, are being manipulated because of this question
24 of who, what the boundaries are between the
25 jurisdiction. And for that reason, I kind of think