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ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

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AZ CORP COMMISSION
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2012 FEB 24 PM 3 01

Arizona Corporation Commission
DOCKETED

FEB 24 2012

DOCKETED BY

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

DOCKET NO. WS-02987A-08-0049

FILING OF COURT DOCUMENTS

1 In accordance with Judge Kinsey's February 17, 2012, Amended Procedural Order,
2 Swing First Golf LLC ("Swing First"), hereby files copies of "all pleadings, rulings, minute
3 entries, and orders, filed or issued in the Superior Court Case since January 27, 2012."

4 Attached are copies of the following documents filed by Swing First:

- 5 1. February 21, 2012, Defendants'/Counterclaimants' Response to Johnson Utilities
- 6 Motion to Dismiss for Lack of Subject Matter Jurisdiction;
- 7 2. February 21, 2012, Defendants'/Counterclaimants' Motion to Quash Subpoena;
- 8 and
- 9 3. February 22, 2012, Notice of Appearance by The Law Offices of Shawn E.
- 10 Nelson, PC.

11 Also attached are copies of the following Orders issued by the Court:

- 12 1. January 30, 2012, Order (Granting Plaintiffs'/Counterdefendants' Motion to
- 13 Exceed Page Length;
- 14 2. February 6, 2012, Minute Entry (Matter Under Advisement);
- 15 3. February 9, 2012, Under Advisement Ruling (Granting in part
- 16 Plaintiffs'/Counterdefendants' Motion for Summary Judgment);
- 17 4. February 13, 2012, Order (Pretrial Management Conference);
- 18 5. February 16, 2012, Minute Entry (Correcting clerical error); and

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

Craig A. Marks (#018077)
Craig A. Marks PLC
10645 N. Tatum Blvd.
Suite 200-676
Phoenix, Arizona 85028
Telephone: (480) 367-1956
Craig.Marks@azbar.org

ATTORNEY FOR
DEFENDANTS/COUNTERCLAIMANTS

JOHNSON UTILITIES, LLC d/b/a
JOHNSON UTILITIES COMPANY, an
Arizona limited liability company
Plaintiff,

v.

SWING FIRST GOLF, LLC, an Arizona
limited liability company, DAVID
ASHTON and JANE DOE ASHTON,
husband and wife

Defendants.

SWING FIRST GOLF, LLC, an Arizona
limited liability company, DAVID
ASHTON and JANE DOE ASHTON,
husband and wife

Counterclaimants

v.

JOHNSON UTILITIES, LLC d/b/a
JOHNSON UTILITIES COMPANY, an
Arizona limited liability company; THE
CLUB AT OASIS, LLC, an Arizona
limited liability company; GEORGE H.
JOHNSON and JANA S. JOHNSON,
husband and wife; BRIAN F. TOMPSETT
and Jane Doe Tompsett, husband and wife

Counterdefendants

NO. CV2008-000141

**DEFENDANTS'/COUNTER-
CLAIMANTS' RESPONSE TO
JOHNSON UTILITIES
MOTION TO DISMISS FOR
LACK OF SUBJECT MATTER
JURISDICTION**

(The Honorable Dean M. Fink)

1 Defendants/Counterclaimants Swing First Golf, LLC, David Ashton, and
2 Jane Doe Ashton (“Swing First”) hereby respond to Johnson Utilities’ Motion to
3 Dismiss for Lack of Subject Matter Jurisdiction. Utility’s Motion is meritless.

4 Swing First’s claims are squarely within the Court’s jurisdiction. Utility’s
5 own contract claim has the same jurisdictional basis as Swing First’s contract
6 claims. Utility misrepresents the Court’s ruling concerning Utility’s motion for
7 summary judgment, which actually does not support Utility’s argument. Utility
8 misstates Swing First’s contract claim concerning Utility’s meter overcharges.
9 Finally, Utility ignores fatal appellate precedent.

10 **I. UTILITY ACKNOWLEDGES THE COURT’S JURISDICTION TO**
11 **RESOLVE TARIFF-BASED CONTRACT CLAIMS**

12 Utility acknowledges that the Court has jurisdiction to resolve its contract
13 claims. Swing First’s contract claims have the same jurisdictional basis as Utility’s
14 contract claims. Both parties allege that they are entitled to damages as a result of
15 breaches of Utility’s Commission approved tariffs.

16 In its Complaint, Utility asks the Court to provide it damages for breach of a
17 contract – Utility’s Commission-approved tariffs. Utility alleges that Swing First
18 has failed to pay the charges required by its authorized tariff for CAP-Water
19 service. To resolve this claim, the jury will have to review the approved tariffed
20 rate (\$0.827 per thousand gallons), the rate Utility actually charged, the gallons
21 actually delivered, and the payments made by Swing First.

22 Similarly, in Count Five of its Amended Counterclaim, Swing First asks the
23 Court to provide it damages for breach of the identical contracts – Utility’s
24 Commission-approved tariffs. Swing First alleges that Utility has charged Swing
25 First more than allowed by its authorized tariffs for CAP-Water and Effluent. To
26 resolve these claims, the jury will have to review the approved tariffed rates, the
27 rates Utility actually charged, the gallons actually delivered, and the payments made

1 by Swing First.

2 Utility cannot claim that the Court has jurisdiction to resolve its contract
3 claims based on breach of its tariffs and then claim that the Court does not have
4 jurisdiction to resolve Swing First's contract counterclaims based on breach of the
5 same tariffs.

6 **II. UTILITY MISREPRESENTS THE COURT'S RULING ON ITS**
7 **MOTION FOR SUMMARY JUDGMENT**

8 Count Five of Swing First's Amended Counterclaim is a contract claim that
9 alleges Utility breached its tariffs and damaged Swing First as a result of those
10 breaches. These damages include overcharges for CAP Water delivered and
11 overcharges for Effluent meter charges.

12 The Court's February 9, 2012, Order concerning Utility's Motion for
13 Summary Judgment granted "the motion with respect to Count One, Count Two,
14 Count Six, and Count Seven of the First Amended Counterclaim, and den[ie]d it
15 with respect to the remaining counts." The Court could not have been clearer that
16 Count Five would go to trial.

17 Despite the clear language of the Court's Order, Utility still misrepresents it,
18 claiming that:

19 The Court has dismissed all of Swing First's contract and contract
20 related counterclaims/third-party claims pursuant to its February 10,
21 2012 Ruling, with the exception of "the dispute over the meter [and]
22 whether [Johnson Utilities] charged Swing First the proper price for that
23 meter."

24 This is so inaccurate, that it is fair to question whether Utility deliberately
25 misrepresented the Court's Order.

26 Utility also misrepresents Swing First's claims under Count Five concerning
27 overcharges for Utility's effluent meter. Utility alleges that the claim has
28 something to do with what size meter should have been installed. Utility knows
29 better. At oral argument on February 6, 2012, the Court recognized that the issue is

1 whether Utility installed a three-inch meter but then charged the rate for a six-inch
2 meter. This was exactly correct.

3 Consistent with its statements at oral argument, the Court clearly stated in its
4 February 9, 2012, Order:

5 The dispute over the meter is not what size meter Johnson installed, but
6 whether it charged Swing First the proper price for that meter.

7 Instead of accurately quoting this 24-word sentence from the Order, Utility twisted
8 its meaning by deleting key words and inserting new ones. Utility stated that the
9 Court found the only issue remaining was "the dispute over the meter [and] whether
10 [Johnson Utilities] charged Swing First the proper price for that meter."

11 Swing First will not ask for sanctions concerning Utility's reckless or
12 deliberate misrepresentations of the Court's rulings. However, Utility should
13 consider whether an apology to the Court would be appropriate.

14 **III. THE ACC DOES NOT HAVE EXCLUSIVE JURISDICTION**

15 As discussed above, Utility has accepted the Court's jurisdiction to resolve
16 breach of contract claims concerning Utility's tariffs. Because it acknowledges the
17 Court's jurisdiction to resolve its contract claims, Utility cannot argue that the Court
18 lacks jurisdiction to resolve Swing First's contract claims based on breach of the
19 same contracts (tariffs).

20 Even absent Utility's tariff-based claims, this Court would still have
21 jurisdiction over the subject matters of Swing First's counterclaims. *Qwest*
22 *Corporation v. Kelly*, 204 Ariz. 25, 59 P.3d 789 (Ariz. App. Div. 2, 2002) is directly
23 on point.

24 In *Kelly*, customers filed a class action lawsuit against Qwest arising from
25 their purchase of Qwest's linebacker service. The customers asserted both contract
26 and tort claims. Qwest moved to dismiss the complaint, arguing that the

1 Commission had “exclusive and plenary jurisdiction over all matters.”¹ The *Kelly*
2 court disagreed, concluding that the superior court had jurisdiction to hear the
3 complaint.

4 First, like this case, the fundamental issue in *Kelly* was whether the utility
5 committed civil wrongs against its customer(s).

6 [The customer] had raised “relatively simple tort and contract issues
7 revolving around a central inquiry: whether, under traditional judicial
8 principles, appellees committed a civil wrong against appellant.”²

9 Like *Kelly*, this case also involves relatively simple tort and contract claims.

10 Further, this Court has already ruled that the jury will have to apply contract
11 principals to determine whether Utility overcharged Swing First:

12 The principal difficulty is that, as the Corporation Commission found,
13 Johnson’s records have been inadequate. The Court is left to fill in the
14 gaps. Filling in gaps is an exercise in factfinding that must be left for
15 the jury.³

16 Similarly, in addition to the contract issues, the jury must decide multiple tort
17 issues—including trespass, negligence, and defamation—which the *Kelly* court says
18 are clearly outside the Commission’s jurisdiction.

19 However, the claims’ most important aspects involve facts and
20 theories of tort and contract far afield of the Commission’s area of
21 expertise and statutory responsibility. Indeed, appellant’s tort and
22 contract claims are the type of traditional claims with which our trial
23 courts of general jurisdiction are most familiar and capable of
24 dealing.⁴

25 The *Kelly* court concluded the complaint should proceed in court.

26 [The] complaint raises claims that revolve “around a central inquiry:
27 whether, under traditional judicial principles, [Qwest] committed a civil
28 wrong against [the tenants].” Likewise, as in *Campbell*, “these issues

¹ *Qwest v. Kelly* at 28.

² *Id.* at 32, quoting *Campbell v. Mountain States Telephone & Telegraph Co.*, 120 Ariz. 426, 586 P.2d 987 (App.1978).

³ Minute Entry dated January 5, 2011.

⁴ *Qwest v. Kelly* at 32.

1 predominate, [therefore] it is clearly not essential for the courts to
2 'refrain from exercising (their) jurisdiction until after 'the specialized
3 administrative agency' has determined some question or some aspect of
4 some question arising in the proceeding before the court.⁵

5 Similarly, there is no need for the Commission to apply some specialized technical
6 expertise. The issues in this case are simple contract and tort claims that take the
7 Commission-approved tariffs as written.

8 Utility full knows that *Kelly* is fatal to its claim that this Court lacks subject
9 matter jurisdiction. Here is what Utility previously told the Court:

10 The [*Kelly*] court held that plaintiff's claims did not implicate technical
11 issues peculiar to the utilities industries, but rather "revolve[d] 'around
12 the central inquiry: whether, under traditional judicial principals,
13 [Qwest] committed a civil wrong against [the tenants]." Although
14 subjects of "tariffs" and "rates" would certainly come up in the
15 litigation, the technicalities of those subjects were not central to the
16 dispute. In that regard, the superior court was found to be fully capable
17 of adjudicating the claims, obviating the need to defer to the ACC under
18 the doctrine of primary jurisdiction.⁶

19 Like *Kelly*, this Court is fully capable of adjudicating all claims in this case. The
20 technicalities of "tariffs" and "rates" are not central to the disputes.

21 The Commission certainly has plenary power concerning ratemaking.⁷ But
22 nothing in this case concerns ratemaking. Neither party is asking the Court to set
23 rates for Utility. Utility's tariffed rates are accepted by both parties. Swing First
24 simply alleges that Utility failed to charge its lawful rates and thereby overcharged
25 Swing First.

26 Utility's Motion is contrary to long-standing Arizona precedent, including
27 the clear holdings of the *Kelly* court.

⁵ *Id.* at 34, citing *Campbell*.

⁶ Plaintiff's Response to Defendants' Motion to Dismiss and Memorandum of Points and Authorities, dated May 7, 2008, at p. 4. Citations omitted.

⁷ *Miller v. Arizona Corp. Com'n*, 227 Ariz. 21, 251 P.3d 400 (Ariz.App. Div. 1 2011).

1 **IV. CONCLUSION**

2 Utility's Motion is meritless. Its position concerning the Court's jurisdiction
3 is inconsistent with its asking the Court to resolve its claims for breach of tariff.
4 Further, Utility drastically misrepresented the Court's rulings on its Motion for
5 Summary Judgment. Finally, Utility ignores the clear holdings of the *Kelly* court,
6 which are fatal to its Motion.

7 Utility's Motion should be denied.

8 **RESPECTFULLY SUBMITTED** on February 21, 2012.

9 Craig A. Marks PLC

10

11 By /s/ Craig A. Marks
12 Craig A. Marks
13 10645 N. Tatum Blvd.
14 Suite 200-676
15 Phoenix, Arizona 85028
16 Telephone: (480) 367-1956

17
18 **Original** of the foregoing electronically filed on February 21, 2012, with the
19 Maricopa County Superior Court:

20
21 **Copies e-mailed to:**

Garrick Gallagher	Michael Kitchen
Anoop Bhatheja	Margrave Celmin
Sanders & Parks PC	8171 E. Indian Bend Road
3030 N. 3rd Street, Suite 1300	Suite 101
Phoenix, Arizona 85012	Scottsdale, Arizona 85250
<u>Garrick.Gallagher@SandersParks.com</u>	<u>mlkitchen@mclawfirm.com</u>
<u>Anoop.Bhatheja@SandersParks.com</u>	

22

23

24

25 By: /s/ Craig A. Marks
26 Craig A. Marks

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

Craig A. Marks (#018077)
Craig A. Marks PLC
10645 N. Tatum Blvd.
Suite 200-676
Phoenix, Arizona 85028
Telephone: (480) 367-1956
Craig.Marks@azbar.org

ATTORNEY FOR
DEFENDANTS/COUNTERCLAIMANTS

JOHNSON UTILITIES, LLC d/b/a
JOHNSON UTILITIES COMPANY, an
Arizona limited liability company

Plaintiff,

v.

SWING FIRST GOLF, LLC, an Arizona
limited liability company, DAVID
ASHTON and JANE DOE ASHTON,
husband and wife

Defendants.

SWING FIRST GOLF, LLC, an Arizona
limited liability company, DAVID
ASHTON and JANE DOE ASHTON,
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Counterclaimants

v.

JOHNSON UTILITIES, LLC d/b/a
JOHNSON UTILITIES COMPANY, an
Arizona limited liability company; THE
CLUB AT OASIS, LLC, an Arizona
limited liability company; GEORGE H.
JOHNSON and JANA S. JOHNSON,
husband and wife; BRIAN F. TOMPSETT
and Jane Doe Tompsett, husband and wife

Counterdefendants

NO. CV2008-000141

**DEFENDANTS'/COUNTER-
CLAIMANTS' MOTION TO
QUASH SUBPOENA**

(The Honorable Dean M. Fink)

1 On February 8, 2012, Plaintiff Johnson Utilities, LLC (“Utility”) issued a
2 subpoena to Phoenix Police Officer Ryan Arnett, commanding him to appear and
3 give testimony at the trial in this case. Defendants/Counterclaimants Swing First
4 Golf, LLC, David Ashton, and Jane Doe Ashton (“Swing First”) hereby move to
5 quash this subpoena.

6 Officer Arnett was the arresting officer in Case CR2005-110896. This case
7 was improperly referred to by Utility and Mr. Johnson in their February 9, 2009,
8 defamatory letter to Swing First’s investors.

9 Swing First objects to the testimony of Officer Arnett. Officer Arnett has no
10 knowledge concerning any issues in this case. Officer Arnett made his arrest on
11 April 11, 2005, long before the events underlying this case. Officer Arnett
12 obviously has no knowledge concerning the actual issues in this case.

13 Utility disclosed that “Officer Arnett is expected to provide testimony
14 concerning the facts and circumstances surrounding the assault against Curtis
15 Layton made by Mr. Ashton, as well as his subsequent arrest.”¹ To the extent that
16 Utility intends to offer testimony from Officer Arnett concerning Mr. Ashton’s prior
17 assault, such evidence is barred by Rules 404, 608, and 609. Specifically, such
18 testimony would be irrelevant, and prejudicial. Finally, Mr. Ashton was convicted
19 in Case CR2005-110896 of a violation of A.R.S. § 13-1203 (M1), a class-one
20 misdemeanor. Under A.R.S. § 13-70(A)(1), the maximum sentence for a class-one
21 misdemeanor is six months. Therefore, testimony concerning this case for the
22 purpose of attacking Mr. Ashton’s credibility is absolutely barred by Rule
23 609(a)(1).

24 Utility’s subpoena should be quashed.

¹ Utility’s June 1, 2011, Initial Disclosure Statement.

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RESPECTFULLY SUBMITTED on February 21, 2012.

Craig A. Marks PLC

By /s/ Craig A. Marks
Craig A. Marks
10645 N. Tatum Blvd.
Suite 200-676
Phoenix, Arizona 85028
Telephone: (480) 367-1956

Original of the foregoing electronically filed on February 21, 2012, with the
Maricopa County Superior Court:

Copies e-mailed to:

Garrick Gallagher
Anoop Bhatheja
Sanders & Parks PC
3030 N. 3rd Street, Suite 1300
Phoenix, Arizona 85012
Garrick.Gallagher@SandersParks.com
Anoop.Bhatheja@SandersParks.com

Michael Kitchen
Margrave Celmin
8171 E. Indian Bend Road
Suite 101
Scottsdale, Arizona 85250
mlkitchen@mclawfirm.com

By: /s/ Craig A. Marks
Craig A. Marks

1 Craig A. Marks (#018077)
2 Craig A. Marks PLC
3 10645 N. Tatum Blvd.
4 Suite 200-676
5 Phoenix, Arizona 85028
6 Telephone: (480) 367-1956
7 Craig.Marks@azbar.org

8 Shawn E. Nelson, Esq. # 019228
9 **Law Offices of Shawn E. Nelson, P.C.**
10 19420 North 59th Avenue, Suite B225
11 Glendale, Arizona 85308
12 (623) 444-5299
13 Fax (623) 444-2489
14 efile@northvalleylawfirm.com

15 Attorneys for Defendants/Counterclaimants

16 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
17 **IN AND FOR THE COUNTY OF MARICOPA**

18 JOHNSON UTILITIES, LLC, et al.,

19 Plaintiff/Counterclaimant,

20 vs.

21 SWING FIRST GOLF, LLC, et al.

22 Defendants/Counterclaimants.

23 No.: CV2008-000141

24 **NOTICE OF APPEARANCE**

25 (Assigned to the Honorable Eileen Willett)

26 Comes now the law firm of The Law Offices of Shawn E. Nelson, PC and hereby
27 gives its notice of appearance as co-counsel with Craig A. Marks, PLC for
28 Defendants/Counterclaimants in connection with the above-entitled and numbered action.

29 DATED this 22nd day of February, 2012.

30 LAW OFFICES OF SHAWN E. NELSON, P.C.

31 /s/ Shawn E. Nelson
32 Shawn E. Nelson, Esq.
33 Attorneys for Defendants/Counterclaimants

1 ORIGINAL e-filed and COPY mailed
2 this 22nd day of February, 2012 to:

3 Garrick Gallagher
4 Anoop Bhatheja
5 Sanders & Parks PC
6 3030 N. 3rd Street, Suite 1300
7 Phoenix, Arizona 85012

8 Michael Kitchen
9 Margrave Celmin
10 8171 E. Indian Bend Road
11 Suite 101
12 Scottsdale, Arizona 85250
13 *Counsel for Plaintiff/Counterdefendant*

14 _____
15 /s/ Hannah Godwin

16
17
18
19
20
21
22
23
24
25

1 Lat J. Celmins (004408)
2 Michael L. Kitchen (019848)
3 **MARGRAVE CELMINS, P.C.**
4 8171 East Indian Bend Rd., Suite 101
5 Scottsdale, Arizona 85201
6 Telephone (480) 994-2000
7 Facsimile (480) 994-2008
8 lcelmins@mclawfirm.com
9 mlkitchen@mclawfirm.com
10 *Attorneys for Plaintiff and*
11 *Counterdefendants*

7 SUPERIOR COURT OF ARIZONA

8 COUNTY OF MARICOPA

9 JOHNSON UTILITIES, LLC d/b/a
10 JOHNSON UTILITIES COMPANY, an
11 Arizona limited liability company

12 Plaintiff,

13 v.

14 SWING FIRST GOLF, LLC, an Arizona
15 limited liability company, DAVID
16 ASHTON and JANE DOE ASHTON,
17 husband and wife

18 Defendants.

19 SWING FIRST GOLF, LLC, an Arizona
20 limited liability company; DAVID
21 ASHTON and JANE DOE ASHTON,
22 husband and wife,

23 Counterclaimants,

24 v.

25 JOHNSON UTILITIES, LLC d/b/a
26 JOHNSON UTILITIES COMPANY, an
27 Arizona limited liability company, THE
28 CLUB AT OASIS, LLC, an Arizona
limited liability company; GEORGE H.
JOHNSON and JANA S. JOHNSON,
husband and wife; BRIAN F.
TOMPSETT and JANE DOE
TOMPSETT, husband and wife,

Counterdefendants.

NO. CV2008-000141

**[PROPOSED] ORDER TO
EXCEED PAGE LIMIT**

*(Assigned to the Honorable
Dean Fink)*

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Pursuant to the foregoing, and good cause appearing therefor,
IT IS HEREBY ORDERED that Plaintiff/Counterdefendants may
exceed the page limit applicable to their Reply Brief..

DATED: _____

Dean M. Fink
Judge of the Superior Court

Granted

Signed on this day, January 30, 2012



/s/ Dean Fink
Judicial Officer of Superior Court

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-000141

02/06/2012

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

JOHNSON UTILITIES L L C, et al.

MICHAEL L KITCHEN
ANUPAM BHATHEJA

v.

SWING FIRST GOLF L L C, et al.

CRAIG A MARKS

MINUTE ENTRY

OCH Courtroom 202

11:03 a.m. This is the time set for an oral argument on Plaintiff's Motion for Summary Judgment. Plaintiff George Johnson is present and represented by counsel, Michael Kitchen and Anupam Bhatheja who represent all Plaintiffs. Defendants are represented by counsel, Craig Marks.

A record of the proceedings is made by audio and/or videotape in lieu of a court reporter.

Argument is presented to the Court.

IT IS ORDERED taking this matter under advisement.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-000141

02/09/2012

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

JOHNSON UTILITIES L L C, et al.

MICHAEL L KITCHEN
ANUPAM BHATHEJA

v.

SWING FIRST GOLF L L C, et al.

CRAIG A MARKS

UNDER ADVISEMENT RULING

The Court took this matter under advisement following oral argument on February 6, 2012. Upon further consideration of Plaintiff's Motion for Summary Judgment, the Court finds as follows.

It appears to the Court that whether the agreements were or could have been assigned is immaterial, because the price term in them is illegal and against public policy. A public utility must treat all customers without discrimination. *Marco Crane & Rigging v. Ariz. Corp. Comm.*, 155 Ariz. 292, 297 (App. 1987). This rule is for the protection of the entire public. A customer receiving the benefit of a reduced price, even if its own conduct in obtaining that price was without blame, cannot enforce it, because the remaining customers are harmed. A remedy against the utility, leaving the favored customer in possession of its advantage, would do the other customers no good. Only non-recognition of the discriminatory contract achieves the equality mandated by the law. For the same reason, the Oasis contract, based as it is on water provided at other than the rate prescribed by the Corporation Commission, is unenforceable.

Whether the flooding water was ordered by Defendants or whether instead it was deliberately sent to damage their property is a fact question, and there is enough in the record to require that it go to the jury. If it was intended to cause damage, that would be outside the limited purpose of the easement and can constitute a trespass. *See Dixon v. City of Phoenix*, 173 Ariz.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-000141

02/09/2012

612, 619 (App. 1992); *see also Smith v. Woodward*, 15 S.W.3d 768, 773 (Mo.App. 2000) (“If the user of an easement exceeds his right, either in manner or extent of use, he is guilty of trespass.”); *Schadewald v. Brule*, 570 N.W.2d 788, 796 (Mich.App. 1997) (“Activities by the owner of the dominant estate that go beyond the reasonable exercise of the use granted by the easement may constitute a trespass to the owner of the servient estate.”).

The dispute over the meter is not what size meter Johnson installed, but whether it charged Swing First the proper price for that meter. There is enough to go to the jury.

Tort damages for breach of the covenant of good faith and fair dealing are available only when there exists a “special relationship” between the parties, which is characterized by “elements of public interest, adhesion, and fiduciary responsibility.” *Rawlings v. Apodaca*, 151 Ariz. 149, 158 (1986) (quoting *Seaman’s Direct Buying Service, Inc. v. Standard Oil Co. of California*, 686 P.2d 1158, 1166 (Cal. 1984)). The Court does not read *Rawlings* or the numerous opinions quoting its language to permit tort damages based on the adhesive nature of the contract alone – the Supreme Court used “and,” not “or,” in listing the elements – and Swing First does not allege any additional elements of public interest or fiduciary responsibility.

Finally, as for the defamation claims, for an extra-judicial communication to qualify as privileged, both its content and its manner must bear some relation to the proceeding, and its recipient must have some relationship to the judicial proceeding. *Green Acres Trust v. London*, 141 Ariz. 609, 614 (1984). On both scores, the nexus between the allegedly defamatory statements and the judicial proceeding strike the Court as too tenuous to be privileged. While Swing First was indeed a party to Johnson’s defamation suit, its members, apart from Mr. Ashton, were not, and the vague threat to “proceed accordingly” against those members who did not disavow Mr. Ashton’s actions does not rise above a “bare possibility” that a proceeding might be instituted, insufficient for immunity for the libel claims. *Id.* at 615. The insinuations of criminal conduct and financial improprieties on Mr. Ashton’s part have nothing to do either with the Corporation Commission complaint or with the issues in Johnson’s suit. Whether any of these statements is hyperbolic is a question of fact for the jury.

IT IS THEREFORE ORDERED granting the motion with respect to Count One, Count Two, Count Six, and Count Seven of the First Amended Counterclaim, and denying it with respect to the remaining counts.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-000141

02/13/2012

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

JOHNSON UTILITIES L L C, et al.

MICHAEL L KITCHEN
ANUPAM BHATHEJA

v.

SWING FIRST GOLF L L C, et al.

CRAIG A MARKS

PRETRIAL MANAGEMENT CONFERENCE

OCH Courtroom 202

11:05 a.m. This is the time set for a Final Trial Management Conference. Plaintiffs are represented by counsel, Michael Kitchen and Anupuam Bhatheja. Defendants are represented by counsel, Craig Marks and Sean Nelson.

A record of the proceedings is made by audio and/or videotape in lieu of a court reporter.

The 5-day trial set March 13 through March 20, 2012 is affirmed. Counsel are advised that the case will be placed on the case transfer calendar. Counsel will be notified if this Court becomes available to preside over the trial.

With respect to Plaintiffs' Motion to Dismiss for Lack of Subject-Matter Jurisdiction recently filed, Plaintiffs' Response is due by February 21, 2012 and Defendants' Reply is due by February 27, 2012. The Court will rule on the motion without oral argument.

There being no objection by Defendants,

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-000141

02/13/2012

IT IS ORDERED granting Plaintiffs' Motion for Leave to File One Additional Motion in Limine.

Motions in Limine are discussed and ruled on as follows:

For the reasons stated on the record,

IT IS ORDERED denying Plaintiffs' Motion in Limine Re: Punitive Damages.

IT IS FURTHER ORDERED denying Plaintiffs' Motion in Limine to Exclude Documents and Evidence Presented in the Arizona Corporation Commission Proceedings subject to specific objections at trial for specific reasons.

As to Plaintiffs/Counterdefendants' Motion in Limine Re: Exclusion of David Ashton's Expert Report, the report will not come in. Mr. Ashton will not be designated as an expert witness but he may testify as a fact witness about the topics covered in his report.

IT IS FURTHER ORDERED denying Plaintiffs/Counterdefendants' Motion in Limine Regarding Prior Case Involvement subject to objections to specific evidence at the time of trial. Any "other acts" information will have to be relevant to come in. With respect to this motion, the following documents are not to be shown to the jury absent prior Court order: Exhibit 64, The ADEQ News Released Dated December 20, 2007; Exhibit 65, The Department of Justice Press Release dated October 7, 2008; and Exhibit 66, the Phoenix Magazine article titled Dissecting Arizona by Jana Bommersbach from February 2008. All "other act" evidence is subject to further objections at the time of trial.

Discussion is held regarding Plaintiffs' Post Trial Memo. Financial documents regarding Johnson Utilities will not be shown to the jury until a request to the judge is made outside the presence of the jury and the judge grants the request.

With regard to the public filings (financial records) submitted by Defendants, if Plaintiffs want to file a response or disclose any contrary evidence to those,

IT IS FURTHER ORDERED extending the discovery deadline for that limited purpose until February 27, 2012.

Preliminary Jury Instructions and the Court's trial procedures are discussed.

Counsel agree that the jury in this case will consist of eight jurors plus one alternate to be selected by lot at the end of trial. Six out of eight jurors will be necessary to return a verdict.

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Note: One day's jury fees will be assessed unless the Court is notified of settlement before 2:00 p.m. on the judicial day before the trial. Counsel are reminded to promptly notify the Court of any settlement pursuant to Rule 5.1(c) Ariz.R.Civ.P.

The Court notes the Rule of Exclusion of Witnesses is not being invoked by the parties.

Counsel are directed to submit any corrections to the Preliminary Jury Instructions by 10:00 a.m. on February 16, 2012.

Counsel are further directed to submit either a revised stipulated joint statement of the case or alternative proposed language to be read to the jury by February 17, 2012.

Discussion is held regarding the Court's February 9, 2012 ruling.

The Court is advised that Defendants' Motion for Summary Judgment regarding defamation and intentional interference filed November 23, 2011 has yet to be ruled on. A separate ruling will be issued on this motion.

Discussion is held on Plaintiffs' request for attorneys' fees on the contract claims. With respect to any summary judgment motions that have been resolved prior to the trial, if attorney's fees have not previously been resolved, they should abide a final decision in the trial and be dealt with when the decision is converted to a judgment.

12:08 a.m. Matter concludes.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.

SUPERIOR COURT OF ARIZONA
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02/16/2012

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

JOHNSON UTILITIES L L C, et al.

MICHAEL L KITCHEN
ANUPAM BHATHEJA

v.

SWING FIRST GOLF L L C, et al.

CRAIG A MARKS

MINUTE ENTRY

A clerical error having occurred,

IT IS ORDERED correcting the February 13, 2012 Pretrial Management Conference minute entry, page 1, paragraph, 3 to read as follows:

With respect to Plaintiffs' Motion to Dismiss... *Defendants'* Response due by February 21, 2012 and *Plaintiffs'* Reply is due by February 27, 2012.

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SUPERIOR COURT OF ARIZONA
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CRAIG A MARKS

MINUTE ENTRY

The Court has read and considered Defendants' Motion for Summary Judgment filed November 23, 2011, Plaintiffs' Response filed January 13, 2012 and the Reply thereto filed January 26, 2012.

There is no allegation in the Second Amended Complaint of any business relationship, actual or prospective, with the Gila River and Colorado Indian communities or with anyone else but the San Tan and Johnson Ranch HOAs. Damage to such relationships is therefore not part of the case. In light of Plaintiffs' admission that they are unaware of any lost business with the HOAs, count four must be dismissed.

The Court does not doubt that Johnson Utilities is a public figure, at least with regard to its regulated business activities. The Court does not find that the statements are conditionally privileged, as the common interest between the parties, which consists solely of the fact that each of them does business with Johnson Utilities, is insufficient. Whether the accusations of fraud were false and malicious cannot be resolved now, but must be decided by the jury.

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IT IS THEREFORE ORDERED granting Defendants' Motion for Summary Judgment with respect to count four and denying it with respect to count three, but finding with respect to count three that Johnson Utilities is a public figure.

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