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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

Arizona Corporation Commission

DOCKETED

2015 MAR -3 A 11: 14

- BOB STUMP - Chairman
- GARY PIERCE
- BRENDA BURNS
- BOB BURNS
- SUSAN BITTER SMITH

MAR 03 2015

AZ CORP COMMISSION  
DOCKET CONTROL

DOCKETED BY	<i>Rau</i>
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- IN THE MATTER OF THE APPLICATION OF DII-EMERALD SPRINGS, L.L.C. FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY TO PROVIDE WASTEWATER SERVICES. ) DOCKET NO. WS-20794A-11-0140
- IN THE MATTER OF THE APPLICATION OF DII-EMERALD SPRINGS, L.L.C. FOR APPROVAL OF RATES. ) DOCKET NO. WS-20794A-11-0279
- IN THE MATTER OF THE APPLICATION OF DOYLE THOMPSON FOR APPROVAL OF A CERTIFICATE OF CONVENIENCE AND NECESSITY TO PROVIDE SEWER SERVICES. ) DOCKET NO. SW-20851A-12-0226
- RESPONSE TO OCTOBER 8 & 9, 2014 PUBLIC COMMENT BY DII-EMERALD SPRINGS L.L.C.

COMES NOW Intervenor, Emerald Springs HOA (hereinafter "HOA"), by and through counsel undersigned, and hereby responds to DII-Emerald Springs, LLC's (hereinafter "DII") public comments submitted on October 8 and 9, 2014 as it appears the Arizona Corporation Commission (hereinafter "ACC") is not moving forward with this matter based upon those public comments. In the event DII's October 2014 public comments are the cause of the delays, then Intervenor HOA hereby seeks to provide the ACC with additional information in an effort to move this matter towards a conclusion.

Although DII initiated a lawsuit against the HOA in 2013 in the La Paz County Superior Court (Exhibit 1: Complaint), that suit is unrelated to DII's application for a certificate of convenience and necessity as well as the subsequent formation of the sewer district. DII alleges in the trial court case that the HOA breached a 2004 sewer services agreement and asks the superior court to grant damages and specific performance. DII later moved to amend its complaint to add a count for reformation, with that requested amendment being challenged and awaiting a judicial decision. At this time there is no immediate resolution of the trial court case on the horizon and no indication of how long it will take to

1 resolve the matter.

2 The 2013 La Paz County Superior Court case is based upon a 2004 agreement entered  
3 into outside of the ACC's framework as DII has never possessed a certificate of convenience  
4 and necessity. Furthermore, the 2013 trial court case is unrelated to the sewer district as the  
5 district was formed *after* DII sued the HOA. In other words, the pending trial court litigation is  
6 not a challenge to the validity of the sewer district.

7 As a result, the trial court case does not justify delaying making a decision on Judge  
8 Harping's proposed order as the superior court does not have jurisdiction over the ACC, the  
9 ACC is not a party to the trial court litigation, the lower court's final decision will not bind the  
10 ACC and the trial court matter does not challenge the formation of the sewer district. The  
11 superior court case, therefore, should not cause the ACC to delay making a decision in the  
12 matter at hand.

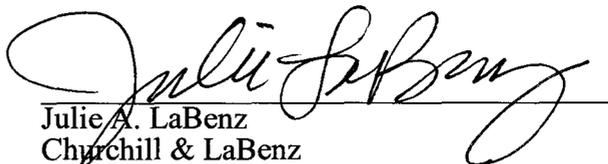
13 In its October 2014 public comment, DII sought a ninety (90) day postponement or until  
14 the resolution of the La Paz County Superior Court case. Yet there is no such resolution on the  
15 horizon and no indication of how long it will take to resolve the matter. Overall, there is no  
16 valid reason why the superior court case should delay the matter at hand.

17 A sewer district has been formed and is serving the subdivision. Given the formation of  
18 the sewer district and that the superior court case does not justify delaying the matter at hand,  
19 Intervenor HOA respectfully requests the ACC approve, sign, and enter Judge Harping's  
20 proposed order.

21 RESPECTFULLY SUBMITTED this 27 day of February, 2015.

22 **CHURCHILL & LaBENZ**

23  
24 By:



25 Julie A. LaBenz  
26 Churchill & LaBenz  
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Attorney for Intervenor Emerald Springs HOA

1 Original and 15 copies mailed  
this 27 day of February, 2015, to:

2 Docket Control  
3 Arizona Corporation Commission  
4 1200 West Washington  
Phoenix, Arizona 85007

5 Copy of the foregoing mailed  
this 27 day of February, 2015, to:

6 Henry Melendez  
7 DII-Emerald Springs, L.L.C.  
8 212 East Rowland Street, No. 423  
9 Covina, CA 97723  
10 [diigroup@aol.com](mailto:diigroup@aol.com)

11 Steve Wene  
12 MOYES SELLERS & HENDRICKS  
13 1850 N. Central Ave., Ste. 1100  
14 Phoenix, AZ 85004  
15 Attorney for Robhana, Inc. and Charles Dunn Capital, Inc.

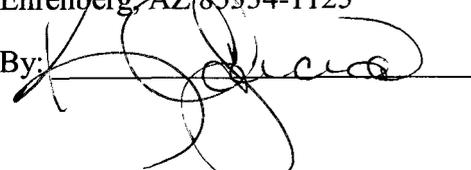
16 Doyle Thompson  
17 COPPER STATE GAME CLUB, R.V. AND MOBILE HOME PARK  
18 P.O. Box 287  
19 Ehrenberg, AZ 85334

20 Janice Alward, Chief Counsel  
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23 1200 West Washington Street  
24 Phoenix, AZ 85007

25 Steven M. Olea, Director  
26 Utilities Division  
27 ARIZONA CORPORATION COMMISSION  
28 1200 West Washington Street  
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Courtesy Copy provided by mail  
this 27 day of February, 2015, to:

Dennis Price  
P.O. Box 1125  
Ehrenberg, AZ 85334-1125

By: 

# Exhibit 1

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5 Telephone: (602) 254-2000  
6 Pinckard@azbar.org  
7 Attorneys for Plaintiff

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**SUPERIOR COURT OF THE STATE OF ARIZONA**  
**IN AND FOR THE COUNTY OF LA PAZ**

DII EMERALD SPRINGS, LLC by Assignment  
from Dynamic Financial Investment & Services,  
Inc. on the 4<sup>th</sup> day of October, 2004,

Case No. CY 201300073

Plaintiff,

vs.

**COMPLAINT FOR BREACH OF  
CONTRACT AND SPECIFIC  
PERFORMANCE**

EMERALD SPRINGS HOMEOWNERS  
ASSOCIATION, an Arizona nonprofit  
corporation,

Defendants.

DII Emerald Springs, LLC ("Plaintiff" or "DII") as and for its Complaint against Emerald Springs Homeowners Association, an Arizona nonprofit corporation ("Defendant" or "HOA"), alleges as follows:

**PARTIES, JURISDICTION AND VENUE**

1. Plaintiff is an Arizona limited liability company.
2. Defendant is an Arizona nonprofit corporation.
3. The acts giving rise to this Complaint all occurred within the State of Arizona, La Paz County, and this Court therefore has jurisdiction over and is the proper venue of this matter.

STATEMENT OF FACTS

1  
2 4. On or about the 10<sup>th</sup> day of July, 2004 Dynamic Financial Investment Services, Inc.  
3 (“Dynamic”) and Defendant entered into an Agreement Regarding Sewer Services (“Services  
4 Agreement”). A true and correct copy of the Services Agreement is attached as Exhibit 1 to this  
5 Complaint and is adopted herein by reference.

6  
7 5. Dynamic on October 4, 2004 assigned all its right, title and interest in the Service  
8 Agreement to DII Emerald Springs (“DII” or “Plaintiff”), the Plaintiff herein. A true and correct copy  
9 of the Assignment is attached as Exhibit 2 and is adopted herein by reference.

10 6. Emerald Springs is a residential subdivision located in La Paz County, Arizona,  
11 consisting of approximately fifty three residential lots (53 lots and 3 community areas). Defendant is  
12 the Home Owners Association for Emerald Springs.

13  
14 7. On June 20, 2003, DII the assignee of Dynamic and Plaintiff herein purchased thirty  
15 three of the lots.

16 8. At the time of the purchase of the lots referred to in Paragraph 7 Mr. Doyle Thompson  
17 (“Thompson”), who owned property neighboring Emerald Springs, was the sewer provider.

18  
19 9. In early 2004, Thompson terminated service to the Defendant, thereby forcing  
20 Defendant to contract with a pumping service to empty its lift station twice a day. In addition to the  
21 inconvenience and expense of this manner of providing sewer services the Defendant believed this  
22 problem would hinder further development of the subdivision. Defendant in its negotiations with  
23 Dynamic made it clear that it did not want to be required to deal with Thompson in the future and  
24 therefore required that Dynamic and/or its assignee continue to provide sewer service until Defendant  
25 could provide its own sewer services. This was accomplished by providing in the Subdivision Public  
26 Report for Emerald Springs on page 7 the following provision:  
27

1 "The sewage collection and transmission facility shall be operated by  
2 Henry Melendez (Emerald Springs, LLC) until such time that such  
3 responsibility is specifically assigned to the homeowners association"

4 A true and correct copy of page 7 of the Subdivision Public Report for Emerald Springs is attached as  
5 Exhibit 3 and is adopted herein by reference.

6 10. DII in reliance upon such commitments agreed to and did construct a sewer plant to  
7 service the lots in Emerald Springs, pursuant to the terms of the Services Agreement.

8 11. Plaintiff constructed the sewer plant and obtained an Adequate Protection Permit from  
9 the Arizona Department of Environmental Equality ("ADEQ") as provided by the terms of the  
10 Services Agreement and as provided in said Services Agreement allowed all lot owners to connect to  
11 the sewer plant.

12 12. The sewer treatment system has a 20,000 gallon per day ("GPD") package wastewater  
13 treatment plant and was at the time of the contract and continues to be able to furnish all sewer  
14 services required by Defendant.

15 13. Due to the emergency situation caused by Thompson's refusal to continue sewer  
16 services Plaintiff expedited the construction of the Waste Water Treatment Plant ("WWTP") and  
17 thereby incurred excess costs which will be shown at the time of the trial herein, but in no event less  
18 than \$442,014.00.

19 20  
21 14. Plaintiff on a continuous basis advised Defendant that the homeowners did not generate  
22 enough sewage to efficiently run the sewer plant, however, despite that fact Plaintiff continued to  
23 provide the services as contracted and rarely increased the rate to cover losses sustained. In fact,  
24 Plaintiffs increases were less than provided pursuant to the Services Agreement and based upon  
25 agreements with Defendant at meetings such deficiencies are recoverable.  
26  
27  
28

1           15.     In December of 2010 Defendant requested Plaintiff to submit an application for a  
2 Certificate of Convenience and Necessity ("CC&N") due to concerns regarding Plaintiff's  
3 qualification.

4           16.     In order to comply with Defendant's request, DII filed an Application with the Arizona  
5 Corporation Commission ("ACC") for a new CC&N to provide wastewater services in a service area  
6 which included Defendant.

7           17.     In violation and in breach of the Services Agreement, Defendant, on March 6, 2012  
8 notified Plaintiff in its letter to Henry Melendez and DII that the Defendant was discontinuing the pipe  
9 connecting Emerald Springs to the subject WWTP in order to enter into a test/pilot program with a  
10 prospective sewer service provider. *See* Exhibit 4, attached hereto and made a part hereof by  
11 reference.  
12

13           18.     Thompson, the person who agreed to furnish wastewater treatment to Defendant on a  
14 temporary basis, did not have the authority to undertake the services contracted for with Defendant.  
15 Such lack of authority was known to Defendant.  
16

17           19.     On June 7, 2012 Thompson filed his application with the ACC for a new CC&N to  
18 provide wastewater services to Emerald Springs.  
19

20           20.     The ACC in its review of the Application of Thompson found that the Defendant,  
21 through its own actions, ceased receiving sewer services from DII's wastewater system and began  
22 receiving sewer service from Thompson and further that the Application to provide such service was  
23 not applied for by Thompson until June 7, 2012.

24           21.     Defendant had actual knowledge of such application and expressed support for  
25 Thompson's application, all of which actions were continuing breaches of its obligations under the  
26 Services Agreement.  
27  
28





1 services at the time the Services Agreement was entered was fair and equitable and the continued cost  
2 to Defendant has remained fair and equitable.

3 31. Plaintiff has agreed to provide the services provided for in the Services Agreement at a  
4 fair and reasonable price as provided for in the Services Agreement and continues to be ready, willing  
5 and able to furnish such services at a fair and reasonable price.

6 32. Plaintiff has demanded that Plaintiff resume the services provided for under the  
7 Services Agreement, however, Defendant refuses to resume the use of the plant constructed by  
8 Plaintiff specifically for the use of Defendant and the homeowners and continues to refuse to resume  
9 such services.  
10

11 33. Plaintiff has no adequate remedy at law to enforce the provision of the Services  
12 Agreement described in paragraph 4 other than specific enforcement of the Services Agreement.  
13

14 34. Plaintiff is entitled to specific performances of the terms, conditions, and provisions of  
15 the Specific Services Agreement described in Paragraph 4, by court, decree, among other things,  
16 ordering Defendant to resume the services described herein.

17 35. Plaintiff is entitled to compensation incidental to a decree of specific performance by  
18 virtue of the delay in Defendant resuming services described herein in that Plaintiff has been, and  
19 continues to be, deprived of the income derived from furnishing such services during the period of non  
20 use of the sewer facility by Defendant.  
21

22 WHEREFORE, Plaintiff for damages as follows:

23 COUNT I

24 1. Damages by virtue of Defendant's breach of contract as proven at trial but in no even  
25 less than Four Hundred Forty Two Thousand Fourteen and no/100 Dollars (\$442,014.00) plus all loss  
26 of revenue from March 6, 2012 until resumption of services by Defendant.  
27

28 2. Attorney's fees and costs according to proof.

