Daniel J. McAuliffe (Arizona Bar No. 003435)
dmcauliffe@swlaw.com
Todd Feltus (Arizona Bar No. 019076)
tfeltus@swlaw.com
Cory L. Braddock (Arizona Bar No. 024668)
cbraddock@swlaw.com
Snell & Wilmer L.L.P.
One Arizona Center
Phoenix, AZ 85004-2202
Telephone: (602) 382-6272

Richard T. Mullineaux (Indiana Bar No. 9874-22)
rmullineaux@k-glaw.com
R. Jeffrey Lowe (Indiana Bar No. 21508-22)
jlowe@k-glaw.com
Crystal G. Rowe (Indiana Bar No. 22524-53)
crowe@k-glaw.com
Kightlinger & Gray, LLP
3620 Blackiston Blvd., Ste. 200
New Albany, IN 47150
Phone: (812) 949-2300
Co-Counsel for Defendant and Counterclaimants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Best Western International, Inc., a non-profit Arizona corporation,

Plaintiff,

v.

John Doe, et al.

Defendants.

AND RELATED COUNTERCLAIMS

Case No. CV06-1537-PHX-DGC

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Oral Argument Requested)

Pursuant to Fed. R. Civ. P. 56, defendants H. James Dial, Nidrah Dial, Loren Unruh, Gayle Unruh, and James Furber move for summary judgment on all claims that have been asserted by plaintiff Best Western International, Inc. ("BWI"). This motion is supported by the following Memorandum of Points and Authorities and the separately-filed Statement of Facts and Appendix of Blog Posts.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

The "Freewrites.net" website (the "Blog") was established by Mr. Dial in May 2006 for the purpose of allowing BWI members to communicate about bylaws that had been recently proposed by BWI management and board of directors. SOF ¶ 1.

BWI is organized as an Arizona nonprofit corporation that acts as a membership organization for approximately 2,400 independently-run hotels throughout North America. SOF ¶ 2. Unlike a franchise organization, BWI is run for the benefit of its members. The members have agreed upon the bylaws that govern BWI's operations. The members also elect BWI's directors who come from their membership and are supposed to have equity interests in BWI member properties. SOF ¶¶ 3-4.

At bottom, this dispute is a political dispute about the direction of BWI. Those entrenched within BWI seek to have an organization that is more centrally run with less input from the members. Dial is part of the group that seeks to have BWI continue with its roots of being an organization of independently-run hotels. The Blog was established so that those that shared in Dial's philosophy could exchange ideas and discuss the impact of bylaws prepared by BWI management. SOF ¶ 5. But current management of BWI does not tolerate dissent from the members they are supposed to serve. Immediately upon the posting of the first articles on the Blog, BWI started an investigation. The investigation continued even though the vast majority of the posts on the Blog discussed the proposed bylaws. SOF ¶¶ 6-7.

On June 14, 2006, BWI filed this action asserting claims for breach of contract, defamation, tortious interference, and trademark infringement against John Doe

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

defendants. BWI immediately sought to take discovery so that it would have subpoena power without any members knowing what it was up to. Dial intervened and defended against BWI's attempts to take expedited discovery. Dial also answered the complaint and successfully moved to dismiss the trademark infringement claims.

In order to harass those that expressed dissenting views, BWI has engaged in an odyssey that has uncovered conduct that is not actionable under any contract or tort theory. Over the past 18 months of extensive discovery, consisting of 32 depositions, 224 subpoenas, and thousands of pages of produced documents and computer logs, BWI is left without any claim that a reasonable juror could find in its favor. BWI cannot identify any damages that has suffered. It cannot point to any contract that was breached. There has been no defamatory statement made. As one might expect from a political dispute, BWI does not have a cognizable legal theory that would entitle this lawsuit to proceed any further.

Below, defendants discuss the five separate grounds that justify dismissal of BWI's claims in their entirety. First, BWI has failed to prove that defendants conduct caused it any damages. Second, neither Dial nor Unruh has breached their membership agreement with BWI. Third, the Communications Decency Act bars any claim related to the operation of the Blog. Fourth, none of the posts actually made by any defendant is defamatory. Finally, without any improper conduct, there is no claim for tortious interference.

II. A REASONABLE JUROR CANNOT CONCLUDE THAT DEFENDANTS CAUSED BWI'S DAMAGES.

A. Background of BWI's Damages Theory.

To support its damages claim, BWI relies exclusively on Dwight Duncan's expert testimony. Duncan opines that BWI has damages in excess of $22,850,000 over a three-year period between 2005 (the Blog did not start until May 2006) and 2007 due to increased member self-terminations. He offers no opinion that defendants caused any of these damages. SOF ¶ 8.

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

Rather than relying upon the Blog, Duncan's damages study relies entirely on the unsupported assumption that defendants sent out faxes in 2005. He concedes that if they did not sent out faxes, then "the damage calculation would not apply." SOF ¶ 9. Duncan assumes that all of the increased self-terminations resulted from defendants' "alleged actions." He did not investigate any other factors for why a member may disassociate with BWI even though deposition testimony has established that BWI's increased design standards led some members to disassociate with BWI. SOF ¶ 11. Even more troubling, the assumptions made by Duncan regarding the fax and the Blog causing self-terminations are not supported by any BWI witness, including its board members and senior management. No one could identify any specific damages as a result of the Blog.

Duncan also provides "expert" testimony on BWI's out-of-pocket expenses. His "opinion" is apparently supported by his review of billing records. SOF ¶ 12. Of course, as detailed below, there is no legal basis for damages of lawyers' fees incurred as a part of the underlying litigation.

In the end, BWI falls woefully short in meeting its burden to prove damages. A reasonable juror cannot conclude that BWI has been damaged by any statements made by defendants in the Blog.

B. Defendants Are Entitled to Summary Judgment Because BWI's Damages Are Entirely Supported by Faulty Assumptions.

Summary judgment is appropriate when a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In fact, "to rebut [a] motion for summary judgment successfully, the plaintiffs must point to some facts in the record that demonstrate a genuine issue of material fact and, with all reasonable inferences in the plaintiff's favor, could convince a reasonable jury to find for the plaintiffs." *Id.* at 323. Here, BWI cannot point to any fact to support its argument that it has been damaged by the Blog.

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

All six claims that BWI has asserted against defendants require proof of damages.[1] Under Arizona law, BWI must prove its claimed lost profits and other damages with "reasonable certainty." *Rancho Pescado v. Northwestern Mut. Life. Ins. Co.*, 140 Ariz. 174, 183, 680 P.2d 1235, 1244 (App. 1984). Arizona courts have long held that "[d]amages that are speculative, remote or uncertain may not form the basis of a judgment" *Coury Bros. Ranches, Inc. v. Ellsworth*, 103 Ariz. 515, 521, 446 P.2d 458, 464 (1968)). And under Arizona law, "[w]hile absolute certainty is not required, the jury must be guided by some rational standard in making an award." *Pasco Indus., Inc. v. Talco Recycling*, Inc., 195 Ariz. 50, 64, 985 P.2d 535, 549 (App. 1998).

The reasonable certainty standard cannot be met by making unwarranted assumptions. Reasonable certainty requires that the damages calculation be supported by the facts, not contradict the facts. When the damages expert's testimony does not meet this standard, summary judgment is appropriate. The United States Supreme Court has cautioned that "[w]hen an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993). In applying that directive, the Northern District of California in *American Booksellers, Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1041-42 (N.D. Cal. 2001), granted the defendants' motion for summary judgment on damages because plaintiff's expert's testimony contained "entirely too many assumptions and simplifications that are not supported by real-world evidence." The Ninth Circuit has also found that summary judgment is appropriate when a damages study does not separate effects from lawful and unlawful activity. *City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361, 1372 (9th Cir. 1992).

[1] BWI may argue that it can get nominal damages for defamation per se. But it would not meet the threshold $75,000 in controversy necessary for diversity jurisdiction.

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

C. BWI Does Not Connect the Blog to Increased Self-Terminations.

Duncan's theory of self-terminations must have come as a surprise to BWI's directors who authorized the lawsuit. None of them could identify any measurable damages–let alone a rash of increased self-terminations. Even though Duncan identified $22.8 million in lost profits due to self-terminations, which he testified constituted 4% of BWI's revenue, not a single director or staff member identified self-terminations as a source of damages. While Duncan claims he relied upon BWI "management," the factual source for his damages theory was BWI's legal team, including in-house counsel Kris Schlomer and David Youseffi and outside counsel Bob Yen. None of these three lawyers have been disclosed as fact witnesses. SOF ¶ 13.

Not a single director could identify any self-termination damages that were sustained as a result of the Blog. Charlie Helm, the only non-lawyer that Duncan relied upon, could not identify a single post that caused any harm.[2] Like Duncan, Helm relied entirely on legal advice that he received from BWI: "I leave that up to my legal." Helm's deposition occurred one month after Duncan prepared his report. Yet, in reviewing numerous claimed actionable posts, Helm testified "I don't know" and he "defers to legal" when asked about damages BWI suffered from the posts. SOF ¶ 14.

Helm's testimony was consistent with the other six directors. Nils Kindgren testified that BWI did not suffer any damages. SOF ¶ 16. Bonnie McPeake could not identify any damages. SOF ¶ 17. Dave Francis testified that no analysis was made about the business case in pursuing the litigation, particularly if the Blog was done by a member, rather than a competitor or disgruntled employee. SOF ¶ 18 The other three directors also could only point to distractions as damages, not self-terminations. This concept was best captured by Larry McRae: "I think that it has caused a great deal of

[2] Duncan did not talk to any of the other six BWI directors or BWI's senior executives. While Duncan claimed that he spoke to one other director, in addition to Helm, on a conference call, he did not know that director's name and the director's name was not reflected in his notes from the call. Duncan also talked to "Karen" who Duncan believe worked in BWI's accounting department regarding the number of self-terminations. SOF ¶ 15.

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

distraction to the board." When asked about self-terminations, he could not identify any. Nor could McRae identify any damages that occurred from the Blog either in December 2007 when his deposition was taken or at the time the lawsuit was filed. SOF ¶ 19. Roman Jaworowicz could only identify distractions as the source of damages: "I believe a lot of the posts are defamatory. I have no idea what that has done to the membership or financially has–has damaged the membership. I couldn't figure it out. Every time there is a distraction because something like this happens, I am sure it costs the company and the membership profits and resources and all sorts of stuff that shouldn't be going to distractions when it should be moving the brand forward." SOF ¶ 20. Ray Johnston could only point to vague damages about harm to BWI's reputation and did not identify self-terminations as a part of BWI's damages. SOF ¶ 21.

BWI's officers also could not identify any damages that resulted from the Blog, let alone any damages from self-terminations. Tom Johnson, BWI's CFO, could not identify any damages caused by the Blog. Nor did he have any evidence that any member terminated their membership because of the Blog. SOF ¶ 22. Richard Leutwyler, BWI's senior vice president for brand quality and member services testified: "I don't have any information about how the Blog has impacted Best Western in any way." Mr. Leutwyler has attributed the increased terminations to customer care changes, the design program requirements, and the quality assurance programs and process, and not the Blog. He also testified that the number of incoming members has remained relatively constant. The number of outgoing properties in 2007 was higher driven by primarily by corporate terminations. Neither management nor the Board believes that BWI is terminating too many members. SOF ¶¶ 23-24. Nor did BWI's financial statements identify any impact from self-terminations. SOF ¶ 25.

Duncan has not quantified any of the supposed damages for corporate distraction and loss of reputation. Nor has BWI. SOF ¶ 26. And there is no evidence that any defendant caused an increase of self-terminations.

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

D. BWI's Damages Rely on a Fax or Faxes Purportedly Sent in 2005 Which Was or Not Authored by the Defendants.

Contrary to the allegations asserted in the Complaint, Duncan's damages analysis is premised on increased self-terminations in 2005. SOF ¶ 27. The Blog did not start until May 2006. SOF ¶ 10. To justify its damages calculation, BWI relies on a fax or faxes that were allegedly sent in 2005 that were defamatory. But Duncan was never provided any documentation related to any faxes sent in 2005.[3] Nor has any such documentation ever been produced. The only information that he considered regarding 2005 faxes was verbally provided by BWI's outside and in-house counsel. Duncan testified that Bob Yen told him that Mr. Dial and Mr. Unruh sent faxes in 2005. SOF ¶¶ 28-29. Based on this information, Duncan's study concludes that BWI suffered a significant increase in self-terminations during 2005 that remained at the 2005 level into 2006 and 2007. SOF ¶ 30. Further, Duncan admitted that if there were no faxes in 2005, he would need to revisit his entire study to determine what BWI's damages would be if the alleged wrongdoing did not occur until 2006:

> Q. And that's what I'm asking you, not specifics, but generally walk us through what you would do -- if you had documentation that these faxes didn't start until May of '06, what you would do to revisit your analysis.
>
> A. As I sit here today, I couldn't tell you comprehensively how I would go about that. I would need to step back to the beginning and walk through the analysis again and revisit and see what other information we would need to glean to be able to make a determination.

Indeed, after the Blog started, Duncan could not identify any increase in self-terminations. SOF ¶ 31.

---

[4] Duncan also includes public speeches and other activities of defendants in his definition of "alleged actions." However, like the faxes, he did not see or analyze any documentation of such actions. Duncan's assumption that defendants sent anonymous faxes to BWI members and engaged in other public speeches and negative actions which harmed BWI is based on representations by Bob Yen. SOF ¶ 29.

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

Duncan's assumption about the 2005 fax is based on a made-up statement by counsel and not evidence that a reasonable juror could rely upon. There is no evidence that any of the named defendants sent *any* fax in 2005, much less any fax that is critical to Duncan's damages calculation. While the Dials and Mr. Unruh did send out faxes in connection with the Blog, all of those faxes were sent in 2006. SOF ¶ 32. There is no evidence that Dial, Unruh, or any other defendant sent any fax to BWI members in 2005. Therefore, there is no evidence that defendants caused BWI's damages.

E. There is No Basis for a Jury to Distinguish Damages Among the Phantom Fax, Defendants' Posts, OtherPosts, Proper Conduct, and Improper Conduct.

Duncan also did not distinguish any damages resulting from the supposed 2005 faxes or the blog. Duncan did not distinguish between posts that were appropriate or not. Instead he looked at the supposed 2005 fax and the Blog as a whole: "My assumption is that the alleged actions hold, which is that information is being conveyed through the blog that is harming BWI and that it's untrue and incorrect or misleading." He did not identify any specific damaging posts. He did not read any post on the Blog. SOF ¶ 33.

Without providing any distinction of damages from particular posts, any damages claim against defendants are speculative. Only a small percentage of posts on the Blog have been identified as actionable. Only 50 were authored by Mr. Dial or Mr. Unruh. Molly Aguilar, Jaworowicz's mistress, admitted writing at least 13 posts. In one of her posts, she asserts that two directors are having an affair – a post another director identified as unbelievable. SOF ¶ 34. Duncan made no distinction between a post like this and any made by Mr. Dial and Mr. Unruh. And they cannot be held liable for others' actions. This leaves a reasonable juror unable to conclude which damages, if any, were caused by Mr. Dial and Mr. Unruh and which damages were caused by other posters, others making non-defamatory statements, or damages caused by the nonexistent 2005 fax or faxes. In short, a reasonable juror can only conclude that defendants did not cause any of the damages claimed by BWI.

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

F. Attorneys' Fees Are Not Recoverable As Damages.

Duncan also provides an opinion regarding the fees that BWI has incurred in this case and asserts that BWI has suffered nearly $900,000 in damages. He bases these damages on invoices from outside counsel and an estimate of time that in-house counsel has spent on this case. SOF ¶ 35. As a matter of law, these are not proper damages. Going back to early statehood, Arizona courts have repeatedly held that fees incurred in litigation are not damages. *E.g., Ponderosa Plaza v. Siplast*, 181 Ariz. 128, 132, 888 P.2d 1315, 1319 (App. 1993); *O.S. Stapley v. Rogers*, 25 Ariz. 308, 314, 216 P. 1072, 1074 (1923); *see also* Restatement (Second) of Torts §914(1). Under Arizona law, a party is also not entitled to recover fees for representing itself. *Lisa v. Strom*, 183 Ariz. 415, 417, 904 P.2d 1239, 1241 (App. 1995). In other words, BWI cannot recover the portion of the salary of its in-house counsel allegedly attributable to this case.

Duncan's damages "opinion" also suffers from numerous evidentiary deficiencies– any of which mandate summary judgment in defendants' favor. First, he lacks foundation to provide any such opinion as he does not assert that the fees incurred were reasonable. Second, his opinion relies upon the factual evidence that will necessarily need to be provided by the lawyers who incurred the fees. None of these lawyers have been disclosed as witnesses. And for BWI's trial counsel, if they testify, they cannot represent BWI at trial. The legal and evidentiary deficiencies in BWI's claim to recover attorneys' fees require summary judgment in defendants' favor for this element of damages.

III. BWI'S CONTRACT RELATED CLAIMS FAIL AS A MATTER OF LAW.

BWI asserts three separate contract-related claims against the Dials[4] and Unruh. First, BWI asserts that the Dials and Unruh breached their contractual obligations with BWI by (1) using BWI's equipment for improper purposes; (2) by using BWI's marks for improper activities, and (3) by disclosing BWI's confidential information. *See* BWI's Revised Second Amended Complaint. (Dkt. # 135). Secondly, BWI asserts that the Dials

[4] Mrs. Dial has never had a contractual relationship with BWI and, accordingly, is entitled to summary judgment on all of the contract related claims. (SOF ¶ 36.)

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

and Unruh have breached the implied covenant of good faith and fair dealing by failing to satisfy their obligations under the contract and by interfering with other members' rights under the Agreement. *Id.* Finally, BWI claims that the Dials and Unruh have breached an implied contract when the Dials and Unruh failed to protect BWI's confidential information. *Id.* All three claims fail as a matter of law.

A. Mr. Dial and Mr. Unruh have not breached their contract with BWI.

As Best Western Members, Mr. Dial and Mr. Unruh have signed Membership Agreements which outline the obligations of the parties. Specifically, the Membership Agreement and License Agreement control the relationship between a member and BWI. The Agreement also incorporates BWI's Bylaws and BWI's Rules and Regulations. (SOF ¶ 37.) Mr. Dial and Mr. Unruh are entitled to summary judgment because no evidence exists that they have breached their Membership Agreements.

1. No evidence exists that the Mr. Dial or Mr. Unruh used BWI's equipment for improper purposes.

The Membership Agreement requires members to purchase computer hardware through Best Western "that will be used by the Applicant in receiving and sending reservations and in communication with Best Western ('Hardware')." (SOF at ¶ 40.) According to the Agreement, BWI provides software and communications equipment, but not Internet access, to the Member. (*Id.*) BWI retains ownership of the software and the communications equipment that is used to receive and send reservations. (*Id.*) Members agree to "use the Hardware, Software and Communications Equipment only for reservation communications with Best Western Central Reservations and with other Members and for other business purposes relating to the operation of the Hotel as a Best Western Hotel." (*Id.*) Also, Members agree to "at [their] own expense, install, maintain and provide for its guests high speed internet access. . ." SOF ¶ 41. BWI has no ownership interest or contractual limitations on usage in the member-provided Internet access. And the reservation system does not provide general Internet access.

The crux of the allegations asserted by BWI is that the Dials and Unruh are using

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

Best Western-owned equipment (hardware, software, and communications equipment used to access the reservation system) to make allegedly defamatory posts on the Blog. BWI has provided no evidence that BWI's equipment was used to make the allegedly actionable posts. Instead, any posts to the Blog coming from the properties operated by the Dials and Unruh were made over the Internet, which is not contractually controlled by BWI.

2. No evidence exists that Mr. Dial or Mr. Unruh have used BWI's marks for improper activities.

The License Agreement grants members a "non-exclusive license to use, at and in connection with the Hotel, the Best Western name and those Best Western trademarks, service marks, and identification symbols as set forth from time-to-time in the Brand Identity Manual ('Best Western Symbols')." (SOF ¶ 44)

This Court dismissed BWI's Lanham Act claims because the Defendants have not used BWI's marks in commerce. SOF ¶ 45. There is no new evidence that Mr. Dial or Mr. Unruh have improperly used BWI's marks. The Blog contains no advertising and does not use BWI's logo in any manner. Thus, BWI is left with the lone argument that the quoted language above limits a member from uttering or writing the words "Best Western" unless they are "at and in connection with the Hotel." SOF ¶¶ 46-47.

Members are permitted to use the marks at their Best Western branded hotels but are restricted from using Best Western's marks at a separate hotel. The purpose of the License Agreement is to prevent members from profiting from using Best Western's marks without BWI collecting corresponding membership fees. But the License Agreement does not restrict a members' right to utter or write the word Best Western when they are not on their property. BWI's argument taken to the extreme would prevent its members from promoting Best Western or explaining their affiliation with the brand while on vacation. The License Agreement has not been violated by using the word "Best Western" on the Blog.

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

3. No contractual obligation exists requiring Mr. Dial or Mr. Unruh to keep information about BWI or other members confidential.

No contract exists that requires Mr. Dial and Mr. Unruh to keep BWI's information confidential. This court said as much in its November 2, 2007 Order: "[i]n short, other than the Bylaw provision relating to executive sessions of the Board, Plaintiff has produced no evidence showing that its members are contractually obligated to keep information about Plaintiff and other members confidential." November 2, 2007 Order SOF ¶ 48. The Court's November 2, 2007 Order was issued after BWI had provided the Court with several documents discussing confidentiality that were unrelated to the contractual obligations owed to BWI by Mr. Dial and Mr. Unruh. No new agreements have been entered into between the parties since that time. There is no contractual duty of confidentiality in the Membership Agreement. SOF ¶ 49.

Further, there is no confidentiality provision in BWI's Membership Agreements, License Agreements, Bylaws & Articles, Rules & Regulations, or any other document governing the relationship between BWI and its members. SOF ¶ 49. BWI's failure to include such provisions in any of their governing documents is logical since, essentially, nothing is confidential regarding the operation, design, and functioning of BWI hotels. Keeping information confidential from competitors is not feasible when BWI's members are allowed to own competing brands. In fact, many members, and multiple directors, hold interests in competing brands, meaning that in some circumstances, BWI's members are also its competitors. SOF ¶¶ 50-51.

B. Mr. Dial and Mr. Unruh have not breached the Implied Covenant of Good Faith and Fair Dealing.

BWI asserts that the Dials and Unruh have a duty to affirmatively perform their obligations under the Membership Agreement and to fulfill the goals and purposes of that contract. To understand the goals and purposes of the contract, it is important to understand the organizational structure of BWI. BWI is a non-profit organization created to serve its members. Members are independent hoteliers who become fee paying

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

members in exchange for having access to the Best Western Reservation System. Best Western has historically been a member-run organization – members vote on the organization's key issues and select its Board of Directors. Members have historically been actively involved in shaping the vision of the organization. This historical perspective makes it clear that the reasonable expectation of the parties would include the active participation of its members in opposing revisions in the Bylaws, campaigning for or against Directors, and actively working to shape the vision of the organization. SOF ¶¶ 53-56. BWI's claim that the creation of the blog and Mr. Dial's and Mr. Unruh's articles posted on the blog contradict the reasonable expectations of the parties agreement is not supported by the facts of this case or the historical traditions of BWI. These claims are without merit.

Mr. Dial and Mr. Unruh have not violated any implied covenant of good faith and fair dealing. Mr. Dial and Mr. Unruh have only engaged in political conversation regarding the state of an organization of which they are both longtime members, similar to the types of conversations in which they have historically taken part over the course of their membership. The articles they have posted on the Blog express opinions about the management and future of BWI. Communicating these opinions to other members who share the same interests falls within the reasonable expectations of the parties and in no way breaches the implied covenant of good faith and fair dealing.

C. No implied contract exists between Mr. Dial and Mr. Unruh and BWI.

Under Arizona law, "There can be no implied contract where there is an express contract between the parties in reference to the same subject matter." *Chanay v. Chittenden*, 115 Ariz. 32, 563 P.2d 287 (1977). Here, BWI is already claiming that the Dials and Unruh have entered into an express contract with BWI that governs the respective obligations of the parties relating to their business relationship. Accordingly, BWI's claim for Breach of an Implied Contract relating to the same business relationship is precluded because the parties have entered into an express contract relating to the same business relationship.

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

IV. THE COMMUNICATIONS DECENCY ACT BARS ALL CLAIMS RELATED TO POSTS THAT DEFENDANTS DID NOT CREATE OR DEVELOP.

The Communications Decency Act ("CDA") provides immunity from BWI's defamation and tortious interference claims against Furber, Mrs. Dial, and Mr. Unruh. The CDA provides that "no *provider* or *user* of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1) (emphasis added). In enacting the CDA, "Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party." *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003). In the Ninth Circuit, this immunity is "quite robust." *Id.* . Furber, Mrs. Dial, and Mr. Unruh are shielded from all liability under the CDA because (1) the Blog constitutes an "interactive computer service;" and (2) they did not create or develop the allegedly defamatory posts. *See Batzel v. Smith*, 333 F.3d 1018, 1030-31 (9th Cir. 2003).

A. The Blog Is And Uses Interactive Computer Services.

An "interactive computer service" is "any information service, system, or access software provider that enables computer access to the Internet." 47 U.S.C. § 230(f)(2). Several courts have held websites are "interactive computer services." *See Gentry v. EBay, Inc.*, 99 Cal.App.4th 816, 831, 121 Cal.Rptr.2d 703 (2002); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wash. App. 2001). As the Ninth Circuit concluded, an "interactive computer service" covers any information services . . . so long as the service or system allows "multiple users" to access a "computer server." *Batzel*, 333 F.3d at 1030. Immunity extends beyond services that simply provide access to the Internet. *Id.* Moreover, the CDA confers immunity not just on "providers," but also on "users," of such services. 47 U.S.C. § 230(c)(1).

The Blog uses interactive computer services to post the comments to its website. In order to make the website available, the Blog must access the Internet. Accordingly, the

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

Blog is an interactive computer service for purposes of the CDA.

B. Furber, Mrs. Dial, and Mr. Unruh Are Not Information Content Providers In The Context of the CDA.

The CDA limits immunity to information "provided by another information content provider." 47 U.S.C. § 230(1)(C). Thus, Furber, Mrs. Dial, and Mr. Unruh are immune under the CDA as long as they do not act as the "information content provider." *Carafano*, 339 F.3d at 1124. An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). If a third party provides the essential published content, an interactive service provider receives full immunity regardless of the editing or selection process. *Carafano*, 339 F.3d at 1124.

In *Batzel*, the Ninth Circuit concluded that immunity applied to the defendant operator of an electronic newsletter who published allegedly defamatory e-mails provided to him by a third party. 333 F.3d at 1021. The Court determined that "the pertinent question is whether [the third party] was the sole content provider of his e-mail, or whether [the defendant] can also be considered to have "creat[ed] or develop[ed]" [the third party's] e-mail message." *Id.* at 1031. The Court concluded that the defendant was not a content provider because he "did no more than select and make minor alterations to [the third party's e-mail]." *Id.* In *Carafano*, the court found that a computer dating service was immune from liability for false content in a dating profile posted on its website because the critical information was provided by a third party and the defendant transmitted the information without alteration. 339 F.3d at 1125

Here, Furber and Mrs. Dial were not content providers for the Blog. On May 1, 2006, Furber registered the Blog. From the creation of the Blog until June 17, 2006, Furber assured anonymity by allowing posters to email their articles to him—via the mailbox linked to the Free Writes Website to which only he had access—for submission onto the Blog. SOF ¶¶ 60-62. Upon receiving a request to submit a post, Furber would

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

review the post, delete information identifying the person who created the post, and then "copy and paste" the body of the email to the blog. SOF ¶ 63. For some posts, Furber may have supplied the titles—which is necessary for electronically indexing the Blog posts—by extracting words or phrases from the text of the articles. SOF ¶ 64. But Furber did not edit, alter, or develop the information in the postings he copied and pasted to the Blog from May 11, 2006 through June 17, 2006. Nor did he filter the proposed submissions based upon the author's point of view. The only email that Furber refused to copy and paste to the blog was both vulgar and obscene in its entirety. SOF ¶ 65.

Because Furber merely made information available on the Internet—information that was created and developed by others—he is not an information content provider. The Blog simply acted as a conduit to reproduce and disseminate the opinions submitted by the various authors of the posts on the Blog. Thus, Furber is entitled to immunity under the CDA for his operation of the Blog.

Likewise, Mrs. Dial and Mr. Unruh enjoy immunity under the CDA as "users" of an interactive computer service (i.e., the Blog) for posts they made, which were created and developed by others. *See, e.g.*, 47 U.S.C. § 230(c)(1); *see also Barrett v. Rosenthal*, 146 P.3d 510, 513, 51 Cal.Rptr.3d 55, 58 (Cal. 2006) (holding a "user" immune and recognizing that "plaintiffs who contend they were defamed in an Internet posting may only seek recovery from the original source of the statement"). Mrs. Dial has not authored *any* posts that are claimed actionable by BWI. Rather, all of the allegedly actionable articles, were created and developed by Mr. Dial—who has admitted to authoring such posts. SOF ¶¶ 57-58. As Mrs. Dial merely acted as Mr. Dial's scrivener, she is immune from liability under the CDA.

V. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON BWI'S DEAMATION CLAIM

With immunity from the CDA, Defendants can only be liable for defamation to the extent that they have actually created and developed the posts on the Blog. Even then, for defamation liability to exist, BWI must establish that: (1) the Defendants made

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

unprivileged statements of fact concerning BWI; (2) the statements were false and published with actual malice; and (3) the statements caused damage to BWI. Restatement (Second) of Torts § 580A.

For purposes of this motion only, Mr. Dial authored and had his wife post the articles comprising Posts 1-41.[5] Mr. Unruh authored Posts 42, and 44-50.[6] Defendants have provided an appendix of these posts along with a chart outlining the reasons that the posts are not defamatory. Mr. Dial and Mr. Unruh are entitled to summary judgment for posting these exhibits because such postings: (1) are true or substantially accurate; (2) contain non-actionable opinions; (3) do not concern BWI; (4) were not published with actual malice; and (5) as discussed in Section I, did not cause any damage to BWI.

A. To the extent that the claimed actionable postings contain verifiable statements, they are true or substantially accurate, barring BWI's defamation claims.

The statements made in the claimed actionable posts are true or substantially accurate. Truth and substantial truth are absolute defenses to a defamation action. *Read v. Phoenix Newspapers, Inc.*, 169 Ariz. 353, 819 P.2d 939, 941 (Ariz. 1991).

Post 1, for example, is true or substantially accurate regarding the ownership of directors. Apart from Directors McPeake (District IV) and Jaworowicz (District III), no present director owns 100% of a Best Western hotel. In 2006, prior to the date of this post, the Board proposed a bylaw change providing for director compensation or salary in the amount of $125,000.00, with no corresponding requirement that the directors work a specific number of days on Best Western business. That bylaw was eventually defeated by the membership. In addition, being a director has become a principal source of income for some directors. Further, in 2006, the Board also proposed a bylaw that would permit a director to remain on the Board for up to 180 days without owning a Best Western

[5] Posts 7, 11, 24, 25, and 27 were made by internet protocol addresses used, at one time, by the Dials and, therefore, *for purposes of this motion only*, these posts will be examined as if they were created by Mr. Dial and posted by Mrs. Dial.

[6] Similarly, Mr. Unruh posted Post 43, which is a letter created and developed by Past-Director and CounterDefendant Nils Kindgren.

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

property. SOF ¶ 89.

Posts 39 and 48, regarding Mr. Jaworowicz's residence and personal life, are true or substantially accurate. Article IV, Section 1 of the Bylaws requires directors to reside in their districts. Before a director may be placed on the ballot for election, his or her residency status must be *certified* to the membership. His personal primary residence is in Phoenix, Arizona, outside of District III. SOF ¶ 130. In addition, Mr. Jaworowicz's fiancée resides in Phoenix, their joint bank accounts are in Phoenix, he owns or leases vehicles in Phoenix, he applied for a driver's license in Phoenix, and BWI sends his expense reimbursement statements in the mail to his home in Phoenix. BWI even mailed his 60-day letter advising him of his supply account delinquency to such home. SOF ¶ 144.

Mr. Jaworowicz was married to Laurie Jaworowicz until August 27, 2007—years after he had begun dating and became engaged to Amolia ("Molly") Aguilar. Thus, the characterization of Ms. Aguilar as his "mistress," is true or substantially accurate. Further, as early as June 2004, BWI began paying for Mr. Jaworowicz and Ms. Aguilar's dinners, gas purchases, and other personal expenses. SOF ¶¶ 131-134.

Likewise, Posts 6, 33, and 35, discussing director expense abuses, are true or substantially accurate. BWI's records show that the directors have consistently exceeded their expense and reimbursement budgets. This is true despite annual increases in such budgets. The Board practice of periodically creating unfunded departments to hide board members' expenses gives the Board unlimited resources, with no accountability. It also conceals the Board's excessive expenditures from members—who are paying such fees—by creating the façade that the directors' expenses are within budget. SOF ¶ 146.

Additionally, the evidence establishes that board members are engaging in gamesmanship to maximize their per diem compensation. Pursuant to the Bylaws, directors are to serve "without salary or other compensation," except that they may request payment of $400.00 per day for each day "a Director (i) is away from *both* the Director's principal place of business and the Director's primary personal residence and

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

(ii) is performing services on behalf of the Corporation." Director Jaworowicz's personal primary residence is in Phoenix, Arizona; yet, he still receives per diem compensation when he purportedly works on BWI business in Phoenix. Director Johnston classified his home as both his primary residence and principal place of business. Since Johnston claims he cannot get BWI work done at home, he conducts BWI business at his hotel office and charges BWI a per diem. In addition, some directors are attempting to make the position full time. The average annual per diem compensation has increased from 139 days in 2004 to 195 days in 2005 and 185 days in 2006. Jaworowicz and Johnston have received over 200 days of per diem compensation, even though Johnston acknowledges that it is "absolutely impossible" for any director to work on BWI business 242 days out of the year. This evidence confirms some directors are attempting to maximize their per diem expense reimbursement. SOF ¶¶ 147-148.

The postings that discuss "R&M Rentals" (Posts 49 and 50) are true or substantially accurate. Jaworowicz made up two fictitious rental car companies, "R&M Rentals" (i.e., Roman and Molly Rentals) and "AM Rentals" (i.e., Amolia Rentals), from which he purported to rent cars while in Phoenix. He submitted the fabricated rental receipts—which included charges for taxes and other surcharges—to BWI for reimbursement. Mr. Jaworowicz never paid the "rental" amounts to R&M Rentals or AM Rentals; rather, he pocketed the funds. Though he charged BWI for taxes, Mr. Jaworowicz never paid these taxes. SOF ¶¶ 135-138

Post 29 discusses the propriety of Board action and questioning whether the CFO (then Tom Johnson) is "rubber stamping" directors' expenses, is true or substantially accurate. In his deposition, then-CFO Johnson testified that he never reviews the documentation supporting expense reimbursements; he simply makes certain that such documentation exists. Indeed, Johnson paid the Jaworowicz's phony rental company receipts without question. When Ernst and Young questioned the legitimacy of these companies, Johnson still did not investigate. Further, when asked why BWI pays Mr. Jaworowicz per diems since his primary residence is in Phoenix, Johnson responded that

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

Mr. Jaworowicz may have two primary residences. Johnson referred to "unwritten" financial policies as justification for his actions proves the author's assertion that the CFO rubber stamps directors' requests and permits present directors to do whatever previous directors have done.[7] SOF ¶ 164.

Post 30, which questions whether the Board uses one standard for itself and another for members, is true or substantially accurate. Mr. Jaworowicz was extended more credit on his supply account than that to which he is entitled based upon the number of rooms in his hotels. At one point, for example, his supply account exceeded $550,000.00, when the maximum credit possible was $305,000.00. BWI also treated Mr. Jaworowicz differently from other members regarding his delinquent supply account. BWI's policy is to send any member delinquent on his or her supply account a 60-day letter threatening termination if the delinquency persists. After 90 days, the member's property is removed from the reservation system and will likely be terminated. As a director, Mr. Jaworowicz has voted to terminate members who are more than 90 days behind on their supply accounts. Indeed, he has even boasted about such terminations. For seven months during 2007, Jaworowicz was hundreds of thousands of dollars in arrears to BWI—much of it over 90 days overdue. But, BWI did not follow its usual practice of sending the 60- and 90-day letters or restricting Mr. Jaworowicz's reservations. Instead, BWI only sent one 60-day letter informing him that $359,218.95 was past-due. Still, Mr. Jaworowicz never received any additional letters, had his reservations restricted, or been subject to termination. Instead, he continues to serve as a director and is allowed to vote in favor of terminating other member hotels that are behind on paying their supply bills. SOF ¶¶ 140-145.

Post 4, which discusses board members improperly setting themselves up for future positions with BWI, is also true or substantially accurate. Past Directors Ken Smotherman and Lowell Cruse served on the International Advisory Committee ("IAC") within five years of the time they had served on the Board, in contravention of Article IV,

[7] Not surprisingly, shortly after his deposition, Johnson "resigned' as BWI's CFO.

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

Section 14 of the Bylaws.[8] While on the IAC, Smotherman and Cruse's travel expenses (including those for spouses) were paid, by BWI members. These *past* directors also received per diem compensation from BWI.

Post 27 is true or substantially accurate; the Board has made imprudent decisions without proper contemplation. Perhaps the most egregious example is the filing of this lawsuit. The Board committed almost two million dollars to pursuing this action, yet not one director or officer—including the CFO—can identify any non-speculative damages sustained by BWI as a result of the Blog or postings thereon. Instead, it appears to have been inspired by a personal grudge and desire to sue individuals for personal monetary gain on the part of one director.

Outsourcing and Medallia and the I Care program are other examples of imprudent decisions, which are also discussed in Exhibits 8, 9, 47. Without permitting membership vote, the Board decided to outsource the members' reservation system—a system which is critical to the success of any Best Western hotel. However, outsourcing did not turn out as planned. Today, approximately 40% of reservations are handled at the Phoenix center which previously served as the only reservation center but closed as a result of outsourcing, and only 60% still handled in Manila.

Posts 17-21, which discuss Medallia and the I Care program, are likewise true or substantially accurate. Medallia is a customer satisfaction survey that was used at the time of these posts to assess penalties against members. Members became very unhappy when they were penalized as a result of the guest satisfaction surveys because often they had already resolved the complaint during the guest's stay at the hotel. Regardless, under the I Care program, as initially adopted, if that guest explained the problem on the survey, he or she would receive a credit from BWI and the member hotel would be subject to penalty. After the date of these blog postings, BWI changed the I Care program so that the surveys no longer result in penalties to members. SOF ¶ 157.

[8] Mr. Cruse also served on the Bylaw Committee immediately following his tenure as a director, in direct violation of the Bylaws.

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

Posts 2 and 5 accurately state that it becomes increasingly more difficult for members to get information about BWI from the Board. A few years ago, the Board hired a governance consultant who opined what occurs in the boardroom should stay there and not be shared with the membership. He also opined that the Board's fiduciary responsibilities are to the brand first, and the membership second. These teaching are in conflict with the way BWI has traditionally operated and its by-laws. The Board has paid Dr. Nygren hundreds of thousands of dollars for his services.

In Post 13, Mr. Dial recounts his first-hand observation that the results of BWI's electronic polls, designed to determine what "members" want for their organization, are skewed because non-members are permitted to vote. He also observed that that questions being asked by the moderator were framed in such a way as to elicit the desired results. The factual information in this post is true or substantially accurate. Similarly, Post 31, which is a tongue-in-cheek comparison to the Catholic tradition of watching for smoke when a new pope is chosen, is true or substantially accurate. When this post was made, the Board had not yet elected a chairman to replace Director Helm, the outgoing chair. David Francis had been nominated as Chairman, with no opposition. Because several directors abstained from voting, Mr. Francis did not receive a majority vote and the Board remained without a chair.

Finally, Post 37 is true or substantially accurate. On June 14, 2006, BWI filed this lawsuit, which contains a prayer for relief directing the site administrator to temporarily or permanently shut down the Blog. Director McPeake also testified that the present lawsuit was pursued to shut down the Blog. The suit has cost BWI members well over a million dollars in attorney fees alone.

B. The Alleged Defamatory Statements are Opinions That Are Not Actionable.

Many of the posts that BWI contends are actionable are merely statements of opinion, which cannot as a matter of law support a defamation claim. The allegedly defamatory statements are not actionable because they are statements of opinion, not

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

statements of fact. The necessity that the statement at issue be one of fact as opposed to one of opinion stems from the Supreme Court's statement that "[u]nder the First Amendment there is no such thing as a false idea." *Gertz v. Robert Welch, Inc.*, 418 U.S.323, 339. The essential difference between a statement of fact and a statement of opinion is that a "statement of fact" implies a provably false assertion while a statement of opinion does not. *Gallagher v. Connell*, 20 Cal.Rptr 3d. 673, 680 App. (2004).

In determining if a statement constitutes an opinion, the court examines the communication in light of the context in which it was published. *Jensen v. Hewlett-Packard Co.*, 18 Cal.Rptr. 2d 83, 89 (App 1993). The court considers the meaning with reference to relevant factors, such as the occasion of the utterance, the persons addressed, the purpose to be served, and all of the circumstances attending the publication. *Id.* Columns or articles in the opinion-editorial pages of newspapers are a well-recognized home of opinion and comment. *Morningstar Inc. v. Superior Court*, 29 Cal.Rptr.2d 547, 556 (App. 1994). The reasonable reader is fully aware that the statements found there are not strictly news. *Id.* The editorial context is a powerful element in construing as opinion what might otherwise be deemed fact. *Id.*; *see also Doe v. Cahill*, 884 A.2d 451 (Del. 2005) (holding that no reasonable person would have interpreted statements made on a blog which existed as a forum for opinions as anything other than opinions); *Intercity Maintenance Co. v. Local 254, Service Employees Intern. Union AFL-CIO*, 241 F.3d 82 (1st Cir. 2001) (holding that statements characterizing a company as a "sweatshop," "plague," and "infestation," and company owner as "bloodsucking, plantation-minded boss" were non-actionable opinions).

The claimed actionable postings represent pure expressions of opinion and are, thus, fully protected by the First Amendment to the United States Constitution. First, the challenged postings were made on an Internet blog suggesting that they contain opinions and not verifiable facts. "There is a spectrum of sources on the internet . . . chat rooms and blogs are generally not as reliable as the *Wall Street Journal*." *Cahill*, 884 A.2d at 465. Instead, blogs and chat rooms tend to be vehicles for the expression of opinions, as

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

opposed to sources of facts or data upon which a reasonable person would rely. *Id.* The relative anonymity afforded by the Internet forum promotes a looser, more relaxed communication style. *Krinsky v. Doe 6*, 72 Cal.Rptr.3d 231, 238-39, App. (2008). Internet users are able to engage freely in informal debate and criticism, leading many to substitute gossip for accurate reporting and often to adopt a provocative, even combative tone. *Id.* at 238. Frequently, online discussions look more like vehicles for emotional catharsis than forums for the rapid exchange of information and ideas. *Id.* Blog messages tend to be "replete with grammar and spelling errors; most posters do not even use capital letters. Many of the messages are vulgar and offensive, and are filled with hyperbole." *Doe v. Cahill*, 884 A.2d 451, 465 (Del. 2005). In this context, "readers are unlikely to view messages posted anonymously as assertions of fact." *Id.*

In addition, the purpose to be served by the claimed actionable posts indicates that they contain opinions and not verifiable factual statements. In 2006, the Board proposed numerous Bylaw changes for membership vote. Mr. Dial and Mr. Unruh disagreed with twenty-six of these proposals and used the Blog as a medium to address their concerns. In Post 42, for example, Mr. Unruh shared his opinions on the proposed Bylaw changes; encouraging members to vote for some of the ballot initiates, but discouraging them from voting for others that he believed were not in members' best interests.[9] Posts 1 and 43, likewise, politically inspire BWI members to vote against bylaw changes. Expressing an opinion in a political debate is not actionable defamation; rather, it is time-honored protected speech. Post 10 reveals a member's frustration that the ballot envelope sent out by the Board was "contaminated with propaganda," supporting the Board's proposed bylaw changes. In Mr. Dial's opinion, "[t]he Board is not fair and balanced," but rather has its own agenda. Post 10 contains exaggerated speech and broad generalizations, all indicia of opinions. Given the tone and purpose, a reasonable reader would not interpret the post as a verifiable statement of fact about BWI.

[9] The membership substantially agreed with Mr. Unruh as it defeated twenty-five out of the twenty-six challenged bylaw changes.

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

In a similar vein, the purpose behind other allegedly actionable posts is to encourage the membership to vote "no" to a proposed bylaw change mandating the purchase and installation of two-way interface at all Best Western hotels. With the two-way interface system, BWI would have complete access to all reservation and revenue information of the Best Western properties. Some members saw this requirement as a step closer to converting BWI into a franchise organization wherein hotels are required to pay franchise fees based upon the number of reservations or revenue received. In Post 7, the poster likens the two-way interface to a "spymaster," and opines that, although the interface could be good for the membership, he does not trust the present Board with such information. Post 25 questions whether the Board will want to charge members a reservation fee for all reservations on the interface—even those obtained without the aid of BWI. These posts contain nothing more than non-actionable opinion and "rhetorical hyperbole" typical of political disputes seeking—or fighting against—change in an organization.

The purpose behind other posts is merely to promote dialogue between the Board and the membership. In Post 26, Mr. Dial uses political hyperbole to discuss the requirements imposed on members, at the hands of the Board. Read in context, Post 26 does not imply any assertions of underlying objective facts. A reasonable person could not interpret Mr. Dial's words as stating facts about BWI—or its directors. Likewise, in Post 29, Mr. Dial merely expresses his opinion regarding the role of a Chief Financial Officer in a multi-million dollar company. No reasonable reader could interpret these statements as anything other than opinion.

Post 11 provides a list of things that the poster believes members want from the Board. Read in the context of an Internet blog, this post does not imply any assertions of underlying objective facts. Thus, a reasonable person could not interpret it to state anything other than protected opinion.

In Posts 22 and 30, Mr. Dial expresses political commentary regarding the questionable leadership of BWI. In a democratic fashion, Mr. Dial rallies the members to

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

organize and "take back our own company." Posts 6 and 27 express opinions about BWI's directors, using pseudonym screen names. A reasonable reader would not view these blanket, unexplained statements as "facts," when placed on such an uncontrolled forum.

Likewise, in Post 37, Mr. Dial remarks that the Board is more interested in "trying to see who said what rather than reading what was said to see if it had merit." While the rhetoric in this post is not positive, the post contains exaggerated speech and broad generalizations, all indicia of opinions. The poster expresses displeasure with the way the Board is governing BWI, not stating facts.

Further, five of Mr. Dial's claimed actionable postings concern political petitions to recall directors and/or staff persons. Post 28, for example, concerns a petition that was circulated to recall Director Jaworowicz pursuant to Article IV, Section 11 of the Bylaws. Similarly, in Post 39, Mr. Dial expresses frustration that the present Board continues to permit Mr. Jaworowicz—who, by his own admission, is sitting in contravention of the Bylaws—to serve as a director. Mr. Dial opines that in-house counsel is protecting Mr. Jaworowicz and suggests that the Board dismiss the lawyer and get independent counsel to read and follow the bylaws. Although these statements do not flatter BWI's counsel, Mr. Dial has the constitutional right to express his opinion.

Post 38 questions who represents BWI's best interests. Mr. Dial opines that the majority of the Board, Tom Johnson, David Kong—the CEO—Ric Leutwyler—the COO—and the attorneys do not represent BWI's best interests. In satirical fashion, he rallies for political change in the organization, including replacing the present leadership. In Posts 40 and 41, Mr. Dial likewise expresses his opinion that the majority Board is not adhering to its fiduciary responsibilities to BWI, but rather, is cowering to the directors' own self-interests and pressures BWI's legal department. Given the context in which these posts were made, the offending statements—which essentially sought to remove BWI's board of directors, staff, and attorneys and replace them with persons willing to represent the best interests of BWI—are not susceptible to a defamatory meaning.

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

Multiple posts discuss opinions on the Board's lack of transparency and the difficulty faced by members in obtaining information about their membership organization. In Posts 2 and 5, Mr. Dial expresses concern over the Board's lack of transparency with the membership and the impact of the governance consultant's philosophy on the relations between members and their elected directors.

Further, the occasion of utterance and the totality of circumstances attending the publication of the posts authored by Mr. Dial and Mr. Unruh indicate the expression of opinion. Posts 14, 45, and 46 opine that members fear the present leadership of BWI. These posts, one of which is written in all capital letters, lack the formality and polish typically found in documents in which a reader would expect to find facts. Similarly, Posts 3 and 34 contain sarcastic opinion and are replete with figurative and expressive language. The challenged portions of these postings reflect Mr. Dial's opinions.

The purpose behind other claimed actionable posts is to express opinions, or simply vent, about the Board's imprudent decision to outsource the reservation system. In Posts 9, 44, and 47, Mr. Dial and Mr. Unruh express their opinions that outsourcing was an expensive mistake. These posts contain factual data upon which the opinions are based and are, therefore, not actionable.

The purpose behind Posts 17, 18, 19, 20, and 21 are to express the opinion that Medallia and the I Care program adopted by the Board for customer service were ill-advised and unfair to the membership. In Post 21, Mr. Dial compares Medallia to the experiment with Pavlov's dog, opining that the former is training guests to expect a free room and other perks every time they stay at a Best Western. This posting is full of hyperbole, invective, short-hand phrases and language not generally found in fact-based documents. In Posts 18, 19, and 20, Mr. Dial likewise expresses his opinion that Medallia is not good for the members, "is a many headed snake," and was not well thought out by the Board.

Several claimed actionable posts include flippant language and satirical hyperbole that does not rise to the level of actionable defamation. Post 23, for example, is a tongue-

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

in-cheek posting that no reasonable reader would take seriously. This post was made by Mr. Dial before the 2007 Annual BWI Convention, and contains hyperbolic language concerning the political unrest in BWI. This satirical post does not, in any way, defame or discredit BWI.

Exhibits 32 and 15 do not state facts and are, therefore, not capable of conferring a defamatory meaning. In exhibit 12, Mr. Dial explains—from an ex-Director's point of view—the voting procedures in BWI assuring members that "the secrecy of the individual ballot is not tarnished." This post was in response to an inquiry regarding whether secrecy in voting is maintained at BWI and does not defame or discredit BWI.

The jokey tenor of exhibits 35 and 36, coupled with the hyperbole and sarcastic language employed, suggest more than unactionable opinion.

Because the posts comprising Exhibits 1-50 contain nothing more than opinion, satirical hyperbole, and protected political speech, Mr. Dial and Mr. Unruh are entitled to summary judgment on Count VIII of BWI's Second Amended Complaint.

C. The Challenged Posts Do Not Concern BWI.

Many of the claimed actionable posts related to statements are made about Roman Jaworowicz, one of the seven members of BWI's board of directors. This group of posts is not "of and concerning" BWI. A corporation, such as BWI, is not defamed by communications defamatory of its officers, agents, or stockholders unless they *also* reflect discredit upon the method by which the corporation conducts its business.[10] *See Dombey v. Phoenix Newspapers, Inc.*, 724 P.2d 562, 571 (Ariz. 1986) (citing REST.2D TORTS § 561 and cmt. b). The defamation of an individual can only cause injury to a corporation if the two are so interconnected that a reasonable person would perceive harm to one as harm to the other. *Dombey*, 724 P.2d at 571; *cf. Peagler v. Phoenix Newspapers, Inc.*, 560

[10] If a publication relates solely to an officer or employee of a corporation in his or her private or personal character, and not in his or her capacity as an officer or employee of the corporation, or in connection with the conduct or management of the corporate business, the right of action is not in the corporation, but in the individual. *See* 50 AM. JUR.2D *Libel and Slander* § 351.

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

P.2d 1216, 1222 (Ariz. 1977) (noting that because a reader of the article would understand that it referred to the plaintiff individually, as well as to the corporation, the individual was libeled as well). BWI must prove as part of its defamation claim that the publication actually concerns BWI. *Hansen v. Stoll*, 636 P.2d 1236, 1240 (Ariz. Ct. App. 1981) (citing REST.2D OF TORTS §§ 564, 617)). BWI and Mr. Jaworowicz are not so interconnected that harm to one is harm to the other. Their names are not synonymous to each other. Mr. Jaworowicz is merely an independent hotel owner and, for a limited period of time, a present director of BWI.

The posts discussing Director Jaworowicz's marital status and personal life (Post 48), as well as the ones that express opinions that he is a "jerk" (Post 32) or "buffoon" (Post 15), do not defame or discredit BWI. Nor do Posts 49 and 50, which question whether Director Jaworowicz engaged in "stealing" when he sought and received reimbursement for a fictitious company named "R&M Rentals." Post 35 provides a humorous list of potential reasons why Mr. Jaworowicz stepped down as Chairman in January 2008.[11] Because these postings relate solely to a director of BWI in his or her private or personal capacity, they do not concern BWI and cannot form the basis of BWI's claim for defamation. Therefore, Defendants are entitled to summary judgment for authoring Posts 15-16, 24, 32, 35, and 48-50.

D. BWI Must Prove that Defendants' Alleged Statements Were Made with Actual Malice.

For two independent reasons, as a matter of law, this Court must apply the actual malice standard in determining whether any of defendants' statements are actionable defamation. The actual malice standard applies because the statements are protected by the common-interest privilege and because BWI is a public figure for purposes of the statements made on the blog.

Since the common-interest privilege applies and BWI is a public figure, the impact

[11] Further, Posts 16 and 24 merely recite historical facts and famous quotations that do not defame BWI.

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

is the same: BWI's burden to prove defamation increases and BWI must show that defendants' statements were made with malice.[12] A statement is made with actual malice when the declarant or author makes the statement with knowledge that it was false or with reckless disregard for the truth. *Burns*, 993 P.2d at 1128. In other words, actual malice means that a defendant publishes a statement after "entertain[ing] serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

The alleged defamatory statements at issue were not made with actual malice or with reckless disregard for their truth. The claimed actionable posts made by Mr. Dial and Mr. Unruh were not inspired by ill will, improper motives, or for the purpose of injuring BWI—an organization of which they have been members for over sixty years collectively, and for which they deeply love.

1. Defendants Statements Are Protected by the Common Interest Privilege.

The Defendants are protected by the qualified privilege referred to as the common interest privilege. "A qualified privilege arises when a person makes a good-faith, bona fide communication upon a subject in which he or she has an interest . . . and the communication is made to a person with a corresponding interest." *Grier v. Johnson*, 232 A.D.2d 846, 847 (1996); *see also Araujo v. Gen'l Elec. Inform. Serv.*, 82 F. Supp.2d 1161, 1172 (D. Or. 2000); *and* REST.2D OF TORTS § 594. The rationale underpinning the privilege is that, absent abuse, the flow of information between people having a common interest should not be impeded. *Foster v. Churchill*, 87 N.Y.2d 744 (1996). Whether a common-interest privilege exists is a question of law. *Aspell v. American Contract Bridge League*, 122 Ariz. 399, 401 595 P.2d 191, 193 (App. 1999); Restatement (Second) of Torts § 619, cmt. a.

[12] Regardless of the applicable standard, BWI must prove its defamation claim by clear and convincing evidence. *Alpine Indus. Computers, Inc. v. Cowles Publ'g. Co.*, 57 P.3d 1178, 1183 (Wash. Ct. App. 2002), *amended on other grounds*, 64 P.3d 49 (2003).

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

The Blog was created for, and is being used by, members, governors, directors, and employees of Best Western as a marketplace to discuss BWI's corporate governance, policies, and leadership, as well as the future of BWI and Best Western hoteliers. The Blog's homepage – which is viewed by *all* site visitors – makes this clear. (SOF ¶ 73.)

Because a common interest exists among the members, governors, directors, and employees and, further, because the claimed actionable posts were made in good faith and in connection with that common interest, the articles authored and/or posted by the Defendants are protected by the common interest privilege. *See, e.g., Stukuls v. State of New York*, 42 N.Y.2d 272, 278-79 (1977).

BWI is precluded from asserting the common interest privilege was abused because the statements were not excessively published, but rather, were submitted through a medium reasonably calculated to reach other persons of common interest, i.e., members, governors, directors, and employees. While the Blog was not initially password-protected, it was not accessible to the general public without the specific URL address which was only given to members, membership hotels, and other interested persons at BWI's annual conventions and district meetings. Further, in January 2007, the Blog was password-protected and the password was only provided to BWI-member properties. SOF ¶¶ 76-80. Defendants do not lose their qualified privilege or immunity merely because the statements may have incidentally reached people outside of the shared interest just as "publication in a fraternal magazine of disciplinary action taken against a member for cause is not an abuse of a privilege because the magazine may be seen by persons who are not members of the order." Restatement (Second) of Torts § 604, cmt. b. Because of the significant interest—shared by all members, governors, directors, and BWI employees—to act in the best interests of BWI, the gravity of harm resulting from certain directors' activities, and the inconvenience of any other medium of communication, publication over the Internet was reasonable.

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

2. BWI Must Prove Actual Malice Because BWI and its Board of Directors are Limited Public Figures.

In determining whether a plaintiff is a limited public figure, Arizona courts apply the test established in *Waldbaum v. Fairchild Productions, Inc.*, 627 F.2d 1287, 1296-98 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 898 (1980). *See Shoen v. Shoen*, 48 F.3d 412, 417 (9th Cir. 1995) (adopting *Waldbaum* test). *Waldbaum* enunciated a three-part test to determine if a plaintiff is a limited public figure. First, the court determines whether there is a public controversy. Second, if the court finds a public controversy, it analyzes the plaintiff's role in it. Finally, the court determines whether the alleged defamation is germane to the plaintiff's position in the controversy. *Waldbaum*, 627 F.2d at 1296-98. If all three elements are met, the plaintiff is a limited public figure and must prove actual malice in order to recover for defamation. *Id.* Whether the plaintiff is a public figure is a question of law. *Id.* at 1298. As demonstrated below, BWI meets all three parts of the *Waldbaum* test.

a. A Public Controversy Existed As To The Future of BWI.

A public controversy is not simply a matter of interest to the public. *Id.* at 1296. Rather, it is a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way. *Id.* A public controversy receives public attention because its ramifications are felt by persons who are not direct participants. *Id.* In determining whether a controversy exists, and defining its contours, the court examines whether there was a debate about some specific issue. *Id.* at 1297.

In this circumstance, BWI and its Board are limited public figures because at the time of Defendants' allegedly defamatory actions, BWI was embroiled in a highly political controversy regarding the proper management and future of the organization. BWI sought to pass a number of bylaws, which would have created a shift in control from the Membership to the Board and staff. Further, the Board employed questionable management practices, introduced new initiatives, design standards and organizational policies, and engaged in a policy of withholding financial and other pertinent information

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

from the very members it is obligated to serve. These proposed bylaw changes, lack of transparency at the Board level, and introduction of costly new initiatives and design standards were controversial among the Membership because they directly affected the profitability and management of all BWI Member properties.

Alarmed by these issues and interested in engaging members in a dialogue about the state of BWI and the recently proposed bylaws, Dial created the blog. The creation of the blog and Defendants' subsequent posts on the blog were directly prompted by, and clearly related to, the controversial actions taken by BWI and its Board.

Members are not franchisees, but are instead owners and operators of their own properties. In this regard, BWI's structure is similar to that of a homeowner's association. In *Martin v. Comm. For Honesty & Justice at Star Valley Ranch*, the Wyoming Supreme Court held that "entities [possessing] characteristics of a governing body or are effectively the equivalent of such because they exercise traditional governmental functions ought to be regarded as the proper subjects of public controversies." 101 P.3d 123, 129 (Wyo. 2004). In holding that the homeowner's association is a limited public figure, the Court stated "the lot owners of Star Valley Ranch should have the same rights as the citizens of a municipality to criticize or comment upon the actions of their elected representatives." *Id.* (internal citations omitted).

As BWI members elect a Board of Directors to represent their interests and govern their organization, they likewise are afforded the same right to criticize and comment upon the actions taken by these elected representatives on behalf of the organization. In this case, BWI and its Board instigated and initiated a controversy which had repercussions for all members and many other stakeholders. This significant segment of the public would reasonably expect to feel the effect of any resolution of such controversy. Thus, under *Waldbaum*, a public controversy regarding the management and future of BWI existed.

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

b. BWI Thrust Itself Into the Forefront of the Controversy And Sought To Be A Factor In The Ultimate Resolution.

According to the *Waldbaum* test, BWI played a role in the controversy. 627 F.2d at 1297. Trivial or tangential participation is not enough. *Id.* Under *Gertz*, it is clear that plaintiffs must have "thrust themselves to the forefront" of controversies so as to become factors in their ultimate resolution. 418 U.S. at 345. They must achieve a "special prominence" in the debate. *Id.* at 351. The plaintiff must either purposefully try to influence the outcome or realistically expect, because of its position in the controversy, to impact the resolution. *Waldbaum*, 627 F.2d at 1297.

Here, BWI proposed a controversial set of bylaw changes aimed at centralizing decision-making power and control with the Board and staff. Upon submission of these bylaw changes to the Membership for vote, BWI produced and disseminated a set of one-sided propaganda in support of the bylaws in an effort to influence members to vote in their favor.

BWI did more than just thrust itself into the midst of a public controversy; BWI actually created the public controversy at issue in this case. These actions spurred dissension within the Membership and led Mr. Dial to create the blog as a forum for members to discuss the company's recent policies and politics, as well as the future of BWI. Defendants' subsequent comments on the blog addressed these very issues as well.

c. The Alleged Defamation Was Germane To BWI's Participation In the Controversy.

The final step in the *Waldbaum* analysis is to ensure that the alleged defamation is germane to the plaintiff's participation in the controversy. 627 F.2d at 1298. The alleged defamation is germane if a reasonable person would conclude that the plaintiff will play, or will seek to play, a major role in determining the outcome of the controversy at issue and whether the allegedly defamatory statements are related to such controversy. *Id.*

Dial developed the blog in response to the controversy BWI created in proposing a set of bylaws, which would greatly change the functioning of the organization and hinder

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

members' traditional power to independently operate their properties—a tradition in Best Western. The allegedly defamatory comments were direct reactions to the Board's efforts to diminish member rights and enhance the Board's power. The comments concern the proposed bylaws, various initiatives, changes in the atmosphere of BWI, and opinions on the wisdom, performance, and qualifications of the Board and staff. As such, these comments are clearly germane to the highly political controversy initiated by BWI. *See Garrison v. Louisiana*, 379 U.S. 64, 85 (1964) (stating that the honesty and motivations of public officials are germane to their fitness for office).

VI. BWI'S TORTIOUS INTERFERENCE CLAIMS FAIL BECAUSE BWI HAS NOT PROFFERED ANY EVIDENCE OF INTERFERENCE WITH THEIR BUSINESS EXPECTANCY.

BWI has asserted two separate tortious interference claims in its Revised Second Amended Complaint. First, BWI asserts that all of the Defendants have interfered with BWI's "prospective economic advantage" with BWI's "customers, prospective customers, Members, prospective Members, and others."[13] *See* Count Nine, Revised Second Amended Complaint at p. 27. Secondly, BWI alleges that Defendant Furber interfered with BWI's contract with the Dials and Unruh. In alleging tortious interference, BWI asks this Court to believe that the Defendants are trying to interfere with the very same expectancy they themselves own as if the Defendants are engaging in some form of business self-mutilation. The opposite is true. The Defendants continue to operate their hotels as Best Western branded hotels and have worked diligently to comply with their contractual obligations and to strengthen the Best Western Brand. Accordingly, the Defendants are entitled to summary judgment on all of the tortious interference claims.

To establish a claim for tortious interference with a business relationship, BWI must show: (1) the existence of a valid contractual relationship or business expectancy; (2) the interferer's knowledge of the relationship or expectancy; (3) intentional

[13] BWI somehow fails to recognize the obvious—that it does not own and operate a single Best Western Hotel. Instead, it is the individual members who have a business expectancy interest with guests who patronize Best Western Hotels.

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. *Hill v. Peterson*, 201 Ariz. 363, 35 P.3d 417 (App. 2001) (*citing Wallace v. Casa Grande Union High School Dist. No. 82 Bd. of Governors*, 184 Ariz. 419, 909 P.2d 486 (App. 1995). Also, the interference must be "improper as to motive or means" before liability will attach. *Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 388, 710 P.2d 1025, 1043 (1985) (abrogated on other grouds by, A.R.S. § 23-1501).

BWI's claim fails because BWI cannot point to a single member who has terminated because of the Defendants' conduct. Nor can BWI point to a single prospective member who decided not to become a member because of the Defendants' conduct. And they cannot point to a single customer or prospective customer lost. Nor have the Defendants themselves terminated their own membership. BWI has not been damaged. Further, even if BWI could show, which it cannot, that a member terminated or that a prospective member opened a competing hotel because of the Defendants conduct, BWI still must show that the Defendants' conduct was "improper as to motive or means" for the defendants to be liable..

The Court has no need to look further that the Defendants continued membership with Best Western. If the Defendants were intending to harm BWI they would begin by self-terminating. Nonetheless, BWI cannot point to any evidence that any of the Defendants have acted in a manner with any intent other than trying to protect the qualities of BWI that originally attracted them to the brand. The Defendants are entitled to summary judgment on BWI's tortious interference claims.

VII. CONCLUSION.

For the foregoing reason, this Court should grant defendants' motion for summary judgment in its entirety.

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

DATED this 9th day of May, 2008.

SNELL & WILMER L.L.P.

s/Todd Feltus

Daniel McAuliffe (Arizona Bar No. 003435)
dmcauliffe@swlaw.com
Todd Feltus (Arizona Bar No. 019076)
tfeltus@swlaw.com
Cory L. Braddock (Arizona Bar No. 024668)
cbraddock@swlaw.com
One Arizona Center
Phoenix, AZ 85004-2202
Telephone: (602) 382-6000
Facsimile: (602) 382-6070
Co-Counsel for H. James Dial, James Furber, Nidrah Dial, Theresa Furber, Loren Unruh, and Gayle Unruh

Richard T. Mullineaux (Indiana Bar No. 9874-22)
rmullineaux@k-glaw.com
R. Jeffrey Lowe (Indiana Bar No. 21508-22)
jlowe@k-glaw.com
Crystal G. Rowe (Indiana Bar No. 22524-53)
crowe@k-glaw.com
Kightlinger & Gray, LLP
One Commerce Square
4106 Charlestown Road
New Albany, IN 47150
Phone: (812) 949-2300
Facsimile: (812) 949-8556
Co-Counsel for H. James Dial, James Furber, Nidrah Dial, Theresa Furber, Loren Unruh, and Gayle Unruh

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2008, I electronically transmitted the attached document to the Clerk's office using the ECF system for filing. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Cynthia Ann Ricketts
DLA Piper US LLP
2415 East Camelback Road, Suite 700
Phoenix, Arizona 85016
Cindy.Ricketts@dlapiper.com

Allison Harvey
DLA Piper US LLP
2415 East Camelback Road, Suite 700
Phoenix, Arizona 85016
Allison.Harvey@dlapiper.com

Robert E. Yen
Yen, Pilch, Komadina & Flemming, P.C.
6017 North 15th Street
Phoenix, Arizona 85014
yen@ypklaw.com

J. Grant Woods
Grant Woods, P.C.
1726 North 7th Street
Phoenix, Arizona 85006
grantwoodspc@yahoo.com

Michael Joseph LaVelle
Lavelle & Lavelle PLC
Camelback Esplanade II Ctr
2525 E Camelback Rd., Ste 888
Phoenix, AZ 85016-4280
MJL@lavelle-lavell.com

By: s/ Todd Feltus
8782229.4