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13 Plaintiff/Counterdefendant  
14 Best Western International, Inc.

15 **IN THE UNITED STATES DISTRICT COURT**  
16 **FOR THE DISTRICT OF ARIZONA**

17 Best Western International, Inc., a non- )  
18 profit Arizona corporation, )  
19 Plaintiff, )  
20 vs. )  
21 James Dial, an Internet website blogger and )  
22 Member of Best Western International, )  
23 Inc.; Nidrah Dial, an Internet website )  
24 blogger; and Loren Unruh, an Internet )  
25 website blogger and Member of Best )  
26 Western International, Inc., )  
27 Defendants. )

Case No. CV06-1537-PHX-DGC

**MOTION TO DISMISS COUNTS  
TWO AND THREE OF DIAL’S  
COUNTERCLAIM PURSUANT  
TO RULE 12(b)(1) AND 12(h)**

**(The Honorable David G.  
Campbell)**

23 Pursuant to Rule 12(b)(1) and 12(h) of the Federal Rules of Civil Procedure,  
24 Counterdefendants Best Western, Inc. (“BWI”) and Roman Jaworowicz (“Jaworowicz”)  
25 hereby move to dismiss the Counterclaims for Tortious Interference with Contractual  
26 Expectancy (Count Two) and Breach of Fiduciary Duty (Count Three) filed by  
27 Counterclaimant Jim Dial (“Dial”). Dial improperly seeks to enforce rights that do not  
28 belong to him, and seeks redress for harm allegedly suffered by others. Indeed, Dial seeks

1 to pursue a claim of tortious interference with contractual expectancy where the  
2 contractual expectancy belongs to an Ohio limited liability company, not Dial, and a claim  
3 for breach of fiduciary duty claim where the duty in question is owed to BWI, not Dial.  
4 **As a matter of law, Dial lacks standing to pursue these claims. Because standing is a**  
5 **fundamental precondition to the Court's subject matter jurisdiction, the Court lacks**  
6 **subject matter jurisdiction over these claims.** Dial's lack of standing is fatal to his  
7 claims. Accordingly, the Court must dismiss Counts Two and Three of Dial's  
8 Counterclaims. This Motion is supported by the following Memorandum of Points and  
9 Authorities, and the entire record herein. A Proposed Order is filed concurrently  
10 herewith.

11 RESPECTFULLY SUBMITTED this 15th day of October, 2008.

12  
13 s/Cynthia A. Ricketts

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. FACTUAL BACKGROUND**

3 BWI is a non-profit Member corporation formed under the laws of the State of  
4 Arizona. *See* BWI's Revised Second Amended Complaint, ¶ 10 [Docket No. 135].  
5 BWI's Members do not have an ownership interest in BWI but instead are Members of  
6 BWI. *See id.*, ¶¶ 10, 11, 28. BWI has approximately 2400 Member hotels in North  
7 America. *See id.*, ¶ 11. Each Member enters a Membership Agreement and agrees to be  
8 bound by the obligations set forth therein and BWI's Bylaws, Articles of Incorporation,  
9 and Rules and Regulations. *See id.*, ¶ 29; Membership Application and Agreement for the  
10 Best Western Green Tree Inn (the "Membership Agreement") [Pl. Tr. Ex. 51], ¶ 11.

11 Each BWI voting member may vote on those issues properly considered by the  
12 Membership including the election of members of its Board of Directors. BWI Bylaws,  
13 Article IV, Section 4. The BWI Bylaws set forth the Board of Directors' powers and  
14 responsibilities. *Id.*, Section 10. The Membership Agreement further states that the  
15 relationship between BWI and its Members is that of an independent contractor.  
16 (Membership Agreement [Pl. Tr. Ex. 51], ¶ 17.) In 2003, BWI voting members in District  
17 III elected Jaworowicz to serve as a member of the BWI Board of Directors. *See* June 27,  
18 2008 Declaration of Roman Jaworowicz, ¶ 1, Exhibit 27 to BWI's Opposition to  
19 Defendants' Motion for Summary Judgment [Docket No. 360].

20 Dial is the voting BWI Member for the Green Tree Inn located in Clarksville,  
21 Indiana. Membership Agreement, ¶ 45. The Green Tree Inn is owned by Green Tree  
22 Investors, LLC ("Green Tree Investors"), an Ohio limited liability company.  
23 Counterdefendants' Statement of Facts in Support of Motion for Summary Judgment  
24 ("C/SOF") ¶ 53 [Docket No. 201]; Indiana Secretary of State Business Services Data,  
25 "Green Tree Investors," *available at* [www.in.gov/sos](http://www.in.gov/sos), *and* Green Tree Investors, Ltd.  
26 Articles of Organization (collectively, the "Green Tree Investors Business Filings"),  
27 attached together hereto as Exhibit 1; *see also* Excerpt of January 8, 2008 Deposition of  
28 James Dial, p. 301:17-20 (admitting that the Green Tree Inn is not held in Dial's name),

1 attached hereto as Exhibit 2. Dial is one of the members of Green Tree Investors. *See*  
2 Membership Agreement, ¶ 44; *see also* Excerpt of January 9, 2008 Deposition of Nidrah  
3 Dial, pp. 8:17-10:10 (admitting that Dial, Nidrah Dial, and Janet Huff's trusts have  
4 interests in Green Tree Investors), attached hereto as Exhibit 3.

5 On June 14, 2006, BWI filed this lawsuit against unknown defendants in  
6 connection with defamatory postings made on the "freewrites.net" website (the "Blog")  
7 and other wrongdoing in connection with the Blog. *See* Complaint [Docket No. 1].  
8 Shortly after the lawsuit was filed, Dial came forward and identified himself as one of the  
9 individuals responsible for the Blog. *See* BWI's Motion for Leave to Amend Complaint  
10 [Docket No. 22.]. On April 19, 2007, Dial asserted counterclaims against BWI for  
11 tortious interference with contractual expectancy and against Jaworowicz for breach of  
12 fiduciary duty.<sup>1</sup> *See* First Amended Counterclaim [Docket No. 90].

13 For his tortious interference claim, Dial alleges that BWI intentionally caused the  
14 Green Tree Inn to not be visible on the BWI reservation website for a few days in  
15 December 2006 and thereby interfered with his asserted business expectancy (*i.e.*, guests'  
16 use of the BWI reservation website to make reservations at the Green Tree Inn). *Id.* As  
17 noted above, however, Dial does not own the Green Tree Inn; instead, the Green Tree Inn  
18 is owned by Green Tree Investors. C/SOF, ¶ 53 [Docket No. 201].

19 For his breach of fiduciary duty claim, Dial alleges that the BWI Board improperly  
20 instituted this lawsuit to cause harm to Dial and BWI Members. First Amended  
21 Counterclaim [Docket No. 90] at 7-8. Although not alleged in his First Amended  
22 Counterclaim, Dial asserts that he believes that Jaworowicz voted in favor of the litigation

23 \_\_\_\_\_  
24 <sup>1</sup> Dial also asserted breach of fiduciary duty claims against all members of the Board of  
25 Directors at the time of the June 14, 2006 vote to approve the filing of the lawsuit, an  
26 abuse of process claim against BWI, and an aiding an abetting abuse of process claim  
27 against each of the Board of Directors. Dial's First Amended Counterclaim [Docket No.  
28 90]. In his Amended Counterclaim, Dial also asserted a tortious interference with  
expectancy claim against BWI and "at least one" member of the BWI Board of Directors.  
*Id.* On May 12, 2008, the Court granted summary judgment in Counterdefendants' favor  
on all of Dial's Counterclaims except Dial's asserted breach of fiduciary duty claim  
against Jaworowicz and his asserted tortious interference claim against BWI. *See* May 12,  
2008 Order [Docket No. 342].

1 as an “interested director” and thereby breached his fiduciary duty to “all BWI members,”  
2 including Dial. Dial’s Response in Opposition to BWI’s Motion to [sic] Summary  
3 Judgment on Jim Dial’s Counterclaim [Docket No. 287] at 6-7; *see also* First Amended  
4 Counterclaim [Docket No. 90] at 9 (wherein Dial alleges that the members of the BWI  
5 Board of Directors owe fiduciary duties to “all BWI members”). Accordingly, any  
6 fiduciary duty that Jaworowicz owes is to “all BWI members,” not individually to Dial.  
7 The BWI Board of Directors voted 6 to 1 in favor of the filing of the lawsuit. Dial's  
8 Responses and C/SOF and S/SOF [Docket No. 288] at 2.

9 Yesterday, October 14, 2008, Defendants produced for the first time an alleged  
10 Assignment of Cause of Action, which purports to assign Green Tree Investors, LLC’s  
11 interest in any tortious interference claim against BWI to Dial. Assignment of Cause of  
12 Action, attached hereto as Exhibit 4 (the “Assignment”). [Def. Tr. Ex. 971]. The  
13 Assignment is dated October 14, 2008, and is signed by Dial, Nidrah Dial, and Janet Huff.  
14 *Id.* Green Tree Investors, LLC is the fictitious name of Green Tree Investors, Ltd.; Green  
15 Tree Investors is inactive; its status as a foreign entity doing business in the state of  
16 Indiana has been revoked.<sup>2</sup> Green Tree Investors Business Filings. Green Tree Investors’  
17 Managing Member is Peter Coratola. *Id.*

## 18 **II. LEGAL ARGUMENT**

19 At the very heart of an Article III Court’s subject matter jurisdiction is the doctrine  
20 of justiciability. For there to be a justiciable claim – a *case or controversy* under Article  
21 III – the litigant must have standing to bring the claim. *EMI, Ltd. v. Bennett*, 738 F.2d  
22 994, 996 (9th Cir. 1984). Where the litigant lacks standing, not only has the litigant failed  
23 to state a claim, but in fact the court does not have subject matter jurisdiction over the

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24  
25 <sup>2</sup> BWI notes that according to the Secretary of State website the Green Tree Investors,  
26 LLC's (the company that owns the Green Tree Inn) filing as a foreign entity in Indiana  
27 was administratively revoked in 2005. Thus, Dial and the Green Tree Investors has no  
28 business expectancy regarding the Membership Agreement and does not have a valid  
business expectancy to do business in Indiana. This information was not disclosed to  
BWI during the course of this litigation and was only discovered by BWI's counsel  
yesterday, 10/14/08. Therefore, BWI reserves the right to further evaluate the effect this  
administrative revocation has under Indiana and Arizona law and on Dial's counterclaim.

1 claim. *See id.* Standing is a fundamental prerequisite to the assertion of jurisdiction,  
2 before the Court even considers the merits of the litigant's claim. So important is the  
3 legal exactness of subject matter jurisdiction that a challenge to the Court's jurisdiction  
4 can be made at any time – even after judgment was been rendered. Fed. R. Civ. P.  
5 12(h)(3); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 505, 126 S. Ct. 1235, 1240 (2006). The  
6 Court may consider evidence and resolve factual disputes regarding jurisdiction.

7 In ruling on a challenge to subject matter jurisdiction, the Court may consider  
8 evidence regarding jurisdiction and rule on the issue prior to trial; to the extent there are  
9 factual issues, the Court may resolve any such issues. *See Thornhill Pub. Co. v. General*  
10 *Tel. & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). Indeed, no presumptive  
11 truthfulness attaches to the claimant's allegations, and disputed facts do not preclude the  
12 Court from evaluating the merits of the jurisdictional challenge. *See id.* The claimant  
13 always bears the burden of establishing subject matter jurisdiction. *Valdez v. United*  
14 *States*, 837 F. Supp. 1065, 1067 (E.D. Cal. 1993).

15 To have standing to bring a claim, the litigant must have an injury-in-fact, the  
16 injury must be fairly traced to the challenged action, and the injury must be capable of  
17 being redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555,  
18 560 n.1, 561 (1992); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). In rare cases, an  
19 individual may bring a claim on behalf of a third party. For example, to bring a claim on  
20 behalf of a third party that is an entity of which the litigant is a shareholder or member,  
21 the question of standing will turn on whether the claim is derivative or direct. *See*  
22 *Lapidus v. Hecht*, 232 F.3d 679, 682 (9th Cir. 2000). Whether a claim is derivative or  
23 direct is a matter of state law; the law applied will be the law of the state in which the  
24 entity is organized. *Id.* To bring a derivative claim, the litigant must satisfy all statutory  
25 preconditions to a derivative claim, otherwise the claim is barred. *Albers v. Edelson Tech.*  
26 *Partners, L.P.*, 201 Ariz. 47, 55 (Ct. App. 2001). Where the claim is not a derivative  
27 claim subject to the express statutory preconditions for standing, a litigant may bring a  
28 claim on behalf of a third party only if the litigant has suffered an injury-in-fact, the

1 litigant has a special close relationship with the third party, and there is some hindrance  
2 preventing the third party's ability to protect his or her own interests. *Campbell v.*  
3 *Louisiana*, 523 U.S. 392, 118 S. Ct. 1419 (1998).

4 In this case, as a matter of law, Dial has not established, and cannot establish,  
5 standing to bring his asserted tortious interference claim or breach of fiduciary duty claim.

6 **A. Dial lacks standing to bring a tortious interference claim.**

7 **1. Dial lacks standing to bring a tortious interference claim**  
8 **individually.**

9 To have standing to bring a claim for tortious interference with contractual  
10 expectancies based upon the Green Tree Inn's lack of visibility on the BWI reservation  
11 website for a few days in December 2006, Dial must establish that he has suffered an  
12 injury-in-fact. *EMI, Ltd.*, 738 F.2d at 996. The Green Tree Inn is owned by Green Tree  
13 Investors, not by Dial. C/SOF [Docket No. 202] ¶ 53. Therefore, to the extent that the  
14 Green Tree Inn suffered any harm as a result of not being visible on the BWI reservation  
15 website (which BWI disputes), this injury was suffered by Green Tree Investors, not by  
16 Dial. *EMI, Ltd.*, 738 F.2d at 997; *Semida v. Rice*, 863 F.2d 1156, 1161 (4th Cir. 1988);  
17 *see also Warde v. Kaiser*, 887 F.2d 97, 102 (6th Cir. 1989) (an insurance agent does not  
18 have standing to bring a tortious interference claim against a competing insurance agent  
19 because the insurance contract expectancy belongs to the insurance company); *see also,*  
20 *Law v. Harvey*, 2007 U.S. Dist. LEXIS 78398, \*19 (N.D. Cal. 2007)(holding that a  
21 member of a limited liability company lacked standing to pursue his various claims of  
22 breach of contract, etc.).

23 Alleged personal economic injury resulting from a wrong to Green Tree Investors  
24 is not sufficient for Dial to establish an injury-in-fact necessary to establish standing. *See*  
25 *EMI, Ltd.*, 738 F.2d at 997 (a shareholder lacks standing to bring a claim on behalf of a  
26 corporation even though a shareholder has an ownership interest in the corporation); *see*  
27 *also Warde*, 887 F.2d at 102 (an insurance agent does not have standing to bring an  
28 interference claim against a competitor's agent even though the agent is entitled to a

1 commission on the pirated account). Thus, any injury that may have in fact been suffered  
2 by the alleged lack of visibility of the Green Tree Inn on the BWI reservation website for  
3 a few days in December 2006 was suffered by Green Tree Investors, not Dial.

4 Dial has never alleged that any tortious interference claim was assigned to him –  
5 indeed, the Assignment was not signed until October 14, 2008, the day before the Joint  
6 Pretrial Order filing deadline. First Amended Counterclaim [Docket No. 90]; Dial’s  
7 Response in Opposition to BWI’s Motion to [sic] Summary Judgment on Jim Dial’s  
8 Counterclaim [Docket No. 287]; Assignment, Exhibit 4 [Def. Tr. Ex. 971]. Regardless,  
9 the alleged assignment of Green Tree Investors’ tortious interference claim to Dial does  
10 not confer standing to Dial: the Assignment is ineffective and void as against public  
11 policy.

12 To begin, standing is determined by the facts that exist at the time the complaint is  
13 filed. *See Lujan*, 504 U.S. at 569 n.4, 112 S. Ct. 2130 (1992); *Clark v. City of Lakewood*,  
14 *259 F.3d 996, 1006* (9th Cir. Wash. 2001)(noting that standing is determined at the time  
15 the complaint is filed, and that court will review changed circumstances if such  
16 circumstances *deprive* the court of jurisdiction). Therefore, even if the assignment is valid  
17 and enforceable, it cannot confer standing on Dial because it occurred years after *Dial*  
18 filed his counterclaim.<sup>3</sup> The fact that Dial did not have standing when he filed his  
19 counterclaim is simply and unavoidably fatal.

20 An assignee always has the burden to establish that the claim has been assigned,  
21 and that the assignment is effective. *GE Commer. Distrib. Fin. Corp. v. Great Cove*  
22 *Marina, Inc.*, 2008 U.S. Dist. LEXIS 76113 (D.N.J. Sept. 29, 2008). Dial cannot satisfy  
23 that burden.

24 The alleged assignment of the tortious interference claim is ineffective under Ohio  
25 law (the state of organization for Green Tree Investors) because it was executed by Dial  
26 and Nidrah Dial. Assignment, Exhibit 4 [Def. Tr. Ex. 4]. Clearly, both Dial and Nidrah

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27 <sup>3</sup> The fact that Dial filed the counterclaim distinguishes this from a case in which a proper  
28 plaintiff assigned a cause of action after the proper plaintiff filed the lawsuit – which is  
not the case here.

1 Dial have a conflict of interest in a transaction that confers on them Green Tree Investors’  
2 claim, since both have an interest in acquiring a counterclaim or claim of set-off against  
3 BWI in this lawsuit. However, the transaction has not met the minimum requirements for  
4 validity of an interested member under Ohio law. Oh. Rev. Stat. 1705.31 (a contract  
5 between the LLC and a member is only valid if the transaction has been properly  
6 approved according to specific statutory preconditions). Given the date of the Assignment  
7 – October 14, 2008, the eve of the deadline for the Joint Pretrial Order – Dial and Nidrah  
8 Dial’s sole purpose in executing the Assignment on behalf of Green Tree Investors was to  
9 acquire a personal interest in Green Tree Investor’s claim to prevent dismissal of Dial’s  
10 counterclaim. Assignment, Exhibit 4 [Def. Tr. Ex. 971]. Additionally, because  
11 Defendants have not disclosed or produce any evidence of the alleged “consideration” for  
12 the Assignment, nor disclosed any evidence surrounding the circumstances of or witnesses  
13 with personal knowledge about the Assignment, Dial cannot establish that the Assignment  
14 is enforceable. Oh. Rev. Stat. 1705.31

15 Additionally, the Assignment is void as against public policy. *Lingel v. Olbin*, 198  
16 Ariz. 249 (Ct. App. 2000) (refusing to enforce an assignment of proceeds of a lawsuit as  
17 violative of public policy in Arizona); *see also, Accrued Fin. Servs. v. Prime Retail, Inc.*,  
18 298 F.3d 291, 297-300 (4th Cir. 2002) (refusing to accord standing to plaintiff were  
19 assignment of claims violated public policy). The sole purpose of the Assignment is to  
20 cure the fatal standing defect, and confer upon Dial a counterclaim in this litigation that he  
21 does not otherwise admittedly have – this is an impermissible purpose, and does not  
22 confer standing on Dial. *See Smith v. Ayres*, 977 F.2d 946, 949-51 (5th Cir. 1992) (an  
23 assignee was not permitted to proceed against defendant because assignment was made to  
24 avoid standing defects arising from lack of derivative standing and to pursue a vexatious  
25 claim). Moreover, the Assignment represents a collusive effort among the members of  
26 Green Tree Investors (or at least some of them) in an effort to create standing for a cause  
27 of action that would otherwise not exist and would be dismissed – this is akin to adding a  
28 party for the sole purpose of establishing or defeating jurisdiction. *See id.*; *see also,*

1 *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987) (finding fraudulent  
2 joinder where defendant was added to destroy diversity); *Parks v. New York Times Co.*  
3 308 F.2d 474, 477 (5th Cir. 1962) (finding fraudulent joinder and ignoring the  
4 fraudulently joined defendant even though defendant had cognizable nominal claims).  
5 Such collusive efforts for purposes of trying to establish jurisdiction should not be  
6 tolerated.

7 Dial has the burden of establishing standing, and the burden of establishing that the  
8 assignment of Green Tree Investor's cause of action is valid and enforceable – he can do  
9 neither as a matter of law and fact. Accordingly, this Court does not have jurisdiction  
10 over Dial's tortious interference claim, and it must be dismissed.<sup>4</sup>

11 **2. *Dial lacks standing to bring the tortious interference claim on***  
12 ***behalf of Green Tree Investors.***

13 Dial asserts his tortious interference claim in his individual capacity, not on behalf  
14 of Green Tree Investors. First Amended Counterclaim [Docket No. 90] at 8. As noted  
15 above, it is undisputed that Green Tree Investors is not a party to this litigation. *Id.*  
16 However, even to the extent that Dial's claim can be construed as being asserted on Green  
17 Tree Investors' behalf, Dial still lacks standing, divesting this Court of jurisdiction over  
18 his tortious interference claim.<sup>5</sup>

19 As noted above, because the business expectancy of guests making reservations at  
20 the Green Tree Inn belongs to Green Tree Investors, Dial has not suffered and could not

21 <sup>4</sup> It is uncontroverted that Green Tree Investors is not a party to this lawsuit and not  
22 pursuing claims on its own behalf. First Amended Counterclaim [Docket No. 90].

23 <sup>5</sup> Green Tree Investors is an Ohio limited liability company. Pursuant to Ohio law, a  
24 member of a limited liability company may bring an action on *behalf* of a limited liability  
25 company and obtain a judgment for the limited liability company only if management is  
26 not reserved to its members, if the managers of the company with authority to commence  
27 the action have refused to do so, or if an effort to cause those managers to commence the  
28 action is not likely to succeed. Oh. Rev. Stat. § 1705.49. In a derivative action on behalf  
of an Ohio LLC brought pursuant to § 1705.49, the complaint must set forth with  
particularity the plaintiff's effort to secure commencement of the action by the managers  
or the reasons for not making the effort. Oh. Rev. Stat. § 1705.51. Dial's tortious  
interference counterclaim does not satisfy this requirement. First Amended Counterclaim  
[Docket No. 90] at 8. Moreover, Dial has not alleged, nor are there facts nor were  
documents produced in discovery to establish, that management of Green Tree Investors  
is left to its members. *Id.*

1 suffer an injury-in-fact as a matter of law. Moreover, Dial has never alleged any  
2 individual injury-in-fact, nor has Dial ever presented any evidence of any injury-in-fact  
3 suffered on an individual basis. First Amended Counterclaim [Docket No. 90] at 7-8  
4 (Dial merely alleges that the tortious interference with the Green Tree Inn caused Dial  
5 harm); Dial's Opposition to BWI's Motion for Summary Judgment [Docket No. 287] at  
6 15-16. Dial's alleged economic injury resulting from a wrong to Green Tree Inn and thus  
7 Green Tree Investors is insufficient, as a matter of law, to establish an injury-in-fact to  
8 him. *See EMI, Ltd.*, 738 F.2d at 997; *Warde*, 887 F.2d at 102.

9 Dial also has never alleged the special close relationship required to establish  
10 standing on behalf of a third party. *See* First Amended Counterclaim [Docket No. 90]. A  
11 special relationship sufficient to confer standing must be a confidential relationship, such  
12 as the doctor-patient or attorney-client relationship or parent-child relationship. *See*  
13 *Griswold v. Connecticut*, 381 U.S. 479 (1965) (doctor-patient); *Caplin & Drysdale,*  
14 *Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989) (attorney-client relationship is  
15 one of special consequence); *Miller v. Albright*, 523 U.S. 420, 118 S. Ct. 1428 (1998)  
16 (father-daughter). The Supreme Court has also found a sufficiently close relationship in  
17 cases where there is a constitutional bond of trust between the litigant and the third party,  
18 or where the litigant is the party that is most likely to cause harm to the third party based  
19 upon the law or incident in question. *See Powers v. Ohio*, 499 U.S. 400, 411 (1991) (a  
20 special bond of trust between the defendant and the jurors); *Barrows v. Jackson*, 346 U.S.  
21 249, 259 (1953) (owner of real estate subject to racial covenant granted standing to  
22 challenge such covenant in part because she was "the one in whose charge and keeping  
23 [reposed] the power to continue to use her property to discriminate or to discontinue such  
24 use"). Such a relationship simply is neither asserted nor established here. *See* First  
25 Amended Counterclaim [Docket No. 90]; *see also* Dial's Opposition to BWI's Motion for  
26 Summary Judgment [Docket No. 287].

27 Finally, at no time has Dial alleged, nor is there any evidence to establish, that  
28 Green Tree Investors is hindered in pursuing the tortious interference claim on its own

1 behalf. *Powers*, 499 U.S. at 411; *see* First Amended Counterclaim [Docket No. 90];  
2 Dial's Opposition to BWI's Motion for Summary Judgment [Docket No. 287]. Dial thus  
3 lacks standing because there are no facts establishing (or even allegations asserting) that  
4 Green Tree Investors is hindered in any way from bringing any tortious interference claim  
5 on its own behalf. *Cf. Singleton v. Wulff*, 428 U.S. 106, 116 (1976) (physician's standing  
6 to bring a claim on behalf of his patients proper where patients had no ability to enforce  
7 their own rights because of privacy concerns and imminent mootness); *see also* First  
8 Amended Counterclaim [Docket No. 90].

9 As a matter of law, Dial does not have standing to bring an action for any personal  
10 harm allegedly suffered as a result of alleged harm to Green Tree Investors. Additionally,  
11 Dial's lack of injury-in-fact, lack of special relationship with Green Tree Investors, and  
12 the lack of evidence that Green Tree Investors is hindered from pursuing any tortious  
13 interference claim (as well as Dial's failure to allege that the claim is brought on Green  
14 Tree Investors' behalf or to add Green Tree Investors as party) is fatal. Accordingly, this  
15 Court should dismiss Dial's claim for tortious interference (Count Two) for lack of  
16 subject matter jurisdiction.

17 **B. Dial lacks standing to bring claim for breach of fiduciary duty.**

18 *i. Dial lacks standing to bring a breach of fiduciary duty claim*  
19 *individually.*

20 An individual shareholder or member does not have standing to pursue a claim for  
21 a director's fiduciary duty in his individual capacity. *See Hidalgo v. McCauley*, 50 Ariz.  
22 178, 184 (1937); *Schroeder v. Hudgins*, 142 Ariz. 395, 398 (Ct. App. 1984) (“[E]ven  
23 where all of the stock in a corporation is owned by a sole shareholder, he may not  
24 maintain an action individually for wrongs against the corporation. To obtain a personal  
25 right of action, there must be relations between the individual and the tortfeasor  
26 ‘independent of those which the shareholder derives through his interest in the corporate  
27 assets and business.’”) (internal citations omitted); *DCH Health Services Corp. v. Waite*,  
28 95 Cal. App. 4th 829, 832 (2002) (a director does not owe a fiduciary duty to anyone but

1 the company). In fact, an individual shareholder or member is precluded from filing a  
2 lawsuit for breach of a director's fiduciary duty for alleged wrongs done to the corporation  
3 because the injury is suffered by the company - and thus is inherently derivative in nature.  
4 *Funk v. Spalding*, 74 Ariz. 219, 223, 246 P.2d 184, 186 (1952).<sup>6</sup> As discussed below, Dial  
5 has not satisfied the conditions precedent to his ability to maintain a derivative action to  
6 pursue on behalf of BWI (and "all of the BWI members") any perceived breach of  
7 fiduciary by any member of the BWI Board of Directors, including Jaworowicz.  
8 Accordingly, Dial does not have standing to bring his asserted breach of fiduciary duty  
9 claim. *See Hidalgo*, 50 Ariz. at 184; *Waite*, 95 Cal. App. 4th at 832.

10 Additionally, to the extent Dial attempts to argue that Jaworowicz (or any other  
11 Board member) owes him, as an individual, a fiduciary duty, the Membership Agreement  
12 precludes any such claim. The Membership Agreement states clearly that the relationship  
13 between BWI and the Member is in the nature of an independent contractor. Membership  
14 Agreement, ¶ 17. Where an agreement states that the parties are independent contracting  
15 parties, no fiduciary duty exists between the two. *Urias v. PCS Health Sys.*, 211 Ariz. 81,  
16 87, 118 P.3d 29, 35 (Ct. App. 2005). Accordingly, Dial has no standing to bring any  
17 fiduciary duty claim as an individual, and the Court must dismiss this claim for lack of  
18 subject matter jurisdiction.

19 ***ii. Dial lacks standing to bring breach of fiduciary duty claim on  
20 behalf of BWI (and "all of the BWI members").***

21 An individual member of a member association (equivalent to a shareholder) only  
22 has standing to pursue claims that are derivative in nature after complying with A.R.S.  
23 § 10-3631. A.R.S. § 10-3631; *see also Callanan v. Sun Lakes Homeowners' Ass'n #1*,  
24 134 Ariz. 332 (1982). Because BWI is a non-profit Member corporation, a derivative  
25 lawsuit may be brought only by the lesser of 50 Members or any Member or Members  
26 having 25% or more of the voting power. A.R.S. § 10-3631. Dial has not complied, and  
27 cannot comply, with this statutory condition precedent; Dial does not have 25% of the

28 <sup>6</sup> There are a few exceptions to this general rule, none of which exist here. *Funk*, 74 Ariz. at 223, 246 P.2d at 186.

1 voting power. Additionally, the counterclaim admits that it is brought by Dial alone, not  
2 by 50 Members. First Amended Counterclaim [Docket No. 90] at 9. Dial also has not  
3 complied with A.R.S. § 10-3632 which requires that a written demand be first made upon  
4 the corporation for corrective action. A.R.S. § 10-3632. Accordingly, Dial lacks standing  
5 to bring any fiduciary duty claim on behalf of BWI (and “all of the BWI members”). This  
6 Court thus lacks subject matter jurisdiction over Dial’s asserted breach of fiduciary duty  
7 claim,<sup>7</sup> and should dismiss Count Three for lack of subject matter jurisdiction.

8 **III. CONCLUSION**

9 As a matter of law, Dial lacks standing to pursue his asserted tortious interference  
10 and breach of fiduciary duty claims. Because standing is a fundamental precondition to  
11 the Court’s subject matter jurisdiction, Dial’s lack of standing is fatal to his claims. For  
12 the reasons set forth herein, Counterdefendants respectfully request that this Court dismiss  
13 Counts Two and Three of Dial’s Counterclaims in their entirety, and award any additional  
14 relief the Court deems appropriate.

15 RESPECTFULLY SUBMITTED this 15th day of October, 2008.

17 s/Cynthia A. Ricketts

18 Cynthia A. Ricketts  
19 Allison L. Harvey  
20 Susan T. Watson  
21 DLA Piper LLP (US)  
22 Attorneys for Plaintiff Best Western  
23 International, Inc.

24 s/Michael J. LaVelle (w/permission)

25 Michael J. LaVelle Esq.  
26 LaVelle & LaVelle  
27 Attorneys for Counterdefendant Roman  
28 Jaworowicz

26 \_\_\_\_\_  
27 <sup>7</sup> Additionally, even if Jaworowicz was self-interested when the BWI Board of Directors  
28 voted on June 14, 2006 to approve the filing of this lawsuit (which he was not), any self-  
interest does not give rise to a claim: the BWI Board voted 6 to 1 to file this lawsuit,  
thereby negating the effects of Jaworowicz’s self-interest as a matter of law.

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2008, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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Cory L. Braddock  
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Attorneys for Counterdefendant Roman  
Jaworowicz

12 Attorneys for  
13 Plaintiff/Counterdefendant  
14 Best Western International, Inc.

15 **IN THE UNITED STATES DISTRICT COURT**  
16 **FOR THE DISTRICT OF ARIZONA**

17 Best Western International, Inc., a non- )  
18 profit Arizona corporation, )  
19 Plaintiff, )

20 vs. )

21 James Dial, an Internet website blogger and )  
22 Member of Best Western International, )  
23 Inc.; Nidrah Dial, an Internet website )  
24 blogger; and Loren Unruh, an Internet )  
25 website blogger and Member of Best )  
26 Western International, Inc., )  
27 Defendants. )

Case No. CV06-1537-PHX-DGC

28 **INDEX OF EXHIBITS TO**  
**MOTION TO DISMISS COUNTS TWO AND THREE OF DIAL'S**  
**COUNTERCLAIM PURSUANT TO RULE 12(b)(1) AND 12(h)**

- EXHIBIT 1 – Green Tree Investors Business Filings;
- EXHIBIT 2 – Excerpt of January 8, 2008 Depo. of James Dial, p. 301:17-20;
- EXHIBIT 3 – Excerpt of January 9, 2008 Depo. of Nidrah Dial, pp. 8:17-10:10;
- EXHIBIT 4 – Assignment of Cause of Action (the “Assignment”).

# EXHIBIT 1

Name Searched On:  
**GREEN TREE INVESTORS (Legal)**

**Current Information**

Entity Legal Name:  
**GREEN TREE INVESTORS, LTD.**

Entity Fictitious Name:  
**GREEN TREE INVESTORS, LLC**

Entity Address:  
**5060 PARKCENTER AVENUE, SUITE D, DUBLIN, OH 43017**

**General Entity Information:**

Control Number: **2001022700950**  
Status: **Revoked**  
Entity Type: **Foreign Limited Liability Company (LLC)**

Entity Creation Date: **2/27/2001**  
Entity Date to Expire: **2/27/2031**  
Entity Inactive Date: **1/26/2005**

Original Creation Date: **2/15/2001**  
Original Creation State: **OH**

**There are no other names on file for this Entity.**

Registered Agent(name, address, city, state, zip):  
**PETER L. CORATOLA**  
**2524 TAMARACK LANE**  
**INDIANAPOLIS , IN 46227**

Principals(name, address, city, state, zip - when provided)  
**This Limited Liability Company Does Not Have Managers.**

Transactions:

Date Filed	Effective Date	Type
02/27/2001	02/27/2001	Application for Certificate of Authority
01/26/2005	01/26/2005	Revocation

**Corporate Reports:**  
**Years Paid**  
N/A



**Years Due**

2003/2004 2005/2006 2007/2008

**Additional Services Available:****This Business Entity is not eligible to receive a Certificate of Existence/Authorization.**

---

**NEW SEARCH**

*All the entity information captured by the Indiana Secretary of State, pursuant to law, is displayed on the Internet. For further information, please call our office at 317-232-6576. Copies of actual corporate documents can also be ordered online.*

If you encounter technical difficulties while using these services, please contact the *accessIndiana Webmaster*.

If you are unable to find the information you need through the resources provided on this web site, contact Secretary of State Todd Rokita's Business Services Division at 317-232-6576.

« Back to the SOS Web site

200105301710



DATE:	DOCUMENT ID	DESCRIPTION	FILING	EXPED	PENALTY	CERT	COPY
02/22/2001	200105301710	ARTICLES OF ORGANIZATION/DOM. LLC (LCA)	85.00	10.00	.00	5.00	.00

**Receipt**

This is not a bill. Please do not remit payment.

TRACY S COMISFORD  
5060 PARK CENTRAL AVE  
DUBLIN, OH 43017

# STATE OF OHIO

**Ohio Secretary of State, J. Kenneth Blackwell**

1210136

It is hereby certified that the Secretary of State of Ohio has custody of the business records for

**GREEN TREE INVESTORS, LTD.**

and, that said business records show the filing and recording of:

Document(s)

**ARTICLES OF ORGANIZATION/DOM. LLC**

Document No(s):

**200105301710**



United States of America  
State of Ohio  
Office of the Secretary of State

Witness my hand and the seal of  
the Secretary of State at Columbus,  
Ohio this 15th day of February,  
A.D. 2001.

*J. Kenneth Blackwell*  
Ohio Secretary of State

**PLAINTIFF'S  
EX. 433**



Prescribed by **J. Kenneth Blackwell**

Please obtain fee amount and mailing instructions from the Forms Inventory List (using the 3 digit form # located at the bottom of this form). To obtain the Forms Inventory List or for assistance, please

call Customer Service:

Central Ohio: (614)-466-3910 Toll Free: 1-877-SOS-FILE (1-877-767-3453)

SECRETARY OF STATE Expedite this form  Yes

2008 FEB 15 AM 11:18

**ARTICLES OF ORGANIZATION** CLIENT SERVICE CENTER

(Under Section 1705.04 of the Ohio Revised Code)  
Limited Liability Company

The undersigned, desiring to form a limited liability company, under Chapter 1705 of the Ohio Revised Code, do hereby state the following

FIRST: The name of said limited liability company shall be Green Tree Investors, Ltd.  
(the name must include the words "limited liability company", "limited", "Ltd", "Ltd.", "L.L.C.", or "L.L.C.")

SECOND This limited liability company shall exist for a period of Thirty (30) years

THIRD: The address to which interested persons may direct requests for copies of any operating agreement and any bylaws of this limited liability company is

5060 Park Center Avenue  
(street address or post office box)

Dublin OHIO 43017  
(city, village, or township) (state) (ZIP code)

Please check this box if additional provisions are attached hereto

Provisions attached hereto are incorporated herein and made a part of these articles of organization

**J. Kenneth Blackwell**  
Secretary of State

FOURTH: Purpose (optional)  
The business purpose of this limited liability company is to buy, sell, own  
operate, invest in, and manage real property of every kind and description,  
and to engage in any lawful business permitted by the laws of the State of Ohio.

IN WITNESS WHEREOF, we have hereunto subscribed our names on

Signed *Peter L. Coratola*  
Name Peter L. Coratola, Managing Member

(date)  
Signed \_\_\_\_\_  
Name \_\_\_\_\_

( If insufficient space for all signatures, please attach a separate sheet containing additional signatures )



# J. Kenneth Blackwell

Prescribed by:  
J. Kenneth Blackwell  
Secretary of State  
30 East Broad St. 14th Floor  
Columbus, Ohio 43266-0418

## ORIGINAL APPOINTMENT OF AGENT (for limited liability company)

The undersigned, being at least a majority of the members of Green Tree Investors, Ltd.  
(name of limited liability company)  
hereby appoint Peter L. Coratola to be the agent upon whom any process, notice or  
(name of agent)  
demand required or permitted by statute to be served upon the limited liability company may be served. The complete address  
of the agent is:

5060 Park Center Avenue

(street address - P.O. Boxes are not acceptable)

Dublin

Ohio

43017

(city, village, township)

(zip)

By <u>Peter L. Coratola</u> (authorized member, manager, or representative)	By _____ (authorized member, manager, or representative)
Name: <u>Peter L. Coratola, Managing Member</u>	Name: _____
By _____ (authorized member, manager, or representative)	By _____ (authorized member, manager, or representative)
Name: _____	Name: _____
By _____ (authorized member, manager, or representative)	By _____ (authorized member, manager, or representative)
Name: _____	Name: _____

### ACCEPTANCE OF APPOINTMENT

The undersigned, named herein as the statutory agent for Green Tree Investors, Ltd.  
(name of limited liability company)  
hereby acknowledges and accepts the appointment of agent for said limited liability company.

Peter L. Coratola  
(Agent's signature)

# EXHIBIT 2

Dial, H. James (01/08/08) 1/17/2008 12:00:00 PM

<p>1 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA</p> <p>2</p> <p>3 BEST WESTERN INTERNATIONAL, ) INC., a non-profit Arizona ) 4 corporation, ) 5 Plaintiff, ) 6 -v- ) CAUSE NO. CV06-1537-PHX-DGC 7 JAMES FURBER, an Internet ) website administrator, ) 8 et al. ) 9 Defendants. ) 10 H. JIM DIAL, an individual, ) 11 Counterclaimant, ) 12 -v- ) 13 BEST WESTERN INTERNATIONAL, ) INC., a non-profit Arizona ) 14 corporation, et al., ) 15 Counterdefendants. ) 16 17 The deposition upon oral examination of H. JAMES DIAL, a witness produced and sworn before me, Dana S. 18 Miller, RPR, CRR, Notary Public In and for the County of Hendricks, State of Indiana, taken on behalf of the 19 Plaintiff at the offices of Kightlinger &amp; Gray, 3620 Blackiston Boulevard, Suite 200, New Albany, Indiana, 20 on January 8, 2008, at 9:33 a.m., pursuant to the Federal Rules of Civil Procedure. 21 22 ACCURATE REPORTING OF INDIANA 23 William F. Daniels, Propr., RPR/CP and CM 24 12922 Brighton Avenue Carmel, Indiana 46032 25 (317)848-0088</p>	<p>1 Response to Litigation Threats 178 6-17-06 E-mail, Re: Fw: Letter to 133 Board D61505 2 179 6-23-06 Bonnett/Schloemer Letter 136 3 32 Exhibit 1 to Defendant James 147 Furber's Statement of Facts in 4 Support of His Motion for Summary Judgment (Previously Marked) 5 58 5-12-06 Posts on Blog (Previously 157 Marked) 6 180 Answers to BWI's First Set of 157 Interrogatories to Defendant H. James Dial 7 181 Sweeping Design Changes Coming Post 166 on Blog 8 9 By-Laws &amp; Articles (Previously 174 Marked) 9 182 9-28-07 Dear Best Westamer Letter 178 10 183 5-17-06 Posts on Blog 180 50 5-16-06 Dear Fellow Best Western 184 Voting Members Letter (Previously Marked) 11 184 5-22-06 Posts on Blog 187 185 Hell Will Freeze Over Blog 198 12 72 6-2-06 Postings on Blog (Previously 205 Marked) 13 73 6-3-06 Posts on Blog (Previously 209 Marked) 14 17 Best Western Aims at Doubling Asia 220 Operations Newspaper Article (Previously Marked) 15 16 Letter That Came Out at Convention 224 After the Q&amp;A Session (Previously Marked) 16 59 8-3-06 Posts on Blog (Previously 227 Marked) 17 167 McPeak Post on Blog (Previously 239 Marked) 18 168 Director McPeak - Request Post on 239 Blog (Previously Marked) 19 66 Rumor Post on Blog (Previously 239 Marked) 20 186 5-10-07 Lowe/Ricketts Letter 241 187 A Little Reminder Post on Blog 243 21 188 9-26-07 Counsel/Harvey Letter 244 189 Joint Report on Settlement 247 22 Negotiations 23 106 Best Western inn-Cider (Previously 255 Marked) 24 190 Answers to BWI's First Requests For 259</p>
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<p>1 APPEARANCES</p> <p>2</p> <p>3 FOR THE PLAINTIFF:</p> <p>4 DLA PIPER US, LLP Cynthia A. Ricketts, Esq. Allison L. Harvey, Esq. 5 2415 E. Camelback Road, Suite 700 Phoenix, Arizona 85016-4245 6 7 BEST WESTERN INTERNATIONAL, INC. David Youseff, Esq. Kristin Schloemer, Esq. 8 6201 N. 24th Parkway Phoenix, Arizona 85016-2023 9 10 FOR THE DEFENDANT AND COUNTERCLAIMANT H. JAMES DIAL AND DEFENDANTS JAMES FURBER, NIDRAH DIAL, THERESA FURBER, LOREN UNRUH and GAYLE UNRUH: 11 12 KIGHTLINGER &amp; GRAY, LLP Richard T. Mullineaux, Esq. Crystal G. Rowe, Esq. 13 3620 Blackiston Boulevard, Suite 200 New Albany, IN 47150 14 15 ALSO PRESENT: Nidrah Dial James Furber 16 INDEX OF EXAMINATION 17 PAGE 18 EXAMINATION BY MS. CYNTHIA RICKETTS 5 19 EXAMINATION BY MR. RICHARD MULLINEAUX 312 20 EXAMINATION BY MS. CYNTHIA RICKETTS 314 21 22 INDEX OF EXHIBITS 23 PAGE 24 76 Jim Dial's Answer to Plaintiffs' 119 First Amended Complaint and Dials' 25 Counterclaims ... (Previously Marked) 177 5-19-05 Letter, Re: Board Action in 126</p>	<p>1 Admission and Interrogatories to H. James Dial 2 46 Member Authorization Form 261 (Previously Marked) 3 191 Magnuson &amp; Jim Dial Posting on Blog 261 192 Leave Roman Alone Post on Blog 263 4 193 Please Take This Blog Site Down Jim 271 Post on Blog 5 194 No Chairman Elected Post on Blog 271 195 When Will the Black Hats Be Deposed 273 6 Post on Blog 44 Request for Membership Information 273 7 (Previously Marked) 196 Petition to Recall Director Post on 273 8 Blog 197 Why the CFO Must Be Truthful Post on 275 9 Blog 198 Double Standard Post on Blog 279 10 199 Blogger Notice About Notice 1 and 2 283 Post on Blog 11 200 We Don't Have to be Mushrooms 283 Anymore Post on Blog 12 201 The Board's Little Dance Post on 284 Blog 13 202 Outsourcing Again?? Post on Blog 285 203 New Chairman??? 2Yr Term Chairman??? 287 14 Post on Blog 204 H. Jim Dial's First Amended 288 15 Counterclaim 205 9-7-07 Counsel/Mullineaux Letter 306 16 206 Information of Roman's Loan 314 17 18 19 20 21 22 23 24 25</p>
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Dial, H. James (01/08/08) 1/17/2008 12:00:00 PM

301

1 removal of the Clarksville BWI from the  
 2 BestWestern.com Website, the Clarksville BWI lost  
 3 patrons and Jim Dial suffered harm." Do you see  
 4 that?  
 5 A Right.  
 6 Q Do you know how many patrons the Clarksville Inn or  
 7 your property in Clarksville suffered as a result  
 8 of--  
 9 A I have no idea. I'm the outside man. So you have  
 10 to go on what Nidrah says on that.  
 11 Q And it says that Jim Dial suffered harm. So  
 12 it's--  
 13 A Money.  
 14 Q Money? And whatever your inside person, your wife,  
 15 says you suffered, that would be the amount--  
 16 A Right.  
 17 Q -- is that correct? And the Best Western  
 18 Clarksville or the Green Tree Inn isn't held in  
 19 your name personally, correct?  
 20 A It is not.  
 21 Q And the property's held in, what is it, the Green  
 22 Tree Investors, LLC; is that correct?  
 23 A You have to go to my research person for that. I  
 24 don't keep track of all those titles.  
 25 Q If you can look at Count One of your counterclaim,

302

1 it talks about abuse of process. Do you see that  
 2 count?  
 3 A Yes.  
 4 Q And what -- is there anything other than what  
 5 you've already testified about that you believe  
 6 that the Best Western has done that was a willful  
 7 act and use of the judicial process for an ulterior  
 8 purpose not proper in the regular conduct of the  
 9 proceedings?  
 10 A I think the, yeah, the fact that the lawsuit was  
 11 filed. And it was improperly filed, in my opinion.  
 12 It was an improper purpose using members' money to  
 13 go after a means to recover some money for Roman,  
 14 which he's made -- boasted many times he had six,  
 15 \$700,000 coming he'd been assured.  
 16 Q Is there anything else?  
 17 A Not that I can think of right now.  
 18 Q If you can take a look at Count Two of the  
 19 counterclaim. And this count is entitled  
 20 Intentional Interference with Contractual  
 21 Expectancy - Against BWI and at Least One Member of  
 22 the Board. Do you see that?  
 23 A Uh-huh.  
 24 Q And is that, at least one member of the board, is  
 25 that primarily or only -- let me rephrase that

303

1 Is that at least one member of the board  
 2 reference limited to Mr. Jaworowicz at this time?  
 3 A I suppose that's true. I don't know.  
 4 Q And if you look at paragraph 62 and 63 where it's  
 5 talking about there was interference with your  
 6 expectancy and damage caused to you, is that  
 7 referring to the loss of the patrons at the Green  
 8 Tree Inn?  
 9 A Yes.  
 10 Q Is there anything else that you're referring to  
 11 there?  
 12 A Offhand, I can't say.  
 13 Q And if you'd look at Count Three of this, your  
 14 amended counterclaim, this Count Three is Breach of  
 15 Fiduciary Duty - Against the Board." Do you see  
 16 that?  
 17 A Yes.  
 18 Q And you're talking about, is this against all the  
 19 board members who were named? There's a list on  
 20 page 2, it's Nils Kindgren, Larry McRae, Roman  
 21 Jaworowicz, Bonnie McPeake, Charlie Helm and Ray  
 22 Johnston and Dave Francis.  
 23 Are you claiming that all of those board  
 24 members have breached their fiduciary duties?  
 25 A Yes and no.

304

1 Q Can you explain what you mean?  
 2 A Well, I believe that three of the board members,  
 3 which is Bonnie, Dave and Nils, have done far less  
 4 to damage me than the other four, but I'm not sure  
 5 that they have done everything in their power to  
 6 fulfill their fiduciary duty to the members of Best  
 7 Western.  
 8 Q And what do you believe that Bonnie McPeake, Nils  
 9 Kindgren and David Francis could have done or may  
 10 have done to fulfill the fiduciary duties?  
 11 A Tell the members what the hell's going on.  
 12 Q About what?  
 13 A Instead of sealing their lips when they get out  
 14 from the board, like Dr. Nygren told them to or  
 15 like the lawyers tell them to.  
 16 Get out and tell the members, okay, I have a  
 17 fiduciary duty, so that overrides everything else.  
 18 Here is what's going on in Best Western, and I'm  
 19 not going to be silenced.  
 20 Q So are you claiming that the board by these three  
 21 board members by not talking to the members have  
 22 breached their fiduciary duties?  
 23 A Yes.  
 24 Q And what do you believe that Roman Jaworowicz,  
 25 Charlie Helm, Larry McRae and Ray Johnston have

# EXHIBIT 3

UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF ARIZONA  
 BEST WESTERN INTERNATIONAL, )  
 INC., a non-profit Arizona )  
 corporation, )  
 )  
 Plaintiff, )  
 )  
 -v- ) CAUSE NO.  
 ) CV06-1537-PHX-DGC  
 JAMES FURBER, an Internet )  
 website administrator, )  
 et al. )  
 )  
 Defendants. )  
 )  
 H. JIM DIAL, an individual, )  
 )  
 Counterclaimant, )  
 )  
 -v- )  
 )  
 BEST WESTERN INTERNATIONAL, )  
 INC., a non-profit Arizona )  
 corporation, et al., )  
 )  
 Counterdefendants. )  
 )  
 The deposition upon oral examination of NIDRAH  
 DIAL, a witness produced and sworn before me, Dana S.  
 Miller, RPR, CRR, Notary Public in and for the County  
 of Hendricks, State of Indiana, taken on behalf of the  
 Plaintiff at the offices of Kightlinger & Gray, 3620  
 Blackiston Boulevard, Suite 200, New Albany, Indiana,  
 on January 7, 2008, at 9:39 a.m., pursuant to the  
 Federal Rules of Civil Procedure.  
 ACCURATE REPORTING OF INDIANA  
 William F. Daniels, Propr., RPR/CP and CM  
 12922 Brighton Avenue  
 Carmel, Indiana 46032  
 (317)848-0088

1 149 How Did It Come To This? Post on 216  
 Blog  
 2 150 9-13-06 E-mail, Re: Wondering 223  
 151 Just Wondering Post on Blog 224  
 3 152 10-4-06 E-mail, Re: Good Morning 227  
 153 10-4-06 E-mail, Re: Good Morning 244  
 4 154 10-4-06 E-mail, Re: Good Morning 247  
 155 11-9-06 E-mail, Re: Fwd: Site 248  
 5 156 Important Notice to Posters on This 249  
 Site  
 6 157 12-2-06 E-mail, Re: Important 250  
 Information  
 7 158 2-7-07 E-mail, Re: Visitors 254  
 159 8-23-06 E-mail, Re: The Only Thing 254  
 8 160 9-12-06 E-mail, Re: Read This 257  
 161 12-19-06 E-mail, Re: FreeWrites 258  
 9 32 Exhibit 1 to Defendant James 259  
 Furber's Statement of Facts in  
 Support of His Motion for Summary  
 Judgment (Previously Marked)  
 10 162 12-18-06 E-Mail, Re: FreeWrites 269  
 163 2-7-07 E-mail, Re: I Saw the Post 270  
 12 164 Free Speech Post 271  
 165 7-3-06 E-mail, Re: FW: Hosting 275  
 13 Options and Considerations  
 166 Dear Fellow Best Western Member Fax 279  
 14 167 McPeak Post on Blog 280  
 168 Director McPeak - Request Post on 281  
 Blog  
 15 68 Rumor Post on Blog (Previously 281  
 Marked)  
 16 169 Roman He is Our Director Our Man 286  
 Post on Blog  
 17 170 Roman Will Be Chairman Our Man Post 286  
 on Blog  
 18 171 Chairman Roman Jaworowicz - Yes Post 287  
 on Blog  
 19 172 Work Product Document Log 289  
 20 173 Privilege Log for Unallocated Disc 299  
 Space  
 21 174 Fivefeethigh.com Post on Blog 311  
 175 What is BW & Fivefeethigh Up-To? 311  
 Post on Blog  
 22 176 Another BW Site Not Protected Post 312  
 on Blog  
 23  
 24  
 25

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 7 BEST WESTERN INTERNATIONAL, INC.  
 David Youssefi, Esq.  
 Kristin Schloemer, Esq.  
 8 6201 N. 24th Parkway  
 Phoenix, Arizona 85016-2023  
 9  
 10 FOR THE DEFENDANT AND COUNTERCLAIMANT H. JAMES DIAL AND  
 DEFENDANTS JAMES FURBER, NIDRAH DIAL, THERESA FURBER,  
 LOREN UNRUH and GAYLE UNRUH:  
 11  
 12 KIGHTLINGER & GRAY, LLP  
 Richard T. Mullineaux, Esq.  
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 13 3620 Blackiston Boulevard, Suite 200  
 New Albany, IN 47150  
 14  
 15 ALSO PRESENT: James Dial  
 James Furber  
 16 INDEX OF EXAMINATION  
 17 PAGE  
 18 EXAMINATION BY MS. CYNTHIA RICKETTS 4  
 19  
 20 INDEX OF EXHIBITS  
 21 PAGE  
 22 144 Nidrah Dial's Affidavit 7  
 23 145 5-15-04 Letter, Re: Repurchase of 80  
 Green Tree Inn  
 24 146 5-15-04 Membership Application and 83  
 Agreement  
 25 147 6-14-06 Dial/Ricketts Letter, Re: 180  
 Document Retention and Security  
 Issues  
 148 Responses to Request for Production 184

1 NIDRAH DIAL,  
 2 having been first duly sworn to tell the truth,  
 3 the whole truth, and nothing but the truth,  
 4 relating to said matter, was examined and  
 5 testified as follows:  
 6 EXAMINATION BY MS. CYNTHIA RICKETTS:  
 7 Q Please state your name.  
 8 A Nidrah Dial.  
 9 Q What is your home address?  
 10 A We use a mailbox. P.O. Box 2396, Clarksville,  
 11 Indiana.  
 12 Q Where is it that you actually –  
 13 A 4711 – 47131. We actually live at 1425 Broadway,  
 14 Clarksville, different ZIP code.  
 15 Q And how long have you lived at the 1425 Broadway  
 16 address?  
 17 A I believe it was March of '05.  
 18 Q Is the 1425 Broadway address near the Clarksville  
 19 Green Tree Inn?  
 20 A It is at the Green Tree Inn. We have an apartment  
 21 there.  
 22 Q An apartment at the Green Tree Inn?  
 23 A Uh-huh.  
 24 Q And how big is the apartment?  
 25 A About 3,000 square feet.

Dial, Nidrah 1/7/2008 5:22:00 PM

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1 Q How many bedrooms does it have?  
2 A Two.  
3 Q Does anyone other than your husband, Jim Dial, live  
4 at that address, 1425 Broadway?  
5 A The dog.  
6 Q Anyone else?  
7 A No.  
8 Q Other than – so do you actually own the apartment?  
9 A We own the hotel, so it's –  
10 Q And the apartment is part of the hotel; is that  
11 correct?  
12 A That's correct.  
13 Q You've sat through a number of depositions in this  
14 matter, correct?  
15 A Correct.  
16 Q So you understand generally how we're going to  
17 operate?  
18 A Yes.  
19 Q I'm going to ask you some questions. I'll try to  
20 give you the courtesy of letting you finish your  
21 answer before I start my question. If you could  
22 give me the same courtesy of letting me finish my  
23 question before you start your answer, it will make  
24 the court reporter's job a lot easier. Okay?  
25 A Yes.

1 A No. I might have problems keeping awake. It's  
2 thyroid.  
3 MS. RICKETTS: We'll mark as an Exhibit 144.  
4 (Deposition Exhibit 144 marked for  
5 identification.)  
6 Q I've handed you what has been marked as Exhibit  
7 144. It is a document, I believe it's your  
8 affidavit; is that correct?  
9 A Yes.  
10 Q Is this a declaration you submitted in this matter?  
11 Did you sign this affidavit at one point in time?  
12 A Yes, but there's no signature page on here.  
13 Q Right. I don't think that we ever received a  
14 signature page.  
15 A I signed it. I definitely signed it. I'd feel  
16 better if the signature page were on here.  
17 Q Do you have a signed version of it?  
18 A There may be even another page, seems like it.  
19 Q Yeah, maybe there is, yeah.  
20 A I probably have a copy with me.  
21 MS. ROWE: This is it right here. I'll make  
22 you a copy.  
23 MS. RICKETTS: Okay, great.  
24 THE WITNESS: Does it end with No. 167  
25 MS. ROWE: Yes.

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1 Q It's also important that you answer audibly rather  
2 than nodding your head or shrugging your shoulders  
3 so that she can, the court reporter can take down  
4 your responses. Okay?  
5 A Okay.  
6 Q If at any point in time you'd like to take a break,  
7 we can take a break as long as there's not a  
8 question pending. All right?  
9 A Yes.  
10 Q And if you don't understand a question I've asked  
11 you, please ask me to rephrase my question, and  
12 I'll do my best to rephrase my question in a manner  
13 that you understand it. Okay?  
14 A Fine.  
15 Q If you answer my question, I'm going to assume that  
16 you've understood what I've asked you.  
17 A Correct.  
18 Q You do understand, Mrs. Dial, that you are under  
19 oath today?  
20 A Yes.  
21 Q Are you on any medication this morning?  
22 A No. In fact, I forgot to take it.  
23 Q The fact that you forgot to take your medication,  
24 will that impact your ability to tell the truth  
25 today?

1 MS. RICKETTS: We'll re-mark it.  
2 MR. MULLINEAUX: Yeah, we'll get a copy and  
3 just – want to just take a second, and we'll get  
4 that done.  
5 MS. RICKETTS: Okay, that's fine. Great,  
6 thank you.  
7 (A recess was taken.)  
8 Q I've handed you what has been marked as Exhibit  
9 144. And this is a copy of your declaration; is  
10 that correct?  
11 A That's correct.  
12 Q And is that your signature on page 4 of this  
13 declaration?  
14 A Yes, it is.  
15 Q And did you sign it on or about September 1, 2007?  
16 A Right, uh-huh.  
17 Q In this declaration, paragraph 2, you indicate that  
18 Green Tree Investors, LLC owns the Best Western  
19 Green Tree Inn in Clarksville, Indiana.  
20 Is that still true today?  
21 A Yes.  
22 Q And for how long a period of time has Green Tree  
23 Investors, LLC owned Best Western Green Tree Inn?  
24 A Since 1981, I think, but we were not part of Green  
25 Tree Investors at that time.

Dial, Nidrah 1/7/2008 5:22:00 PM

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1 Q Who was part of Green Tree Investors at that point  
2 in time?  
3 A It was Bob Holloway, Dave Huff and probably Janet  
4 Huff, but I'm not sure about Janet Huff. And there  
5 was another man, I can't remember his name.  
6 Q When did you become a part of Green Tree Investors,  
7 LLC?  
8 A In April of 19 – 2004.  
9 Q Is that the same time that Mr. Dial, Jim Dial,  
10 became a part of Green Tree Investors, LLC?  
11 A Yes.  
12 Q Why did you and Mr. Dial become a part of Green  
13 Tree Investors, LLC in April of 2004?  
14 A We were buying the hotel. And we bought the LL –  
15 the LLC was part of the deal.  
16 Q Are you a member of Green Tree Investors, LLC?  
17 A I don't know whether they call it a member or not,  
18 but I am, yes, I am part of it.  
19 Q Is anyone other than you and your husband, Jim  
20 Dial, part of Green Tree Investors, LLC?  
21 A Yes.  
22 Q Who?  
23 A Janet Huff.  
24 Q And Janet Huff owns 50 percent?  
25 A Actually, it's not Janet Huff. It's actually two

1 Green Tree Investors, LLC?  
2 MR. MULLINEAUX: If you know.  
3 A She was – she just left her portion in when  
4 Mr. Holloway sold his. We actually bought  
5 Mr. Holloway's interest. The third man had sold  
6 out to them a long time ago.  
7 Q Do you recall how much you paid for Mr. Holloway's  
8 interest?  
9 A No. I could look it up, but I do not remember.  
10 Q Do you know what the document is entitled that  
11 reflects this purchase of Mr. Holloway's interest?  
12 A Actually, no. It would be the closing papers on  
13 the property. I haven't looked at those for some  
14 time. I don't remember.  
15 Q Do you recall how much you and Mr. Dial paid for  
16 Mr. Holloway's interest in the Green Tree  
17 Investors, LLC?  
18 A No, I don't.  
19 Q Do you have an idea or an approximate amount?  
20 A No, because it's not that simple with the trust and  
21 everything involved. I really don't want to give  
22 an amount, no.  
23 Q You have no idea, no range of the amount?  
24 A No, because I'm not sure what portion was allocated  
25 to Mrs. Huff and Mr. Holloway.

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1 of her trusts. And I can't tell you the exact  
2 percent. They're both in the neighborhood of  
3 25 percent, but they're not exactly 25 percent.  
4 They total 50 percent.  
5 Q So Janet Huff's interest in Green Tree  
6 Investors, LLC totals 50 percent?  
7 A Yes.  
8 Q So you own – you and Mr. Dial own 50 percent of  
9 Green Tree Investors, LLC; is that correct?  
10 A Yes.  
11 Q If there is a disagreement between you and Mr. Dial  
12 on the one hand and Mrs. Huff on the other hand  
13 who –  
14 A She –  
15 Q How is the tie resolved?  
16 A She has no say whatsoever in the operation of the  
17 business or the LLC either.  
18 Q Is there a document reflecting that?  
19 A I'm sure there is.  
20 Q Do you know what that document's called?  
21 A No. It would have been prior to the closing on the  
22 sale of the property.  
23 Q What role does Janet Huff through her two trusts –  
24 A Strictly as an investor.  
25 Q How much money did Mrs. Huff's two trusts invest in

1 Q Does Mrs. Huff get any of the – any earnings or  
2 profit that are –  
3 A No.  
4 Q – generated?  
5 A No. She only gets interest on her money.  
6 Q How often is the interest on Mrs. Huff's money paid  
7 to her?  
8 A Monthly.  
9 Q And how much is the monthly interest paid to  
10 Mrs. Huff?  
11 A \$6,000.  
12 Q Is that paid by the Green Tree Investors, LLC?  
13 A Yes.  
14 Q In paragraph 4 of your affidavit that's been marked  
15 as Exhibit 44, you state that you are not a member  
16 of Best Western and have never been a member of  
17 Best Western.  
18 A That is correct.  
19 Q Is that true still today?  
20 A Yes.  
21 Q Have you had any involvement in Best Western since  
22 the purchase of the Green Tree Inn?  
23 A Yes.  
24 Q And what has the nature of that involvement been?  
25 A I'm the general manager at the property.

# EXHIBIT 4

**ASSIGNMENT OF CAUSE OF ACTION**

For valuable consideration, the undersigned assigns to H. James Dial, all the undersigned's right, title and interest in and to the cause of action against Best Western International, Inc., which is currently pending in the United States District Court for the District of Arizona, Case Number CV06-01537-PHX-DGC for intentional interference with contractual expectancy. The Assignment includes the full rights to maintain an action and to settle, compromise, or reassign the cause of action, and to give a release in the undersigned's name in full discharge of the liability under the cause of action.

Dated the 14<sup>th</sup> day of October, 2008.

GREEN TREE INVESTORS, LLC

BY: H. James Dial  
H. James Dial

BY: Nidrah A. Dial  
Nidrah A. Dial

BY: Janet L. Huff  
Janet L. Huff

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

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

Plaintiff,

vs.

James Dial, an Internet website blogger and Member of Best Western International, Inc.; Nidrah Dial, an Internet website blogger; and Loren Unruh, an Internet website blogger and Member of Best Western International, Inc.,

Defendants.

Case No. CV06-1537-PHX-DGC

**[PROPOSED] ORDER  
GRANTING  
COUNTERDEFENDANTS'  
MOTION TO DISMISS COUNTS  
TWO AND THREE OF DIAL'S  
COUNTERCLAIMS PURSUANT  
TO RULE 12(b)(1) AND 12(h)**

**(The Honorable David G.  
Campbell)**

Having considered Plaintiff/Counterdefendant Best Western International, Inc. and Counterdefendant Roman Jaworowicz's Motion to Dismiss Counts Two and Three of James Dial's ("Dial") Counterclaims, and for good cause appearing, it is hereby

ORDERED that the Motion is granted; it is further

ORDERED that Count Two of Dial's Counterclaims is hereby dismissed with prejudice; and it is further

ORDERED that Count Three of Dial's Counterclaims is hereby dismissed with prejudice.