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8 **SUPERIOR COURT OF ARIZONA**

9 **YAVAPAI COUNTY**

10 HARVARD SIMON I, LLC, an
11 Arizona limited liability company; THE
12 PRESERVE AT THE RANCH, LLC,
13 an Arizona limited liability company;
14 OLD CAPITOL INVESTMENTS,
15 LLC, an Arizona limited liability
16 company; and WHISPERING
17 CANYON DEVELOPMENT, LLC, an
18 Arizona limited liability company,

19 Plaintiffs,

20 v.

21 INSCRIPTION CANYON RANCH
22 SANITARY DISTRICT, an Arizona
23 sanitary district; GENE LEASURE,
24 District Board Member; CHARLIE
25 TURNEY, District Board Member; and
26 DAYNE TAYLOR, District Board
27 Member,

28 Defendants.

No. CV2010-01855

**DEFENDANT'S INITIAL RULE 26.1
DISCLOSURE STATEMENT**

21 Pursuant to Ariz.R.Civ.P. Rule 26. Defendants Inscription Canyon Ranch Sanitary
22 District ("the District"), and District Board Members Gene Leasure, Charlie Turney and
23 Dayne Taylor, by and through undersigned counsel, hereby submit their Initial Rule 26.1
24 Initial Disclosure Statement. As of the submission of this Disclosure Statement,
25 Defendants have not completed discovery concerning the factual basis of their claims or
26 the claims by other parties in this case. Nonetheless, Defendants provide the following
27 disclosures in good faith. Notwithstanding Defendants' good faith effort, they have not
28

1 yet discovered all relevant facts, legal theories, witnesses or documents, and may have
2 inadvertently omitted facts, legal theories, witnesses and documents from this Disclosure
3 Statement, which later may be deemed relevant. As additional facts, legal theories,
4 witnesses and documents are discovered and developed, Defendants will supplement this
5 Disclosure Statement. Notwithstanding these limitations, and without waiving the
6 foregoing rights, Defendants makes the following disclosures:

7 **I. FACTUAL BASIS FOR DEFENDANTS' DEFENSE**

8 **A. ICR SANITARY DISTRICT AND THE ORIGINAL TREATMENT
9 PLANT**

10 The Plaintiffs in this case are Harvard Simon I, L.L.C. ("Harvard"), Old Capitol
11 Investments, L.L.C. and Whispering Canyon Development, L.L.C. (collectively
12 "Whispering Canyon" or "WC") and The Preserve at the Ranch, L.L.C. ("The Preserve").

13 The ICR Sanitary District (the "District"), a political subdivision of the State, was
14 duly created by the Yavapai County Board of Supervisors in December 1995. The initial
15 board members were Swayze E. McCraine, the developer of Inscription Canyon Ranch
16 ("ICR"), Kimble McClymonds, a water/wastewater operator, and William A. Gary, a real
17 estate developer. The District owns the land upon which the SBR Plant was located and
18 where the current treatment plant is situated. The original treatment plant consisted of a
19 Sequencing Batch Reactor ("SBR Plant") and was initially permitted for 46,000 gallons
20 per day ("gpd"). The SBR Plant was completed prior to 1999 to serve only the ICR
21 development.

22 **B. THE DISTRICT BOARD**

23 The District is governed by a three-member Board, which makes the necessary
24 policy, regulatory and business decisions for the District's benefit. Gene Leasure, Dayne
25 Taylor and Charles Turney are the current Board members (the "Board"). In addition to
26 holding semi-monthly public meetings, the Board performs other discretionary duties,
27 such as monitoring and regulating wastewater demands and activities in the District. The
28 Board members donate their time and have never charged the District for their work or

1 expenses (except for minor office-related supplies and mileage).

2 The Board, on behalf of the District, provides sanitary services to members in the
3 District. The Board, it is required by law to assure its members and future lot owners that
4 the wastewater treatment plant in the District has the capacity to treat their current and
5 future planned sewage. The Board also looks after the interests of the lots owners by
6 determining whether, in its discretion, the District's wastewater treatment plant appears
7 to be in compliance with all laws and regulations of the State of Arizona, including those
8 adopted by the District.

9 **C. THE HARVARD – DISTRICT AGREEMENT**

10 Prior to 1999, the District was content with the existing WWTP. Harvard believed
11 that it could benefit from the use of the District's WWTP and approached the District
12 with an enticing proposition for increasing its boundaries to include Harvard's Talking
13 Rock Ranch development. Harvard desired the use of the existing WWTP and a potential
14 source of effluent for its golf course.

15 Harvard negotiated with Swayze E. McCraine and entered into an agreement with
16 the District on December 8, 2000. In consideration for extending the District's
17 boundaries to encompass Harvard's Talking Rock Ranch ("TRR") development
18 (containing approximately 1,500 residential dwellings, golf course, ranch compound and
19 common areas), Harvard agreed, among other things, to:

- 20 a. Construct the sewer collection systems on its development;
- 21 b. Construct the wastewater treatment facility to service its development
22 and other developments in the District so Harvard could accelerate
23 Harvard's ability to sell lots that would be delayed in seeking approvals
24 by the Arizona Department of Environmental Quality ("ADEQ");
- 25 c. Construct the new wastewater treatment plant at no cost to the District;
26 and
- 27 d. Construct the new plant in accordance with all applicable standards and
28 in strict conformance with applicable regulations of ADEQ, Yavapai
County Environmental Services Department (the "County"), and the
District.

1 Upon information and belief, the District would not agree to jeopardize its ability to
2 provide adequate WWTP resources to its lot owners in exchange for an unsecured
3 promise to restore the District to a compliance position at some uncertain date in the
4 future.

5 The inducements intended with respect to the Wastewater Treatment Plant
6 (“WWTP”) improvements are self-evident. The Harvard – District Agreement waived
7 the District’s \$2,500 tie-in fee for the Talking Rock Ranch development, contemplating
8 not that Harvard would have the interest-free use of the monies for indefinite period of
9 time but, rather, that Harvard was about to embark upon expanding the treatment plant’s
10 capacity. The Agreement also provides that effluent from the treatment plant would be
11 made available to Harvard for use on the Talking Rock Ranch’s golf course (“the TRR
12 Golf Course”), with “[t]he price to be paid for such effluent to be mutually agreed upon
13 between District and [Harvard], from time to time.” Nowhere is there any expression of
14 an intent that the capacity of the existing WWTP be reduced to enable Harvard to provide
15 effluent for the TRR Golf Course.

16 In fact, Harvard represented to the District that “Harvard has agreed to spend
17 millions of dollars to add capacity to the existing plant and upgrade that plant at our
18 expense so that not only our future residents but also those in the utilities [sic] current
19 subdivisions will have a higher level of wastewater service.” In May of 2001, Harvard
20 entered into a “Utility Development Agreement” with Pivotal that the District understood
21 to be in furtherance of Harvard’s obligation to construct the expanded WWTP
22 contemplated by the Harvard-District Agreement.

23 The initial Harvard Agreement had been negotiated and signed between
24 developers and without proper Board approval. On June 03, 2002, the District Board
25 addressed “the treatment plant expansion, development plans, modifications to the
26 current wastewater system, financing and other issues that relate to the recorded
27 agreements with Harvard. The Board approved the Harvard Agreement, “other than the
28

1 15% repayment portion which will be addressed in the future.”

2 **D. HARVARD – PIVOTAL AGREEMENT**

3 Harvard and Pivotal agreed to construct the treatment plant in increments to avoid
4 paying upfront for the full infrastructure cost of treating effluent for Harvard’s Talking
5 Rock Ranch development (and the pre-existing ICR development), as required under
6 ADEQ laws and regulations and the District’s Ordinance. Harvard and Pivotal to
7 incremental construction of expanded treatment plant capacity corresponding to lots sales
8 and building permits. ADEQ’s regulations, however, require that planned wastewater
9 treatment capacity correspond to the number of lots in approved subdivisions. Houses
10 may be constructed faster than the treatment plant expansions.

11 **E. THE BOARD’S EXERCISE OF ITS DISCRETION TO INSIST
12 UPON HARVARD’S COMPLIANCE WITH ITS OBLIGATIONS TO
13 CONTSTRUCT A PLANT THAT CONFORMS WITH ADEQ
14 REGULATIONS AT NO EXPENSE TO THE DISTRICT.**

14 Under the first Significant Amendment to the APP in 2002, Santec, on behalf of
15 Harvard and Pivotal, designed a plant to be expanded in six phases to handle a flow of
16 455,500 gallons per day. The initial phase of the Santec Plant was designed and
17 constructed with a 62,500 gpd designed capacity. However, in the APP application for
18 the existing Santec Plant, Santec represented to ADEQ that the designed flow from TRR
19 and ICR to the plant would be 62,500 gpd and the actual capacity at the treatment plant
20 would be 108,500 gpd. The actual WWTP does not have a designed capacity of more
21 than 62,500 gpd and may not actually handle that volume of flow.

22 On December 31, 2002, the APP was amended to change the treatment process of
23 the plant to modified extended aeration (called the “Santec Plant”) and to increase the
24 permit capacity from 46,000 gpd to 455,000 gpd. The amendment also required Class B+
25 level of effluent treatment from the plant. Effluent from the plant is discharged to the
26 TRR golf course for reuse.

27 In January 2004, Jason Williamson of Pivotal informed the District (Jennifer
28

1 Bartos) that the first phase of the Santec Plant (62,500 gpd) had been running and ready
2 to receive raw wastewater in April 2003. He requested that the plant be transferred to the
3 District, although he acknowledged “a small number of issues remained.” Because the
4 warranty period was about to expire and the District was concerned about the problems
5 with the WWTP, the Board did not accept the defective Santec Plant. Currently, the
6 Santec Plant is being used and the old original SBR tanks are not in service. Expansion
7 of the Santec Plant is not feasible in the limited space of the treatment plant site owned
8 by the District.

9 **F. FANN ENVIRONMENTAL’S REVIEW OF THE SWI 2006 STUDY**

10 The Board hired an environmental consulting firm to provide its professional and
11 unbiased expertise in determining sewage treatment demands in the District. Michael
12 Young of Fann Environmental, LLC (“Fann Environmental”) concluded that an earlier
13 study performed for Harvard (“the SWI Study”) excluded significant data and “certain
14 aspects of the Study were glossed over or were omitted to defend [SWI’s]
15 recommendations.” Furthermore he reported: “In review of the anticipated ‘build-out’
16 design capacity of 485,500 gpd we found no consideration for several factors including,
17 change of residential use (number of persons per residential unit), increase BOD and TSS
18 due to water conservation measures and increased flow from non-residential users due to
19 increase use of the community facilities.”

20 Later, Jeff T. Sawyer, Vice-President of Fann Environmental, advised the
21 Board on the appropriate gpd rate for the District. He reported that (1) 165
22 gpd per residence would not be prudent as suggested by SWI; (2) ADEQ
23 would not accept a rate below 200 gpd per residence, and (c) he
24 recommended that **250 gpd per household** be used in designing the
25 treatment facility.

26 The District Board, in reliance on the professional expertise of Fann Environmental and
27 in the exercise of its discretion, determined that the current Santec plant is significantly
28 undersized to handle additional hookups to the treatment plant in the District.

1 **G. CIVILTEC’S ESTIMATES OF THE DISTRICT’S WASTEWATER**
2 **TREATMENT DEMANDS IN 2007**

3 The District hired Civiltec Engineering, Inc. (“Civiltec”) to independently review
4 Harvard’s wastewater treatment demands. The Board asked Civiltec to provide the
5 District with its professional and unbiased determination of the amount of wastewater
6 treatment capacity that would be required of the District. In April 2007, Richard H.
7 Shroads, a certified professional engineer with Civiltec, calculated sewage treatment
8 demands using a range of estimated daily gallons per homes.

9 Mr. Shroads determined the following required average daily wastewater
10 treatment using the three types of communities and three different events: lots sold to
11 date, lots platted, and ultimate build out. He calculated the treatment plant capacity based
12 on lots sold to date for the following respective communities: a retirement community
13 (159,040 gpd), for a hybrid community (198,800 gpd), and a family community (238,560
14 gpd). Based on lots platted, he estimated the average daily wastewater treatment
15 requirement for: a retirement community (225,120 gpd), a hybrid community (281,400
16 gpd), and a family community (337,680 gpd). For the ultimate planned lots, Mr. Shroads
17 estimated the average daily wastewater treatment demand for: a retirement community
18 (382,400), a hybrid community (478,000 gpd), and a family community (573,600 gpd).
19 Civiltec did not apply any peaking factor to these calculations. Under any of these
20 scenarios and assumptions, the existing 62,500-gpd designed capacity plant is grossly
21 inadequate.

22 Civiltec advised the Board in 2007 that the sewage treatment capacity must be at
23 least 178,909 gpd to treat sewage under the lowest residential gpd (lots sold in the
24 District for a retirement community) and from the TRR Compound. Given the
25 unquestionably reasonable basis for the moratorium, the District’s discretionary acts are
26 not subject to question by Plaintiffs.

27 **H. WHISPERING CANYON DEVELOPMENT**
28

1 Under the Harvard – Pivotal Agreement, the parties acknowledged that
2 “Whispering Canyons” development may seek sanitary services from the District, and if
3 so, Whispering Canyons and Pivotal contemplated they would enter into a Utility
4 Development Agreement. Whispering Canyons would then pay Harvard \$75,000 (or 25
5 percent of the “Initial and Progress” payments Harvard agreed to pay Pivotal).
6 Whispering Canyon is allegedly owned by Old Capitol Investments L.L.C., an Arizona
7 limited liability company, whose members are Paul E. Johnson, Jr., Roben Johnson,
8 Kathryn Johnson, Christa Johnson, PJJR Consulting LLC, and Four Capital Group, Inc.,
9 as members.

10 On July 16, 2002, Capital Title Agency Trust No. 1043, on behalf of the
11 beneficiaries of the Trust (HWH Enterprises, L.L.C. and Old Capital Investments,
12 L.L.C.), requested that the District to amend its boundaries to include Whispering
13 Canyon. On August 7, 2002, the District Board approved the annexation of Whispering
14 Canyon within the District, and informed Whispering Canyon of its terms: “Capacity
15 adequate to service all dwellings in the annexed area planned development shall be paid
16 for and supplied by the Whispering Canyons Developer through an agreement with
17 Pivotal Utility Management/Santec Corporation.” The District’s approval to annex WC
18 further provided that all improvements for that development and the capacity in the
19 treatment plant “shall be provided [by WC] at no cost to the present Sanitary District,”
20 and WC would be subject to the District’s Ordinance.

21 In the District’s Resolution No. 2002-4, Whispering Canyon was annexed into the
22 District subject to the following conditions:

- 23
24 (a) All improvements required to serve the annexed properties will be bought and
25 paid for by the landowners having property within the annexed area. This
26 includes, but is not limited to: financing costs, engineering services, easements
27 and/or rights-of-way, sewer mains, laterals, pump stations and service
28 connections within the annexed area; upgrade of facilities such as pump
stations, sewer mains and laterals within the present Sanitary District as may

1 be required to service the area to be annexed. Capacity adequate to service all
2 dwelling in the annexed area planned development shall be paid for and
3 supplied by the Whispering Canyons Developer through an agreement with
4 Pivotal Utility Management/Santec Corporation.

5 (b) Said improvements will be designed to meet all Federal, State and local
6 regulations. Prior to construction, all plans and specifications shall be
7 approved by all involved regulatory agencies, including the ICR Sanitary
8 District.

9 (c) All improvements as specified in (a) above shall be provided at no cost to the
10 present Sanitary District. Free and clear title to all required improvements and
11 all related easements shall be delivered to the District prior to the
12 commencement of any sewage treatment services to the annexed area
13 described above.

(emphasis added).

14 **I. THE PRESERVE AT THE RANCH DEVELOPMENT**

15 The Preserve was previously part of Harvard's TRR and The Preserve is subject to
16 the Harvard – District Agreement. In 2004, the District approved the first twelve lots to
17 be developed in The Preserve subject to certain conditions, including among others:

18 Developer must pay all expenses incurred by the District (including
19 administrative, engineering, operational, or legal if necessary) that are
20 related to the development of his project. None of the fees are negotiable
21 and "reasonable & customary" will be determined by the District.

22 The District accepted the sewer infrastructure of The Preserve development.

23 **J. INSCRIPTION CANYON RANCH**

24 Inscription Canyon Ranch was the original development served by the District. Of
25 the 356 lots in Inscription Canyon Ranch, 224 dwellings have been built and are
26 receiving wastewater treatment at the Santec Plant. Harvard (and The Preserve) and
27 Whispering Canyon agreed to build sufficient treatment capacity for the entire 356
28 residential lots in ICR, as well as the additional sewage treatment capacities for their

1 developments.

2 **K. THE 2006 MORATORIUM, ITS SUSPENSION, AND ESCROW**
3 **AGREEMENT**

4 In 2005, Harvard represented to the District that it had been collecting WWTP fees
5 from lot purchasers and paying those fees to Pivotal for purposes of expanding the sewer
6 plant under Harvard's agreement with Pivotal. In 2006, the District adopted a
7 moratorium to regulate additional "approvals to construct" in the District. The extensive
8 recitals in the 2006 moratorium resolution explain the legal basis and factual background
9 leading up to the 2006 and 2009 moratoriums adopted by the District.

10 In a letter dated on or about September 25, 2006, the Board informed Harvard of
11 the conditions for lifting the 2006 Moratorium. It required, among other conditions, the
12 submission of Capacity Assurance forms for each completed and anticipated subdivision
13 (or phase) through build-out. The Board also required financial assurance that the plant
14 would be completed to handle sewage treatment through build out in the District, such as
15 through an escrow account controlled by the District with funds to meet those costs or a
16 construction loan secured by a first mortgage on Harvard's assets.

17 To induce the Board to lift the 2006 moratorium, Harvard's Craig Krumwiede
18 represented to the District Board that funding of the new plant's construction would not
19 be a problem. Mr. Krumwiede assured the District several times that it had set aside
20 millions of dollars for constructing the new plant, "it was not a problem," and that
21 Harvard would live up to its signed agreement with the District to build the new
22 expanded plant at no cost to the District. The District Board intended to hold Harvard to
23 its promise to begin planning for the construction of the Build-Out WWTP with
24 Harvard's funds, as promised.

25 After discussions with Craig Krumwiede and Clint Poteet of Harvard, the District
26 agreed to lift the 2006 moratorium in exchange for Harvard's agreement to make "a good
27 faith" deposit of \$500,000 in a joint escrow account and Harvard's reaffirmation of its
28

1 commitment to fund the new plant as required by the Harvard-District Agreement. On
2 October 16, 2006, the parties entered into a Memorandum of Understanding (“the
3 MOU”) and an escrow agreement. The MOU is compelling evidence that, at the time
4 that it entered into the Harvard-District Agreement, Harvard understood that it was to
5 fund the cost of the build-out WWTP, not promise construction at some later, unspecified
6 date:

7
8 2. Disclosure and accounting of all previous fees collected and
9 dispersed in the name of the District. The remaining unused funds in
10 excess of \$500,000 shall be deposited in the above escrow account. All
11 new lot sales sewer fees shall go to this account when Harvard Simon I,
12 L.L.C. works the Pivotal agreement to this resolve.

13 3. Disbursement of escrow funds: Funds shall be released for
14 Harvard Simon I, L.L.C. share any and all requirements that are pertinent to
15 the construction, repair, and/or expansion of the New Waste Water
16 Treatment Plant for the Inscription Canyon Ranch Sanitary District.

17 4. Harvard Simon I, L.L.C. guarantees to completely fund their
18 share of the new waste water treatment plant that the ICRSD Board selects.
19 Harvard Simon I, L.L.C. shall fund the waste water treatment plant to what
20 is needed to have sufficient capacity at build out.

21 5. Pivotal shall not bring any claims against ICRSD. Harvard
22 Simon I, L.L.C. agrees to indemnify and defend the ICRSD against any
23 such claims, liability or lawsuits arising under the contract between Pivotal
24 and Harvard Simon I, L.L.C. (which included either ICRSD as a party by
25 its “consent” or at least ICRSD as the third-party beneficiary under the
26 contract).

27 The Escrow Agreement was amended to: 1) include Whispering Canyon in the same
28 capacity as Harvard, with Harvard was deemed to be 80 percent and Whispering Canyon
was deemed to be 20 percent; and 2) require that a District Board member approve all
contracts and disbursements involving the escrow account.

Harvard and Whispering Canyon “guaranteed” to “completely fund” a new
wastewater treatment plant sufficient for build-out. Harvard, Whispering Canyon and the
District established the escrow account with First American Title Insurance Agency, Inc.

1 (“First American”). Monies previously collected by Harvard and Pivotal were to be
2 placed in escrow, except for funds properly used to pay for the Santec Plant. In addition,
3 all WWTP fees collected from future lot sales were to be deposited in that account.
4 Disbursements from the escrow account would only be for construction, repair and
5 expansion of the new treatment plant.

6 **L. PLAINTIFFS’ FAILURE TO ACCOUNT FOR WWTP FUNDS**
7 **RECEIVED IN CONNECTION WITH LOT SALES**

8 Harvard placed \$500,000 into the escrow account on October 01, 2006. Harvard
9 prepared a statement, “Lot Wastewater Development Fees Paid to Pivotal as of
10 3/27/2007, Phase Two,” which was submitted to First American. It indicates that Pivotal
11 had previously received \$923,294 as WWTP fees for 382 lots in Talking Rock Ranch and
12 Whispering Canyon (\$2,417 per lot). Harvard and WC agreed to pay \$300,000 to Pivotal
13 towards constructing the first expanded treatment plant constructed by Pivotal’s affiliate,
14 Santec, which is known as the “Santec Plant.”

15 In addition, Harvard and WC authorized Pivotal to collect \$2,417 for each lot sold
16 (later increased to \$3,000) to fund the expansion of wastewater treatment plants to treat
17 350 gpd for each residence. The \$2,417 fee collected under the Harvard-Pivotal
18 Agreement was exclusively for increasing treatment plant capacity, and not for use by
19 Harvard or anyone else in building the sewer collection and delivery infrastructure or
20 effluent ponds or reuse systems.

21 Harvard and Whispering Canyon have not accounted for more than \$1,597,459
22 that is not in the escrow account. The District has received no explanation or accounting
23 of the discrepancy in the number of lots sold, the basis for fees collected, the particular
24 lots that have not paid the WWTP fee, or the amounts paid or owed by Harvard for its
25 TRR Compound and Whispering Canyon. WWTP fees for almost half the lots sold have
26 not been accounted for. The District has not received a full accounting of WWTP fees
27 paid to Harvard, to Whispering Canyon, to Pivotal, or to The Preserve. The District has
28

1 not received a full accounting on the amounts paid by Harvard or Whispering Canyon to
2 Pivotal under the initial and progress payments (\$300,000). Furthermore, the District has
3 not received a full accounting as to how WWTP fees were spent before the establishment
4 of the First American escrow account.

5 **M. THE DISTRICT'S INABILITY TO FUND THE REQUIRED**
6 **WWTP IMPROVEMENTS**

7 Harvard reported to the District that it had no money to expand the plant.
8 Plaintiffs have not expressed any indication that they have any financial capability to
9 fund the WWTP's expansion. Plaintiffs contend that their only source of revenue to fund
10 the plant's expansion is through new revenue generated from lot sales. On information
11 and belief, funds that Harvard may have set aside for expanding the plant may have been
12 misappropriated by Douglas Zuber. Defendants are aware that, in October of 2008,
13 Zuber was charged with embezzling \$11 Million.

14 In August 2009, Harvard informed the District through its operator, AQuality, that
15 the construction of the new initial MBR plant is "on hold". In July 2009, Harvard
16 claimed that it had no money and it unilaterally decided to "put on hold" the construction
17 of a new expanded plant, even though it knew the expansion was critically overdue and
18 had made promises to begin construction many times before. The District is informed
19 and believes that Plaintiffs, or any one of them, intended to obtain financing for at least
20 part of the WWTP improvement costs. Real estate conditions over the past few years
21 may well have interfered with those plans and caused an abrupt halt to the improvements
22 for which Harvard appeared to be planning.

23 **N. THE PUBLIC REPORTS**

24 Under A.R.S. § 32-2101(54), Harvard is a subdivider that owns or has owned six
25 or more lots in a single platted subdivision which have been and are offered for sale. As
26 a subdivider, Harvard was required to obtain a Disclosure Report (Public Report) prior to
27 offering lots for sale in accordance with A.R.S. § 32-2181 *et seq.* and Commissioner's
28

1 Rule A.A.C. R4-28-B1207. The subdivision laws of Arizona intend to protect the public
2 health, safety, and welfare. *See Alaface v. National Investment Co.*, 181 Ariz. 586, 596-
3 97, 892 P.2d 1375, 1385-86 (App. 1994) (laws are to insure that residential
4 developments have adequate streets, utilities, and drainage and that land is usable and
5 safe). Sanitary services for subdivided lots must be disclosed to prospective lot buyers in
6 the Public Report.

7 Arizona’s real estate statutes protect purchasers of property against incomplete or
8 inadequate improvements that have been proposed or promised to buyers. Under A.R.S.
9 § 32-2183 (F), it is “unlawful for a subdivider to sell any lot in a subdivision unless one
10 of the following occurs”:

11 1. All proposed or promised subdivision improvements are completed.

12 2. The completion of all proposed or promised subdivision improvements is
13 assured by financial arrangements acceptable to the commissioner. The financial
14 arrangements may be made in phases for common community and recreation facilities
15 required by a municipality or county as a stipulation for approval of a plan for a master
16 planned community.

17 3. The municipal or county government agrees to prohibit occupancy and the
18 subdivider agrees not to close escrow for lots in the subdivision until all proposed or
19 promised subdivision improvements are completed.

20 4. The municipal or county government enters into an assurance agreement with
21 any trustee not to convey lots until improvements are completed within the portion of the
22 subdivision containing these lots, if the improvements can be used and maintained
23 separately from the improvements required for the entire subdivision plat. The
24 agreement shall be recorded in the county in which the subdivision is located.

25 Harvard, The Preserve, and Whispering Canyon failed to provide purchasers of
26 lots in the District with a full and complete “true statement” of sewage disposal facilities
27 for their subdivisions. A.R.S. § 32-2181(A) (18) and (19) provides that the Public Report
28

1 must include, among other components:

2 18. A true statement of the nature of any improvements to be installed by
3 the subdivider, the estimated schedule for completion and the estimated
4 costs related to the improvements that will be borne by purchasers of lots in
5 the subdivision.

6 19. A true statement of the availability of sewage disposal facilities and
7 other public utilities, including water, electricity, gas and telephone facilities
8 in the subdivision, the estimated schedule for their installation, and the
9 estimated costs related to the facilities and utilities that will be borne by
10 purchasers of lots in the subdivision.

11 Plaintiffs' Public Reports did not describe the details of sanitary services in the District,
12 under the Harvard – District Agreement. The Reports did not mention that the treatment
13 plant would require expansion, the estimated schedule for completing the expansion, and
14 that the full estimated cost for the expanding the plant to treat the subdivision's sewage
15 that would be borne by its lot purchasers. The Reports did not mention or describe the
16 details of the Harvard – Pivotal Agreement or the Pivotal – Whispering Canyon
17 Agreement that materially relate to the provision of sanitary services by the District for
18 the subdivisions in the Public Reports.

19 Several Public Reports recorded with the Yavapai County Recorder notify all
20 prospective and existing lot owners that:

21 ICR Sanitary district will be responsible for maintenance of sewer lines
22 and sewage collection within and outside the subdivision with costs to
23 Lot purchasers included in monthly fees assessed by ICR Sanitary
24 District.

25 (*See, e.g.,* Whispering Canyon Phase Public Report ICRSD 000027).

26 The sewage collection and disposal company is the ICR Sanitary District
27 (928-445-5258) which is in compliance with the Arizona Department of
28 Environmental Quality, and is a sanitary district formed and regulated
under Title 48 of the Arizona Revised Statutes. ICR Sanitary District is
responsible for maintenance of the sewage collection and disposal
facilities both within and outside the subdivision. . . Lot purchaser shall
pay Seller a "Wastewater Development Fee" of \$3,000.00, subject to

1 change, to reimburse Seller for certain costs incurred by Seller in
2 connection with wastewater facilities constructed or to be constructed for
3 the benefit of the Lot and the Development.

4 (emphasis added). (*See, e.g.*, Talking Rock Ranch Public Report ICRSD 000843).
5 Harvard now contends that the Wastewater Development Fee, a \$3,000/lot fee, is, in
6 reality, an interest-free loan that it is free to use until it decides, at an unknown date in the
7 future, the expand the WWTP. Such an interpretation of the Public Report is misleading,
8 at best, and, more likely, downright fraudulent from a consumer’s perspective.

9 **II. LEGAL THEORIES SUPPORTING DEFENDANTS’ DEFENSES TO**
10 **PLAINTIFFS’ CLAIMS.**

11 **A. ARIZONA PROPERTY RIGHTS PROTECTION ACTION.**

12 The Arizona Property Rights Protection Act (“the Act”) does not apply to
13 Plaintiffs’ claims. The Act is codified in Chapter 8, Article 2 of Title 12-an Article
14 entitled “Eminent Domain”. It is based on an Initiative Measure designed “to ensure that
15 Arizona citizens do not lose their home or property or lose the value of their home or
16 property without just compensation”. The Findings and Declarations with respect to the
17 Act recite instances in which a government condemned a residential or commercial
18 property to further the interests of developers. The Act’s purpose is to thwart
19 development when it deprives an owner of its property rights.

20 Ironically, Plaintiffs are the very type of developer that the Act was intended to
21 thwart. Plaintiffs seek to develop residential communities with no regard to the safety
22 and health interests of the individual lot owners. The Act specifically excludes from its
23 ambit limitations or prohibitions of uses that are for the protection of the public’s health
24 and safety, including rules and regulations relating to health and sanitation, solid or
25 hazardous waste, and pollution control. (A.R.S. § 12-1134(B)(1)) as well as those that do
26 not directly regulate an owner’s land. (A.R.S. § 12-1134(B)(6)). Clearly, the Act cannot
27 be interpreted to further Plaintiffs’ interests in selling lots that are, contrary to the
28

1 statements made by Plaintiffs in the Public Reports, not served by a wastewater treatment
2 system that is suitable for the type of development that the Plaintiffs designed.

3 Further, the Act does not provide Plaintiffs with the relief that they seek. The
4 Moratorium is the direct result of Plaintiffs' actions, not Defendants. Any diminution in
5 value to Plaintiffs' lots is the direct result of their failure to provide the necessary funding
6 or financial guarantees to assure Defendants that the District is complying with its
7 obligation to ensure that the wastewater treatment facilities are, and will continue to be,
8 adequate.

9 **B. SPECIAL ACTION**

10 The plant's effluent-treatment capacity was provided to ADEQ for purposes of
11 obtaining amendments to the APP. ADEQ, however, merely approves the plant's
12 engineering for compliance with environmental discharge requirements. ADEQ does not
13 currently examine or approve the volumes of influent to the plant from real estate
14 developments. The policy for addressing influent flows to the plant, in this case, is the
15 legal responsibility of the District.

16 The Board reasonably determined in its fundamental governmental policy for the
17 District the amount of influent that may be safely treated at the plant, based on studies by
18 its environmental consultants and professional engineers. The District may control the
19 influent by regulating hookups to sewer connections using the plant, such as occurred by
20 its adoption of the Hookup Moratorium. The Board performs discretionary duties on
21 behalf of the District in "regulating" and "operating [its] sewerage system" as authorized
22 under A.R.S. § 48-2001 (B) (1) and the Sanitary District statutes.

23 In legally adopting the Hookup Moratorium, the Board acted on behalf of the
24 District under its powers granted by A.R.S. § 48-2011 (in pertinent part):

25 In addition to powers specifically granted, a sanitary district, acting through its
26 board of directors, may:

- 27 1. Construct, maintain and operate within or without the district a
28 sewerage system and necessary sewage disposal and treatment plants.

1 10. Formulate and adopt rules governing . . . connections to the sewer lines
2 of the district . . .

3 11. Require permits for any and all connections described by paragraph 10
4 and for installation and maintenance of private sewage disposal systems.

5 12. Formulate and adopt rules governing . . . the operation and utilization
6 of . . . treatment plants of the district.

7 18. Manage and conduct the business and affairs of the district, and do all
8 other things incidental to exercising the powers granted by this article, . . .

9 The Board has the legal authority to adopt resolutions to “govern connections to sewer
10 lines” in the District and require permits for such connections. The Hookup Moratorium
11 is a rule setting forth the governmental policy and conditions for allowing additional
12 connections to sewer lines in the District contingent upon the expansion of treatment
13 facilities, in accordance with the provisions set forth in the Moratorium.

14 The District is “a body corporate with the powers, privileges and immunities
15 generally granted to municipal corporations by the constitution and laws of this state for
16 the purposes prescribed by [the sanitary district statutes].” A.R.S. § 48-2001 (D). All of
17 the alleged facts complained of by Plaintiffs constitute actions taken by the Board in their
18 official capacity and were taken in furtherance of the purposes for which the District was
19 formed, namely to regulate, manage and operate the sewerage system, including among
20 other things the sewer lines and wastewater treatment plant. Pursuant to A.R.S. § 12-
21 2021, mandamus exists to compel performance of an act which the law specially imposes
22 as a duty resulting from an office, trust or station. Mandamus will not lie to compel a
23 person or officer to perform an act not authorized or required by some plain provision of
24 law. The purpose of a mandamus action is not to create duties, but require performance of
25 duties already existing. *State ex rel. Williams v. Superior Court in and For the County of*
26 *Pima*, 18 Ariz. App. 92 (1972).

27 Mandamus will lie only where two conditions are present; first, the act,
28 performance of which is sought to be compelled, must be a ministerial act which law
specially imposes as duty resulting from office or; if discretionary, it must clearly appear

1 that the officer had arbitrarily or unjustly, and in abuse of discretion refused to act.
2 Furthermore, there must be no other plain, speedy or adequate remedy at law. *Rhodes v.*
3 *Clarke*, 92 Ariz. 31 (1962). The duty must be clear and indisputable. *Dey v. McAlister*, 19
4 Ariz. 306 (1918).

5 The writ of mandamus is a discretionary writ and even where an absolute legal
6 right is shown, it will be withheld wherever the public interest is to be adversely affected.
7 *Daystar Investments, L.L.C. v. Maricopa County Treasurer* (App.Div.1 2004).
8 Mandamus is an extraordinary remedy designed to expedite matters where applicant has
9 immediate and complete right to the thing demanded. *Burns v. Superior Court of Pima*
10 *County*, 97 Ariz. 112 (1965). Mandamus will not lie to compel municipal board or
11 officers to do an act unless the petitioning party proves clear right to performance of the
12 act. *Miners & Merchants Bank v. Herron*, 46 Ariz. 71 (1935). Mandamus lies only to
13 compel an officer to perform a duty concerning which he has no discretion, and which he
14 has refused to perform. *Board of Regents of University and State Colleges v. Frohmiller*,
15 69 Ariz. 50 (1949); *Hutchins v. Frohmiller*, 55 Ariz. 522 (1940).

16 A writ of mandamus to a public officer cannot be used to compel the performance
17 of discretionary acts. *Peterson v. Rodgers*, 51 Ariz. 502 (1938). Because a mandamus
18 action is designed to compel performance of an act the law requires, the general rule is
19 that if the action of a public officer is discretionary that discretion may not be controlled
20 by mandamus. *See Sears v. Hull*, 192 Ariz. 65 (1998). Where the act sought to be
21 compelled by mandamus is discretionary, mandamus will lie only where such discretion
22 has been abused. *State ex rel. Green v. Superior Court In and For Pima County*, 3 Ariz.
23 App. 473 (App. 1966).

24 To justify mandamus, a refusal to perform the duty imposed must clearly appear,
25 but that refusal need not be an outright adverse determination. *State Bd. of Barber*
26 *Examiners v. Walker*, 67 Ariz. 156 (1948). In order to justify mandamus, a “refusal to
27 perform duty” imposed may be either express or implied, and any conduct of officer or
28

1 tribunal under a duty to perform, signifying unequivocal intention not to perform,
2 amounts to a refusal, and a refusal may be implied from a colorable or unreasonable
3 delay in acting, although a proper and reasonable postponement of action, made in good
4 faith, does not constitute a refusal to act. *Id.*

5 “Ministerial duties” for purposes of mandamus claim, are those which permit
6 public officer only one course of action on admitted state of facts. *Kahn v. Thompson*,
7 *185 Ariz. 408 (App.Div.2 1971)*. In *Board of Regents v. Frohmiller*, 69 Ariz. 50, 65-66
8 (1949), wherein the Court distinguishes between ministerial and discretionary acts.

9 We held in *Magma Copper Co. v. Arizona State Tax Commission*, 67
10 Ariz. 77 that ‘An act is ministerial where the law requiring it to be
11 performed, prescribes the time, manner and occasion of its performance
12 with such certainty that nothing remains for judgment or discretion’ An
13 official act is judicial [sic] when it is the result of judgment or discretion
14 based upon evidence gathered.

15 Courts have consistently refused to step on the toes of local government where
16 discretion is involved. If a public officer is not specifically required to perform a duty or
17 has any discretion as to what shall be done, mandamus does not lie to compel him to
18 perform that duty. *Graham v. Moore*, 56 Ariz. 106,109 (1940).

19 Regulations of general application will not be overturned by the
20 courts unless the challenges show the restrictions to be arbitrary and
21 without a rational relationship to a legislative state interest. *Euclid v.*
22 *Ambler Realty Co.*, 27ZU.S. 365, 388, 47 S. Ct. 114,118, 71 L. Ed. 303
23 (1926); *Cardon Oil Co. v. City of Phoenix*, 122 Ariz. 102, 104, 593 P.2d
24 656, 658 (1979) Development impact fees are presumed a valid exercise by
25 legislative bodies of the power to regulate land use. *Home Builders*
26 *Association of Central Arizona v. City of Scottsdale*, 187 Ariz. 479, 482,
27 930 P. 2d 993, 996 (1997). Courts must afford considerable deference to
28 the legislative body in this regard. *Id.* 482-483, 930 P.2d at 996-997.

There are situations where “mandamus may be used to compel an officer, board or
commission to take action even though such action is discretionary,” but “it cannot be
used to require that such discretion be exercised in a particular manner.” *Sensing v.*
Harris, 217 Ariz. 261, 172 P.3d 856 (App. 2007) citing *Miceli v. Indus. Comm'n*, 135

1 Ariz. 71, 73, 659 P.2d 30, 32 (1983); *Ariz. State Highway Comm' n v. Superior Court of*
2 *Maricopa County*, 81 Ariz. 74, 77, 299 P.2d 783, 785 (1956); *Yes on Prop 200*, 215 Ariz.
3 at 465, 160 P.3d at 1223. For example, a professional licensing board may have
4 discretion to deny a license, but it may not delay an application for an extended period
5 when the statutes require it to act. *Eastman v. Southworth*, 87 Ariz. 394, 398-99, 351 P.2d
6 992, 994-95 (1960) (application to practice medicine delayed for nine years). *Sensing*,
7 *supra*.

8 Mandamus is only appropriate if the public officer is specifically required by law
9 to perform the requested act. *Id* A party may disagree with how an official has chosen to
10 act, but disagreement alone is not a basis for mandamus. *See Yes on Prop 200*, 215 Ariz.
11 at 467, 160 P.3d at 1225 (finding “mandamus is not an appropriate method to obtain a
12 definition of duties that are otherwise subject to dispute”). A party seeking mandamus
13 must show that he is entitled to relief. *Sensing, supra*.

14 In *Peterson v. Jefferson County*. The court upheld a committee’s actions in
15 furtherance of the purposes of a moratorium resolution regarding a sewage system.
16 There, the court held:

17 We also believe that the standard employed by the Committee
18 was reasonably calculated to achieve the stated purpose of the
19 moratorium resolution, . . . Assuming arguendo that all of this
20 uncontroverted evidence is true, we believe that the Committee, in
21 the exercise of its discretion, could have reasonably decided that the
22 volume allocation method employed was the most cost-effective
23 means of determining sewer allocations for the area treated by the
24 Patton Creek plant. Stated simply, the purpose of the sewer
25 moratorium was to regulate the volume of sewage treated at the
26 Patton Creek plant and the Committee chose to use the volume of
27 water previously used to service this facility as the touchstone for
28 determining the allocation in this case. As noted in Custred, supra,
arbitrariness and capriciousness are equivalent to gross abuse and
since we do not find a gross abuse of discretion on the part of the
Sewer Moratorium Committee, we deem it inappropriate to second-
guess their judgment as to “ ‘matters within the technical field of
their duties and power.’ ”

1 (Emphasis added). Likewise, the District, in the exercise of its discretion, elected
2 to hold Plaintiffs to the terms of the Harvard-District
3 Agreement and insist that a build-out WWTP be constructed if financial guarantees were
4 refused. The District's refusal to release Plaintiffs from their contractual obligations is
5 not an act for which mandamus relief is appropriate.
6

7 **C. BREACH OF CONTRACT**

8 One party's breach of a material provision in a contract excuses the other party's
9 performance. *Zancanaro v. Cross*, 85 Ariz. 394, 400, 339 P.2d 746, 750 (1959). Harvard
10 agreed to construct and install sewer facilities necessary for the District to extend sewer
11 utility services to the property at no cost to existing District customers or the District.
12 That promise has yet to be fulfilled. Harvard owes the District more than \$66,000 for
13 services performed exclusively for Talking Rock Ranch and its Santec Plant. Further,
14 Whispering Canyon currently owes the District more than \$167,000 for services
15 performed exclusively for the benefit of Whispering Canyon and late charges, penalties
16 and interest. Those delinquent reimbursable expenses of the District began accruing on
17 or about October 31, 2007

18 **D. BREACH OF COVENANT OF GOOD FAITH**

19 One party's breach of a material provision in a contract excuses the other party's
20 performance. *Zancanaro v. Cross*, 85 Ariz. 394, 400, 339 P.2d 746, 750 (1959). Harvard
21 failed to honor its obligation to construct the promises WWTP. It failed to safeguard the
22 fees that it collected with each lot sale. It benefited from the effluent used for the TRR
23 golf course. In addition, Harvard owes the District more than \$66,000 for services
24 performed exclusively for Talking Rock Ranch and its Santec Plant.

25 Further, Whispering Canyon currently owes the District more than \$167,000 for
26 services performed exclusively for the benefit of Whispering Canyon and late charges,
27 penalties and interest. Those delinquent reimbursable expenses of the District began
28

1 accruing on or about October 31, 2007. Plaintiffs, not the District, breached the implied
2 covenant of good faith and fair dealing.

3 **E. DAMAGES**

4 Plaintiffs have not disclosed the basis for their damage calculations. The District
5 contends that, to the extent that Plaintiffs have been damaged at all, their damages are the
6 cause of the real estate market decline, not the moratorium.

7 Further, the District contends that Plaintiffs cannot prove damages with any
8 specificity. Harvard acknowledges that it is responsible for the full cost of constructing
9 all of the wastewater treatment plant and facilities. It merely complains that it should be
10 permitted to promise compliance at a later date, meanwhile selling lots and incrementally
11 collecting wastewater treatment fees to help defray the costs that Harvard promises to
12 fund at some future date. Plaintiffs do not contend that the wastewater treatment fees will
13 be adequate to fund 100% of the necessary WWTP improvements. Further, Plaintiffs
14 neither consider the projected increases in the costs of delayed construction nor credit
15 them against their alleged damages.

16 **F. DEFENDANT'S COUNTERCLAIM**

17 In addition to the defenses described above, Defendants will file a Motion for Leave
18 to Amend their Answer to assert Counterclaims. At this time, Defendants intend to
19 counterclaim for breach of contract, breach of the implied covenant of good faith and fair
20 dealing and for an accounting of the wastewater treatment plant fees collected by
21 Harvard.

22 **III. THE NAMES, ADDRESSES AND TELEPHONE NUMBERS OF** 23 **ANY WITNESSES WHO DEFENDANTS EXPECT TO CALL AT TRIAL AND A** 24 **DESCRIPTION OF THE SUBSTANCE OF EACH WITNESS' EXPECTED** 25 **TESTIMONY**

- 26 1. Gene Leasure
27 c/o Douglas C. Nelson
28 Law Office of Douglas C. Nelson, P.C.

1 7000 North 16th Street, Suite 120-307
2 Phoenix, Arizona 85020
3 602) 395-1612

4 Gene Leasure is expected to testify about all of the facts relevant to this action
5 including, but not limited to, the District's obligations, the Moratoriums and the reasons
6 therefor, all agreements between the parties, the District's concerns and its fear of
7 exposure to individual lot owners, the District's exercises of its discretion, Harvard's
8 breach of the Harvard-District Agreement and the promises implied therein, Harvard's
9 breach of its fiduciary obligations to the District and the need for an accounting of the
10 waste water treatment fees collected, converted, stolen and/or spent by Plaintiffs or any
11 entity affiliated with any Plaintiff.

12 2. Dayne Taylor
13 c/o Douglas C. Nelson
14 Law Office of Douglas C. Nelson, P.C.
15 7000 North 16th Street, Suite 120-307
16 Phoenix, Arizona 85020
17 (602) 395-1612

18 Dayne Taylor is expected to testify about all of the facts relevant to this action
19 including, but not limited to, the District's obligations, the Moratoriums and the reasons
20 therefor, all agreements between the parties, the District's concerns and its fear of
21 exposure to individual lot owners, the District's exercises of its discretion, Harvard's
22 breach of the Harvard-District Agreement and the promises implied therein, Harvard's
23 breach of its fiduciary obligations to the District and the need for an accounting of the
24 waste water treatment fees collected, converted, stolen and/or spent by Plaintiffs or any
25 entity affiliated with any Plaintiff.

26 3. Charlie Turney
27 c/o Douglas C. Nelson
28 Law Office of Douglas C. Nelson, P.C.
7000 North 16th Street, Suite 120-307
Phoenix, Arizona 85020

1 (602) 395-1612

2
3 Charlie Turney is expected to testify about all of the facts relevant to this action
4 including, but not limited to, the District's obligations, the Moratoriums and the reasons
5 therefor, all agreements between the parties, the District's concerns and its fear of
6 exposure to individual lot owners, the District's exercises of its discretion, Harvard's
7 breach of the Harvard-District Agreement and the promises implied therein, Harvard's
8 breach of its fiduciary obligations to the District and the need for an accounting of the
9 waste water treatment fees collected, converted, stolen and/or spent by Plaintiffs or any
10 entity affiliated with any Plaintiff.

- 11 4. John Freeman, former ICR Sanitary District Board Member
12 c/o Douglas C. Nelson
13 Law Office of Douglas C. Nelson, P.C.
14 7000 North 16th Street, Suite 120-307
15 Phoenix, Arizona 85020
16 (602) 395-1612

17 John Freeman is expected to testify about all of the facts relevant to this action
18 including, but not limited to, the District's obligations, the Moratoriums and the reasons
19 therefor, all agreements between the parties, the District's concerns and its fear of
20 exposure to individual lot owners, the District's exercises of its discretion, Harvard's
21 breach of the Harvard-District Agreement and the promises implied therein, Harvard's
22 breach of its fiduciary obligations to the District and the need for an accounting of the
23 waste water treatment fees collected, converted, stolen and/or spent by Plaintiffs or any
24 entity affiliated with any Plaintiff.

- 25 5. Cheryl Ibbotson, District Accountant
26 Wallace & Associates, Income Tax and Accounting Service, LLC
27 302 W. Willis Street, Ste. 105
28 Prescott, Arizona 86301
(928) 445-6581

1 Cheryl Ibbotson is expected to testify about all the facts relevant to this action
2 including, but not limited to, the District's accounts and invoices to Plaintiffs.

- 3 6. Gloria Lorntzen, District Clerk
4 Wallace & Associates, Income Tax and Accounting Service, LLC
5 302 W. Willis Street, Ste. 105
6 Prescott, Arizona 86301
7 (928) 445-6581

8 Gloria Lorntzen is expected to testify about all the facts relevant to this action
9 including, but not limited to, the preparation of the District's minutes and documents.

- 10 7. Paula Carlaftes, Escrow Officer
11 First American Title Insurance Agency, Inc.
12 600 West Gurley Street
13 Prescott, Arizona 86305
14 (928) 445-4361

15 Paula Carlaftes (or her designated custodian of records) is expected to
16 testify about all the facts relevant to this action including, but not limited to, the escrow
17 agreement (Escrow No. 250-4770669) and the payments and distributions made under the
18 escrow agreement.

- 19 8. Craig Krumwiede
20 Harvard Investments
21 c/o Andrew M. Federhar/Dawn Meidinger
22 Fennemore Craig, P.C.
23 3003 North Central Avenue
24 Suite 2600
25 Phoenix, Arizona 85012-2913
26 (602) 916-5000

27 Craig Krumwiede is expected to testify about any fact relevant to this action
28 including, but not limited to: Harvard's agreements with the District, construction of the
sewage system connection to the wastewater treatment plant, Harvard's agreements with
Pivotal Utility Management, LLC ("Pivotal"), Harvard's payments to Pivotal, Harvard's
agreements with Santec, Harvard's payments to Santec, payments made by Harvard to

1 the District, payments made to the First American Title escrow account, Harvard's
2 actions in furtherance of the expansion of treatment plant capacity, his communications
3 with the District's Board members and the District's agents, Harvard's sales of lots and
4 his communications with the representatives of Pivotal/Santec, Whispering Canyon, and
5 The Preserve, the real estate market at all relevant times, Harvard's financing
6 arrangements at all relevant times, and Plaintiffs' alleged damages.

7 9. Clint Poteet
8 Harvard Investments
9 c/o Andrew M. Federhar/Dawn Meidinger
10 Fennemore Craig, P.C.
11 3003 North Central Avenue
12 Suite 2600
13 Phoenix, Arizona 85012-2913
14 (602) 916-5000

13 Clint Poteet is expected to testify about any fact relevant to this action including,
14 but not limited to: Harvard's agreements with the District, construction of the sewage
15 system connection to the wastewater treatment plant, Harvard's agreements with Pivotal,
16 Harvard's payments to Pivotal, Harvard's agreements with Santec, Harvard's payments
17 to Santec, payments made by Harvard to the District, payments made to the First
18 American Title escrow account, Harvard's actions in furtherance of the expansion of
19 treatment plant capacity, his communications with the District's Board members and the
20 District's agents, Harvard's sales of lots and his communications with the representatives
21 of Pivotal/Santec, Whispering Canyon, and The Preserve, the real estate market at all
22 relevant times, Harvard's financing arrangements at all relevant times, and Plaintiffs'
23 alleged damages.

24 10. Kevin Scheel
25 Harvard Investments
26 c/o Andrew M. Federhar/Dawn Meidinger
27 Fennemore Craig, P.C.
28 3003 North Central Avenue

1 Suite 2600
2 Phoenix, Arizona 85012-2913
3 (602) 916-5000

4 Kevin Scheel is expected to testify about any fact relevant to this action including,
5 but not limited to: Harvard's agreements with the District, construction of the sewage
6 system connection to the wastewater treatment plant, Harvard's agreements with Pivotal,
7 Harvard's payments to Pivotal, Harvard's agreements with Santec, Harvard's payments
8 to Santec, payments made by Harvard to the District, payments made to the First
9 American Title escrow account, Harvard's actions in furtherance of the expansion of
10 treatment plant capacity, his communications with the District's Board members and the
11 District's agents, Harvard's sales of lots and his communications with the representatives
12 of Pivotal/Santec, Whispering Canyon, and The Preserve, the real estate market at all
13 relevant times, Harvard's financing arrangements at all relevant times, and Plaintiffs'
14 alleged damages.

15 11. Doug Zuber
16 Harvard Investments
17 c/o Andrew M. Federhar/Dawn Meidinger
18 Fennemore Craig, P.C.
19 3003 North Central Avenue
20 Suite 2600
Phoenix, Arizona 85012-2913
602) 916-5000

21 Doug Zuber is expected to testify about any fact relevant to this action including,
22 but not limited to: Harvard's agreements with the District, construction of the sewage
23 system connection to the wastewater treatment plant, Harvard's agreements with Pivotal,
24 Harvard's payments to Pivotal, Harvard's agreements with Santec, Harvard's payments
25 to Santec, payments made by Harvard to the District, payments made to the First
26 American Title escrow account, Harvard's actions in furtherance of the expansion of
27 treatment plant capacity, his communications with the District's Board members and the
28

1 District's agents, Harvard's sales of lots and his communications with the representatives
2 of Pivotal/Santec, Whispering Canyon, and The Preserve, the real estate market at all
3 relevant times, Harvard's financing arrangements at all relevant times, and Plaintiffs'
4 alleged damages.

5 12. Cole Johnson
6 c/o Andrew M. Federhar/Dawn Meidinger
7 Fennemore Craig, P.C.
8 3003 North Central Avenue
9 Suite 2600
10 Phoenix, Arizona 85012-2913
11 (602) 916-5000

12 Cole Johnson is expected to testify about any fact relevant to this action including,
13 but not limited to: Whispering Canyon's agreements with the District, Whispering
14 Canyon's agreements with Harvard, payments by Whispering Canyon to Harvard,
15 payments by Whispering Canyon to Pivotal, payments made to the First American Title
16 escrow account, construction of the Whispering Canyon's sewage system connection to
17 the wastewater treatment plant, the development of Whispering Canyon, payments made
18 by Whispering Canyon to the District, all actions by any Plaintiff in furtherance of the
19 expansion of treatment plant capacity, his communications with the District's Board
20 members and the District's agents, Whispering Canyon's sales of lots and his
21 communications with the representatives of Pivotal/Santec, Harvard, and The Preserve,
22 the real estate market at all relevant times, Whispering Canyon's financing arrangements
23 at all relevant times, and Plaintiffs' alleged damages.

24 13. Tim Emberlin
25 Whispering Canyon
26 c/o Andrew M. Federhar/Dawn Meidinger
27 Fennemore Craig, P.C.
28 3003 North Central Avenue
Suite 2600
Phoenix, Arizona 85012-2913

Tim Emberlin is expected to testify about any fact relevant to this action including,
but not limited to: Whispering Canyon's agreements with the District, Whispering

1 Canyon's agreements with Harvard, payments by Whispering Canyon to Harvard,
2 payments by Whispering Canyon to Pivotal, payments made to the First American Title
3 escrow account, construction of the Whispering Canyon's sewage system connection to
4 the wastewater treatment plant, the development of Whispering Canyon, payments made
5 by Whispering Canyon to the District, all actions by any Plaintiff in furtherance of the
6 expansion of treatment plant capacity, his communications with the District's Board
7 members and the District's agents, Whispering Canyon's sales of lots and his
8 communications with the representatives of Pivotal/Santec, Harvard, and The Preserve,
9 the real estate market at all relevant times, Whispering Canyon's financing arrangements
10 at all relevant times, and Plaintiffs' alleged damages.

11 14. James T. Heitel
12 The Preserve At The Ranch, LLC
13 c/o Andrew M. Federhar/Dawn Meidinger
14 Fennemore Craig, P.C.
15 3003 North Central Avenue
16 Suite 2600
17 Phoenix, Arizona 85012-2913
18 (602) 916-5000

19 James T. Heitel is expected to testify about any fact relevant to this action
20 including, but not limited to: The Preserve's agreements with the District, The Preserve's
21 agreements with Harvard, payments by The Preserve to Harvard, payments by The
22 Preserve to Pivotal, payments made to the First American Title escrow account,
23 construction of The Preserve's sewage system connection to the wastewater treatment
24 plant, the development of The Preserve, payments made by The Preserve to the District,
25 all actions by any Plaintiff in furtherance of the expansion of treatment plant capacity, his
26 communications with the District's Board members and the District's agents, The
27 Preserve's sales of lots and his communications with the representatives of
28 Pivotal/Santec, Harvard, and Whispering Canyon, the real estate market at all relevant
times, The Preserve's financing arrangements at all relevant times, and Plaintiffs' alleged
damages.

1 15. Brian Siever
2 The Preserve At The Ranch, LLC
3 c/o Andrew M. Federhar/Dawn Meidinger
4 Fennemore Craig, P.C.
5 3003 North Central Avenue
6 Suite 2600
7 Phoenix, Arizona 85012-2913
8 (602) 916-5000

9 Brian Siever is expected to testify about any fact relevant to this action including,
10 but not limited to: The Preserve's agreements with the District, The Preserve's
11 agreements with Harvard, payments by The Preserve to Harvard, payments by The
12 Preserve to Pivotal, payments made to the First American Title escrow account,
13 construction of The Preserve's sewage system connection to the wastewater treatment
14 plant, the development of The Preserve, payments made by The Preserve to the District,
15 all actions by any Plaintiff in furtherance of the expansion of treatment plant capacity, his
16 communications with the District's Board members and the District's agents, The
17 Preserve's sales of lots and his communications with the representatives of
18 Pivotal/Santec, Harvard, and Whispering Canyon, the real estate market at all relevant
19 times, The Preserve's financing arrangements at all relevant times, and Plaintiffs' alleged
20 damages.

21 16. Jason Williamson, Executive Director
22 Pivotal Utility Management, L.L.C.
23 6825 E. Tennessee Ave., Suite 401
24 Denver, Colorado 80224
25 (303) 333-1250
26 Fax: (303) 333-1257
27 jwilliamson@pum.agillion.com

28 Jason Williamson is expected to testify about any fact relevant to this action
including, but not limited to, Pivotal's relationship with Santec, Pivotal's agreement with
Harvard, Pivotal's agreement with Whispering Canyon, Pivotal's communications with
Plaintiffs, Pivotal's relationship with the District, and the design and construction of

1 sanitary treatment facilities in the District.

2 17. Dwight L. Zemp, Vice President
3 Santec Corporation
4 220 Malibu Street
5 Castle Rock, Colorado 80108
6 (303) 660-9211

7 Dwight L. Zemp is expected to testify about any fact relevant to this action
8 including, but not limited to, the relationship of Santec Corporation to Pivotal, the
9 relationship of Santec and Pivotal to Plaintiffs, and the construction of and plans for
10 improvements to the wastewater treatment plant in the District.

11 18. Jim Jones, Director of Sales
12 Talking Rock Ranch
13 14503 N. Talking Rock Ranch Road
14 Prescott, Arizona 86305

15 Jim Jones is expected to testify about any fact relevant to this action including, but
16 not limited to, the sales of lots and building of homes in the Talking Rock Ranch
17 development.

18 19. Pat Carpenter
19 AQuality Water Co.
20 P.O. Box 264
21 Williams, Arizona 86046
22 (928) 606-0498

23 Pat Carpenter is expected to testify about any fact relevant to this action including,
24 but not limited to, the operation of the sanitary system within the District.

25 20. Chris Williamson
26 AQuality Water Co.
27 P.O. Box 264
28 Williams, Arizona 86046
(928) 606-0563

Chris Williamson is expected to testify about any fact relevant to this action

1 including, but not limited to, the operation of the sanitary system within the District.

- 2 21. Jennifer Bartos
3 Improvement District Services, Inc.
4 219 Grove Avenue
5 Prescott, Arizona 86301
6 Telephone: (928) 443-9484

7 Jennifer Bartos is expected to testify about any fact relevant to this action
8 including, but not limited to, the Harvard Agreement and the relationships between the
9 District and Harvard.

- 10 22. Richard Aldridge
11 Shephard-Wesnitzer, Inc.
12 221 N. Marina Street, Suite 102
13 Prescott, Arizona 86301
14 (928) 541-0443

15 Richard Aldridge is expected to testify about any fact relevant to this action
16 including, but not limited to, the studies performed by Shephard-Wesnitzer, Inc. that were
17 performed on behalf of the Plaintiffs for the District.

- 18 23. Chad Daines, AICP
19 Former Director, Yavapai County Development Services
20 Yavapai County
21 500 South Marina Street
22 Prescott, Arizona 86303
23 (928) 771-3214

24 Chad Daines is expected to testify about any fact relevant to this action including,
25 but not limited to, the regulatory review and approval processes of sanitary facilities by
26 the County and the regulatory review and approval processes of land developments
27 within the District.

- 28 24. Steven Mauk
Interim Director, Yavapai County Development Services
Yavapai County
500 South Marina Street
Prescott, Arizona 86303

1 (928) 771-3214

2 Steven Mauk is expected to testify about any fact relevant to this action including,
3 but not limited to, the regulatory review and approval processes of sanitary facilities by
4 the County and the regulatory review and approval processes of land developments
5 within the District.

6
7 25. Tom Lange
8 Former Director, Yavapai County Development Services
9 Yavapai County
10 500 South Marina Street
11 Prescott, Arizona 86303
12 (928) 771-3214

13 Tom Lange is expected to testify about any fact relevant to this action including,
14 but not limited to, the regulatory review and approval processes of sanitary facilities by
15 the County and the regulatory review and approval processes of land developments
16 within the District.

17 26. Kenneth E. Spedding
18 Former Director, Yavapai County Development Services
19 Yavapai County
20 500 South Marina Street
21 Prescott, Arizona 86303
22 (928) 771-3214

23 Ken Spedding is expected to testify about any fact relevant to this action
24 including, but not limited to, the regulatory review and approval processes of sanitary
25 facilities by the County and the regulatory review and approval processes of land
26 developments within the District.

27 27. Bev Staddon, Special Districts Coordinator
28 Yavapai County Board of Supervisors
1015 Fair Street
Prescott, Arizona 86305
(928) 583-1148

1 Bev Staddon is expected to testify about any fact relevant to this action including,
2 but not limited to, the documents involving the District.

3
4 28. Taly Gilama
5 Project Manager, APP & Reuse Unite
6 Groundwater Section, Water Quality Division
7 Arizona Department of Environmental Quality
8 1110 West Washington Street
9 Phoenix, Arizona 85007
10 (602) 771-4695

11 Taly Gilama is expected to testify about any fact relevant to this action including,
12 but not limited to, the laws and regulations of the Arizona Department of Environmental
13 Quality and issuance of the Aquifer Protection Permit to the District.

14 29. Asif Majeed
15 Arizona Department of Environmental Quality
16 1110 West Washington Street
17 Phoenix, Arizona 85007
18 (602) 771-4683

19 Asif Majeed is expected to testify about any fact relevant to this action including,
20 but not limited to, the laws and regulations of the Arizona Department of Environmental
21 Quality and issuance of the Aquifer Protection Permit to the District.

22 30. Ryan Richards
23 Arizona Department of Environmental Quality
24 1110 West Washington Street
25 Phoenix, Arizona 85007
26 (602) 771-4868

27 Ryan Richards is expected to testify about any fact relevant to this action
28 including, but not limited to, the laws and regulations of the Arizona Department of
Environmental Quality.

31. Michele Richardson
Arizona Department of Environmental Quality

1 1110 West Washington Street
2 Phoenix, Arizona 85007
3 (602) 771-4868

4 Michele Richardson is expected to testify about any fact relevant to this action
5 including, but not limited to, the laws and regulations of the Arizona Department of
6 Environmental Quality.

7 32. Custodian of Records
8 Arizona Department of Environmental Quality
9 1110 West Washington Street
10 Phoenix, Arizona 85007

11 A person designated by the Arizona Department of Environmental Quality may
12 testify about any fact relevant to this action including, but not limited to, the admission of
13 the Department's public records, if necessary.

14 33. Any witness identified by any other party.

15 **IV. THE NAMES, ADDRESSES AND TELEPHONE NUMBERS OF ALL**
16 **PERSONS WHO DEFENDANTS BELIEVE MAY HAVE KNOWLEDGE**
17 **RELEVANT TO THE EVENTS, TRANSACTIONS OR OCCURRENCES THAT**
18 **GIVE RISE TO THE ACTION, AND THE NATURE OF THE KNOWLEDGE OR**
19 **INFORMATION EACH PERSON IS BELIEVED TO POSSESS**

20 Raylene Junkins
21 [Address Unknown]

22 Raylene Junkins is believed to possess knowledge or information regarding
23 Whispering Canyon.

24 **V. NAMES AND ADDRESSES OF ALL PERSONS WHO HAVE GIVEN**
25 **STATEMENTS, WHETHER WRITTEN OR RECORDED, SIGNED OR**
26 **UNSIGNED, AND THE CUSTODIAN OF THE COPIES OF THE STATEMENTS**

27 Defendants are aware only of those statements identified in Plaintiffs' Initial
28

1 Disclosure Statement. Discovery is ongoing, and in the event any persons who make
2 such statements that become known to Defendants, they will supplement this Disclosure.

3 **VI. NAMES AND ADDRESSES OF EACH PERSON WHO**
4 **DEFENDANTS EXPECT TO CALL AS AN EXPERT WITNESS AT TRIAL, THE**
5 **SUBJECT MATTER ON WHICH THE EXPERT IS EXPECTED TO TESTIFY,**
6 **THE SUBSTANCE OF THE FACTS AND OPINIONS TO WHICH THE EXPERT**
7 **IS EXPECTED TO TESTIFY, A SUMMARY OF THE GROUNDS FOR EACH**
8 **OPINION, THE QUALIFICATIONS OF THE WITNESS, AND THE NAME AND**
9 **ADDRESS OF THE CUSTODIAN OF ANY REPORTS PREPARED BY THE**
10 **EXPERT**

9 Dwight Duncan
10 EconLit LLC
11 Economic and Litigation Consulting
12 The Great American Tower
13 3200 North Central Avenue, Ste. 1850
14 Phoenix, Arizona 85012
15 Telephone: 602-264-1400

14 Mr. Duncan is expected to testify about the damages alleged by Plaintiffs as well
15 as the present day value of the wastewater treatment fees that should have been collected
16 and safeguarded by Harvard.

17 Discovery is ongoing. Defendants will supplement this Disclosure if additional
18 expert witnesses are retained.

19 **VII. A COMPUTATION AND THE MEASURE OF DEFENDANTS'**
20 **DAMAGES**

21 Defendants seek attorney's fees and costs pursuant to A.R.S. §§ 12-431, 12-341.01
22 and 12-349, and any other applicable statute.

23 Defendants incorporate all individuals listed in Sections III and IV, above, as
24 damages witnesses that Defendants may call at the trial of this matter.

25 **VIII. THE EXISTENCE, LOCATION, AND GENERAL DESCRIPTION**
26 **OF TANGIBLE EVIDENCE OR RELEVANT DOCUMENTS THAT THE**
27 **DEFENDANTS PLAN TO USE AT TRIAL AND RELEVANT INSURANCE**
28 **AGREEMENTS**

1
2 1. Defendants incorporate by reference all documents disclosed in the
3 Mandamus Action (Yavapai County Claim No. CV2010-00036).

4 **IX. A LIST OF DOCUMENTS OR, IN THE CASE OF VOLUMINOUS**
5 **DOCUMENTARY INFORMATION, A LIST OF THE CATEGORIES OF**
6 **DOCUMENTS, KNOWN BY DEFENDANTS TO EXIST WHETHER OR NOT IN**
7 **DEFENDANTS' POSSESSION, CUSTODY OR CONTROL, WHICH**
8 **DEFENDANTS BELIEVE MAY BE RELEVANT TO THE SUBJECT MATTER**
9 **OF THE ACTION, AND THOSE WHICH APPEAR REASONABLY**
10 **CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE**
11 **AND THE DATE UPON WHICH THOSE DOCUMENT WILL BE MADE OR**
12 **HAVE BEEN MADE AVAILABLE FOR INSPECTION AND COPYING**

13 1. Public Reports regarding Whispering Canyon (bates labels ICRSD000001 –
14 ICRSD000050 attached hereto)

15 2. Public Reports regarding The Preserve at the Ranch (bates labels
16 ICRSD000051 – ICRSD000078 attached hereto)

17 3. Public Reports regarding Talking Rock Ranch (bates labels ICRSD000079
18 – ICRSD001121 attached hereto)

19 4. All documents disclosed or identified in connection with the Mandamus
20 Action.

21 5. Arizona Department of Environmental Quality's Self-Monitoring Report
22 Filings ("SMRF") for the Santec Plant, which are public documents available for
23 inspection at ADEQ, 1110 West Washington Street, Phoenix, Arizona, 85007.
24 Telephone: 602-771-2300.

25 6. Any and all pleadings filed in connection with this lawsuit

26 7. Any and all documents produced by any of the parties in their Rule 26.1
27 Disclosure Statement, as supplemented

28 8. Deposition transcripts of any witnesses taken in this litigation

9. Any and all exhibits listed by all other parties to this litigation

Defendants reserve the right to call witnesses designated by Plaintiffs and to seek

1 or object to documents listed by Plaintiffs.

2 Defendants reserve the right to amend and supplement this Disclosure Statement
3 as further investigation, research and discovery warrants and as additional information is
4 received through the discovery stage.

5 DATED this _____ day of March, 2011.

6 SACKS TIERNEY P.A.

7

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By: _____
Julianne C. Wheeler
Attorneys for Defendants

11

12

ORIGINAL of the foregoing filed
and COPY of the foregoing mailed
this _____ day of March, 2011 to:

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Andrew M. Federhar
Dawn Meidenger
FENNEMORE CRAIG
3003 North Central Avenue
Suite 2600
Phoenix, Arizona 85012-2913
Attorneys for Plaintiffs

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