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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

HARVARD SIMON I, LLC, an)	
Arizona limited)	
liability company; THE)	
PRESERVE AT THE RANCH,)	
LLC, an Arizona limited)	No. P1300CV201000036
liability company;)	
WHISPERING CANYON)	Division IV
DEVELOPMENT, LLC, an)	
Arizona limited)	
liability company,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
)	
INSCRIPTION CANYON RANCH)	
SANITARY DISTRICT, an)	
Arizona sanitary)	
district, et al.,)	
)	
Defendants.)	
)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

**BEFORE: THE HONORABLE KENTON D. JONES
Judge of the Superior Court**

**ORAL ARGUMENT IN RE: PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Prescott, Arizona

March 3, 2011

10:00 a.m.

P R O C E E D I N G S

1
2 THE COURT: This is Yavapai County Superior
3 Court Cause No. CV 201000036, *Simon vs. Inscription*
4 *Canyon*. Now is the time set for two oral arguments.

10:05:24 5 First one we're going to address in a moment is the
6 plaintiff's motion for partial summary judgment filed on
7 December 21st, 2010, and then we're going to address the
8 defendant's motion for partial summary judgment.

9 Counsel, would you note your appearances and
10:05:42 10 your parties for the record, please, your clients.

11 MR. FEDERHAR: Good morning, Your Honor.
12 Thank you. Andrew Federhar and Dawn Meidinger for the
13 plaintiffs Harvard Simon. We have with us Clint Poteet
14 and Jim Heitel. I believe Mr. Krumwiede is parking his
10:05:59 15 car and will be in, in just a second.

16 THE COURT: We have enough people, I guess
17 we didn't miss one. How's that.

18 MR. NELSON: Good morning. I'm Doug Nelson
19 on behalf of the defendants today. With us is Charlie
10:06:09 20 Turney, Gene Leasure, Dayne Taylor, who are defendants
21 and our co-counsel on behalf of the defendants, Harold
22 Watkins.

23 THE COURT: Mr. Watkins, I did get your
24 notice of association.

10:06:21 25 MR. WATKINS: Thank you, Your Honor.

1 THE COURT: It's very nice to have you
2 today. Are we waiting for someone to appear, Mr.
3 Federhar?

4 MR. FEDERHAR: No, Your Honor. We're ready
10:06:28 5 to go.

6 THE COURT: Thank you. And we do, in a case
7 with no shortage of paper, we're much shorter on time
8 than we are on paper. Mr. Federhar, if you would then
9 make your argument in regard to plaintiff's motion for
10:06:43 10 partial summary judgment.

11 MR. FEDERHAR: Well, Your Honor, if the
12 paper gets any heavier I'm going to need a Sherpa,
13 because this notebook is getting a little heavy to carry
14 around.

10:06:52 15 THE COURT: I do understand.

16 MR. FEDERHAR: I believe Your Honor has
17 given us one hour for both motions today.

18 THE COURT: We'll work with you on that.
19 There are enough issues that need to be addressed that
10:07:01 20 the last thing I want to do is put myself at a
21 disadvantage by not having the information I need to
22 rule on the motions that are before me. We do not have
23 an eleven o'clock. Let us do this. Let us go forward,
24 recognizing that we have an hour for these motions.
10:07:15 25 Let's take the time we need to be thorough, and we will

1 certainly be out of here by noon one way or another.

2 How's that.

3 MR. FEDERHAR: I'd like it a little better,
4 Your Honor, if we could get it a little earlier. I have
10:07:28 5 a flight at two o'clock at Sky Harbor to Airport. I
6 would like to be out of here by 11:30.

7 THE COURT: I suppose you want to be present
8 for Mr. Nelson's argument.

9 MR. FEDERHAR: It would be helpful, Your
10:07:42 10 Honor.

11 THE COURT: Thank you. Mr. Nelson, we do
12 have some additional time. I do understand the scope of
13 these motions. In fact, it was interesting in reviewing
14 these motions, I think most of what I've seen I have
10:07:51 15 seen in earlier pleadings. So really what you've done
16 is kind of coalesced those issues down for purposes of
17 summary judgment. I do understand that. Mr. Federhar,
18 if you will.

19 MR. FEDERHAR: Sure, Your Honor. The open
10:08:00 20 meeting law motion is an easy one to understand and an
21 easy one to decide because there are no facts in
22 question, and I want to emphasize that. Not only are
23 there no facts in question about the District's
24 violation of the open meeting law, and I mean repeated
10:08:14 25 violation of the open meeting law, but in their

1 response, Your Honor, they actually conceded a violation
2 that we hadn't accused them of, so they're very helpful
3 for us in the way that they're responding.

4 So let's start off then with the first
10:08:27 5 violation that we didn't bring in our original motion
6 but they conceded in their response and so we talked
7 about in our reply. That is the September 28th letter
8 to Yavapai County wherein they ask Yavapai County to
9 impose a moratorium. It is an action of the Board, a
10:08:43 10 letter of the Board stating that the Board is requesting
11 that Yavapai County take this action.

12 In response to talking about that in our
13 original motion, the response was: Yeah, and there was
14 a single sentence in our August 14, 2009, minutes where
10:09:02 15 one Board member asked about the possibility of
16 reinstituting the moratorium that had been previously
17 put in place in 2006. One Board member asking a
18 question translates to the Board requesting Yavapai
19 County to impose a moratorium a month and a half later;
10:09:23 20 no action of the Board showing that was in fact the
21 Board's position; no action of the Board directing that
22 Yavapai County be requested of this information. The
23 Board sends out a letter saying it is the Board's
24 official policy position that Yavapai County imposed a
10:09:40 25 moratorium.

1 THE COURT: Wasn't it more extensive than
2 that, though? Didn't they say: If you don't do it, we
3 will?

4 MR. FEDERHAR: That's correct, Your Honor.

10:09:48 5 THE COURT: My only point is this, does that
6 indicate that a decision had been made to act in a
7 certain fashion?

8 MR. FEDERHAR: You're reading my outline,
9 Your Honor, because my next comment is not only is there
10:10:01 10 the problem of the Board saying it's our request that
11 you do it, but then they go on to say: And if you
12 don't, we will. How do they know? They've not noticed
13 that they're going to take an action. They've not given
14 the public any chance to comment on it. They've not
10:10:17 15 included it in their minutes, yet they are writing a
16 letter at the end of September saying if you don't do
17 it, we will. Now, if that doesn't evidence an entity
18 that has made up its mind on what it's going to do
19 outside of the public's realm, I don't know what does,
10:10:33 20 Your Honor. And I'm glad Your Honor caught that point
21 about the letter.

22 So here we have this letter. It comes out
23 of thin air. There's certainly nothing on an agenda
24 about it. There's certainly nothing in the minutes
10:10:49 25 about it, and it evidences two specific policy

1 decisions; one by a Board against the county; and two, a
2 threat to the county that if they don't do it, we intend
3 to do it. And sure enough, eventually in December an
4 item shows up on an agenda. This is after the County
10:11:06 5 refused to impose a moratorium, and the item says
6 Resolution 209-01, and that's it. Doesn't describe what
7 the resolution is. It doesn't tell anybody in the
8 public what's going to happen, and people show up and
9 say what's this about? Oh, you'll see in a minute. So
10:11:24 10 they take a vote and suddenly it turns out for the first
11 time at the meeting that this is about a moratorium.
12 Now, the *Karol* case, K-a-r-o-l, is directly on point.

13 In that case, Your Honor, the Arizona court
14 said you can't just give notice by giving a number of a
10:11:40 15 resolution. You have to describe what the resolution's
16 all about, because after all, this is not gotcha
17 politics. This is a publicly elected group that has a
18 duty to inform the citizens over which it has
19 jurisdiction of what it intends to do. And all that
10:11:59 20 they gave them notice of was the intent to adopt a
21 resolution with numbers, nothing about the substance,
22 nothing about the topic, nothing at all to inform the
23 public. This is not a technical violation. That's what
24 the *Karol* case says, Your Honor. It's a substantive
10:12:17 25 violation, and it's as a matter of law based on the

1 Karol case, Your Honor, a violation of the open meeting
2 law.

3 And you know what, the Board knew it,
4 because sure enough come January 6th, let's have another
10:12:30 5 meeting and let's try and ratify it. But unfortunately
6 the gang that can't shoot straight shot crooked again,
7 and they didn't do it right in January; they didn't give
8 72 hours advance notice; their minutes were not properly
9 published after the December meeting; they're not timely
10:12:47 10 published; they're never timely published, so it comes
11 up to January 6th, there's typographical errors in the
12 notice. But again, there's not the necessary 72 hours
13 notice of what they're going to do. And sure enough,
14 they recognize that, and on January 13th they try and do
10:13:06 15 it for the third time, Your Honor.

16 A couple problems, however. Under the open
17 meeting law you have 30 days to ratify your mistake, to
18 say whoops, we made a mistake, and we need to ratify
19 this action, and we're going to cleanup our violation of
10:13:22 20 the open meeting law. So the open meeting law provides
21 them with a safe harbor, but that safe harbor expired on
22 January 8th, 2010, because the December 6th meeting
23 where the resolution was adopted, Your Honor, was more
24 than 30 days after the January 13th meeting where they
10:13:43 25 attempted to properly ratify their action in December.

1 The --

2 THE COURT: Wait, wait, wait. I was going
3 back to December 9th. You said December 6.

4 MR. FEDERHAR: December 9th, I apologize.

10:13:56 5 December 9th, January 6th --

6 THE COURT: So your position is that
7 December 9th they didn't do it right, January 6th they
8 didn't do it right, and by January 13th they tried to
9 ratify.

10:14:07 10 MR. FEDERHAR: They tried to ratify again,
11 but their 30-day window in which to do so, the statutory
12 time period within which to do so had passed, Your
13 Honor.

14 THE COURT: And is that a knew or should
10:14:17 15 have known standard?

16 MR. FEDERHAR: It's a flat standard, Your
17 Honor, just 30 days past.

18 THE COURT: Thirty days past the action or
19 recognition?

10:14:24 20 MR. FEDERHAR: Past the action, Your Honor.

21 THE COURT: Okay.

22 MR. FEDERHAR: So on January 8th that was
23 the last day they could properly attempt to ratify, and
24 that's why they held their meeting on January 6th in an
10:14:37 25 effort to ratify. But as I said, they didn't give the

1 requisite 72-hour notice of what this was all about, so
2 they kept making mistakes. So by the time January 13th
3 arrives, Your Honor, they are now without power to
4 ratify their December 9th decision, and I want to say
10:14:57 5 that again. They are without power to ratify it. They
6 need to start all over again, but they didn't. They
7 didn't propose a new resolution. They didn't notice a
8 new resolution. They didn't give the public an
9 opportunity to comment. They re-re-ratified their
10:15:17 10 December 9th action on January 13th, and that's what
11 we're having to live under today.

12 So they violated the open meeting law on
13 December 9th, they re-violated it on December -- on
14 January 6th, and they failed to ratify within 30 days as
10:15:34 15 required by statute, so their January 13th meeting is
16 null and void. They didn't pass a new resolution on
17 January 13th, Your Honor. They sought to re-ratify
18 Resolution 2009-01, and the statute simply says you
19 can't do it.

10:15:53 20 So Your Honor, open meeting law is a pretty
21 open and shut case. Not a lot to argue about, because
22 those facts that I just laid out for you are undisputed.
23 And when you go through the statement of facts that we
24 submitted to you, they don't contest those facts.

10:16:14 25 Now their only argument is, awe, these are

1 technical violations, Your Honor, don't be hard on us.
2 You know, they're not technical violations, Your Honor.
3 They are repeated disregard from going back to August
4 where they decided without the benefit of notice to the
10:16:30 5 public where they decided, without giving the public any
6 notice of what they were intending to do, that either
7 the County was going to impose a moratorium or they
8 were, and that's what that letter says, Your Honor, in
9 September 28th. You were absolutely correct to point
10:16:46 10 that out. Everything that they do from that point
11 forward is tainted by that violation of the open meeting
12 law, and that's not a technical violation, Your Honor,
13 that's purposeful; it's intentional; and it is happening
14 at such a regular interval that you cannot contend that
10:17:03 15 it is a technical violation. They simply can't. And
16 the *Ahnert* case, A-h-n-e-r-t, that we cite to you also
17 talks about that, that these are not technical
18 violations, Your Honor. And so Your Honor, there's no
19 defense to it; there's no question about it; and Your
10:17:22 20 Honor, the added bonus is if we're correct in our
21 argument to you, all the other arguments in front of
22 Your Honor go away because the ordinance in question is
23 void, is not enforceable, there is no moratorium, and
24 this case is over. Be happy to answer any questions,
10:17:39 25 Your Honor.

1 THE COURT: You do want to make a two
2 o'clock flight, don't you?

3 MR. FEDERHAR: Your Honor, I'd write a
4 shorter letter if I had more time to make it short.

10:17:49 5 THE COURT: Mark Twain, I know him well.
6 Mr. Nelson, hold on just one second.

7 Mr. Federhar, you also addressed within your
8 motion that at the January 13th meeting the defendants
9 went into an executive session without properly noticing
10 it.

10:18:30 10
11 MR. FEDERHAR: Correct, Your Honor.

12 THE COURT: And I wasn't sure from the
13 structure of the argument, I suppose, if it was noticed
14 for an executive session and just not properly entered
10:18:40 15 or if it had not been noticed but they went into
16 executive session anyway. So where is the failing in
17 regard to the executive session issue that you raise in
18 regard to January 13?

19 MR. FEDERHAR: Your Honor, because I don't
10:18:53 20 mention it in my oral argument I don't mean to not focus
21 on it and not tell you.

22 THE COURT: That's okay. I just didn't
23 understand on the language whether it was not noticed
24 but held, or if it was held but not properly entered
10:19:06 25 into.

1 MR. FEDERHAR: Sure. Let's go to the
2 agenda, Your Honor, if I could just take two seconds,
3 because I think I'll find the agenda for you for January
4 13th because I think we gave them all to you. Didn't
10:19:20 5 we, Dawn? Would you help me?

6 I've got the minutes, our Exhibit 8 -- if
7 you'll just bear with me for a second, Your Honor, while
8 we find that agenda for you.

9 THE COURT: Not a problem.

10:19:34 10 MR. FEDERHAR: Here it is, Your Honor. It's
11 Exhibit 18. So if we look at Exhibit 18 to our motion,
12 Your Honor, we look at number one, call the meeting to
13 order; number two, introduction, approval of minutes,
14 new business, ratify Yavapai County presentation. We'll
10:20:00 15 go to the next page, operator report. Next page, old
16 business. Next page, continuing on. Then you get to
17 the executive session on the third page under item 8,
18 and it says here: The ICR may vote to discuss a matter
19 listed on the agenda in executive session. But they
10:20:20 20 don't list an executive session as a matter of business
21 for January 13, so there is no item. This is just the
22 standard boilerplate that you see on every one of their
23 agenda notices. So there is no item on the agenda to
24 call an executive session, and that's the problem. They
10:20:40 25 called an executive session. They didn't give notice of

1 their intent to call.

2 THE COURT: So it doesn't say may adjourn
3 into executive session to address a personnel matter, or
4 to address a financial issue.

10:20:54 5 MR. FEDERHAR: There is nothing on this
6 agenda that says on that particular day the Board may go
7 into executive session. There is the boilerplate
8 language that you see on every one of their agendas
9 about executive session.

10:21:08 10 THE COURT: It's no different than any other
11 agenda. I don't need you to look. I need you to tell
12 me.

13 MR. FEDERHAR: That's their case, Your
14 Honor. Before I say it authoritatively, Your Honor, I
10:21:21 15 want to look back and make sure I'm correct, because I
16 don't want to tell the Court something that's not
17 correct, so let's look at the agenda. Well, that's not
18 correct, Your Honor. Let's look at the agenda Item No.
19 5, for example.

10:21:34 20 THE COURT: What date?

21 MR. FEDERHAR: This is the December 9th
22 agenda, okay. And it says at the very top: During the
23 public meeting the Board may vote to go into executive
24 session. If so, the public will be asked to leave. All
10:21:52 25 right.

1 Now, there is that similar language here at
2 the top of Exhibit 18. It's in a little different
3 print, but the language that's at the end here, again,
4 does not note an executive session for that day. And I
10:22:11 5 think what you'll see, Your Honor, if you look at other
6 public meeting agendas is there's an item that says if
7 necessary, executive session. And on this calendar,
8 since it's eight items, that would be Item No. 7 and the
9 adjournment would be No. 8. But you have to tell the
10:22:27 10 public that you're going to go in executive session or
11 may go into an executive session as an item on your
12 agenda, and it's just not there. Just saying we might
13 do it doesn't tell them you're going to, because you
14 haven't put it on your agenda.

10:22:42 15 THE COURT: Thank you. Mr. Nelson.

16 MR. NELSON: Thank you, Your Honor. The
17 first item I'd like to clear up is the reference that
18 counsel made moments ago about the time period for
19 ratification. The standard A.R.S. 38-431.05 provides
10:23:07 20 that under (b)(1) ratification shall take place at a
21 public meeting within 30 days after discovery of the
22 violation or after such discovery should have been made
23 by the exercise of reasonable diligence.

24 From the record you will note that the
10:23:29 25 District received the letter in late December from

1 plaintiffs and complained of an open meeting violation,
2 and in response to that the subsequent reaffirmation and
3 the ratification occurred.

4 THE COURT: As a result of that letter the
10:23:56 5 January 6th meeting was a generalized scheduled.

6 MR. NELSON: Yes.

7 THE COURT: All right.

8 MR. NELSON: The other point, before I get
9 into what I planned on talking about here is the last
10:24:10 10 discussion that dealt with the meeting of January 13 and
11 the notice, there were two notices; the first one
12 included the general business notice and the reference
13 to the potential voting for an executive session
14 occurring during that January 13 meeting. The second
10:24:42 15 notice had the formal notice dealing with the
16 ratification of the past actions, which complies with
17 the standard that the Attorney General's Office
18 provides.

19 Now, what I'd like to do is get to the core
10:25:07 20 of my argument. First of all, I would emphasize that
21 today the court sits as a court of equity. This is a
22 matter that's one of substance over form. It's a search
23 for justice in light of the total circumstances.

24 In this context, keep in mind that these
10:25:32 25 parties have known each other, have been trying to

1 resolve problems for many years. As the inartfully
2 drafted letter of September to the County indicates,
3 there was an earlier moratorium, and as a result of that
4 moratorium there was to be a solution to all of these
10:25:56 5 problems that the District has in reference to
6 compliance with the ADEQ laws, and so as a result of
7 that communication from the Board the effort was made to
8 see if the County would reconsider an opportunity to
9 impose building moratoriums, or I should say a
10:26:27 10 moratorium on building permits.

11 THE COURT: So the idea was that if no
12 building permits were issued, then no septic permits
13 were necessary.

14 MR. NELSON: That's correct. And I think
10:26:38 15 the simplified way to understand this process for the
16 real estate development is at the beginning there's a
17 plat file with the County. The second stage is the
18 subdivision of those lots. The third stage is the sale
19 of those lots. That's where it triggers the public
10:27:04 20 reports with the real estate department. The fourth
21 stage is the building permit. The fifth and final
22 stage, which is the one the Board deals with, is the
23 connection. And so in order to resolve this problem
24 through the 2006 moratorium, what happened is that the
10:27:34 25 Board requested the assistance of the County on the

1 building permit side of things and so that it would not
2 be confronted with the connections. Because the county
3 had already approved these plots, it felt that it could
4 not issue building permits; thus, the entire problem
10:28:01 5 rests with the District.

6 So in light of all that, the effort was
7 trying to -- was, on my behalf, we were trying to find a
8 solution, and as the affidavits filed in the statements
9 of fact controverting the motion for summary judgment,
10:28:28 10 the -- each individual Board member disputes that
11 contention that any decision had been made. In other
12 words, it was merely exploratory how to resolve it.

13 THE COURT: How do you explain the "then we
14 will"? That sounds like a decision that's been made,
10:28:46 15 excuse me, and I don't want to read too much into it,
16 but I think to the casual reader indicates we need you
17 to do this thing, which is apparently a collective
18 decision, and if you don't then we have already
19 determined that we will. So how do you answer that?

10:29:03 20 MR. NELSON: My answer is that the letter
21 was improperly written. In other words, that there was
22 no decision, there could not be a decision, and the
23 Board understood that. There was no action undertaken,
24 and it was my in-artful drafting of that letter that
10:29:27 25 basically said -- it should have said, you know, we will

1 explore reinstating the old moratorium, as Mr. Turney
2 had indicated in the minutes, or what have you. But
3 basically there was this comment, I guess, that
4 incorrectly stated what actually had occurred.

10:29:55 5 THE COURT: Okay.

6 MR. NELSON: And I might emphasize that
7 factually that goes to the intent, and I think as a
8 genuine material fact here that the testimony of the
9 Board members as to what they did, when they did it, and
10:30:16 10 why they did what they did would be very important for
11 the Court to have that testimony in terms of whether or
12 not I properly, as their counsel, represented to the
13 County what they had done or what they intended to do
14 and whether or not any decision had been formulated.

10:30:41 15 THE COURT: All right.

16 MR. NELSON: In reference to this effort on
17 this motion for summary judgment, it would result in a
18 major, major reward for the plaintiffs who have breached
19 their agreements with the District. That would -- in
10:31:08 20 other words, the developers agreed to construct capacity
21 for the sold lots in the District, and they also state
22 repeatedly that they would construct the plant in
23 compliance with all Arizona laws, including the Arizona
24 Department of Environmental Quality regulations, as well
10:31:30 25 as the District's ordinance.

1 THE COURT: Mr. Nelson, I want to ask you a
2 question because every time I go through this in my
3 mind, and I have many times since our last meeting, how
4 do we end up functioning at the I guess behest and
10:31:52 5 direction of the developers here? How is it that a
6 Title 48 special district, improvement district, is
7 beholden to the developers as to whether or not it's
8 going to provide the service that ADEQ has authorized
9 them to provide? And that may be part of the history
10:32:18 10 that will help this court understand your position,
11 because the things that I would expect to see a special
12 district do, it doesn't appear the special district's
13 doing, and that in a sense people who have purchased
14 properties in these subdivisions are held hostage, under
10:32:35 15 your explanation of the case, to developers rather than
16 being provided a service by the utility. So how did we
17 get to the point to where it's up to the developers as
18 to whether or not people buying properties are going to
19 get sewer hookups?

10:32:54 20 MR. NELSON: That's a correct observation
21 that you just made, and how that occurred was with the
22 initial developer, which was the developer of the
23 Inscription Canyon Ranch.

24 THE COURT: Okay.

10:33:11 25 MR. NELSON: That individual, Swayze

1 McCraine, had anticipated that he would develop a
2 property that later became known as Talking Rock Ranch.
3 He became ill and decided to sell it to Harvard. In
4 that context, they employed Fennemore Craig to draft a
10:33:38 5 development agreement, which was crafted among
6 developers, and the idea was that the property that we
7 now know as Harvard's Talking Rock Ranch was annexed
8 into the District on the condition that Harvard would
9 construct the waste water treatment plant facilities at
10:34:09 10 no cost to the District for all service within the
11 District.

12 In conjunction with that, which opens up the
13 unclean hands of all this, you know, in this matter,
14 equity matter dealing with the open meeting law and
10:34:37 15 such, there was this transaction that was not properly
16 noticed and approved and signed by the developers, among
17 themselves, developers setting both as the District.

18 In other words, Mr. Swayze, his operator and
19 another developer were the three Board members of the
10:35:04 20 District that sat on the opposite side of the table. In
21 essence, what they agreed to do is create this front of
22 a public entity, and then they would pass the public
23 dollars back privately to Harvard and to its contractor
24 Pivotal, which the District is still trying to collect
10:35:22 25 to this day some of those monies.

1 THE COURT: So that's how we get to the
2 situation where there's a private developer that is
3 taking the fees that is being paid to this utility
4 District and holding them in private hands and to some
10:35:36 5 extent not accounting for them, because I believe at our
6 last meeting you indicated monies are missing.

7 MR. NELSON: Yes, and so then --

8 THE COURT: And who are those, are those
9 developers, are they subject to this litigation?

10:35:48 10 MR. NELSON: If I might, Your Honor.

11 THE COURT: My question is this, does this
12 court have jurisdiction over those developers that were
13 part of that setting that up?

14 MR. NELSON: If I may approach.

10:36:03 15 THE COURT: Please.

16 MR. NELSON: Thank you. This might help.

17 THE COURT: Hold on, Mr. Federhar. I've
18 been provided with something at the top that says
19 Harvard Simon I, LLC, et al, versus Inscription Canyon
10:36:18 20 Ranch.

21 MR. FEDERHAR: Yes, Your Honor.

22 THE COURT: You have been provided with
23 that?

24 MR. FEDERHAR: At the same time you have
10:36:23 25 been, Your Honor.

1 THE COURT: Understood. Mr. Nelson, what
2 does this illustrate for me?

3 MR. NELSON: The purpose is to illustrate
4 merely who the players are here in an effort to respond
10:36:33 5 to your question.

6 THE COURT: Thank you.

7 MR. NELSON: And your question is are they
8 developers in this lawsuit, yes and no. Two of them
9 are. One is the Whispering Canyon, and you'll notice on
10:36:53 10 the chart they were annexed into the District. The
11 District only has memorandum of understanding with
12 Whispering Canyon. It has no agreement.

13 THE COURT: Memorandum of understanding to
14 accomplish what?

10:37:12 15 MR. NELSON: To pay towards the capacity to
16 be built by Harvard.

17 THE COURT: So what you're saying is that
18 the District has a memorandum of understanding that
19 Whispering Canyon will do a certain thing?

10:37:30 20 MR. NELSON: And how that came about, Your
21 Honor, again going back to this 2006 and this whole
22 endeavor of trying to solve this over-committed capacity
23 issue, there was a 2006 moratorium, the parties got
24 together without this counsel, at least, and said we're
10:37:50 25 going to resolve this, and what they did is said Harvard

1 said we'll put up a half-million dollars in good faith,
2 and then they basically footnoted it and said, but we'll
3 take that half a million from Pivotal when we track down
4 the money. So Harvard, and actually a portion of that
10:38:15 5 percent, 20 percent of that half a million came from
6 Whispering Canyon, which has the other project. That
7 went to First American. They went to Pivotal, tried to
8 get the money. They got some of the money. And before
9 they wrote -- before Pivotal wrote the check of what it
10:38:38 10 had then in its account, which the Board has never seen
11 and doesn't even know today how much is in, you know,
12 outstanding or in that account, Harvard and Whispering
13 Canyon took out half a million that they had put into
14 the pot. The reason why I bring that up is the
10:38:59 15 developers have no money in this. All the lot
16 purchasers have made all the payments here.

17 So back to your earlier question about who's
18 in the lawsuit as developers, Whispering Canyon has sued
19 the defendants. The other one is the Preserve. That's
10:39:25 20 the small developer that took out the phase 26 out of
21 the original Talking Rock Ranch. They sold a part of
22 that development to the Preserve, which is shown on the
23 chart here from Harvard Talking Rock Ranch annexation
24 down to the Preserve.

10:39:49 25 The developer for Talking Rock itself,

1 according to the plaintiffs here, is that the developer
2 on their behalf is Harvard Investments, apparently,
3 which is different from the plaintiff in this case, and
4 the plaintiff in this case is that Harvard Simon I, LLC,
10:40:22 5 which is as far as we can determine just a satellite
6 entity out there, Harvard Investments does not own any
7 property.

8 MR. FEDERHAR: I'm sorry, Your Honor, this
9 is wholly and totally irrelevant to whether there was a
10:40:39 10 leave of violation of the statute.

11 THE COURT: It's outside the scope of the --
12 I did not expect this kind of an explanation. Mr.
13 Nelson, here's --

14 MR. NELSON: Okay.

10:40:48 15 THE COURT: -- what, we may set that for
16 discussion another day. I had simply asked what
17 developers were involved in the original circumstances
18 that we now work with, just give me a couple names.
19 You've given me Whispering Canyon. You've given me the
10:41:05 20 Preserve.

21 MR. NELSON: And the Harvard Investments.

22 THE COURT: All right. Go ahead with your
23 argument.

24 MR. NELSON: With the Talking Rock Ranch.

10:41:12 25 THE COURT: Thank you.

1 MR. NELSON: The other point I'd like to
2 make in regard to the consequences of any actions by
3 this Court in reference to the pending motion would be
4 that it would condone the breach of the agreements that
10:41:38 5 plaintiffs have with the County, and they agreed with
6 the County in their development agreements to comply
7 with the statutes, including ADEQ's regulations as well
8 as the District's ordinance.

9 THE COURT: I'm struggling with one of
10:42:10 10 those, Mr. Nelson. You say that they agreed to comply
11 with the ADEQ requirements. In reading Mr. Federhar's
12 documents I am advised that the only allegation of a
13 violation by ADEQ that's been noted is the District not
14 having taken possession of the facility. We addressed
10:42:28 15 this the last time we were together. I was somewhat
16 incredulous that the property we're required to
17 establish and maintain and oversee and all that doesn't
18 belong to us, we the sanitary district. So is that one
19 of the ADEQ requirements that's not being met, is that
10:42:45 20 the requirement that's not being met? Where does that
21 fit into the scheme of complying with ADEQ requirements?

22 MR. NELSON: ADEQ requirements in that
23 respect to the ownership of the plant is not a
24 violation. They made the observation that the District
10:43:07 25 does not own the plant, has not approved it, and that

1 they did not indicate at all that that was a violation.

2 The violation --

3 THE COURT: There was no direction to
4 correct, in other words.

10:43:23 5 MR. NELSON: No.

6 THE COURT: Go ahead. Thank you.

7 MR. NELSON: And as you may recall, the only
8 reason why the District is on the permit for the Harvard
9 Santec plant is because the District had the original
10:43:38 10 plant that was installed. When Harvard came on the
11 scene after annexation, it took out the plant, the big
12 plant, that was there to serve all the lots within the
13 original development.

14 THE COURT: Who owned that plant?

10:43:56 15 MR. NELSON: The District.

16 THE COURT: So private developer came in and
17 took out public utility property.

18 MR. NELSON: Yes.

19 THE COURT: Under an agreement to do that?

10:44:07 20 MR. NELSON: No.

21 THE COURT: With authority to do that?

22 MR. NELSON: No, the District was advised
23 after the fact that that was the decision. Actually,
24 the developer went to ADEQ and said we're going to keep
10:44:18 25 that plant there inactive, and that gets into some of

1 the numbers issues that we had at the outset, because
2 you start with the facility that actually has 120,000
3 gallons per day capacity.

4 MR. FEDERHAR: Again, Your Honor --

10:44:32

5 THE COURT: And now we're down to
6 sixty-three five. I understood, Mr. Federhar. Mr.
7 Nelson, I know I'm asking these questions --

8 MR. NELSON: I'm sorry.

10:44:42

9 THE COURT: No, no, that's okay. I've got
10 gaps. You folks have been working on this for a few
11 years. I've got gaps in my understanding. I'm trying
12 to track these ownership issues, management issues,
13 towards the issue of what's been noticed, what has been
14 done right, what hasn't been done at all. Go ahead with
15 your argument. I will try to restrain my comments a
16 bit, my questions. Go ahead.

10:44:56

17 MR. NELSON: Your Honor, the notion of any
18 violation out there is such that there is no existing
19 violations, and we understand that. The problem is that
20 the law for the requirement of the permit says that
21 there will be a violation if there's any discharge, and
22 if the discharge occurs ADEQ, and what I mean by
23 discharge, there's raw sewage going out the pipe.

10:45:15

24 THE COURT: Understood.

10:45:44

25 MR. NELSON: If that occurs, then what the

1 ADEQ will do, of course, is look at the permit and
2 determine that there should have been capacity there at
3 200 gallons per day per lot, and it would be negligence
4 per se and make the Board, the District, liable for all
10:46:15 5 the consequences, including any environmental damage
6 that occurs, not to mention the penalties that the Board
7 and the District agreed to pay if it didn't comply with
8 the permit, the statutes, and the regulations of ADEQ.

9 And to wrap that up in terms of the
10:46:40 10 importance, since 2006 this Board has employed four
11 separate experts on this issue. Each one has told the
12 Board the same thing, 200 gallons per day per lot,
13 dwelling lot, and that you must comply with these
14 requirements. It doesn't mean that you have to wait
10:47:10 15 until ADEQ walks in with a ticket of violation. The
16 other thing that's important in that regard is that ADEQ
17 furthermore directly informed the District of these
18 requirements.

19 And there's a misstatement that's been made
10:47:36 20 by the plaintiffs in this, they assert that you may
21 recall in our last session we talked about the 80
22 gallons per day per person.

23 THE COURT: Yes.

24 MR. NELSON: Per dwelling, and plaintiffs
10:47:51 25 assert that that regulation was in place before the 200

1 gallon per day standard, or regulation --

2 MR. FEDERHAR: I'm sorry. Again, Your
3 Honor, this has nothing to do with the matter that's in
4 front of you today, which is did they violate the law or
10:48:14 5 didn't they. And so I'm just concerned that we're being
6 dragged far afield to issues that are wholly irrelevant
7 to what we're here about today.

8 THE COURT: Mr. Nelson.

9 MR. NELSON: I'll just close this up.

10:48:24 10 THE COURT: We have so much to address and
11 to say that I'm not interested would be a total
12 fabrication. I'm entirely interested. I'm totally
13 interested in how we've gotten where we are. We do need
14 to stay with this motion itself.

10:48:38 15 MR. NELSON: All right. In regard to that,
16 Your Honor, the writ of mandamus that's been requested
17 in the motion itself, if one reads the Statute 38 --

18 MR. FEDERHAR: Again, Your Honor, we're here
19 on an open meeting law issue, not a mandamus issue,
10:48:57 20 that's their motion for summary judgment which we'll get
21 to in a minute. Right here we're on open meeting law.

22 THE COURT: And I was open to the writ of
23 mandamus issue because I'm prepared to address that with
24 you. In regard to the open meeting law issues, Mr.
10:49:11 25 Nelson, where are we?

1 MR. NELSON: If I might, Your Honor, let's
2 -- the statute provides that if there's a complaint
3 under the open meeting law, relief might be sought and
4 it's a writ of mandamus.

10:49:28 5 THE COURT: Okay.

6 MR. NELSON: And the writ is for compliance
7 with the open meeting law. And my point is that what
8 plaintiffs have tried -- has, you know, what they've
9 tried to do in this case is turn that writ into
10 something else in terms of avoiding this moratorium.
11 And the statute, again, it's 38-431.04 says yes, you can
12 come in with a writ, and what's the writ? It says you
13 must do. And the thing that must be done of course in
14 this instance is to comply with the open meeting law.
15 And of course, when you read the motion it's asking the
16 Court to do other things. It's asking the Court to void
17 the moratorium and basically instruct this Board to
18 violate its permit and its laws that are very
19 straightforward. And again as I mention, it's been
20 analyzed by many folks over many years without any
21 contrary alternative other than what has occurred.

22 Another element on this motion, and in the
23 context of equity and justice being done through this
24 process it's interesting to note that plaintiffs have
10:51:16 25 not filed any written demand for an investigation,

1 either with the Attorney General's office or with the
2 County Attorney's office. If they thought this was such
3 a serious matter, I presume they would have sought
4 outside independent review.

10:51:40 5 THE COURT: You mean file a complaint with
6 the Attorney General's office in regard to the open
7 meeting law violations?

8 MR. NELSON: Yes.

9 THE COURT: All right.

10:51:51 10 MR. NELSON: The other part of that argument
11 is that obviously if they had done so, it would open up
12 these other issues that the Court has observed in
13 reference to the utilization of public funds by private
14 entities, the compliance with the other laws in addition
10:52:11 15 to ADEQ laws, not the least of which is the Subdivision
16 Recording Act and so forth.

17 Let me wrap up here shortly by emphasizing
18 that the December 9th meeting was the meeting in which
19 the Board attempted to adopt the resolution for the
10:52:40 20 moratorium on the connections.

21 Again, the Board met on January 6th, 2010,
22 and that was duly noticed, and through that effort there
23 was a reaffirmation, and the case law is quite clear
24 that any action that a public body takes may be
10:53:09 25 corrected at any time, and so what the Board did is

1 basically adopt a new resolution, if you will, a
2 reaffirmation on January 6th. If there's any question
3 whatsoever, it's suspenders with the belt. The Board
4 again had a duly noticed meeting on January 13. Again,
10:53:41 5 it was well within the 30 days of discovery of the
6 alleged open meeting violation. And as our papers
7 indicate, the Board does not feel that there was any
8 material violation of the open meeting law for a variety
9 of reasons, not the least of which is that Harvard and
10:54:07 10 the other developers have been attending the Board
11 meetings, have been following this process, and as the
12 facts support, the Harvard representatives would only
13 meet outside of an open meeting with all Board members.
14 That's the only way the Board could get information to
10:54:33 15 try to get its public monies back to make sure that the
16 over-committed capacity is resolved and so forth.
17 That's the only setting in which they could have a
18 sit-down to try and get these matters moving forward.

19 THE COURT: And I've read that in the
10:54:48 20 pleadings. I do understand that element of this, Mr.
21 Nelson. What do you have for me on the open meeting law
22 itself? We're running time here.

23 MR. NELSON: Okay. In conclusion, the
24 request for the removal of the Board is one that
10:55:04 25 requires a genuine issue of fact regarding intent, and

1 it's the Board's intent in that regard, it's not the
2 intent of my letter to a county authority, and so that
3 is the core and crux of the information that the court
4 would need before it could make any ruling on a removal
10:55:38 5 of a Board member or a fine.

6 THE COURT: Thank you.

7 MR. NELSON: So with that, we are through.

8 THE COURT: Understood. Mr. Federhar, very
9 briefly.

10:55:49 10 MR. FEDERHAR: You bet. Your Honor, first
11 of all I want to apologize. I misspoke about the
12 statute. But our papers pointed out to you that the
13 violation was so obvious they had to know it the moment
14 they did it, so.

10:56:00 15 THE COURT: I did read the argument.

16 MR. FEDERHAR: Apologize for that, Your
17 Honor. Let's go to Exhibit 12 to our motion, Your
18 Honor. Exhibit 12 is the January 6th, 2010, agenda.
19 And it says new business, A, Resolution 2009-01
10:56:19 20 moratorium on sewer hookup. That's all it says. It
21 doesn't say that it's being ratified, Your Honor, it
22 just says moratorium.

23 Now, when you go to the statute that Mr.
24 Nelson was just talking about, 38-431.05, it says in
10:56:38 25 subsection two that ratification -- that the notice of

1 the meeting for ratification shall include a description
2 of the action to be ratified, a clear statement that the
3 public body proposes to ratify a prior action, and
4 information on how the public might obtain a detailed
10:56:55 5 written description of the action to be ratified. Three
6 different things; a description of the action to be
7 ratified, a statement that there they intend to ratify,
8 and how you get information on what's being ratified.

9 So you look at Exhibit 12, word ratified
10:57:12 10 never shows up here, Your Honor, nor is there a way to
11 tell the public to how to go out and get something to
12 find out what's being ratified, Your Honor. So nothing
13 about the January 6th meeting complied with the statute.
14 It simply didn't do it.

10:57:29 15 Then you go to our Exhibit 18 and there it
16 says ratify Resolution 2009-01. Again, one of the three
17 things to be ratified -- to be included by the statute
18 but not the other two. So there's no information nor is
19 there a description of what's being ratified. They only
10:57:49 20 do it by title, which as the *Karol* case tells you is
21 insufficient.

22 Now, Your Honor, they start with their only
23 defense, their only defense that you heard about. And
24 again, you didn't hear that there were any factual
10:58:06 25 questions, was that Mr. Nelson, what was his phrase,

1 in-artfully drafted the letter. Now, Your Honor sees a
2 lot of cases with a lot of evidence before him, and Your
3 Honor knows that a party cannot create a question of
4 fact by contradicting its own prior statement, and
10:58:29 5 that's what Mr. Nelson just attempted to do in front of
6 you. He attempted to take the plain, unambiguous
7 language of that September 28th letter and excuse it as
8 inartful drafting. You can't contradict your own prior
9 statement to create a question of fact. That September
10:58:56 10 28th letter stands for exactly what it very clearly
11 says; if you don't do it, we will. A decision has been
12 made.

13 Now, interesting to note, Your Honor, that
14 their only real defense to you is that you're sitting
10:59:15 15 somehow as a court of equity. Violations of statute are
16 not judged under a question of equity. You either
17 comply or you don't, and whether they have grievances
18 against Harvard is irrelevant to whether they violated
19 the statute. That's the only question in front of you
10:59:36 20 today, and it is clear by the uncontroverted evidence,
21 Your Honor, that in August they made a decision without
22 public input and without public notice that if the
23 County kept issuing building permits they were going to
24 impose a moratorium. They noticed it finally in
10:59:56 25 December. They didn't tell the public what they were

1 going to do. They knew they had to. In January they
2 tried to cure it with a defective notice that did not
3 comply with the statute, did not tell the public that
4 there was a ratification going on, and then they tried
11:00:11 5 to cure it a third time, Your Honor, later in January,
6 still failing to provide the public with information as
7 required by the statute.

8 The statute must require more than simply
9 listing "Ratify Resolution 2009-01." Otherwise, the
11:00:28 10 Karol case is meaningless, and otherwise the three
11 things that are required by that section of Title 38
12 would be rendered meaningless, Your Honor. And you know
13 you don't interpret a statute to render provisions of it
14 meaningless. It had to require something more. They
11:00:45 15 didn't do it. The action is null and void. We're not
16 seeking mandamus on this issue, we're seeking an order
17 that the action is null and void and that there is no
18 moratorium, and we'll deal with that in the next
19 argument about what we're doing with the motions for
11:01:02 20 summary judgment. If you have any questions, Your
21 Honor, I'd be happy to answer them.

22 THE COURT: I don't.

23 MR. FEDERHAR: Thank you, Your Honor.

24 THE COURT: Mr. Nelson, time to change
11:01:10 25 gears.

1 MR. NELSON: Okay. First, Your Honor, if I
2 might, the reference --

3 THE COURT: Let me change out the paper that
4 I've got in front of me here so I can get to both my
11:01:20 5 questions and the argument that's being presented. Go
6 ahead, Mr. Nelson.

7 MR. NELSON: In reference to the January 6th
8 notice that was just talked about.

9 MR. FEDERHAR: Excuse me, Your Honor, are we
11:01:38 10 going to go back to argue the motion?

11 THE COURT: I don't think so.

12 MR. FEDERHAR: Thank you.

13 MR. NELSON: The motion for summary judgment
14 filed by the defendants in this case is a partial
11:01:56 15 motion, and the focus is strictly on the rules of law
16 that we think are applicable to this case. And the
17 first one is that the defendants urge the Court to
18 recognize that the District under its Sanitary District
19 laws has the authority to regulate connections within
11:02:19 20 the District, and we spell out in our papers the
21 specific regulations, or excuse me, the specific
22 statutes that provide that ordinances and resolutions
23 may be adopted for the enforcement of the health, safety
24 and welfare of the District.

11:02:44 25 A second matter is that the Court determine

1 that moratoriums adopted by a District are presumed to
2 be valid. In that context, as you know from the record,
3 the effort was made on January 6th to adopt, or excuse
4 me, on December, what was it, 9th?

11:03:13 5 MR. FEDERHAR: December 9th.

6 MR. NELSON: Ninth, to adopt it in 2009, and
7 then on the January 6th it was a new resolution that was
8 adopted. It did not include the ratification on the
9 January 6th, and then for the further assurance there
10 was a ratification of the earlier December resolution.

11 In reference to a third matter that we bring
12 in our motion for summary judgment, we urge that the
13 Court adopt the standard of either bad faith or a
14 fraudulent act is required before the action of a Board
11:04:13 15 can be ruled as unlawful, also no reasonable standard
16 set forth in the statutes. For instance, in many cases,
17 including with the regulations of ADEQ and the like, it
18 requires that the director of ADEQ comply with
19 reasonable application of those standards, and if the
11:04:41 20 law is silent the courts in Arizona have consistently
21 held that that standard is either fraud or bad faith by
22 the Board, and that would be element of the intent.
23 That's the crux under the open meeting law, you have to
24 prove that there was a fraudulent effort by the Board or
11:05:08 25 some bad faith by the Board in order to exercise the

1 authorities for voiding the moratorium or for
2 discharging elected officials.

3 A fourth element we request is that the ADEQ
4 statutes and regulations be determined as applicable in
11:05:33 5 determining the capacity for the treatment of sewage in
6 the District, and I think there's been no dispute, and
7 keep in mind our motion addresses narrow legal issues.
8 The fifth one deals with the rule that no additional
9 hookups should be allowed if the sewage treatment plant
11:06:04 10 has inadequate capacity for sold lots. Again, if we
11 look at the record here, the trigger has always been
12 sale of lots, in all the documents, from the first
13 agreement entered into with Harvard's contractor they
14 talked about the sale of lots and the necessity of
11:06:33 15 obtaining 50,000 gallons per day and having that up and
16 running within something like 258 days of the first
17 sale, and in all the subsequent documents, including the
18 guarantee that Harvard made to ADEQ for the current
19 permit, our very recent permit, is tied to the sale of
11:07:00 20 lots. It's not tied -- it doesn't focus on any matter
21 dealing with past or current flows. It deals with the
22 sale of lots and 200 gallons per day per dwelling lot.
23 The sixth and final request deals with a
24 statute that the plaintiffs claim is applicable for the
11:07:29 25 awarding of attorneys' fees, that's A.R.S. 12-348, and

1 the courts have clearly decided that standard does not
2 apply to political subdivisions, including this
3 District, and so with that I'd be open to any questions
4 you might have.

11:07:55 5 THE COURT: I have been struck throughout
6 these proceedings since I first got involved in this
7 case with the number of nuances that control the actions
8 of the parties. You just made a comment about the fact
9 that sales of lots controls the issue of capacity; is
11:08:17 10 that right?

11 MR. NELSON: Yes.

12 THE COURT: So that if there is inadequate
13 capacity today and the developers sell a lot today, it
14 actually increases the problem of getting sewer access
11:08:38 15 to anyone for each sold lot, it increases the problem.

16 MR. NELSON: Yes.

17 THE COURT: But for each of those sold lots
18 the District takes a thousand dollars, as I understand
19 or I remember from our last get together, from each of
11:08:56 20 those lots the District takes a thousand dollars for,
21 and I don't want to call it a sewer hookup fee, but --

22 MR. NELSON: Capacity.

23 THE COURT: Whatever you want to call it,
24 sure. So I go out and buy a lot today in one of these
11:09:08 25 subdivisions, I pay a thousand dollars to give me access

1 to sewer and by buying the lot and even paying the
2 thousand dollars I make it more difficult for any of the
3 people who currently own lots out there to get access to
4 sewer, correct?

11:09:26 5 MR. NELSON: Yes.

6 THE COURT: Seems troubling, doesn't it,
7 that we're continuing to sell lots and continuing to
8 collect fees when that does nothing more than exacerbate
9 the problem that resulted in the moratorium?

11:09:39 10 MR. NELSON: Right.

11 THE COURT: It seems like, and when I say
12 the District I mean this very liberally, it seems like
13 the District has created an impossible circumstance that
14 it doesn't have an answer for and this court is going to
11:09:52 15 have to try and somehow come up with an answer, I
16 anticipate, but that in everything that is done the
17 problems's made worse than a resolution being where --
18 made anywhere nearer.

19 MR. NELSON: In that context, the District
11:10:09 20 didn't create the problem.

21 THE COURT: That's why I said the larger
22 context. I'm not talking about these three gentlemen.
23 I'm not even talking about the District Board.

24 MR. NELSON: I understand. You're
11:10:21 25 absolutely right. The problem is connected with money

1 and money protects the environment and the public
2 welfare in the sense of having available adequate
3 capacity, and we have no money here except through the
4 sale of lots by virtue of the structure that was put
11:10:42 5 together before we all showed up.

6 THE COURT: And so we can track that, when I
7 say "we" and I'm talking about the District Board has no
8 money.

9 MR. NELSON: No.

11:10:58 10 THE COURT: The money it collects, the one
11 thousand dollars it collects from the sale of each lot,
12 if that's the number or not, I don't remember.

13 MR. FEDERHAR: \$3,000.

14 THE COURT: \$3,000 from the sale of the
11:11:08 15 lots. Mr. Federhar is correct. It doesn't matter to me
16 how many zeros or what the first number is,
17 particularly. The fact is the money's being collected.
18 It's collected from the sale of the lot. It goes into
19 an account maintained by a private developer, and I
11:11:22 20 don't mean that in a disparaging term. I'm not
21 disparaging developers by that. The point is that the
22 developer is not the public entity that's collecting the
23 money, excuse me, who has the authority to direct the
24 collection of the money. So the money comes in. The
11:11:41 25 person who contributes the money isn't any closer to

1 getting sewer hookups than the dozens or hundreds or
2 whatever they are of people who previously owned lots,
3 and the money isn't going to resolve the issue because
4 the money doesn't end up with the Board, correct?

11:11:57 5 MR. NELSON: Yes. And part of that is in
6 the context that prior to the moratorium of 2006 that
7 sought to correct all this, it was all entirely in
8 private hands, contractor of Harvard's. In an effort to
9 resolve that, those funds went into an escrow account,
11:12:20 10 and so they go into an escrow account. Now, that's
11 under the joint control of the District and the
12 developers for the construction of the plant for sold
13 lots that have committed capacity, which is not out
14 there. And that was all solved with the proposed
11:12:39 15 construction of this 250,000 gallon capacity plant until
16 Harvard pulled the plug in August of 2009.

17 THE COURT: Let me ask you a question that
18 hopefully will keep us on track with where we are in
19 these arguments today. You gave me a very brief
11:13:12 20 description of what Board that existed at a time prior
21 to the formation of the District, I believe, is that
22 correct, or was it with the formation of the District?

23 MR. NELSON: With the formation of the
24 District.

11:13:21 25 THE COURT: And the folks that were on the

1 Board at that time established a process whereby the
2 money that should have been collected into the District
3 accounts went into private hands, and that's simply
4 what's being maintained today?

11:13:36 5 MR. NELSON: Yes, in essence, yes.

6 THE COURT: So it's not that these gentlemen
7 sitting over here said, gee, why don't we give this
8 money over to an outside person, not a member of the
9 public utility. It's that, that's what they inherited
10 when they came to the table.

11 MR. NELSON: Yes. The original Board was
12 developers sitting across the table with other
13 developers, and so they set up this convoluted scheme to
14 take public funds from a District, they didn't put on
11:14:11 15 their District hat, their Board hat, they put on their
16 developer hat and said you take these public monies --

17 THE COURT: Mr. Federhar.

18 MR. NELSON: -- and collect those funds and
19 then build the plant.

11:14:22 20 THE COURT: That's what I was, that's what I
21 had arrived at. Thank you, Mr. Nelson.

22 MR. NELSON: Right, and so what we would
23 urge is that the Court obviously grant our motion for
24 partial summary judgment and then I would be willing to
11:14:44 25 answer further questions.

1 THE COURT: Thank you. Mr. Federhar --

2 MR. FEDERHAR: No, no, no. The factual
3 description you've --

4 THE COURT: Are you done now?

11:14:57 5 MR. FEDERHAR: Almost, Your Honor. The
6 factual description that you just heard about what
7 happened is not accurate. It's also not relevant to our
8 motions today. I understand Your Honor's thirst to
9 learn more about this. It's very complicated. There'll
11:15:11 10 be a lot of testimony. I think what you've just heard
11 today is not accurate. This District collects into a
12 joint escrow account \$3,000 from every sale. This
13 District taxes everybody within the District and
14 collects money for the operation of its sanitary
11:15:28 15 district system and its equipment. This District simply
16 has not accepted title to the plant, as they were
17 required to do.

18 THE COURT: You just changed courses on me.
19 You went from collecting money, to title, to plant. I
11:15:41 20 want to know, I want to know, where's the money?

21 MR. FEDERHAR: The money, there's two
22 different pots of money, Your Honor.

23 THE COURT: Tell me about both of them real
24 quick.

11:15:50 25 MR. FEDERHAR: There's a pot of money that

1 sells a lot, \$3,000 joint escrow account, you'll
2 remember it, we talked about half a million dollars.

3 THE COURT: That's, absolutely do. Where's
4 the \$3,000?

11:16:01 5 MR. FEDERHAR: It's in First American Title.

6 THE COURT: So I understand, Mr. Federhar,
7 it's sitting in an escrow account at First American
8 Title?

9 MR. FEDERHAR: Yes.

11:16:09 10 THE COURT: That is helpful. Now, where's
11 the second money?

12 MR. FEDERHAR: The second money are the fees
13 that they charge, they collect.

14 THE COURT: And where are those monies?

11:16:15 15 MR. FEDERHAR: With them.

16 THE COURT: That answers that question.
17 Thank you. Go ahead.

18 MR. FEDERHAR: Yeah, so pretty simple. Your
19 Honor, this case is about mandamus. They have a public
11:16:27 20 duty to provide sanitary systems and to provide sanitary
21 services. We cited you to the *Jung* case, the *Veach*
22 case, *Kasun* case, all cases of the Arizona Supreme Court
23 and Courts of Appeal that say to you that this sanitary
24 district has an affirmative duty to provide sanitary
11:16:52 25 sewer services. And what those cases say is that even

1 though this is akin to a municipal corporation and not
2 under the regulation of the Arizona Corporation
3 Commission, they are treated just like a public utility
4 and the law treats them just like a public utility, and
11:17:13 5 the law is that once they start providing services, they
6 can't stop. And so you look at the concurring opinion
7 in *Jung*; you look at the majority opinion in *Kasun*; you
8 look at the other cases we cited to Your Honor, and they
9 have a duty to provide sanitary sewer services. And
11:17:36 10 think about it, Your Honor, they're a sanitary district.
11 They've passed an ordinance that says nobody can have
12 any other sanitary sewer services other than ours if you
13 live inside the boundaries of our District, and they
14 have that power. The statute gives them that power.
11:17:52 15 Nobody can put in a septic system within the boundaries,
16 and they have that power. We're not arguing about that.
17 But with power, now I'm going to quote Spider-Man, I
18 quoted Mark Twain to you before, but with power comes
19 great responsibility. They have a duty to provide sewer
11:18:09 20 services and they're shirking that duty.

21 Now, that's what this lawsuit 's about.
22 Okay. It's a writ of mandamus to force them to provide
23 the service they have a duty to maintain. So mandamus
24 is pretty simple, Your Honor. You asked two questions;
11:18:28 25 do they have a duty and are they carrying it out. Those

1 are the only two questions you ask in a mandamus action,
2 aren't they. And they talk a lot about their police
3 powers, but they don't acknowledge the duty to provide
4 sanitary services, and that's where the public gets
11:18:48 5 caught in the middle, Your Honor. It's not by what the
6 developer's done, it's because the District is not
7 carrying out its duty.

8 Now, what did the District do to set this
9 up? There's a development agreement, and you've heard a
11:19:05 10 lot about it. The development agreement required
11 Harvard, and I'm just going to speak generically of
12 Harvard, to go out and take care of sanitary sewer
13 system, and it submitted an Aquifer Protection Permit
14 with the District, and the District is on the permit,
11:19:22 15 and the District signed the permit application, and that
16 APP, Aquifer Protection Permit, calls for phased
17 construction of a sanitary sewer system up to 454,000
18 gallons. And the way you get there, Your Honor, is that
19 when you hit 85 percent of each module, of each 62,500
11:19:48 20 gallon module, you build the next one, and that's what
21 was represented by the District and by Harvard to DEQ,
22 that as equal flows hit 85 percent of each capacity
23 we'll build the next one. And when you look at the
24 development agreement, it expressly talks about
11:20:08 25 building, "in phases."

1 And what the District is telling you today
2 as the basis of their moratorium is that we don't build
3 in phases. We build it in bulk and we build it based on
4 lots sold, not sewage flow, but the representation the
11:20:34 5 District made to ADEQ when it applied for its Aquifer
6 Protection Permit was that it would expand based on
7 flow. And if you need any better proof of that, Your
8 Honor, where's DEQ saying to the District, hey, guys,
9 where's your bigger plant? You've got the latest
11:20:57 10 inspection report as evidenced in this case. It's one
11 of the documents you've seen already. It's been talked
12 about and you mentioned it earlier because it noted in
13 there that there were ownership issues in there, and
14 you've already discussed that today. Where is DEQ
11:21:13 15 saying, hey, wait a minute, you've got all these lots
16 sold and you've only got 62,500 gallons of capacity out
17 there, build more. And the answer is ADEQ isn't here
18 because they're not at 85 percent of their capacity,
19 Your Honor.

11:21:27 20 THE COURT: We discussed that in the last
21 meeting we were together, that by holding the plant to
22 what I think you've identified as 40 percent capacity,
23 we can't get to the 85, correct, so we can't expand.

24 MR. FEDERHAR: Why can't we get there?
11:21:43 25 Because they won't let anybody else hook up.

1 THE COURT: My point is that the realty
2 where we are today is that while 85 percent is the
3 trigger --

4 MR. FEDERHAR: Right.

11:21:51 5 THE COURT: It's the switch that results in
6 new construction starting, wait a minute, that limits
7 have been put in place holding it below the 85 percent;
8 if you can't reach the 85 percent then you can't expand,
9 correct?

11:22:03 10 MR. FEDERHAR: You don't need to expand
11 under the ADEQ permit, that's correct, Your Honor.
12 Because why do you need to build a plant that's neither
13 going to be used or useful, and that's a separate issue
14 that we'll deal with at our next hearing, because the
11:22:19 15 concept is first of all if you accept what I've told you
16 and what the Arizona Supreme Court has directed, in both
17 case *Jung* and in other cases, that these folks are
18 treated like a public utility in front of the
19 Corporation Commission, then they have to apply the same
11:22:38 20 principles, and that's the used and useful principle.
21 You don't build a plant until you need it. Why should
22 the taxpayers of a district have to pay for something
23 that's not being used? It's a very simple concept, Your
24 Honor.

11:22:49 25 So the problem here, Your Honor, is the plug

1 that keeps the flow from going into the sewer. If the
2 plug is pulled and there's more flow into the plant and
3 it hits 53,000 gallons, then we double the size of the
4 plant, and Harvard has not renounced that promise.

11:23:14 5 When the plant, when the need to expand --

6 THE COURT: Hold on. Hold on. I'll bet
7 there's not a person here that doesn't want me to
8 understand what's being said, so I've got to tell you
9 that anything that distracts where I'm trying to figure
11:23:29 10 out what's going on in the gallery is probably not
11 helpful to anybody's position. So while I understand
12 you may disagree with Mr. Federhar, you may disagree
13 with Mr. Nelson, I'm going to ask you to quietly sit and
14 listen, because to the extent I've got to tell you at
11:23:47 15 this time I've now been distracted, I've now got to get
16 back into the flow of discussion. So please control the
17 sounds and motions coming out of the gallery. Now,
18 thank you, Mr. Federhar. Where were you?

19 MR. FEDERHAR: Let me get you back.

11:24:00 20 THE COURT: You said the problem was if the
21 flow hits 53,000 gallons.

22 MR. FEDERHAR: Harvard will expand and add
23 62,000 more capacity.

24 THE COURT: He is prepared to at this time?

11:24:10 25 MR. FEDERHAR: Yes, sir. As soon as we hit

1 that 53,000 gallon, that 85 percent trigger, the
2 planning and construction process will start as required
3 by the ADEQ permit. As I said, Harvard has not
4 renounced that. The issue that the District wants to
11:24:26 5 bring up, Your Honor, is they want to change the
6 technology and change the plant. They want to go from
7 the type of plant that's out there to a different
8 technology that costs four, five, however millions of
9 dollars to construct, as opposed to adding another
11:24:44 10 62,500 gallons of capacity for a couple hundred thousand
11 dollars. That was what was in the original ADEQ permit.
12 That's why you heard the reaction from the gallery.
13 They want a different technology and a different type of
14 plant, and there's all sorts of different technologies
11:25:02 15 about how you treat sewage, Your Honor, and you'll hear
16 about that when we have our hearing in May about the
17 different technologies that are available, but Harvard
18 has never backed away from its obligation to construct a
19 plant when the 85 percent of capacity is reached.

11:25:18 20 So Your Honor, the motions you have in front
21 of you for summary judgment are kind of unique. I've
22 got to hand it to them. These are more like motion *in*
23 *limine* or just argument to the Court. You're not
24 deciding things based on uncontested questions of fact,
11:25:36 25 and you're being asked to apply inapplicable standards.

1 This is a mandamus action. It's not a breach of
2 contract action, although there is a breach of contract
3 claim in one of our other lawsuits, not in this one.
4 This is a mandamus action, Your Honor. So bad faith
11:25:54 5 doesn't come into play. Authority to regulate, well,
6 that comes in. Do they have a duty, and Your Honor
7 should find that they have a duty to provide sanitary
8 sewer services. The question is whether they're in
9 breach of that duty for any excusable reason, and those
11:26:09 10 are questions of fact that you're going to decide at a
11 hearing in May, unless Your Honor's going to decide
12 today that as a matter of law they have a duty to
13 provide sanitary services and they're in breach of that
14 duty and that's the end of it, but we've not asked you
11:26:23 15 for summary judgment on that matter today, Your Honor.

16 What you're being asked to do is to decide
17 five issues, six issues, actually, that are simply
18 inappropriate. The police power, they have those powers
19 that are listed in the statute, but the exercise of the
11:26:39 20 police power to impose a moratorium in all of the cases
21 that have been cited to you were based upon an imminent
22 threat to the public health and safety. Imminent threat
23 to the public health and safety. Remember Mr. Nelson's
24 statement to you as we were talking about the open
11:26:57 25 meeting law, and we're going a little far afield. What

1 was it he said, quote: There is no existing violation.
2 You heard him. That means there's no imminent threat to
3 the public health and safety.

4 He said to you the moratorium is presumed
11:27:15 5 valid. No, it's not. This is a mandamus action. In
6 mandamus you look simply to whether they have the duty
7 and whether they're carrying it out. There's no
8 presumption of validity that attaches to that. They
9 asked for a standard of review that's fraud and bad
11:27:32 10 faith. No, the standard of review is do they have a
11 duty; are they carrying it out. There's no reason for
12 this motion for summary judgment.

13 They want the DEQ statues to apply but they
14 badly misinterpret them, Your Honor. As you heard in
11:27:45 15 our first get together, DEQ has this table in its
16 regulations and it says, you know, use this amount of
17 gallons per person, etcetera, etcetera, and at the
18 bottom there's a little footnote and they want to talk
19 about what's in the table, and we want to talk about
11:27:59 20 what's in the footnote and the permit. The table says,
21 you know, in the absence of something else you use a
22 hundred gallons per person per day, and there are other
23 areas you can go down to 80. There's a lot of argument
24 about which one to use. The footnote says, I'm
11:28:16 25 paraphrasing: If you've got real data, you can use

1 that. And we have real data, and the real data shows
2 based on how many years of service out there now, six,
3 seven, eight, that even with the ranch compound that
4 we're averaging 80 gallons per household unit, and we've
11:28:36 5 been doing that consistently for all those years. ADEQ
6 says you can use actual data, so the use of ADEQ
7 standards, Your Honor, isn't an irrelevant point in this
8 process. The question is do they have a duty to provide
9 sanitary sewer services; are they carrying it out in
11:28:57 10 light of the fact they just admitted to you there is no
11 ongoing violation out there. They want you to say they
12 can't have any more hookups, but as Your Honor has noted
13 that puts you in a catch-22. The ADEQ permit requires
14 construction of a new phase at 85 percent. You'll never
11:29:15 15 get to 85 percent with a moratorium in place.

16 The development contract that they entered
17 into the District did with the developer says the
18 developer's authorized to develop in phases, so you're
19 being asked to rule on a racetrack that's going around
11:29:31 20 in a circle with no on ramp and no off ramp. You have
21 to let the system work the way it was designed to work,
22 the way of it was represented to DEQ that it would work.
23 And that is to say let them hook up; when you get to 85
24 percent you better start building your new plant, and
11:29:49 25 that's exactly what this process was established to do.

1 That's what they agreed to do. That's what DEQ
2 authorized, and that's what ought to happen.

3 Finally, they say you don't award fees to
4 us. Well, you know, Your Honor, until you hear the
11:30:05 5 evidence you're not going to know whether to award fees,
6 and we believe that their conduct, their repeated
7 violations of the open meeting law, their utter
8 disregard for public records and public input may lead
9 you to a finding of bad faith that strips them of any
11:30:20 10 qualified immunity they might have, so we just think
11 it's premature for you to make those decisions. Happy
12 to answer any questions, Your Honor.

13 THE COURT: Thank you. Mr. Nelson.

14 MR. NELSON: Yes, in reference to the ADEQ
11:30:34 15 permit, the District has never filed applications. The
16 developers filed the application, obtained the
17 information, and then as occurred with the Santec plant,
18 they submitted it to ADEQ and ADEQ said you're not,
19 Harvard, you're not the permittee, the District is, go
11:30:58 20 get their signature.

21 THE COURT: And that's when they signed onto
22 the APP?

23 MR. NELSON: Yes.

24 THE COURT: Thank you.

11:31:05 25 MR. NELSON: And that also occurred more

1 recently. It's been Harvard that hired the Aqua
2 Engineering out of Utah to investigate, determine
3 alternatives, the different technologies that counsel
4 mentioned, and they came back and recommended to the
11:31:21 5 District and to Harvard to go with the MBR plant and
6 again, given the load --

7 THE COURT: This is the more expensive plant
8 that Mr. Federhar --

9 MR. NELSON: Right, the recent one. This is
11:31:37 10 the pathway that occurred in that the Board
11 investigated, took trips, as did Harvard's
12 representatives, and analyzed various plants, looked at
13 costs as among many other factors, and Aqua Engineering
14 came in and said you need 250,000 gallons per day, you
11:31:58 15 should have that installed and constructed. And so
16 Harvard said, yes, we agree. We decide on that, and
17 matter of fact when the moratorium was lifted, there was
18 this memorandum of understanding that's attached to the
19 First American Trust Agreement to pull the money in from
11:32:21 20 the private sector. In that memorandum it specifically
21 says that the District may select the plant. The
22 District, however, wanted to be sure that Harvard agreed
23 that this was the proper plant, so Harvard hired its own
24 engineer, Aqua Engineering. Its own engineer told
11:32:47 25 Harvard you need 250,000 gallons and we recommend that

1 you build the MBR plant. That occurred up until the
2 middle of 2009 after \$400,000 of the monies paid by lot
3 purchasers had been spent towards that MBR plant. And
4 then when it really came to the time when Harvard was to
11:33:15 5 put up the money for real construction costs, when
6 things were going to have to be put in the ground,
7 Harvard said we can't do it; we don't have any money and
8 we're not going to do it.

9 THE COURT: When was this?

11:33:30 10 MR. NELSON: This was in the middle of --
11 this was July of 2009. That's that secret meeting that
12 they wanted so that it wouldn't be recorded, it wouldn't
13 be transcribed.

14 THE COURT: Okay.

11:33:45 15 MR. NELSON: And in reference to the table
16 one that was talked about, yeah, there's a footnote, but
17 the footnote says you have to apply to ADEQ. And as
18 you've seen, I'm, or heard me say I should say, several
19 times, the District went to ADEQ and said is there
11:34:07 20 anything we can do. And they said no. You know, it's
21 200 gallons per day, per lot. And matter of fact if the
22 District or even Harvard today walked in with an
23 application, they would apply the new -- they're not so
24 new any more -- 2005 regulations that require that 80
11:34:31 25 gallons per day, per person, using the most recent

1 census, 2.234 persons per household, which gives you the
2 187 gallons per day per household, and so you could make
3 an application, but tied to that is a multiplier, so the
4 amount would actually be more.

11:34:54 5 THE COURT: So are you telling me that table
6 one hundred with the modifications -- excuse me, the
7 table with a hundred gallons, is what my note is, per
8 person per day, no longer has the footnote indicating
9 that if you have real data you can use that?

11:35:08 10 MR. NELSON: You can use real data if you
11 come in and show that information to ADEQ.

12 THE COURT: And has anybody gone into ADEQ
13 with that information?

14 MR. NELSON: No.

11:35:22 15 THE COURT: Asking to use actual data rather
16 than the formula numbers?

17 MR. NELSON: No, they haven't, and the
18 reason why is because ADEQ will then apply its
19 regulations which require the 80 gallons per day
11:35:40 20 calculation by the number of lots, and the reason why it
21 will not rely, well, why it cannot rely on real data is
22 that --

23 MR. FEDERHAR: I'm sorry, Your Honor, he's
24 just speculating about what ADEQ's going to do.

11:35:58 25 MR. NELSON: No.

1 THE COURT: Hold on, Mr. Federhar. Go
2 ahead.

3 MR. NELSON: The reason is that then there
4 will be a re-examination of the financial assurances
11:36:08 5 that if you're not going to build or if you don't have
6 it in the ground today, as the District originally did,
7 it had 120,000 gallons capacity in the ground before the
8 lots were sold, or when they were sold. Today that does
9 not exist. And so ADEQ will apply that table, but will
11:36:33 10 also require a review of the rest of the permit,
11 including the financial assurances that Harvard will
12 have to agree to provide so that that capacity is there.

13 THE COURT: So I'm waiting to hear the
14 downside.

11:36:51 15 MR. NELSON: Oh, the downside is that --

16 THE COURT: My point is, and we need to wrap
17 this up, but my point is if what we're going to do is
18 keep doing what we're doing because if we do something
19 different ADEQ's going to find out and, boy, we're going
11:37:06 20 to be in trouble, I don't see where that changes from
21 where we are today. It also keeps ADEQ out of the loop.
22 So even to the extent that we went to them and said we
23 have this conundrum, we can't get past these
24 limitations, we can't do that because we can't go to
11:37:22 25 ADEQ and even address those issues, right?

1 MR. NELSON: Well, there's no hesitation.
2 The consultants for the District have.

3 THE COURT: They've told them this is our
4 problem.

11:37:31 5 MR. NELSON: Right.

6 THE COURT: We can't develop because of
7 agreements.

8 MR. NELSON: No. They've gone to the ADEQ
9 and said this is our permit, this is what we see in the
10 permit, the 200 gallons per day, per lot.

11 THE COURT: Right.

12 MR. NELSON: And ADEQ says yes, comply with
13 that. And so you can come in and request a change,
14 which the District would urge the plaintiffs to do. Go
15 to ADEQ. And matter of fact --

16 THE COURT: The District wants the
17 plaintiffs to go to ADEQ and seek a modification for the
18 District?

19 MR. NELSON: For the plaintiff's plant.
11:38:09 20 Keep in mind, the plaintiffs own the plant, and they
21 have the --

22 THE COURT: Excuse me, this is the plant
23 that was purchased with the monies collected by the
24 District, but the District won't take ownership of.

11:38:22 25 MR. NELSON: No, the monies, yes. And the

1 reason, well, the monies were collected by developers,
2 went to Santec, and the District had no development
3 involvement with the selection of Santec or the plant
4 and the plant is incomplete. The developer of the plant
11:38:48 5 has recently been out there and said it's never been
6 fully completed.

7 THE COURT: Mr. Nelson, I understand all
8 that. My dilemma is this. It seems to me like we've
9 built in all these impossible circumstances. We can't
11:39:00 10 go to ADEQ and get an exception because then they're
11 going to find out something else. We can't declare it
12 85 percent and begin construction because of something
13 else. There's always something that prevents, frankly,
14 the people of this district who own lots and haven't
11:39:18 15 built houses yet from being able to build on them,
16 because of what appear to be relationship problems that
17 keep the district or keep the developers or whoever it
18 is from just going out and saying we've got to get this
19 matter moving forward. Do you understand my frustration
11:39:33 20 with this?

21 MR. NELSON: I've had similar frustrations
22 since I've been involved with --

23 THE COURT: I bet.

24 MR. NELSON: Stayed awake nights, actually,
11:39:41 25 trying to think of solutions, and the Board has put one

1 on the table and that is it would readily give the
2 Harvard the sole decision on when to expand the plant if
3 it would accept the permit and take the District off the
4 liability and the penalties for the permit, because
11:40:04 5 that's, the District has --

6 THE COURT: What penalties for the permit?

7 MR. NELSON: If there's a raw sewage
8 discharge.

9 THE COURT: But there's not, but there's
11:40:17 10 not. So what you're saying is -- tell me again what
11 your proposed resolution of this is. I'd like to know
12 how close we are to a position where we could actually
13 start building.

14 MR. FEDERHAR: We're not, Your Honor.
11:40:28 15 You're being led down a rabbit trail. You're not being
16 told, from our description, an accurate description. I
17 don't mean to be impatient, Your Honor, but this really
18 has nothing to do with what we're dealing with.

19 THE COURT: I understand, Mr. Federhar.
11:40:41 20 Thank you.

21 MR. NELSON: But what we need here is to put
22 the decision-making and the permits and everything under
23 one hat, and what we have is the permit with the
24 District because of the original permit, not because it
11:40:55 25 owns the plant and hasn't approved the incomplete plant,

1 is to put the permit back with Harvard and let them make
2 the decision of when they want to expand and they can
3 determine whether or not they are in compliance with
4 ADEQ regulations, which this Board has on four different
11:41:22 5 times gone back and told if you're not out there with
6 available capacity at 200 gallons per day per dwelling
7 lot --

8 THE COURT: I understand, Mr. Nelson. I do.

9 MR. NELSON: And so thank you very much.

11:41:38 10 THE COURT: It does seem like we chase our
11 tail a bit when it comes to the issues here.

12 Mr. Federhar, I understand that you need to
13 be getting out of here, and I did not mean to delay
14 this. The discussion for everyone here who knows these
11:41:51 15 issues and has known these over time in memorial
16 probably are somewhat increduloused by my questions, but
17 it is where it is. I have two motions in front of me.
18 I'm going to take them under advisement at this time. I
19 will be ruling with them, excuse me, I will be ruling on
11:42:08 20 them as I get to them.

21 Mr. Federhar, as the plaintiff's counsel is
22 there anything else the court needs to be looking at
23 today or addressing or anything that's hanging in the
24 file that is not in process?

11:42:20 25 MR. FEDERHAR: We have a hearing in front of

1 you on March 22nd, if your ruling today does not
2 otherwise dispose of that, and then we're set in front
3 of you in May, if again your ruling today does not
4 dispose of that.

11:42:33 5 THE COURT: Thank you. Mr. Nelson, anything
6 further?

7 MR. NELSON: We have a reply forthcoming to
8 the motion to strike the supplemental brief on the use
9 and useful argument.

11:42:43 10 THE COURT: Yes. Yes, that is not even at
11 issue yet.

12 MR. FEDERHAR: Correct.

13 THE COURT: It's not been fully briefed.

14 MR. NELSON: That's correct.

11:42:50 15 THE COURT: Thank you. With that, folks, I
16 do appreciate your time and we're adjourned.

17 (Proceedings adjourned at 11:42 a.m.)

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C E R T I F I C A T E

STATE OF ARIZONA)
) ss
COUNTY OF YAVAPAI)
-----)

I, Holly M. Draper, certify that I am an Official Court Reporter for the Superior Court of Yavapai County, State of Arizona; that I was present and took down in shorthand all proceedings had in the above-entitled matter, and that the foregoing 67 pages contain a full, true and correct transcription of my shorthand notes so taken.

WITNESS my hand this 5th day of April, 2011.

Holly M. Draper, RPR
Arizona CR #50744