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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Desert Mountain Club, Inc., Plaintiff, vs. Thomas Clark and Barbara Clark, husband and wife, Defendants.	No. CV2014-015334 **Response to Joinder in Robert Jones's Motion for Protective Order, Motion for Order Requiring Defendants to Provide Complete Writings Upon Request, Motion to Disqualify** (Assigned to the Honorable Dawn Bergin)

I. RESPONSE TO JOINDER

For all the reasons why the motion filed by Christopher LaVoy on behalf of Robert Jones should be denied, the joinder in that motion by Desert Mountain must also be denied.

Desert Mountain expresses consternation over the fact that this law suit is a public proceeding. Depositions are private proceedings in the sense that they do happen in a lawyer's office and are not necessarily open to the public, but a motion showing good cause must be made before the court may enter an order restricting publication of the transcript to the general public. The court is constrained by the rules of procedure:

> (2) Before entering an order in any way restricting a party or person from disclosing information or materials produced in discovery to a person who is not a party to the litigation in which the information or materials are being discovered or denying an intervener's request for access to such discovery materials, a court shall direct:
>
> > (a) the party seeking confidentiality to show why a confidentiality order should be entered and continued; and (b) the party or intervener opposing confidentiality to show why a confidentiality order should be denied in whole or part, modified or vacated. The burden of showing good cause for an order shall remain with the party seeking confidentiality. **The court shall**

> **then make findings of fact concerning any relevant factors**, including but not limited to: (i) any party's need to maintain the confidentiality of such information or materials; (ii) any nonparty's or intervener's need to obtain access to such information or materials; and (iii) any possible risk to the public health, safety or financial welfare to which such information or materials may relate or reveal. Any order restricting release of such information or materials to nonparties or interveners shall use the least restrictive means to maintain any needed confidentiality. No such findings of fact are needed where the parties have stipulated to such an order or where a motion to intervene and to obtain access to materials subject to a confidentiality order are not opposed.

ARIZ. R. CIV. P. 26(c)(2) (bolding added).

Desert Mountain, clearly, has not followed this procedure. It has established no grounds for confidentiality that prevents disclosure of depositions to nonparties to this litigation or publication on the internet.

Findings of fact are required of the court before ordering confidentiality in a law suit because confidentiality is not the norm. It is extraordinary. It is only allowed upon a clear showing of good cause. There is none in this case so far.

Desert Mountain is the plaintiff in this case. It is advancing law suits against not only the Clarks, who are defendants in this case, but many other members of the Desert Mountain Golf Club who do not want to be members. They are being sued because they refuse to pay the $65,000.00 to $100,000.00 or more the club demands just to quit or resign. All of these other people, many of whom have been served with demand letters by Fennemore Craig, have a real, bonafide, justified interest in the outcome of this case. They want to know what is happening in this case because it affects them. Desert Mountain wants to keep what happens in this case secret because a loss is bad for Desert Mountain. All of the members who are disadvantaged by the war chest of a $30-million-a-year corporation have a greater interest in what goes on in this case than the club's desire to act in secret. After all, the plaintiff is a member-owned non-profit corporation. Non-profits are supposed to be open books. What possible secret can a non-profit keep from its members—its owners?

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II. OBJECTIONS TO FORM

Desert Mountain seeks one more order from the court. It objects to the form of questions being put to the witnesses, the use of electronic images on a screen rather than hard copies of the documents.

The only citation to any authority for this objection to images rather than paper documents is ARIZ. R. EVID. 106. Rule 106 deals with admission of evidence at trial, not the use of documents at a deposition. A rule 106 objection is no more valid at a deposition than a hearsay objection.

Desert Mountain complains that its chief operating officer has a vision problem and cannot see the larger than life images on the computer screen. H-m-m-m. People with vision problems prefer the enlargement the computer image allows, and the court can look at the video of Mr. Jones's easy view of the documents—no squinting, no leaning forward, no glasses—when he is looking at images on the screen. The video is filed herewith.

The plaintiff has another tool if they think it is disadvantaged by a computer image rather than a hard copy of the document. It is a form objection.

> [F]orm objections refer to a category of objections, which includes objections to "leading questions, lack of foundation, assuming facts not in evidence, mischaracterization or misleading question, non-responsive answer, lack of personal knowledge, testimony by counsel, speculation, asked and answered, argumentative question, and witness' answers that were beyond the scope of the question."

Security National Bank v. Abbott Laboratories, 299 F.R.D. 595, 601 (N.D. Iowa, 2014).

Two of the form objections available are mischaracterization and misleading. If somehow showing both pages of a two-page, document in larger-than-life-format—both pages displayed side-by-side on the screen—results in a mischaracterization or some misleading question, a form objection preserves that. If only seeing the one important paragraph of a 200-page document is misleading or a mischaracterization, again, a form objection preserves that. Moreover, the witness gets to read the deposition if he wants and can make any changes that reflection after poring over the 200-page document supports.

We are in the twenty-first century. The tedium of giving hard-copy documents to everyone seated around the table, taking the time for the court reporter to mark it and then making the witness

fumble through a large document is time consuming and does nothing but delay and obfuscate. No one who has sat through a deposition or a trial where electronic documents are presented to the witness can say in good faith that there is anything inefficient or wrong with it. If the lawyers think there is something misleading or some mischaracterization by only showing the one provision that matters in the case, then they have the right to preserve that objection: form. Form objections are just like every other objection. Counsel better have a good-faith basis for it. A continuing objection would suffice.

Undersigned counsel tries cases electronically. Undersigned counsel has been an adjunct professor of law at ASU's law school teaching electronic presentation of evidence in the courtroom and for pretrial discovery proceedings. Ten years ago, undersigned counsel was involved in a jury trial in Maricopa County that lasted ten months, *State v. Grabinski, et al.*, CR2001-006183. The Honorable Ken Fields presided at that trial. It was the longest and most complicated securities fraud trial in Arizona history. Exhibits were marked with numbers that exceeded 32,000. Over 8,000 exhibits were admitted into evidence. There were approximately one hundred witnesses. No one saw a paper exhibit until the thousands and thousands of exhibits were made available to the jury during deliberation. If trials can be tried like this, then depositions can be conducted electronically.

III. MOTION TO DISQUALIFY

There is one more issue. Mr. LaVoy's involvement in this case is unethical. Fennemore Craig has embraced this unethical conduct by its tag-team relationship with Mr. LaVoy. Fennemore Craig has partaken of the fruit of the forbidden tree and thereby disqualified itself.

> The Ethics Commission admits in its brief that it disclosed the confidential matter to the Attorney General without obeying § 36-25-4(c). Thus, the Ethics Commission violated the confidentiality commands of § 36-25-4(b). The Attorney General does not claim any independent knowledge of wrongdoing by E.J.M. Therefore, the Attorney General's investigation and convening of the grand jury were and are illegal as fruit of the poisonous tree.

Ex parte E.J.M., 829 So.2d 105 (Ala. 2001) at 110.

Mr. LaVoy's deposition—a custodian of records deposition—is pending to discover how badly Mr. LaVoy's perfidy has infected Fennemore Craig.

IV. CONCLUSION AND ATTORNEYS FEES

The deposition transcript filed with this court in conjunction with Chris LaVoy's motion reveals the unreasonable, groundless, abusive, and obstructionist conduct of both Mr. LaVoy and Mr. Callahan. ARIZ. R. CIV. P. 26(f) provides:

> The court shall assess an appropriate sanction including any order under Rule 16(i) against any party or attorney who has engaged in unreasonable, groundless, abusive, or obstructionist conduct.

ARIZ. R. CIV. P. 16(i) adopts the sanctions in rule 37(b).

An argument can be made that the lawyer who signed this joinder and motion for protective order, Seth G. Schuknecht, bar number 030042, violated Rule 11 by filing this motion, so he is subject to sanctions. The reality is, however, that Mr. Schuknecht is a relatively new lawyer at a very large firm and is under the supervision of and does the bidding of the lead lawyer in this case, Christopher L. Callahan, bar no. 009635. It is Mr. Callahan and Fennemore Craig who should be sanctioned for this specious motion.

Notably and importantly for Rule 11 purposes, the signature block used by Fennemore Craig is improper because it purports to be the signature of a law firm instead of the lawyer with the bar license. This signature block does not comply with Rule 11. *Pavelic & LeFlore v. Marvell Entertainment Group*, 493 U.S. 120 (1989). Mr. Schuknecht is responsible for not signing the motion he filed in accordance with the rules, but, again, he works for a large firm where he is likely to be discharged unless he does what they demand, even though it is a violation of the rules. The rule says:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name . . . .

ARIZ. R. CIV. P. 11(a). Why this rule? It is the lawyer who has the bar license, not the law firm. The lawyer who signs is responsible, and it is the lawyer who signs who is liable for the sanctions when he signs something that

> to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for extension, modification, or reversal of existing law; and it is not interposed for an improper

> purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Id.

Walking out of the deposition, blaming Mr. LaVoy for taking the witness out of the deposition, joining Mr. LaVoy for taking the witness out, joining Mr. LaVoy in his unethical motion, and subscribing to the unwarranted, unsupported request for protective order is nothing but an attempt to delay and run up the expenses in this case. It should not be countenanced. Sanctions must be entered.

Respectfully submitted this 4th day of June 2015.

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