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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

PLAINTIFF

Plaintiff,

v.

DEFENDANT

Defendants.

NO.

**Defendants X MOTION TO DISMISS  
THE COMPLAINT OR, IN THE  
ALTERNATIVE, STAY  
PROCEEDINGS AND COMPEL  
ARBITRATION OF ALL CLAIMS**

(Assigned to the Honorable...)

Defendants X respectfully move this Court to (1) Dismiss all allegations of the Complaint either on the basis that the Binding arbitration agreements and Commencement Letter dated March 31, 2008 prevail or (2) Dismiss Counts V (Conversion), VI (Fraud), VII (Conspiracy), XI (Interference with Prospective Business Relations), and XII and XIII (RICO Violations) on the merits for reasons set forth herein. In the alternative, Defendants X seek to stay this matter on the basis that there is pending arbitration of all claims alleged against the Xs pursuant to the Binding Arbitration Clauses and the

1 Arbitration Commencement Letter referenced above.

2 Defendants X support this Motion with the following Memorandum of Points and  
3 Authorities, the exhibits attached hereto, and all matters of record, which are incorporated  
4 herein by this reference.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. INTRODUCTION.**

7 [Arbitration issues were researched and drafted as a joint project between Spencer  
8 Proffitt and another summer associate; thus, this motion has been edited to include only  
9 those sections that are the sole work-product of Spencer Proffitt.]

10 [. . .]Even if the Court determines that these issues should be tried judicially,  
11 several of the claims should be dismissed for failure to state a claim for which relief can  
12 be granted. Specifically, Counts V (Conversion), VI (Fraud), VII (Conspiracy), XI  
13 (Interference with Prospective Business Relations), and Counts XII and XIII (RICO  
14 Violations) all fail as a matter of law.

15 **II. FACTUAL BACKGROUND.**

16 [ Section A has been redacted]

17 **B. Failure to State a Claim.**

18 Beginning in 2006, X (“X”) did architectural work for Plaintiff as an independent  
19 contractor. Compl. ¶ 9. Plaintiff primarily provides only commercial architectural design  
20 work for its clients. *Id.* ¶ 8. Plaintiff began a commercial project for George and Bill Y  
21 (collectively, the “Y”) starting in November of 2006. *Id.* ¶ 33. Sometime prior to 2007,  
22 X began assisting the Y with some residential design work, outside of his role with  
23 Plaintiff. *Id.* ¶ 15. Plaintiff alleges that X would occasionally use Plaintiff’s “personnel,  
24 equipment, materials and other assets” for the assistance he provided to the Y. *Id.* ¶ 25.  
25 On June 6, 2007, X signed an employment agreement to work as Vice President and  
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1 Principal Architect for Plaintiff. *Id.* ¶¶ 16 & 18. The employment agreement allegedly  
2 stated that X had to notify Plaintiff’s Executive Director of Administration if X was to  
3 perform any architectural services outside Plaintiff. *Id.* ¶ 20.

4 Along with the signed employment agreement, X sent a letter to Plaintiff on June 6,  
5 2007 (“June 6 Letter”) disclosing the architectural projects X was working on apart from  
6 his work at Plaintiff. *Id.* ¶ 21. A true and correct copy of such letter is attached to this  
7 memorandum as Appendix “D”. The June 6 Letter is the only affirmative representation  
8 that Plaintiff alleges X made to Plaintiff regarding outside architectural work. *Cf.* Compl.  
9 ¶¶ 1-44. The letter states in part: “I am assisting George and Bill Y (Owners of  
10 Company) with the design of their residences. I do free hand [sic] sketches of the designs  
11 and turn the information over to a residential design firm they have hired to do all of the  
12 CAD work and building permit drawings.” *Id.* ¶ 21; Appendix “D”. The letter never  
13 stated that X was not receiving compensation for these freehand drawings, nor for the  
14 other outside work which he disclosed. *Id.* X also disclosed that he was using Plaintiff  
15 personnel for at least some of the outside work. *Id.*

16 **III.** [Redacted]

17 **IV. THE COURT SHOULD ENTER AN ORDER DISMISSING COUNTS V, VI,**  
18 **VII, XI, XII, AND XIII ON THE MERITS.**

19 Even if this Court decides to exercise its jurisdiction over this matter, Counts V  
20 (Conversion), VI (Fraud), VII (Conspiracy), XI (Interference with Prospective Business  
21 Relations), and Counts XII and XIII (RICO violations) should be dismissed as to the  
22 Defendants X for failure to state a claim for which relief can be granted. *See* Fed. R. Civ.  
23 P. 12(b)(6). A motion to dismiss for failure to state a claim should be granted where “it  
24 appears certain that the plaintiff would not be entitled to relief under any statement of  
25 facts susceptible of proof under the claim stated.” *State ex rel. Corbin v. Pickrell*, 136  
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1 Ariz. 589, 594 (Ariz. 1983). In determining whether to dismiss a complaint, the  
2 allegations of the complaint must be taken as true and are to be read in the light most  
3 favorable to the non-moving party. *See, e.g., Logan v. Forever Living Products Int'l*, 203  
4 Ariz. 191, 194 (Ariz. 2002). At the same time, however, mere conclusions of law are not  
5 sufficient to overcome a motion to dismiss. *Aldabbagh v. Ariz. Dept. of Liquor Licenses*,  
6 162 Ariz. 415, 417 (Ariz. App. 1997).

7  
8 **A. Plaintiff's Claim for Conversion (Count V) Against Defendants X Fails as a**  
9 **Matter of Law.**

10 The Court should dismiss Plaintiff's claim for conversion in its entirety because  
11 Plaintiff has failed to allege, and under no circumstances could it allege, the proper  
12 elements to support a conversion claim against the Xs. In Arizona, to establish a claim for  
13 conversion, a plaintiff must allege and prove the following three elements: (i) plaintiff  
14 has a right to control a "chattel;" (ii) defendant intentionally exercised control or  
15 dominion over that chattel, which; (iii) seriously interferes with the plaintiff's right to  
16 control the chattel. *See Miller v. Hehlen*, 104 P.3d 193, 203 (Ariz. App. 2005). "Chattel"  
17 is either tangible property or "intangible property that is merged in, or identified with,  
18 some document." *Id.* If the elements are met, the court must inquire into the seriousness  
19 of the interference to determine whether the offending party must pay the full value for  
20 the chattel. *Id.*

21 The only support Plaintiff gives for a charge of conversion is that "X exercised  
22 wrongful control over Plaintiff's funds and assets, without Plaintiff's knowledge or  
23 consent." Compl. ¶ 72. The only factual allegation related thereto is that X did not  
24 "compensate Plaintiff for the use of Plaintiff's personnel, equipment, materials and other  
25 assets" used to complete outside work. *Id.* ¶ 25. The allegations do not address whether  
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1 the “assets” used could be considered tangible “chattel” in satisfaction of the first element  
2 of a count for conversion. Even if the Court were to assume that the vague terms  
3 “equipment” and “materials” refer to tangible chattel, Plaintiff cannot allege that whatever  
4 “control and dominion” the Xs exercised over those assets seriously interfered with  
5 Plaintiff’s right to control those assets. Indeed, the Complaint merely alleges that X’s  
6 control was “wrongful” and amounted to conversion. *Id.* ¶¶ 72-73. Such a mere  
7 conclusion of law cannot overcome a motion to dismiss. *Aldabbagh* 783 P.2d at 1209  
8 (Ariz. App. 1997).

9 Because there is no indication that X exercised control over “chattel,” and because  
10 there is no indication that any control substantially interfered with Plaintiff’s right to  
11 control such chattel, the Court should dismiss Count V on the merits.

12  
13 **B. Plaintiff’s Claim for Fraud (Count VI) Against Defendants X Fails as a**  
14 **Matter of Law.**

15 The Court should dismiss Plaintiff’s claim for fraud in its entirety because Plaintiff  
16 has failed to allege, and under no circumstances could it allege, the proper elements to  
17 support a fraud claim against X. In Arizona, to establish a claim for fraud, a plaintiff must  
18 allege and prove the following nine elements: (i) a representation; (ii) its falsity; (iii) its  
19 materiality; (iv) the speaker's knowledge of its falsity or ignorance of its truth; (v) his  
20 intent that it should be acted upon by and in the manner reasonably contemplated; (vi) the  
21 hearer's ignorance of its falsity; (vii) his reliance on its truth; (viii) the reliance was  
22 reasonable and justified under the circumstances; (ix) his consequent and proximate  
23 injury. *Echols v. Beauty Built Homes, Inc.*, 647 P.2d 629, 631 (Ariz. 1982). All of these  
24 elements must be specifically proven by clear and convincing evidence. *Dunlap v. Jimmy*  
25 *GMC of Tucson, Inc.*, 666 P.2d 83, 89 (Ariz. App. 1983).

26

1           Moreover, a plaintiff alleging fraud in his or her complaint must plead each  
2 element with particularity. *See* Fed. R. Civ. P. 9(b). Under Rule 9(b), a plaintiff “must  
3 state the time, place, and specific content of the false representations as well as the  
4 identities of the parties to the misrepresentation.” *Schreiber Distrib. Co. v. ServWell*  
5 *Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

6           In support of Count VI, Plaintiff asserts that “X affirmatively misrepresented that  
7 the work he was doing on the Y project was unpaid, and CAD and other work on the  
8 project was being provided by others. Compl. ¶ 77. Plaintiff further asserts that it relied  
9 on X’s “material omissions and misrepresentations.” *Id.* ¶ 79. However, omissions are  
10 irrelevant to a charge of actual fraud, which requires an affirmative representation that is  
11 false. *See Echols*, 647 P.2d at 631. Plaintiff has failed to allege an affirmative  
12 representation that is false. The only affirmative representation that Plaintiff alleges is  
13 that X stated in the June 6 Letter: “I am assisting [Johns Doe] (Owners of Company) with  
14 the design of their residences. I do free hand [sic] sketches of the designs and turn the  
15 information over to a residential design firm they have hired to do all of the CAD work  
16 and the building permit drawings.” Compl. ¶ 21; Appendix “D”. Plaintiff claims that this  
17 representation is false because X received payment for this work. *See id.* ¶ 77. However,  
18 X never stated, or even implied, that this work was unpaid.

19           X stated that he was doing “free hand sketches.” In common usage, a freehand  
20 sketch is one which is drawn “by hand without mechanical aid,” not a sketch that is done  
21 free of charge. *See American Heritage Dictionary* (3d Ed.). There is nothing in the  
22 alleged representation that would imply that X was not receiving compensation for his  
23 services to the Y. Similarly, Plaintiff has made no allegation that X did not “turn the  
24 information over to a residential design firm” after making the freehand sketches. In sum,  
25 the only affirmative representations which Plaintiff can point to were not false under any  
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1 facts that Plaintiff can allege. If these representations were false for some other reason,  
2 Plaintiff must plead so with particularity in order to withstand a motion to dismiss. Fed.  
3 R. Civ. P. 9(b). Because the only alleged, affirmative representation is true in its entirety,  
4 Plaintiff similarly cannot show the requisite knowledge of its falsity. *See Echols*, 647  
5 P.2d at 631.

6 In addition, Plaintiff must have justifiably relied on a false statement. Plaintiff has  
7 not pointed to any actions it took, or that it refrained from taking, in reliance on the  
8 alleged representation that X was not being compensated for outside work.

9 Moreover, Plaintiff cannot assert damages with particularity. Plaintiff cannot  
10 allege that it would have received the Y' residential business but for a false representation  
11 by X. Any lost compensation or other monetary damages are speculation at best.  
12 Because all elements of actual fraud must be alleged with particularity, and because  
13 Plaintiff has failed to establish an affirmative representation which was false, justifiable  
14 reliance on such a representation, or any damages as a proximate cause of that reliance,  
15 the Court should dismiss Count VI on the merits.

16 **C. Plaintiff's claim for Interference with Prospective Business Relations**  
17 **(Count XI) fails as a matter of law.**

18 The Court should dismiss Plaintiff's claim for Interference with Prospective  
19 Business Relations in its entirety because Plaintiff has failed to allege, and under no  
20 circumstances could it allege, the proper elements to support a tortious interference claim  
21 against X. To support a claim of interference with prospective business relations, Plaintiff  
22 must show (i) the existence of a valid business expectancy; (ii) the interferer's knowledge  
23 of the expectancy; (iii) intentional, wrongful interference causing a breach or termination  
24 of the expectancy; and (iv) resultant damage to the party whose relationship or expectancy  
25 has been damaged. *Neonatology Assocs., Ltd. v. Phoenix Perinatal Assocs., Inc.*, 164  
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1 P.3d 93, 99 (Ariz. App. 2007). Plaintiff must allege that an expectancy is more than mere  
2 “hope.” *Id.* For the interference to be wrongful, it must be accomplished by some kind of  
3 improper conduct on the part of the defendant. *Id.* at 100.

4 Plaintiff fails to allege that it had a valid business expectancy. Plaintiff admits that  
5 the architectural services it provides are “primarily commercial.” Compl. ¶ 8. Plaintiff  
6 does not allege that X failed to refer any commercial work for the Y. *See generally id.*  
7 Other than having an “ongoing, valid, and existing business relationship” with the Y,  
8 Plaintiff gives no reason it should have expected the Y to provide it with further business.  
9 *See id.* ¶ 103. There is no allegation that the Y were unusually satisfied with the  
10 commercial work that Plaintiff had done for them in the past, nor any other reason that  
11 would make Plaintiff’s expectancy rise above the level of mere “hope.”

12 Further, there are no facts alleged that make X’s conduct improper or wrongful.  
13 Indeed, X fully disclosed on June 6, 2007 that he was “assisting George and Bill Y  
14 (owners of Company) with the design of their residences.” Compl. ¶ 21. As discussed  
15 previously, there was no reason for Plaintiff to assume that the Y did not compensate X  
16 for his assistance. Considering X’s full and fair disclosure to Plaintiff of his working  
17 relationship with the Y, any interference with Plaintiff’s business expectancy cannot be  
18 wrongful. Because Plaintiff had no valid business expectancy beyond mere hope, and  
19 because X’s conduct relating to his residential work for the Y was not wrongful, the Court  
20 should dismiss Count XI on the merits.

21 **D. Plaintiff’s claim for Conspiracy (Count VII) against the Xs fails as a matter**  
22 **of law.**

23 The Court should dismiss Plaintiff’s claim for “Actual Damages Resulting from  
24 Acts of Conspirators” in its entirety because Plaintiff has failed to allege, and under no  
25 circumstances could it allege, the proper elements to support a civil conspiracy claim  
26

1 against X. Arizona law states that a claim for civil conspiracy is essentially a claim for  
2 damages resulting from the acts of conspirators. *Perry v. Apache Junction Elem. Sch.*  
3 *Dist. #43 Bd. of Trustees*, 514 P.2d 514, 517 (Ariz. App. 1973). Thus, for Count VII to  
4 stand, Plaintiff must be able to allege the proper elements to support a civil conspiracy  
5 claim.

6 To support a claim of civil conspiracy, Plaintiff must show (i) an express or  
7 implied agreement to cooperate in a particular line of conduct; (ii) acts of a tortious nature  
8 carrying the agreement into execution; (iii) knowledge that the act which the defendants  
9 are aiding is a tort; and (iv) substantial aid in commission of the act. *Dube v. Likins*, 167  
10 P.3d 93, 100 (Ariz. App. 2007). A civil conspiracy requires an underlying tort, and there  
11 are no damages separate from those of the underlying tort. *Dawson v. Withycombe*, 163  
12 P.3d 1034, 1054 (Ariz. App. 2007). Indeed, the United States Supreme Court has noted  
13 that civil conspiracy is essentially a theory of vicarious liability. *Beck v. Prupis*, 529 U.S.  
14 494, 503 (2000).

15 The only underlying torts alleged in paragraphs 1-81 of the Complaint, to which X  
16 could have provided “substantial aid” are 1) conversion; and 2) actual fraud. *See*  
17 *generally* Compl. ¶¶ 45-81. If X were liable for either of these, he would be liable  
18 directly, thus rendering a conspiracy charge superfluous as a means of holding X  
19 vicariously liable for his own acts. *See generally id.*

20 Further, both these torts, as well as that of tortious interference fail as a matter of  
21 law. *See supra* Parts IV.B, C, & D. Because the underlying torts fail as a matter of law,  
22 there can be no damages resulting from the acts of conspirators. Thus, the Court should  
23 dismiss Count VII on the merits.

24  
25 **E. Plaintiff’s claims for violation of Racketeer Influenced and Corrupt**  
26 **Organizations Act (RICO) (Counts XII & XIII) fail as a matter of law.**

1 The Court should dismiss Plaintiff’s claim for violation of RICO in its entirety  
2 because Plaintiff has failed to allege, and under no circumstances could it allege, the  
3 proper elements to support a civil RICO claim against X. Indeed, to borrow the words of  
4 a federal judge in New York, this appears to be “a case in which an angry plaintiff tries to  
5 transform garden variety claims of fraud and breach of fiduciary duty into a RICO  
6 action.” *Vicon Fiber Optics Corp. v. Scrivo*, 201 F. Supp. 2d 216, 217 (S.D.N.Y. 2002).  
7 The elements of a federal RICO violation as alleged in this case are: (i) Conduct; (ii) of  
8 an “enterprise”; (iii) through a “pattern”; (iv) of “racketeering activity”. *Sun Sav. & Loan*  
9 *Ass’n v. Dierdorff*, 825 F.2d 187, 191 (9th Cir. 1987); *see* 18 U.S.C. §§ 1961 & 1962(c).  
10 There is no disputing that X was involved in conducting an enterprise. However, Plaintiff  
11 cannot allege sufficient facts to show any racketeering activity. Moreover, even if the  
12 conduct alleged could be called “racketeering activity,” it did not rise to the level of a  
13 pattern.

14 **1. X’s conduct was not racketeering activity.**

15 Racketeering activity is defined by a list of predicate offenses. § 1961(1). The  
16 “[f]ive predicate acts” listed by Plaintiff are nowhere on that list. *see* Compl. ¶ 114. The  
17 only alleged offenses that appear on the list of predicate offenses for “racketeering  
18 activity” are mail fraud and wire fraud. Compl. ¶ 115. Even if the offenses described  
19 there were particular enough to survive a Rule 9(b) motion, *see* Fed. R. Civ. P. 9(b),  
20 Plaintiff cannot plead sufficient facts to support wire or mail fraud.

21 The elements of mail and wire fraud are (i) a scheme or artifice to defraud; (ii) use  
22 of the United States mail or interstate wires in furtherance of the scheme; and (iii) specific  
23 intent to defraud. *Larsen v. Lauriel Inv., Inc.*, 161 F. Supp. 2d 1029, 1041-42 (D. Ariz.  
24 2001). If there is no underlying common law fraud, a mail fraud claim is untenable.  
25 *Hashimoto v. Clark*, 264 B.R. 585, 603 (D. Ariz. 2001). To show specific intent, Plaintiff  
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1 must show, at a minimum, “the existence of a scheme ‘reasonably calculated to deceive  
2 persons of ordinary prudence and comprehension.” *Sun Sav. & Loan*, 825 F.2d at 196.

3 In addition, The Ninth Circuit requires that the plaintiff must suffer an “actual  
4 injury” as a result of the “predicate acts” of mail and wire fraud. *Sigmond v. Brown*, 828  
5 F. 2d 8, 9 (9<sup>th</sup> Cir. 1987). This requires “proof of loss.” *Id.* To survive a motion to  
6 dismiss, the “injury” caused by the defendant's alleged predicate acts must be a “concrete  
7 financial loss.” *Oscar v. University Students Co-Op. Assoc.*, 965 F.2d 783, 785 (9<sup>th</sup> Cir.)  
8 *cert denied*, 506 U.S. 1020 (1992). Without such an injury, Plaintiff lacks standing.

9 Plaintiff’s case for mail and wire fraud fails both because there is no underlying  
10 scheme to defraud, and because Plaintiff does not have standing.

11 There was no scheme to defraud. At the time he signed the employment  
12 agreement, X disclosed any architectural work he was doing at that time. Compl. ¶ 21;  
13 *see* Appendix “D”. Nowhere in this disclosure did X claim he was not being reimbursed  
14 for this work. *See* Appendix “D”. If there was any sort of scheme, it was not “reasonably  
15 calculated to deceive persons of ordinary prudence and comprehension”, even if Plaintiff  
16 misunderstood the term “freehand.” *See Sun Sav. & Loan*, 825 F.2d at 196.

17 Furthermore, even if there were an underlying scheme, Plaintiff cannot show  
18 damages proximately caused by any mail fraud violation. Plaintiff can allege no facts  
19 showing that, in absence of any scheme by X, the Y’s would have given their business to  
20 Plaintiff. Even more, Plaintiff cannot allege the letter or phonecalls themselves  
21 contributed in any way to Plaintiff’s failure to secure the Y’ patronage for their residential  
22 projects. Without such a showing, there can be no “concrete financial loss.” *Oscar*, 965  
23 F.2d at 785. Plaintiff has no standing to assert mail or wire fraud, and can show no  
24 scheme to defraud.

25 **2. X’s conduct did not constitute a pattern.**

26

1 Even if X’s acts were racketeering acts, they would not rise to the level of a  
2 pattern. A pattern of racketeering requires at least two predicate acts within ten years. 18  
3 U.S.C. § 1961(5) (2006). Although two predicate acts are necessary, they are not  
4 sufficient; the racketeering acts must (i) be related; and (ii) amount to or pose a threat of  
5 continued criminal activity. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239  
6 (1989). The predicate acts cannot be sporadic or isolated. *Durning v. Citibank, Int’l*, 990  
7 F.2d 1133, 1138 (9th Cir. 1993). Multiple acts arising from a single event cannot form a  
8 pattern. *Id.* at 1139. A pattern is unlikely when there is only one victim of alleged fraud.  
9 *Id.* (citing *Medallion Television Enters. v. SelectTV of Cal.*, 833 F.2d 1360 (9th Cir.  
10 1988)).

11 No acts by X “pose a threat of continued criminal activity.” Indeed, the facts as  
12 alleged by Plaintiff are unlikely to amount to even common law fraud or other tort, let  
13 alone criminal activity. *See supra* Parts IV.B, C, D, & E. Further, any alleged conduct  
14 arises out of a single event—X’s agreement with the Y—and therefore cannot form a  
15 pattern. Moreover, Plaintiff is the only victim of the alleged fraud. It is extremely  
16 doubtful that a single event, allegedly fraudulent, with a single victim can rise to the level  
17 of a pattern.

18 Because X committed no racketeering acts, and because even if Xs acts were  
19 racketeering acts they did not amount to a pattern, there has been no violation of RICO.  
20 Without an underlying violation of RICO, there similarly cannot be a conspiracy to  
21 violate RICO. *See* 18 U.S.C. 1962(d) (2006). Therefore, the Court should not allow  
22 Plaintiff to raise a garden variety fraud allegation into a RICO violation, and should  
23 dismiss Counts XII and XIII on the merits.

24 **V. CONCLUSION.**

25 Based on the foregoing, Defendants X respectfully request that the Court enter an  
26

1 Order dismissing, or, in the alternative, staying the instant proceeding and compelling  
2 Plaintiff to arbitrate his claims in an arbitration proceeding. If such is not possible, then  
3 Defendants X respectfully request that the Court dismiss Counts V (Conversion), VI  
4 (Fraud), VII (Conspiracy), XI (Interference with Prospective Business Relations), and  
5 Counts XII and XIII (RICO violations) for failure to state a claim for which relief can be  
6 granted.

7 RESPECTFULLY SUBMITTED this \_\_ day of August, 2008.

8  
9 Firm

10 By: \_\_\_\_\_  
11 Jane Lawyer  
12 Attorney for Defendants

13 ORIGINAL of the foregoing filed  
14 with the Clerk of the Court  
15 this \_\_ day of August, 2008, and

16 COPY of the foregoing hand-delivered  
17 this day of August, 2008, to:

18 The Honorable [Judge]  
19 Maricopa County Superior Court  
20 101 West Jefferson Street  
21 Phoenix, Arizona 85003; and

22 COPY of the foregoing mailed  
23 this \_ day of August, 2008, to:

24 *Attorneys for Plaintiff*  
25  
26 \_\_\_\_\_