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# MEMORANDUM

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Date: February 16, 2022

To: The Honorable Chair and Members  
Pima County Board of Supervisors

From: Jan Leshner   
Acting County Administrator

Re: **City of Tucson Differential Water Rate Lawsuit**

The February 2 [Memorandum](#) to the Board noted that the case was moved to Maricopa County, that a judge had not been assigned and that we were waiting for the City of Tucson to file its response.

Attached please find filings that were made by the City of Tucson on Monday, February 14.

Judge Randall Warner has been assigned to hear the case.

JKL

Attachments

c: Carmine DeBonis, Jr., Deputy County Administrator for Public Works  
Yves Khawam, PhD, Assistant County Administrator for Public Works

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9 Attorneys for Defendants

10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
11 **IN AND FOR THE COUNTY OF MARICOPA**

12 PIMA COUNTY, a body politic in the  
13 State of Arizona,

14 Plaintiff,

15 v.

16 CITY OF TUCSON, a municipal  
corporation of the State of Arizona,  
17 REGINA ROMERO, in her official  
capacity as the Mayor of Tucson, LANE  
18 SANTA CRUZ, in her official capacity as  
Tucson City Councilmember, PAUL  
19 CUNNINGHAM, in his official capacity as  
Tucson City Councilmember, KEVIN  
20 DAHL, in his official capacity as Tucson  
City Councilmember, NIKKI LEE, in her  
21 official capacity as Tucson City  
Councilmember, RICHARD FIMBRES, in  
22 his official capacity as Tucson City  
Councilmember, STEVE KOZACHIK, in  
23 his official capacity as Tucson City  
Councilmember, and MICHAEL  
24 ORTEGA, in his official capacity as  
Tucson City Manager,

25 Defendants.

No.: CV2022-001141

**ANSWER**

1 Defendants City of Tucson, its Mayor, Councilmembers and City Manager, for  
2 their Answer to Plaintiff's Complaint, admit, deny, and allege as follows:

3 **INTRODUCTION**

4 1. Admit that this action concerns Tucson City Ordinance No. 11881 and that  
5 a copy is attached as Exhibit A. Deny the remaining allegations and every allegation of  
6 the Complaint not specifically admitted herein.

7 2. Admit that many municipal water utilities charge differential rates and that  
8 the City did not do so immediately before adopting the Ordinance. Deny the remaining  
9 allegations.

10 3. Admit that Tucson Unified School District and the Tohono O'odham and  
11 Pascua Yaqui are exempt from differential rates by operation of intergovernmental  
12 agreements and other prior agreements for water service. Deny the remaining allegations.

13 4. Deny.

14 5. Deny.

15 6. Deny.

16 7. Deny.

17 8. Deny.

18 9. Deny.

19 10. Deny.

20 **PARTIES**

21 11. Admit that Pima County is a body politic and a Tucson Water customer that  
22 purchases water in unincorporated areas. Deny the remaining allegations.

23 12. Admit.

24 13. Admit.

25 14. Admit.

26 15. Admit.

1 16. Admit.

2 17. Admit.

3 18. Admit.

4 19. Admit.

5 20. Admit.

6 21. Admit that the individual Defendants reside in Pima County.

7 **JURISDICTION AND VENUE**

8 22. Deny that jurisdiction is proper in this Court at this time. Section XIV of  
9 the 2000 Supplemental IGA (Complaint Ex. E) requires Pima County to arbitrate before  
10 it “may initiate an action in the appropriate court.”

11 23. Admit that venue was proper in Pima County but that Tucson moved this  
12 action to Maricopa County as a matter of right.

13 **DAMAGE TIER**

14 24. Deny.

15 **GENERAL ALLEGATIONS**

16 25. Deny.

17 26. Defendants lack knowledge or information sufficient to form a belief.

18 27. Defendants lack knowledge or information sufficient to form a belief.

19 28. Admit.

20 29. Admit.

21 30. Deny that the resolution selectively quoted explains that Tucson has an  
22 obligation to provide water to residents in Pima County.

23 31. Admit that the M.U.M was dissolved in 1976. Deny the remaining  
24 allegations.

25 32. Deny.

26 33. Admit.

- 1           34.    Admit.
- 2           35.    Admit.
- 3           36.    Admit the making of the 1979 IGA and that it resolved the referenced  
4 litigation. Deny the remaining allegations.
- 5           37.    Admit.
- 6           38.    Admit.
- 7           39.    Admit.
- 8           40.    Deny that the 2000 Supplemental IGA reflects any commitment to provide  
9 equitable, regional water service.
- 10          41.    Deny.
- 11          42.    Admit.
- 12          43.    Admit.
- 13          44.    Admit that a majority of CWAC members opposed the proposed  
14 differential rates while some supported such rates.
- 15          45.    Admit.
- 16          46.    Admit that notwithstanding the County's concerns and the expressed  
17 displeasure of some water customers, the Mayor and City Council on April 6, 2021  
18 adopted a notice of intent to consider differential rates and set a public hearing for June  
19 8, 2021.
- 20          47.    Admit.
- 21          48.    Admit that the Interim Assistant City Manager made the presentation to the  
22 CWAC included as a part of Exhibit G and that the County Manager commented on the  
23 presentation by his Exhibit G memorandum.
- 24          49.    Admit that Principal City Attorney Chris Avery sent a Memorandum dated  
25 June 15, 2021 to Tucson Interim Water Director John Kmiec, deny the County's  
26 characterization of the Memorandum's content, admit that a cost of service study

1 followed, a second notice of intent was adopted on August 10, 2021, and another public  
2 hearing was set for October 19, 2021.

3 50. Admit.

4 51. Admit.

5 52. Admit but affirmatively allege that preexisting agreements with Native  
6 American Tribes preclude application of differential rates.

7 53. Admit.

8 54. Admit that the letter attached as Exhibit II was sent by the County  
9 Administrator's Office to the CWAC.

10 55. Admit.

11 56. Admit the first sentence and deny the second vague sentence .

12 57. Admit that the Exhibit L memorandum was sent to the City and that it states,  
13 in part, as quoted.

14 58. Admit on information and belief that Thomas J. Bourassa, CPA authored  
15 the Exhibit M memorandum to the Southern Arizona Home Builders Association  
16 regarding the Phase 2 COSS, allege that Defendants lack knowledge and information  
17 sufficient to form a belief regarding the alleged dissemination of the memorandum, and  
18 deny the remaining allegations.

19 59. Admit.

20 60. Admit.

21 61. Admit.

22 62. Admit.

23 63. Admit.

24 64. Admit.

25 65. Admit.

26 66. Admit.

- 1           67.    Admit.
- 2           68.    Admit.
- 3           69.    Admit.
- 4           70.    Admit.
- 5           71.    Admit.
- 6           72.    Admit that the City has one or more pre-existing intergovernmental
- 7 agreements with Tucson Unified School District that obligate the City to charge the
- 8 Industrial Rate for all District properties wherever located.
- 9           73.    Admit.
- 10          74.    Deny.
- 11          75.    Deny.
- 12          76.    Admit and allege that the City has been annexing portions of
- 13 unincorporated Pima County since 1877.
- 14          77.    Admit.
- 15          78.    Admit.
- 16          79.    Admit, however, allege that it is also true that many residents of Pima
- 17 County have supported annexation by the City.
- 18          80.    Deny.
- 19          81.    Deny the first sentence and admit the second sentence .
- 20          82.    Deny.
- 21          83.    Deny.
- 22          84.    Admit that annexation would increase the City's State-Shared Revenues
- 23 and decrease shared revenue for all other cities and towns.
- 24          85.    Defendants lack knowledge or information sufficient to form a belief.
- 25          86.    Defendants lack knowledge or information sufficient to form a belief.
- 26          87.    Defendants lack knowledge or information sufficient to form a belief.

- 1           88. Defendants lack knowledge or information sufficient to form a belief.
- 2           89. Defendants lack knowledge or information sufficient to form a belief.
- 3           90. Admit that Marana and Oro Valley incorporated in the 1970s, and allege  
4 lack of knowledge and information sufficient to form a belief as to the remaining  
5 allegation.
- 6           91. Admit that the City provides water within a region but denies any inference  
7 it is the exclusive provider and the remaining allegations.
- 8           92. Deny.
- 9           93. Deny.
- 10          94. Admit that the City is entitled to receive 78.45% of CAP water delivered  
11 within Pima County.
- 12          95. Admit.
- 13          96. Admit with the correction that the percentage is 41.0819.
- 14          97. Deny.
- 15          98. Admit that the County produces treated effluent, some of which is provided  
16 to the City free of charge pursuant to the terms of the 1979 IGA and 2000 Supplemental  
17 IGA.
- 18          99. Defendants lack knowledge or information sufficient to form a belief.
- 19          100. Deny.
- 20          101. Deny.
- 21          102. Admit, on average.
- 22          103. Admit that the average County customer generates more gross revenue.
- 23          104. Admit that Tucson-area tribal trust lands and Tucson Unified School  
24 District are exempted because of pre-existing agreements with the City.
- 25          105. Admit that Tucson-area tribal trust lands and Tucson Unified School  
26 District are exempted because of pre-existing agreements with the City.



- 1           106. Deny.
- 2           107. Admit that the City’s sustainable water use policy increases charges based  
3 on consumption, “particularly in areas outside the city limits where the City has limited  
4 powers to promote” environmental sustainability and water conservation. .
- 5           108. Admit.
- 6           109. Admit.
- 7           110. Deny.
- 8           111. Deny
- 9           112. Admit.
- 10          113. Deny.
- 11          114. Admit that Tucson-area tribal trust lands and Tucson Unified School  
12 District are exempted because of pre-existing agreements with the City.
- 13          115. Deny and affirmatively allege that A.R.S. § 9-511(A) establishes the terms  
14 for rates charged for water provided to other municipalities like Oro Valley, Marana, and  
15 South Tucson.
- 16          116. Deny.
- 17          117. Deny.
- 18          118. Deny.
- 19          119. Deny.
- 20          120. Deny.
- 21          121. Deny.
- 22          122. Admit.
- 23          123. Admit.
- 24          124. Deny.
- 25          125. Deny.
- 26          126. Deny.

- 1           127. Deny.
- 2           128. Deny.
- 3           129. Deny.
- 4           130. Deny.
- 5           131. Admit that according to the Phase 2 COSS the “choice of an appropriate
- 6 rate of return differential is a policy decision.”
- 7           132. Deny.
- 8           133. Deny.
- 9           134. Deny.
- 10          135. Deny.
- 11          136. Deny.
- 12          137. Defendants lack knowledge or information sufficient to form a belief.
- 13          138. Deny.
- 14          139. Deny.
- 15          140. Deny.
- 16          141. Admit that it may be appropriate for other municipalities to charge differing
- 17 rates to customers in unincorporated area, and deny it is inappropriate for the City to do
- 18 so.
- 19          142. Admit the first sentence and deny the second sentence.
- 20          143. Deny.
- 21          144. Admit.
- 22          145. Admit.
- 23          146. Admit.
- 24          147. Admit.
- 25          148. Admit that the example customers are located in close physical proximity.
- 26          149. Admit the County Administrator’s statement but deny that it is correct.

1 150. Deny.

2 **COUNT I**

3 **A.R.S. § 9-511.01**

4 151. Admit or deny the incorporated allegations as in the first instance.

5 152. Admit.

6 153. Admit.

7 154. Deny.

8 155. Admit.

9 156. Admit this is an actual and justiciable controversy, albeit subject to  
10 arbitration.

11 157. Deny.

12 158. Deny.

13 159. Deny.

14 **COUNT II**

15 **Common Law Rate Discrimination**

16 160. Admit or deny the incorporated allegations as in the first instance.

17 161. Admit.

18 162. Deny.

19 163. Admit that the Ordinance exempts the Tribes and TUSD, but deny that their  
20 physical characteristics are determinative when comparing them to other customers.

21 164. Admit.

22 165. Deny

23 166. Deny.

24 167. Admit.

25 168. Admit there is an actual and justiciable controversy, albeit subject to  
26 arbitration.

1 169. Deny.

2 170. Deny.

3 171. Deny.

4 **COUNT III**

5 **Equal Protection – Similarly Situated Customers**

6 172. Admit or deny the incorporated allegations as in the first instance.

7 173. Admit.

8 174. Admit.

9 175. Admit.

10 176. Deny.

11 177. Deny.

12 178. Deny.

13 179. Deny.

14 180. Deny.

15 181. Admit.

16 182. Admit there is an actual and justiciable controversy, albeit subject to  
17 arbitration.

18 183. Deny.

19 184. Deny.

20 185. Deny.

21 **COUNT IV**

22 **Equal Protection – Race Based Discrimination**

23 186. Admit or deny the incorporated allegations as in the first instance.

24 187. Admit.

25 188. Admit.

26 189. Admit.

- 1            190. Deny.
- 2            191. Deny.
- 3            192. Deny.
- 4            193. Deny.
- 5            194. Admit there is an actual and justiciable controversy, albeit subject to
- 6 arbitration.
- 7            195. Deny.
- 8            196. Deny.
- 9            197. Deny.

**COUNT V**

**Special Law**

- 12           198. Admit or deny the incorporated allegations as in the first instance.
- 13           199. Admit.
- 14           200. Admit.
- 15           201. Deny that the cited authority is controlling in the present case.
- 16           202. Deny.
- 17           203. Deny.
- 18           204. Deny.
- 19           205. Deny.
- 20           206. Deny.
- 21           207. Admit.
- 22           208. Admit there is an actual and justiciable controversy, albeit subject to
- 23 arbitration.
- 24           209. Deny.
- 25           210. Deny.
- 26           211. Deny.

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**DEFENSES**

1. The Complaint fails to state a claim upon which relief can be granted.
2. Plaintiff has failed to meet and confer, and to arbitrate, before filing this action.
3. The County is not a “citizen” under Article 2, Section 13 of the Arizona Constitution nor a “person” within the meaning of the Fourteenth Amendment to the United States Constitution, and therefore may not assert an equal protection claim.
4. The County lacks standing to assert an equal protection claim on behalf of any citizen or person.
5. The City Council is presumed to have acted within its legislative authority and constitutional limits.

Wherefore, the Complaint should be dismissed and Defendants awarded their attorneys’ fees pursuant to A.R.S. § 12-341.01 and their taxable costs incurred herein.

Dated: February 14, 2022.

GUST ROSENFELD P.L.C.

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Attorneys for Defendants

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2 served and emailed on February 14, 2022 to:

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19 /s/ Adriana Taylor

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Attorneys for Defendants

15 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

16 **IN AND FOR THE COUNTY OF MARICOPA**

17 PIMA COUNTY, a body politic in the  
State of Arizona,

18 Plaintiff,

19 v.

20 CITY OF TUCSON, *et al.*,

21 Defendants.  
22

No. CV2022-001141

**STIPULATION TO JUDICIAL  
ASSIGNMENT**

23  
24 Plaintiff and Defendants hereby stipulate pursuant to A.R.S. § 12-411(C) to the  
25 assignment of this case to the Honorable Randall Warner. “If the parties agree upon a  
26 ... judge, such ... judge shall be selected.” A.R.S. § 12-411(C).

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Respectfully submitted on February 14, 2022.

SNELL & WILMER LLP.

By: /s/Brett W. Johnson – 021527  
Brett W. Johnson  
Attorneys for Plaintiff

GUST ROSENFELD P.L.C.

By: /s/ Charles W. Wirken – 004276  
Charles W. Wirken  
Attorneys for Defendants

Copy of the foregoing emailed  
on February 14, 2022, to;

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10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
11 **IN AND FOR THE COUNTY OF MARICOPA**

12 PIMA COUNTY, a body politic in the  
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16 CITY OF TUCSON, a municipal  
corporation of the State of Arizona,  
REGINA ROMERO, in her official  
17 capacity as the Mayor of Tucson, LANE  
SANTA CRUZ, in her official capacity as  
18 Tucson City Councilmember, PAUL  
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21 Councilmember, RICHARD FIMBRES, in  
his official capacity as Tucson City  
22 Councilmember, STEVE KOZACHIK, in  
his official capacity as Tucson City  
23 Councilmember, and MICHAEL  
ORTEGA, in his official capacity as  
24 Tucson City Manager,

25 Defendants.  
26

No. CV2022-001141

**MOTION TO COMPEL  
ARBITRATION**

(Oral Argument Requested)

1 Defendants City of Tucson, its Mayor, Councilmembers and City Manager move  
2 pursuant to A.R.S. § 12-1502 to compel arbitration of the dispute that is the subject of  
3 this action as required by a contract between the City and Pima County attached to the  
4 Complaint herein and incorporated in each of the County’s claims.

5 **Memorandum of Points and Authorities**

6 **I. The County’s allegation that the City is the regional water supplier flow**  
7 **from an agreement between them.**

8 Pima County brought this action to challenge a Tucson City ordinance that  
9 effects differential water rate charges for certain Tucson Water Department customers  
10 located outside the City limits. A basic and recurring allegation in the County’s  
11 Complaint is that Tucson is a *regional* water supplier – supplying water both within the  
12 incorporated area of the City and beyond in unincorporated areas of Pima County. (¶¶  
13 2, 25-27, 29, 31-32, 36, 40, 75, 91, 101 and 140.) More specifically, the County alleges  
14 that an agreement with the City “formalized the prior understanding that Tucson would  
15 be responsible for *regional* water services.”

16 36. In 1979, Tucson and Pima County finalized a “Sewer Merger  
17 Intergovernmental Agreement” (the “1979 IGA”) (attached as Exhibit D).  
18 ... The 1979 IGA resolved *City of Tucson v. Pima County et al.*, No.  
19 170727 and formalized the prior understanding that Tucson would be  
responsible for *regional* water services and that Pima County would be  
responsible for *regional* wastewater services. \* \* \*

20 That allegation is incorporated in each of the County’s five claims. (¶¶ 151, 160,  
21 172, 186 and 198.) And each of those claims allege and is based, at least in part, on the  
22 non-regional nature of the differential water rates charged to customers in  
23 unincorporated and incorporated areas:

24 **Count I – Violation of A.R.S. § 9-511.01.**

25 154. Because the differential rates established in Ordinance No.  
26 11881 ... treat similarly situated Tucson Water customers dramatically

1 differently, the differential rates imposed on unincorporated customers by  
2 Ordinance No. 118881 are not “just and reasonable.”

3 **Count II – Common Law Rate Discrimination.**

4 165. \* \* \* Ordinance No. 11881 imposes a differential rate to  
5 unincorporated customers even though there has been no legitimate  
6 finding that the cost of service to unincorporated areas is different from  
7 the cost of service to incorporated areas.

8 **Count III – Equal Protection – Similarly Situated Customers.**

9 176. Ordinance No. 11881 discriminates between Tucson Water  
10 customers living in incorporated areas and Tucson Water customers living  
11 in unincorporated areas.

12 **Count IV – Equal Protection – Race Based Discrimination.**

13 190. Ordinance No. 11881 discriminates between Native  
14 Americans and non-Native Americans. [Who are necessarily located,  
15 respectively, on unincorporated and incorporated lands.]

16 **Count V – Special Law.**

17 203. Ordinance No. 11881’s classification between Tucson Water  
18 customers living in incorporated areas and Tucson Water customers living  
19 in unincorporated areas is not legitimate, and does not encompass all  
20 similarly situated members.

21 **II. This dispute is subject to arbitration.**

22 The County and the City later supplemented the 1979 IGA. As alleged in the  
23 Complaint:

24 39. On February 7, 2000, Pima County and Tucson entered into a  
25 “Supplemental Intergovernmental Agreement Relating to Effluent.” (the  
26 “2000 Supplemental IGA”) (attached, with a subsequent addendum, as  
Exhibit E). \* \* \*

The 2000 Supplemental IGA includes an ADR process that requires the City and  
County to “meet and confer” in an attempt to resolve any dispute arising under the 1979  
IGA or the Supplemental IGA and, if unresolved, to arbitrate the dispute.

1 SECTION XIV. ALTERNATIVE DISPUTE RESOLUTION

2 14.1. The following non-binding alternative dispute resolution  
3 process shall be followed for any dispute arising under this Supplemental  
4 IGA or the 1979 IGA.

5 14.1.1 The City and the County shall meet and confer about the  
6 issue or issues in an attempt to resolve the dispute. If there are issues that  
7 cannot be resolved by City and County, each shall appoint one arbitrator  
8 to a three party panel of arbitrators which will decide the dispute. The  
9 appointment of the two arbitrators will occur within 30 days of the  
10 meeting referred to above.

11 \* \* \* \*

12 (Complaint Ex. E at p. 12.)

13 **III. Arbitration of this dispute must be compelled.**

14 **A. The City is entitled to arbitrate.**

15 Although the County alleges that the 1979 IGA “formalized the prior  
16 understanding that Tucson would be responsible for *regional* water services” and its  
17 claims are based on the non-regional nature of the differential water rates charged to  
18 customers in unincorporated and incorporated areas, the County did not meet and confer  
19 with the City or arbitrate before filing this action. Defendants therefore move pursuant  
20 to A.R.S. § 12-1502 to compel arbitration:

21 A. On application of a party showing an agreement described in §  
22 12-1501, and the opposing party’s refusal to arbitrate, the court shall order  
23 the parties to proceed with arbitration....

24 “[A]n agreement described in § 12-1501” includes “a provision in a written contract to  
25 submit to arbitration any controversy thereafter arising between the parties.” Such a  
26 provision is quoted above from the 2000 Supplemental IGA at Section XIV.

27 **B. The other defendants are also entitled to arbitrate.**

28 Although the City’s Mayor, Councilmembers and City Manager are not  
29 signatories to the 2000 Supplemental IGA containing the arbitration provision, they may

1 also compel the County to arbitrate.

2 A nonsignatory can enforce an arbitration clause against a  
3 signatory to the agreement in several circumstances. One is when  
4 the relationship between the signatory and nonsignatory defendants  
5 is sufficiently close that only by permitting the nonsignatory to  
6 invoke arbitration may evisceration of the underlying arbitration  
7 agreement between the signatories be avoided. Another is when  
8 the signatory to a written agreement containing an arbitration  
9 clause must rely on the terms of the written agreement in asserting  
[its] claims against the nonsignatory. When each of a signatory's  
claims against a nonsignatory makes reference to or presumes the  
existence of the written agreement, the signatory's claims arise out  
of and relate directly to the written agreement, and arbitration is  
appropriate.

10 [CD Partners, LLC v. Grizzle,] 424 F.3d at 798 (internal citations omitted)  
11 (internal quotation marks omitted); see also *Amisil*, 622 F.Supp.2d at 830–  
12 31 (non-signatory may compel arbitration based on “close relationship  
13 between the entities involved, as well as the relationship of the alleged  
14 wrongs to the nonsignatory's obligations and duties in the contract ... and  
[the fact that] the claims were intimately founded in and intertwined with  
the underlying contract obligations”).

15 We agree with these authorities. \* \* \*

16 *Sun Valley Ranch 308 Ltd. P'ship ex rel. Englewood Props., Inc. v. Robson*, 231 Ariz.  
17 287, 296–97, ¶¶ 38-39 (App. 2012).

18 Those circumstances exist in this case. First, the relationship between the City  
19 and its Mayor, Councilmembers and City Manager could not be closer, and unless they  
20 are permitted to invoke the arbitration provision it will be eviscerated. Second, the  
21 County relies on the terms of the 1979 IGA in asserting that Tucson is a regional water  
22 supplier, and that IGA is supplemented by the 2000 IGA containing the arbitration  
23 provision.

24 **C. All of the County’s claims are subject to arbitration.**

25 The County’s statutory, common law and Constitutional claims are all subject to  
26 arbitration. See *Sun Valley Ranch 308 Ltd. P'ship ex rel. Englewood Props., Inc. v.*



1 *Robson*, 231 Ariz. at 293, ¶ 18. “[T]he law favors arbitration of disputes that the parties  
2 have agreed to arbitrate.” *Id.*, 231 Ariz. at 291, ¶ 10. Any “doubts about the  
3 arbitrability of disputes should be resolved in favor of arbitration.” *Id.*, 231 Ariz. at  
4 292, ¶ 13.

5 **IV. Conclusion.**

6 The court should order the parties to proceed to arbitration.

7 Respectfully submitted on February 14, 2022.

8 GUST ROSENFELD P.L.C.

9 By: /s/ Charles W. Wirken – 004276

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