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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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| Proceeding | 92054069 |
| Party | Defendant Skydive Arizona, Inc. |
| Correspondence Address | SID LEACH SNELL & WILMER LLP ONE ARIZONA CENTER, 400 E VAN BUREN ST PHOENIX, AZ 85004 UNITED STATES sleach@swlaw.com,dbarker@swlaw.com,lwood@swlaw.com,ipdocket@swlaw.com |
| Submission | Reply in Support of Motion |
| Filer's Name | David G. Barker |
| Filer's e-mail | dbarker@swlaw.com, sleach@swlaw.com, lwood@swlaw.com, IPDocket@swlaw.com |
| Signature | /David G. Barker/ |
| Date | 09/06/2011 |
| Attachments | Hogue v Skydive Reply ISO MSJ.pdf (93 pages)(3408401 bytes) |

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Registration No. 3,099,847 (Application Serial No. 76/641,146)

MARK: **SKYDIVE ARIZONA**

Registered on the Principal Register on June 6, 2006

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| Marc Hogue, <p style="text-align:right">Petitioner,</p> <p style="text-align:center">vs.</p> Skydive Arizona, Inc., <p style="text-align:right">Respondent.</p> | Cancellation No.: 92/054,069 RESPONDENT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT |
|---|---|

Pursuant to the Board's order dated July 26, 2011 (Dkt. #10), Respondent's Rule 12(b)(6) Motion to Dismiss is now a Motion for Summary Judgment. Petitioner filed an opposition to the Motion for Summary Judgment on August 16, 2011 (Dkt. #11) ("Petitioner's Opposition"). Respondent timely files this reply in support of the Motion for Summary Judgment pursuant to the parties' stipulation (Dkt. #9) and the Board's July 26, 2011 order.

I. Summary judgment standard.

"Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving such cases to be resolved as a matter of law." *John W. Carson Found. v. Toilets.com, Inc.*, 94 U.S.P.Q.2d 1942, 1945 (T.T.A.B. 2010). "A party moving for summary judgment has the burden of demonstrating the absence of evidence to support the nonmoving party's case." *Zoba Int'l Corp. v. DVD Format/LOGO Licensing Corp.*, 98 U.S.P.Q.2d 1106, 1109 (T.T.A.B. 2011). "The purpose of summary judgment is . . . to save the time and expense of a useless trial where no genuine issue of material fact remains and more evidence than is already available in connection with the summary judgment motion could not reasonably be expected to change the result." *John W. Carson*

Found, 94 U.S.P.Q.2d at 1945.

The only evidence presented in Petitioner's Opposition is a conclusory, self-serving, unsupported affidavit. *See* Affidavit of Marc Hogue, Petitioner's Opposition, Exh. A ("Hogue Aff."). The affidavit presents *no evidence* that counters Respondent's evidence of claim and issue preclusion. And a "conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact." *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997); *see Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 941, 16 U.S.P.Q.2d 1783, 1786 (Fed. Cir. 1990) (a summary judgment affidavit that does not demonstrate an "evidentiary conflict" does not create an issue of material fact); *see Fram Trak Indus., Inc. v. WireTracks LLC*, No. 92043947, 2006 TTAB LEXIS 21, at *13 (T.T.A.B. Jan. 23, 2006) (citing *Octocom*). So this complete "absence of evidence" to support Petitioner's argument, *see Zoba Int'l*, 98 U.S.P.Q.2d at 1109, entitles Respondent to judgment as a matter of law.

II. Petitioner has presented no evidence that contradicts his prior testimony that SKYDIVE ARIZONA has secondary meaning.

To begin with, Petitioner's affidavit does not mention "secondary meaning" of the SKYDIVE ARIZONA mark. Thus, the only evidence of record relating to secondary meaning is the evidence Respondent submitted in connection with its motion. *See* Motion for Summary Judgment, Exhs. A-F. And that evidence shows (1) the United States District Court for the District of Arizona found that the SKYDIVE ARIZONA mark has secondary meaning, *id.*, Exh. A at 19:17-24,¹ and (2) that Petitioner Hogue believes that the SKYDIVE ARIZONA mark has

¹ The court held, "The Plaintiff has set forth facts that suggest that 'Skydiving [*sic*] Arizona' has acquired secondary meaning within the market of skydiving. The plaintiff has offered hundreds of pages of exhibits, dating pre-1998, to prove that Skydiving [*sic*] Arizona advertised heavily both locally and worldwide. The Plaintiff has offered proof of several national skydiving events have been held at his location, and has submitted testimony from friends and co-workers regarding how well known skydiving is throughout the world, and has shown that his mark has been continuously used for over 15 years."

secondary meaning and functions as a trademark:

I will say and I said it many times, Skydiving [*sic*] Arizona is the best drop zone in the world. There's no question about it. It is a big business. It is a great drop zone. . . . it is the name that's known out there.

Deposition of Marc Hogue, Motion for Summary Judgment, Exh. F (“Hogue Dep.”), at 75:15-78:2; *see* Declaration of Sid Leach, attached as Exh. J (authenticating Exhs. D-F).

Q. [By Mr. Leach] Is Skydive Arizona well known in the skydiving community or market?

A. [By Mr. Hogue] Yes. . . .

Q. Is Skydive Arizona famous in the skydiving market.

A. Yes.

Id. at 114:16-115:1.

Claim and issue preclusion dictate the same result (as reiterated below)—that the Board should sustain the Motion for Summary Judgment. But regardless of what the Board decides on claim and issue preclusion, the only evidence of record relating to secondary meaning in the SKYDIVE ARIZONA mark is evidence showing that secondary meaning exists. Petitioner Hogue has not presented—and it is inconceivable that he could attempt to present, based on his prior testimony—evidence that SKYDIVE ARIZONA does not have secondary meaning. Establishing secondary meaning disposes of the only grounds for cancellation Petitioner asserts—descriptiveness and geographic descriptiveness, Petition to Cancel ¶¶ 10, 16—because “A descriptive mark can receive trademark protection if it has acquired distinctiveness by establishing ‘secondary meaning’ in the marketplace.” *Yellow Cab Co. v. Yellow Cab of Elk Grove, Inc.*, 419 F.3d 925, 927 (9th Cir. 2005); *see Two Pesos v. Taco Cabana*, 505 U.S. 763, 769 (1992); *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 1342, 71 U.S.P.Q.2d 1173, 1181 (Fed. Cir. 2004). Because secondary meaning in the SKYDIVE ARIZONA trademark—which Petitioner has previously acknowledged—disposes of Petitioner’s

only grounds for cancellation, and because Petitioner has presented no evidence showing why his prior testimony about the strength of the SKYDIVE ARIZONA mark is no longer valid, there are no material issues of fact remaining for trial. The Board should grant Respondent's Motion for Summary Judgment.

III. There is no issue of material fact regarding Petitioner's privity with Mullins.

Petitioner argues he was not in privity with Mike Mullins because "the 2001 lawsuit was personal against Mullins and did not involve the property transferred [to Petitioner]." Petitioner's Opposition at 8; *see Honda Motor Co. v. Winkelmann*, 90 U.S.P.Q.2d 1660, 1664 (T.T.A.B. 2009) (unsupported arguments of counsel are insufficient to raise a genuine issue of material fact). But that's not the case. In fact, rights in the "Arizona Skydiving" name, under which Mullins operated and which was the subject of Respondent's suit against Mullins, Motion for Summary Judgment, Exh. A, were transferred to and *were of substantial value* to Petitioner.

For example:

- Hogue initially operated under "Arizona Skydiving" until he settled with Respondent to prevent consumer confusion. Motion for Summary Judgment, Exh. D ¶¶ 2, 4.
- Q.² Who owns Arizona Skydiving Coolidge now?
A.³ I do.
Q. And when did you purchase Arizona Skydiving?
A. I believe April 15th, 2002 was the date.
(Hogue Dep. 18:13-16.)
- Q. Now, what about the website www.arizonaskydiving.com? Who owns that after May 15th?
A. I do.
Q. And do you have complete control over the content of what's on that website? You make all the decisions regarding that website?
A. Yes, I do.
(*Id.* at 22:1-7.)
- "Well, when I [Mr. Hogue] shoot a tandem I don't want them to see Skydive Arizona. I want them to see Arizona Skydiving. We altered the—on all

² All Q's from the Hogue Deposition are by Mr. Peltz, unless noted otherwise.

³ All A's from the Hogue Deposition are by Mr. Hogue, unless noted otherwise.

advertisements we altered via computer, so it said Arizona Skydiving Coolidge instead of Skydive Arizona.” *Id.* at 26:6-10.

- Q. Okay. Well, when you purchased the business from Mike Mullins, did you take out advertising and do things like that for the name Arizona Skydiving Coolidge?
A. Lots of it.
(*Id.* at 57:10-13.)
- “That was the sticking point of this. I wasn’t going to give up the name. The domain name is different than a trade name, let’s say. It is a domain name and I wasn’t—everybody knows how—how do I put this? That’s where people know where to find us on the Internet. If I change that, they’re not going find us on the Internet. It is not Skydivearizona.com. It’s Arizonaskydiving.com. I wasn’t going to give that up. That was a sticking point in that agreement, and we came with that compromise.” *Id.* at 72:8-17.
- Q [By Mr. Leach]. Prior to the time that you purchased the business on May 15, 2002, did Arizona Skydiving Coolidge have a website?
A. Yes, it did.
Q. Was the—you are—or was the locator www.arizonaskydiving.com?
A. Yes, it was.
Q. So the www.arizonaskydiving.com was a domain name that had been originally obtained by Mr. Mullins?
A. Correct.
Q. So as part of the deal in your purchasing the business, the domain name was transferred over to you?
A. Correct.
(*Id.* at 123:1-13.)

The only evidence of record shows Petitioner was in privity as Mullins’s successor-in-interest, not only to the business associated with “Arizona Skydiving,” but also to the name itself. *See John W. Carson Found.*, 94 U.S.P.Q.2d at 1947. Petitioner has presented no evidence to counter Respondent’s evidence of record about privity. Petitioner’s affidavit does not say he was not in privity with Mullins; it does not say he was not Mullins’s successor in interest; it does not say he did not acquire the business and name that were the subject of the prior litigation; and it does not mention any evidence that supports any assertions in the affidavit. “When the moving party’s motion is supported by evidence sufficient to indicate that there is no genuine issue of material fact, and that the moving party is entitled to judgment, the burden shifts to the

nonmoving party to demonstrate the existence of specific genuinely-disputed facts that must be resolved at trial.” *Fram Trak Indus*, 2006 TTAB LEXIS 21, at *12-13. Petitioner has not met his burden.

And *John W. Carson Foundation* is not inapposite as Petitioner asserts. In fact, Petitioner mischaracterizes this case by stating, “the Board applied claim preclusion against a party whose sole shareholder and controlling party formed the new corporation *solely for the purpose of avoiding an injunction*.” Petitioner’s Opposition at 8 (emphasis added). But that’s not what the Board’s basis was for finding privity. Rather, the Board found privity because, “although Mr. Braxton was not a party to the prior civil action or prior Board proceeding, the basis for applying preclusion against him and applicant herein rests on his being the president and sole owner of the defendant in the prior actions.” *John W. Carson Found.*, 94 U.S.P.Q.2d at 1947. This case sets no requirement, as Petitioner asserts, that Petitioner must have been “acting in concert with non-party Mullins in an attempt to avoid the effect of the prior judgment.” Petitioner’s Opposition at 8.

Respondent’s evidence (the only evidence of record) establishes that Petitioner is in privity with Mullins because he acquired Mullins’s business, including use of the “Arizona Skydiving” name, which was the subject of Respondent’s litigation against Mullins, during the litigation against Mullins. *See id.* As the Supreme Court has stated, “nonparty preclusion may be justified based on a variety of pre-existing ‘substantive legal relationships’ . . . [which] include, but are not limited to, preceding and succeeding owners of property.” *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008). Petitioner succeeded Mullins as the owner of Mullins’s property, including the “Arizona Skydiving” name. Nonparty preclusion should apply to Petitioner with respect to Respondent’s prior litigation against Mullins regarding the “Arizona Skydiving” name and business.

Petitioner knew of the litigation, and he knew of the claims Respondent had with respect to Mullins's—and subsequently Petitioner's—use of “Arizona Skydiving,” *see* Motion for Summary Judgment, Exh. D, but he deferred to Mullins's defense of that litigation instead of defending it himself. He had a “full and fair opportunity to litigate,” *Taylor*, 553 U.S. at 892, but he declined. He should be bound by the prior judgment regarding secondary meaning in the SKYDIVE ARIZONA mark. And this result is fair because Petitioner doesn't contest secondary meaning; in fact, he agrees the SKYDIVE ARIZONA mark is strong and famous. *See* Hogue Dep. 114:16-115:1.

IV. Petitioner failed to address the law regarding issue preclusion.

Initially, Petitioner's arguments regarding a lack of issue preclusion fail because, as just mentioned, Petitioner has admitted that SKYDIVE ARIZONA is a strong mark. *See* Hogue Dep. 114:16-115:1. So petitioner's argument is disingenuous (and unsupported by any evidence) that “it would be patently unfair to bind Petitioner,” Petitioner's Opposition at 10, to the Arizona court's finding of secondary meaning in SKYDIVE ARIZONA. It would not be unfair because Petitioner agrees with the court that the mark is strong. As stated earlier, Petitioner has not come forward with any evidence to show that he now disagrees with his previous position regarding the strength of the mark, even though it was his burden to do so. *See Stephen Slesinger, Inc. v. Disney Enters., Inc.*, 98 U.S.P.Q.2d 1890, 1894-95 (T.T.A.B. 2011) (petitioner's burden to present evidence contrary to ownership issue decided in previous lawsuit); *Fram Trak Indus*, 2006 TTAB LEXIS 21, at *12-13; *compare Mayer/Berkshire Corp. v. Berkshire Fashions, Inc.*, 76 U.S.P.Q.2d 1210, 1313-14 (T.T.A.B. 2005) (opposer showed changed circumstances regarding prior finding of likelihood of confusion). So there is no issue of material fact remaining for trial regarding secondary meaning or that this issue was fully and fairly litigated in the prior action.

Next, Petitioner relapses into a discussion of claim preclusion when attempting to argue that issue preclusion does not apply. In doing so, he cites cases that discuss *claim* preclusion to support his position that “a trademark infringement claim is not the same as an *inter partes* cancellation or opposition claim.” Petitioner’s Opposition at 11. But the cases he cites are irrelevant to *issue* preclusion, and, in fact, support Respondent’s argument that issue preclusion applies here. *See, e.g., Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1364-66, 55 U.S.P.Q.2d 1854, 1857 (Fed. Cir. 2000) (decision based on *claim*—not *issue*—preclusion, noting that issue preclusion, based on a prior infringement action, *may apply* in a subsequent cancellation proceeding); *Treadwell’s Drifters, Inc. v. Marshak*, 18 U.S.P.Q.2d 1318, 1321 (T.T.A.B. 1991) (“It is clear that in the civil action [a default judgment], no issues were litigated . . . Because no issues were actually litigated in the civil action, issue preclusion cannot apply.”); *Am. Hygienic Labs., Inc. v. Tiffany & Co.*, 228 U.S.P.Q. 855, 856-57 (T.T.A.B. 1986) (“Because no issues were actually litigated in the civil action . . . issue preclusion cannot apply in this case.”).

And Petitioner doesn’t argue that certain issues litigated in a trademark infringement action cannot be the same as issues litigated in a cancellation proceeding, because that’s not the law. In fact, the court in *Jet, Inc.*, on which Petitioner relies, clarifies the law that issue preclusion may be available here: “where common issues, such as likelihood of confusion, are actually litigated in the earlier [trademark infringement] proceeding, issue preclusion will prevent their relitigation [in a cancellation proceeding].” *Jet, Inc.*, 223 F.3d at 1366, 55 U.S.P.Q.2d at 1859; *see Stephen Slesinger, Inc.*, 98 U.S.P.Q.2d at 1894-95.

Indeed, prior district court summary judgment decisions under § 43(a) of the Lanham Act that are based on descriptiveness of a mark may result in issue preclusion in a subsequent Board proceeding. For example, “It is the opinion of the Board that the [district court’s prior] holdings as to the descriptiveness of applicant’s mark were in fact an integral part of its determination of

the § 43(a) claim and thus preclude the relitigation of the issue in this proceeding.” *Larami Corp. v. Talk To Me Programs, Inc.*, 36 U.S.P.Q.2d 1840, 1844 (T.T.A.B. 1995); see *Mother’s Restaurant, Inc. v. Mama’s Pizza, Inc.*, 221 U.S.P.Q. 394, 397-98 (Fed. Cir. 1983).

Issue preclusion applies here to prevent Petitioner from relitigating secondary meaning. As noted above, if SKYDIVE ARIZONA has secondary meaning, then Petitioner’s claims of descriptiveness and geographic descriptiveness must be dismissed because Respondent’s mark is distinctive. See *Two Pesos*, 505 U.S. at 769; *Nautilus Grp., Inc.*, 372 F.3d at 1342, 71 U.S.P.Q.2d at 1181; *Yellow Cab Co.*, 419 F.3d at 927. This identical issue—secondary meaning—was litigated and decided, see *Stephen Slesinger, Inc.*, 98 U.S.P.Q.2d at 1898, in the previous litigation regarding the use of the “Arizona Skydive” name. This determination was essential to the judgment. *Id.* at 1894. And Petitioner agrees with this determination, See Hogue Dep. 114:16-115:1, so he cannot legitimately argue that his interests were not fully represented. See *Stephen Slesinger, Inc.*, 98 U.S.P.Q.2d at 1894. Petitioner should therefore be precluded from relitigating this identical issue. Based on issue preclusion alone, the Board should grant the Motion for Summary judgment and dismiss this cancellation proceeding.

V. Petitioner’s arguments are unavailing regarding claim preclusion.

Petitioner spends much time arguing that the harm he allegedly has suffered is different than the harm at issue in the Mullins litigation. But that’s irrelevant to whether or not claim preclusion applies here. If the SKYDIVE ARIZONA mark has secondary meaning, then the cancellation must be dismissed, regardless of the type of harm Petitioner has allegedly suffered, because secondary meaning is dispositive of the only grounds for cancellation Petitioner asserted. See *Two Pesos*, 505 U.S. at 769; *Nautilus Grp., Inc.*, 372 F.3d at 1342, 71 U.S.P.Q.2d at 1181; *Yellow Cab Co.*, 419 F.3d at 927. The secondary meaning regarding the SKYDIVE ARIZONA mark in this cancellation proceeding is based on the same set of transactional facts—

whether SKYDIVE ARIZONA is descriptive—as the prior final judgment on the merits in the Mullins litigation regarding secondary meaning. Petitioner was in privity with Mullins with respect to the subject matter of the prior litigation. Therefore, Petitioner should be precluded from relitigating the claim that SKYDIVE ARIZONA lacks secondary meaning. *See Jet, Inc.*, 223 F.3d at 1366 (discussing factors for claim preclusion); *Zoba Int’l*, 98 U.S.P.Q.2d at 1111-12.

VI. Petitioner ignores Supreme Court precedent that dictates Petitioner’s conclusory allegations are insufficient to state a claim.

Petitioner cites an “any state of facts” test for a Rule 12(b)(6) motion to dismiss. *See* Petitioner’s Opposition at 12. But Petitioner ignores controlling law cited in Respondent’s motion that dispenses with a similar “no set of facts” test for the sufficiency of a pleading, stating that the “phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562-63 (2007). The Petition to Cancel contains only labels and conclusions, without factual support, and it fails to state a claim for descriptiveness upon which relief may be granted. *See, e.g., Twombly*, 550 U.S. at 555-56 (pleading must have more than “labels and conclusions”); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (conclusions not entitled to assumption of truth); *McDonnell Douglas Corp. v. National Data Corp.*, 228 U.S.P.Q. 45, 48 (T.T.A.B. 1985) (“mere parroting” of elements not sufficient).

Accordingly, Respondent requests that the Board grant the Motion for Summary Judgment and dismiss the cancellation.

Respectfully submitted, this 6th day of September, 2011:

SNELL & WILMER L.L.P.

By David G. Barker/
Sid Leach
David G. Barker
Attorneys for Respondent
Skydive Arizona, Inc.

Certificate of Service

I hereby certify that on this 6th day of September, 2011, I caused a copy of the foregoing RESPONDENT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT to be served by mailing a copy via the United States Post Office, postage prepaid, in an envelope addressed to:

Jimmie Pursell
Jennings, Strouss & Salmon, PLC
One East Washington Street, Suite 1900
Phoenix, AZ 85004

By: /David G. Barker/
David G. Barker

EXHIBIT G

1 Sid Leach (#019519)
2 Craig Logsdon (#020223)
3 SNELL & WILMER L.L.P.
4 One Arizona Center
5 400 East Van Buren Street
6 Phoenix, Arizona 85004-2202
7 Telephone: (602) 382-6219
8 Attorneys for Plaintiff

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

11 SKYDIVE ARIZONA, INC., an
12 Arizona corporation,

13 Plaintiff,

14 v.

15 MARC HOGUE, an individual;
16 SKYDIVE FORCE, INC., an Arizona
17 corporation; SKYDIVE COOLIDGE,
18 INC., an Arizona corporation,

19 Defendants.

Case No. CV 2006-015563

**AMENDED SEPARATE STATEMENT
OF UNDISPUTED FACTS IN
SUPPORT OF PLAINTIFF SKYDIVE
ARIZONA, INC.'S RENEWED
MOTION FOR SUMMARY
JUDGMENT**

(Assigned to Hon. J. Kenneth Mangum)

20 For Plaintiff Skydive Arizona's Amended Separate Statement of Undisputed Facts
21 ("PSOF") in Support of Plaintiff Skydive Arizona, Inc.'s Renewed Motion for Summary
22 Judgment, Skydive Arizona states as follows:

23 1. Larry Hill opened a skydiving center, or "dropzone," in Arizona more than
24 25 years ago. (See Affidavit of Larry Hill, attached as Ex. A at ¶ 2.)

25 2. He began using the mark "Skydive Arizona" when he moved to Coolidge in
26 1986, and incorporated as Skydive Arizona, Inc. that same year before moving to the
27 current location in Eloy. (*Id.* at ¶ 3.)

28 3. Skydive Arizona is the largest skydiving operation in the world, and even
Mr. Hogue will agree is the best and most prestigious. (*Id.* at ¶ 4; Deposition of M.
Hogue, attached as Ex. B at p. 75:15-17; 114:14-115:1.)

1 4. Skydive Arizona has hosted numerous national and international
2 competitions, and is one of the training sites for several of the world's most prestigious
3 skydiving teams. (Ex. A. at ¶ 5.)

4 5. In 1998, Mike Mullins opened a drop zone eleven miles away at the
5 Coolidge Airport, where Skydive Arizona previously operated. (*Id.* at ¶ 6.)

6 6. Mr. Mullins called his drop zone "Arizona Skydiving" and "Arizona
7 Skydiving Coolidge," thereby capitalizing on the marketing and image of Skydive
8 Arizona. (*Id.* at ¶ 7.)

9 7. Mr. Hogue purchased "Arizona Skydiving" from Mr. Mullins in 2002 and
10 purportedly changed the name to "Skydiving Coolidge," (*Id.* at ¶ 8.)

11 8. In 2001, Skydive Arizona began a successful lawsuit against Mr. Mullins'
12 business for trademark infringement, unfair competition, and other wrongful actions,
13 captioned *Skydive Arizona v. Mike Mullins d/b/a Arizona Skydiving Coolidge*, CV-01-
14 1854-PHX-SMM. (*See* Mullins Complaint, attached as Ex. C.)

15 9. Skydive Arizona prevailed in that lawsuit on summary judgment. (*See*
16 Mullins order, attached as Ex. D.)

17 10. Defendant Marc Hogue's purchase of the infringing company occurred
18 during that litigation. (*See* Settlement Agreement, attached as Ex. E. at ¶ 5.)

19 11. Instead of involving Mr. Hogue as a party in the litigation, Skydive Arizona
20 executed a signed a Settlement Agreement with him. (*Id.*)

21 12. A competitor benefits enormously by adopting a name and marketing
22 strategy such as a website that confuses the public into believing it is actually Skydive
23 Arizona. Part of that benefit comes from Skydive Arizona's extensive marketing and
24 excellent reputation. (Ex. A. at ¶ 9.)

25 13. The marketing includes more than a million dollars of advertising and
26 promotion of the Skydive Arizona mark on the Internet, trade publications in the United
27 States, Europe, South America, and Australia, billboards, newspapers, yellow pages, and
28 on college campuses. (*Id.* at ¶ 10.)

1 14. For years, Skydive Arizona has spent more than \$13,000 per month on
2 advertising. (*Id.* at ¶ 11.)

3 15. Skydive Arizona has also been the focus of high-profile news and media
4 coverage, including segments on Phoenix Channel 12 and the national cable channel
5 Discovery Wings. (*Id.* at ¶ 12.)

6 16. On June 6, 2006, Skydive Arizona obtained a registered trademark for its
7 business name. (*See* Trademark, attached as Ex. F.)

8 17. One of the reasons a competitor’s use of the mark “Arizona Skydiving” is so
9 damaging is because Skydive Arizona has long been synonymous in the minds of
10 customers with the mark “Arizona Skydiving.” (Ex. A. at ¶ 13.)

11 18. Both “Skydive Arizona” and “Arizona Skydiving” acquired secondary
12 meaning prior to the 1998 opening of the dropzone in Coolidge named “Arizona
13 Skydiving.” (*Id.* at ¶ 14.)

14 19. On occasion, Skydive Arizona has specifically and intentionally used the
15 mark “Arizona Skydiving” to identify itself. (*Id.* at ¶ 15.)

16 20. For example, in instances where competing businesses are listed
17 alphabetically, Skydive Arizona would use “Arizona Skydiving” to place it at the top or
18 beginning of the group. (*Id.* at ¶ 16.)

19 21. Skydive Arizona also used the mark “Arizona Skydiving” in Yellow Page
20 ads prior to 1998. (*Id.* at ¶ 17.)

21 22. In addition to offering a place for expert skydivers, Skydive Arizona caters
22 to the general public and novice skydivers. (*Id.* at ¶ 18.)

23 23. Of the marketing techniques used by the dropzone owned or operated by
24 Mr. Hogue, one of the most damaging has been its use of the website
25 www.arizonaskydiving.com. (*Id.* at ¶ 19.)

26 24. Skydive Arizona itself uses and relies on the Internet as a major marketing
27 channel. (*Id.* at ¶ 20.)

28

1 25. Skydive Coolidge, when it was known as Arizona Skydiving beginning in
2 1998 and continuing until Mr. Hogue shut down the domain name during litigation, used
3 this same marketing channel and has effectively taken customers away from Skydive
4 Arizona by using “arizonaskydiving” in the name of its web address. (*Id.* at ¶ 21.)

5 26. During the course of litigation, Mr. Hogue shut down the domain name
6 thereby breaching the material provisions of the Settlement Agreement which required
7 him to maintain active links to Skydive Arizona’s webpage. (Letter to P. Johnson dated
8 June 15, 2009, attached as Ex. G.)

9 27. Even more recently; however, Mr. Hogue re-launched the website which
10 still is not in compliance with the Settlement Agreement. (*See* Printout of webpage,
11 attached as Ex. H.)

12 28. Consumers often located the website at www.arizonaskydiving.com during
13 Internet searches, then telephoned the number on the website and reserved a lesson or
14 tandem jump, and paid with a credit card—all the while believing they were purchasing
15 services from Skydive Arizona. (Ex. A at ¶ 22.)

16 29. Confirming this happened, both parties agree customers have often gone to
17 Skydive Arizona for a tandem skydive reserved on the phone, only to discover that the
18 phone number they obtained from the website was for a different business. (*See* Ex. E. at
19 ¶ 2.)

20 30. In the Settlement Agreement that Mr. Hogue signed, he admitted “[d]uring
21 the period that Marc Hogue has been operating the business, there have been occasions
22 when customers have made a telephone reservation to do a tandem jump at either Arizona
23 Skydiving or at Skydive Arizona, and have shown up at the other dropzone by mistake.”
24 (*Id.*)

25 31. In the trademark infringement case, Skydive Arizona documented that the
26 Coolidge dropzone diverted 31,367 jump ticket purchases and 1,046 customers away from
27 Skydive Arizona. (*See* Suppl. Decl. of K. Gramando from *Mullins*, attached as Ex. I at ¶
28 4.)

1 32. At that time, between 80-90% of the total customers at Arizona Skydiving
2 Coolidge each day were previous Skydive Arizona customers. (*Id.*)

3 33. While the trademark infringement lawsuit was pending, the owner of
4 Arizona Skydiving sold the business to Mr. Hogue. (Ex. A at ¶ 23.)

5 34. Although he became the owner of the dropzone that had been involved in
6 the improper trade practices, Skydive Arizona did not name Mr. Hogue as a party in that
7 litigation. (*Id.* at ¶ 24.)

8 35. Instead, Mr. Hogue and Skydive Arizona reached a Settlement Agreement
9 setting forth several specific steps Mr. Hogue would take to avoid confusion to the public.
10 (Ex. E.)

11 36. For example, Mr. Hogue agreed to change the name of his new business and
12 stop marketing his drop zone in ways that would confuse the public with Skydive
13 Arizona. (Ex. E.)

14 37. As of May 15, 2003, Mr. Hogue has owned and had complete control over
15 the website www.arizonaskydiving.com, which he runs through the Scottsdale Internet
16 provider Extreme Internet. (Ex. B. at 22:1-17.)

17 38. In view of the importance of the Internet as a marketing channel for Skydive
18 Arizona, the Settlement Agreement required Mr. Hogue to take certain steps on his
19 website to avoid consumer confusion. (Ex. E.)

20 39. Mr. Hogue agreed that as long as he maintained control of the website, it
21 would include a “Links” page with a link to the Skydive Arizona website, and a
22 disclaimer advising all visitors to the website that the webpage is not associated with
23 Skydive Arizona. (*Id.* at ¶ 8(b).)

24 40. Specifically, Mr. Hogue further agreed that he would include the following
25 conspicuous statement on the home page: “Not affiliated with Skydive Arizona. You can
26 reach Skydive Arizona’s web site by going to our ‘Links’ page under ‘Resources.’” (*Id.*)

27 41. Notwithstanding these provisions, the Settlement Agreement required Mr.
28 Hogue to assign the domain name www.arizonaskydiving.com to Skydive Arizona when

1 he no longer met the following criteria in the operation of his business: (1) he did not own
2 at least 34% equity in it; or (2) he no longer had personal responsibility or was actively
3 involved in the management of the business. (*Id.* at ¶ (8(a).)

4 42. The Settlement Agreement defines the “business” as “the skydiving
5 operations now being conducted by Marc Hogue at 6300 North Airport Road, South
6 Hanger, Coolidge, Arizona, 85228.” (*Id.* at ¶ 1.)

7 43. Specifically, the Settlement Agreement stated:

8 “If either of those conditions cease to exist, (i.e., Marc Hogue
9 no longer has at least a 34% equity ownership of such
10 business, or is no longer responsible for or actively involved in
11 the management of such business), then Marc Hogue agrees
12 that the domain name or web site address of
13 “www.arizonaskydiving.com” will be promptly assigned to
14 Skydive Arizona.”

15 (*Id.* at ¶ 8(a).)

16 44. The terms in the Settlement Agreement pertaining to the webpage resulted
17 from negotiation and compromise. Initially, the Settlement Agreement called for Mr.
18 Hogue to relinquish the www.arizonaskydiving.com domain immediately. (Ex. B. at
19 72:8-17.)

20 45. However, Mr. Hogue did not want to relinquish the domain, so he entered
21 into personal negotiations with Mr. Hill to reach a contractual term they could both live
22 with. (*Id.* at p. 150:22 – 152:14.)

23 46. These negotiations resulted in the compromise described above. (*Id.* at
24 71:17-23.; 72: 8-17.)

25 47. Although Mr. Hogue has failed to perform several obligations under the
26 Settlement Agreement, this Motion pertains only to one: his failure to transfer the internet
27 domain www.arizonaskydiving.com to Skydive Arizona. Performance is long past due,
28 because Mr. Hogue no longer operates his skydiving business out of the Coolidge Airport
or anywhere else, yet has refused to transfer the web address www.arizonaskydiving.com
to Skydive Arizona. (Ex. A. at ¶ 25.)

1 48. There is conclusive proof that Mr. Hogue no longer operates a dropzone at
2 the Coolidge Airport, and Mr. Hogue does not dispute it. (*Id.* at ¶ 26.)

3 49. According to an earlier version of webpage www.arizonaskydiving.com,
4 Skydive Coolidge moved to a “new location” in Gila Bend. (*See* Directions, attached as
5 Ex. J.)

6 50. An article from the Coolidge newspaper published on zwire.com shows Mr.
7 Hogue gave up his lease at the Coolidge Airport in the summer of 2005. (P. McConckie
8 “Civilian Jumps to End at Coolidge Airport,” August 5, 2005 published on zwire.com,
9 attached as Ex. K.)

10 51. While Skydive Arizona strongly disputes Mr. Hogue’s interpretation of the
11 contract, the fact is that Mr. Hogue ceased all operations of his Coolidge dropzone. (Ex.
12 A. at ¶ 27.)

13 52. As of June 15, 2009, Mr. Hogue’s dropzone had not only ceased operation
14 at the Coolidge airport, it was no longer in good standing with the Arizona Secretary of
15 State because they failed to submit annual reports. (Ex. G.)

16 53. As a litigation tactic, Mr. Hogue renewed the certification on June 15, 2009,
17 after Skydive Arizona pointed out that the business was not in good standing. (See Letter
18 of P. Johnson dated July 10, 2009, attached as Ex. L.)

19 54. Mr. Hill, President of Skydive Arizona, is familiar with skydive operations
20 in Arizona. Mr. Hogue has not operated a drop zone or facility in Arizona since leaving
21 the Coolidge Airport. (Ex. A. at ¶¶ 1, 49.)

22 55. The website also now says that “Skydive Coolidge” will be “Opening soon
23 in a new location!” (Ex. H.)

24 56. Yet Mr. Hogue has not produced any admissible evidence such as business
25 records, customer receipts, leases, or other documents, to show that Skydive Coolidge
26 remained in operation after it shut down at the Coolidge Airport. (Ex. A. at ¶ 28.)

27 57. The Agreement requires him to maintain a link on the
28 “arizonaskydiving.com” website to the Skydive Arizona home page, with a disclaimer

1 that tells visitors to his web page that he is not Skydive Arizona. (Ex. E. at ¶ 8.)

2 58. Mr. Hogue failed to maintain the link. (Ex. A. at ¶ 29.)

3 59. In fact, when Mr. Hogue’s website was active, he maliciously maintained a
4 link at the bottom of the home page that was labeled “Skydive Arizona,” but it actually
5 linked to his website, and not to the Skydive Arizona website. (*Id.* at ¶ 30.)

6 60. As mentioned, for more than a year, Mr. Hogue shut down the website
7 during this litigation altogether. (Ex. G.)

8 61. Recently, as a litigation tactic, Mr. Hogue has re-launched the website, but
9 without the proper disclaimers required by the Settlement Agreement. (Ex. H.)

10 62. Skydive Arizona’s business continues to be irreparably harmed by Mr.
11 Hogue’s refusal to assign the domain name. (Ex. A. at ¶ 31.)

12 63. As previously explained, the Internet is a significant marketing channel for
13 Skydive Arizona’s goods and services. (*Id.* at ¶ 32.)

14 64. Many first time jumpers use the internet to locate a skydiving center where
15 they can go for their first skydive. (*Id.* at ¶ 33.)

16 65. Mr. Hogue’s use of the confusingly similar “www.arizonaskydiving.com”
17 domain name results in the unfair diversion of business to his website in violation of the
18 settlement agreement reached by the parties. (*Id.* at ¶ 34.)

19 66. Because of the irreparable harm, Mr. Hogue stipulated that injunctive relief
20 would be the appropriate remedy for a breach by either party: “The parties acknowledge
21 and agree that any breach of this Settlement Agreement will cause irreparable harm to the
22 non-breaching party, and agree that the terms of this Settlement Agreement may be
23 enforced by injunctive relief.” (Ex. E. at ¶ 11.)

24 67. This is a bizarre claim by Mr. Hogue because he concedes the attached
25 Agreement contains his signature. (Ex. B. at p. 60:9-10; 62:4-6.)

26 68. Nevertheless, Mr. Hogue contends the version he signed has two minor
27 differences. (*Id.* at 61:15-21.)

28 69. He contends the version he signed changed the spelling of his first name

1 from “Mark” to “Marc,” and changed the way it referenced his skydiving business from
2 “Arizona Skydiving” to “Arizona Skydiving Coolidge.” (*Id.* at p. 100:19 – 25.)

3 70. These were the only changes. According to Mr. Hogue, apart from
4 correcting the names, all terms remained the same. (*Id.*)

5 71. Most importantly to this Motion, the respective duties, obligations, and
6 consideration are not any different. (*Id.*)

7 72. Therefore, the terms regarding Mr. Hogue’s duty to transfer ownership of
8 the internet domain are identical. (*Id.*)

9 73. Q: But what I am trying to say is that the substance of your
10 agreement with Larry Hill was that you would continue with
11 that [domain] name as long as you had 35 percent equity and
12 you maintained complete control of the business?

13 A: That sounds correct.

14 (*Id.*)

15 74. Nevertheless, the undisputed facts in the record show that Mr. Hogue did in
16 fact sign the Settlement Agreement attached to his deposition and this Motion. (*Id.* at
17 p. 98:24-99:3.)

18 75. Mr. Hogue testified that the signature on the last page is his, and the
19 signature on the Agreement matches his signature on his divorce decree. (*Id.*, See
20 Divorce Decree, attached as Ex. M.)

21 76. Mr. Hogue further clarified that he only signed one version of the
22 Settlement Agreement, so this version has to be the one he signed. (Ex. B at p. 153:4 -
23 10.)

24 77. Additionally, Mr. Hogue concedes the first page bears his initials where he
25 corrected the date on the Settlement Agreement. (*Id.* at p. 98:24-99:3.)

26 78. Mr. Hogue only corrected the date on the final copy of the Settlement
27 Agreement, and his corrections match the version produced at his deposition and attached
28 to this Motion. (*Id.* at p. 156:11-23.)

1 79. Further suggesting that no other Settlement Agreement exists, Mr. Hogue
2 claims to have a copy but has never produced it even though it is the subject of this
3 lawsuit. (Def. Hogue Discl., attached as Ex. N at ¶ 16.)

4 80. In this contract, Mr. Hogue agreed to perform several actions in
5 consideration for Skydive Arizona foregoing a lawsuit against him for unfair competition,
6 trademark violations, and other wrongful actions in connection with his business. (Ex. E.)

7 81. Mr. Hogue breached the contract by failing to perform his duty to assign the
8 www.arizonaskydiving.com domain to Skydive Arizona and provide a disclaimer and link
9 on his web page. (Ex. A. at ¶ 35.)

10 82. With respect to the required transfer of the website address, the transfer was
11 due when Mr. Hogue breached the Settlement Agreement by, among other things, ceasing
12 operations of the skydive business at the Coolidge airport, or he no longer had a 34%
13 interest in the ownership of the business, or he was no longer “responsible for and actively
14 involved in the management” of the business, or he failed to maintain the domain name
15 consistent with his contractual obligations. (Ex. E. ¶ 8.)

16 83. Mr. Hogue no longer operates any business out of the Coolidge Airport, so
17 necessarily he does not have 34% ownership of any skydiving business there, nor is he
18 responsible for and actively involved in the management of such business, nor has he
19 properly maintained the domain name. (Ex. G.)

20 84. Despite performance being due two years ago, Mr. Hogue still has not
21 assigned the domain name to Skydive Arizona. (Ex. A. at ¶ 37.)

22 85. Not only did Mr. Hogue cease operations at the Coolidge Airport, he did not
23 continue operating his business anywhere. (Ex. G.)

24 86. The fact that Skydive Force and Skydive Coolidge ceased active operations
25 is documented by the Arizona Corporation Commission. (Ex. G.)

26 87. In addition, Skydive Arizona has been unable to locate Skydive Force or
27 Skydive Coolidge operating anywhere in Arizona. (Ex. A. at ¶ 1, 49.)

28

1 88. The website fails to disclaim, as required, that it is not affiliated with
2 Skydive Arizona. (Ex H.)

3 89. Likewise, the website does not provide a link to the Skydive Arizona page.
4 (*Id.*)

5 90. Mr. Hogue’s use of the Internet domain with a similar name to Skydive
6 Arizona confuses an unknown number of Internet users. (Ex. A. at ¶ 41.)

7 91. Although Skydive Arizona and Mr. Hogue agree it happens time and time
8 again, it would be difficult, speculative, inadequate, and incomplete to project how many
9 Internet users have already been misled, and how many will be misled in the future. (*Id.*
10 at ¶ 42.)

11 92. Likewise, it is difficult to put a price tag on the damage to reputation and
12 goodwill caused by Mr. Hogue’s continued misuse of the Internet domain. (*Id.* at ¶ 43.)

13 93. Customers will continue to be led to Mr. Hogue’s website and,
14 consequently, to his much smaller and less sophisticated operation (to the extent Mr.
15 Hogue is even running a skydive operation at this point – something for which there is no
16 evidence presented). (*Id.* at ¶ 44.)

17 94. Furthermore, Mr. Hogue’s use of the website cannot be managed or
18 controlled effectively with strategies to mitigate the harm caused by the confusingly
19 similar domain name. (*Id.* at ¶ 45.)

20 95. Mr. Hogue has refused to employ mitigating measures already. (*Id.* at ¶ 46.)

21 96. He does not have the required disclaimer on the site, nor does he post a link
22 to the Skydive Arizona web page as required in the Settlement Agreement. (*Id.* at ¶ 47.)

23 97. The past and future damage caused by the infringement would be in the
24 millions of dollars. (*Id.* at ¶ 48.)

25 ///

26 ///

27

28

1 DATED this 31st day of December, 2009.

2 SNELL & WILMER L.L.P.

3
4 By: s/ Michael J. Coccaro for

5 Sid Leach

6 Craig Logsdon

7 One Arizona Center

8 400 East Van Buren Street

9 Phoenix, Arizona 85004-2202

10 Attorneys for Plaintiff

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28
Snell & Wilmer

L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren
Phoenix, Arizona 85004-2202
(602) 382-6000

1 ORIGINAL filed with the Court and a COPY
2 hand-delivered this 31st day of December, 2009 to:

3 Hon. J. Kenneth Mangum
4 Judge of the Superior Court
5 East Court Building – Room 514
6 Phoenix, AZ 85003

7 COPY of the foregoing sent
8 via U.S. Mail this 31st day of December, 2009, to:

9 Paul G. Johnson
10 The Collier Center 11th Floor
11 201 East Washington Street
12 Phoenix AZ 85004-2385

13
14 s/ Jan Snyder

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EXHIBIT B

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ARIZONA

Skydive Arizona, L.L.C.,)
)
Plaintiff,)
)
vs.) CIV01-1854-PHX-SMM
)
Mike Mullins d/b/a Arizona Skydiving)
Coolidge, and Does I through 10 d/b/a)
Arizona Skydiving, Coolidge,)
)
Defendants.)
)

DEPOSITION OF MARC HOGUE

Coolidge, Arizona
April 7, 2003
2:53 p.m.

REPORTED BY:
AMY E. STEWART
Certified Court Reporter
Certificate No. 50462

PREPARED FOR:
SUPERIOR COURT

(Original)

18

1 THE WITNESS: Well, when I -- say that
2 again. You threw me off. That I know he knew -- that I
3 know that he knew that operations were going on here, yes.

4 BY MR. PELTZ:

5 Q. Based upon the conversations --

6 A. Yes.

7 Q. -- the social coacervations --

8 A. Yes.

9 Q. -- about skydiving going on here --

10 A. Yes.

11 Q. -- and things of that nature?

12 Yes. Okay. That's fine.

13 Who owns Arizona Skydiving Coolidge now?

14 A. I do.

15 Q. And when did you purchase Arizona Skydiving?

16 A. I believe April 15th, 2002 was the date.

17 Q. He can't answer for you. I am sure Sid would
18 object to that for sure.

19 A. April, May. It might have been May 15th. It was
20 either April 15th or May 15th. I don't remember. We
21 closed the deal late April of last year.

22 Q. April or May is fine. If you -- if you can't say
23 any closer than that, then if I need a better answer, then
24 I will ask. Don't be afraid to have an answer. That's
25 your answer.

1 Q. Now, what about the website
2 ww.arizonaskydiving.com? Who owns that after May 15th?

3 A. I do.

4 Q. And do you have complete control over the content
5 of what's on that website? You make all the decisions
6 regarding that website?

7 A. Yes, I do.

8 Q. And did you change the website server from the
9 company that Mike uses, Gain Communications, to a
10 different server?

11 A. Yes, I did.

12 Q. Who is it now?

13 A. Extreme Internet in Scottsdale.

14 Q. And when you first got that site back on
15 May 15th, did you change the content of the website and
16 what it looked like?

17 A. Completely.

18 Q. Did Mr. Mullins have any control or input over
19 what you put on that website?

20 A. Nope.

21 Q. Now, when you first started in this business
22 after May 15th, did there come a time when you needed some
23 aircraft to support the skydiving business here?

24 A. Certainly.

25 Q. And when would that have been?

1 marked with Skydiving -- can you at least see it? It
2 shows up quite readily?

3 A. Yes.

4 Q. Okay. I got some exhibits here. I want to talk
5 to you for a minute about some signs that I saw on the way
6 in here.

7 A. Yes. I forgot about them. I am going to get in
8 trouble for those.

9 Q. What makes you say that?

10 A. Because I am supposed to change it from Arizona
11 Skydive Coolidge to Skydive Coolidge, and I didn't do that
12 yet. Larry actually just told me about it last week.

13 Q. Well, here's a diagram that's been marked as
14 Exhibit 2 for the purpose of this deposition. I've been
15 told it sort of fairly and accurately represents a diagram
16 of the road that we drove on to get out here today and the
17 airport at Coolidge.

18 MR. LEACH: Object to the form of the
19 question.

20 BY MR. PELTZ:

21 Q. What do you think?

22 A. That's the only way in and the only way out.

23 Q. Okay. So it would be fair to say that this
24 fairly depicts -- it is not to scale or anything, but it
25 sort of depicts the layout of how you get off the highway

1 basically." I think that was about it.

2 Q. I am going to show you what's been marked as
3 Exhibit No. 7 and ask you if you can recognize that.

4 A. It looks like the agreement that we -- that Larry
5 and I signed changing the name, but this doesn't look like
6 the one that I signed.

7 Q. Well, I want you to look at it real carefully and
8 tell me if that is the one you signed or not?

9 A. It's got my signature. There's no question it is
10 a copy of my signature.

11 Q. I understand that.

12 A. It is definitely my signature, but the one that I
13 signed I specifically gave back and said, "I don't own
14 Arizona Skydiving. I own Arizona Skydiving Coolidge."

15 He went through in his computer in his
16 office and changed everywhere where it said Arizona
17 Skydiving to Arizona Skydiving Coolidge. At the same time
18 he had him go in and change -- he spelled my name with a
19 K. You can see how many times my name is in here. I
20 said, "Well, since you're in there, change it to C as
21 well."

22 Q. Okay. Hold on a minute. Now, you said something
23 I didn't understand it here. You said that the -- this
24 looks like, if I understand your testimony, something that
25 has some of terms of your agreement, but you said there

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1 was typos? In other words, where it says Arizona
2 Skydiving instead of Arizona Skydiving Coolidge --

3 MR. LEACH: Object to the form.

4 BY MR. PELTZ:

5 Q. -- in this agreement --

6 MR. LEACH: Object to the form of the
7 question, leading.

8 BY MR. PELTZ:

9 Q. -- in the original one that you looked at, right?

10 A. Correct.

11 Q. And in the original one, it also misspelled your
12 name with a K, M-a-r-k, the common way to spell Mark?

13 A. Correct.

14 Q. When I look at this agreement, it looks like it
15 still has --

16 A. It says Arizona Skydiving instead of Arizona
17 Skydiving Coolidge.

18 Q. It says Arizona Skydiving Coolidge and it has the
19 Mark fixed?

20 A. Correct.

21 Q. But now if I understood your testimony, you told
22 him when you go back and change Arizona Skydiving
23 Coolidge, change the Mark too?

24 A. Correct.

25 Q. Now, was the very next agreement that you saw

1 correct in those respects or did you see one draft that
2 looks like this with the Mark changed, but not Arizona
3 Skydiving?

4 A. I never saw one in that form. The next one that
5 I saw had Arizona Skydiving Coolidge everywhere and it had
6 my name spelled correctly and that's the one I signed.

7 Q. So the difference between this one here and -- do
8 you have any idea what these numbers are down here on the
9 corner of that document?

10 A. No, I don't.

11 Q. See, it says SA001476.

12 A. I don't. My guess is it is Skydive Arizona and a
13 document number.

14 Q. And then 77. They're sequential numbers, it
15 looks like. 78, 79.

16 Those weren't on the original contract that
17 you signed?

18 A. I couldn't say that with certainty. I don't
19 know. I don't remember ever seeing them, but --

20 Q. Okay. So you know that when you looked at
21 whatever agreement that you agreed on with Larry Hill --

22 A. Uh-huh.

23 Q. -- you said, "Hey, fix Arizona Skydive to change
24 it to Arizona Skydiving Coolidge. That's the company I
25 own"?

1 supposed to be the agreement.

2 Do you have a copy of what you did sign?

3 THE WITNESS: I do --

4 MR. LEACH: Why don't you get it because --

5 THE WITNESS: -- in San Diego.

6 MR. LEACH: Okay.

7 THE WITNESS: Yeah.

8 MR. LEACH: Obviously, we want to get the

9 right document.

10 THE WITNESS: Right.

11 MR. LEACH: No one is intentionally

12 providing the wrong document here.

13 MR. PELTZ: We don't know what anyone else

14 is doing.

15 THE WITNESS: I saw it. That didn't come
16 from anybody else. Mike brought it to me and said, "Are
17 you Skydiving Coolidge?" I was like, "No way." I didn't
18 make that mistake, did I? Maybe I did. I started to
19 doubt myself and I looked at the document. I am like,
20 "How did I miss that?"

21 Then as soon as I saw Arizona Skydiving,
22 then I said, "Absolutely not," because that was the two
23 things. The name -- my first name, I really didn't care
24 about. When I saw everywhere that it said, "Arizona
25 Skydiving," I threw it back to Larry. I said, "No. I am

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1 The name is Coolidge Skydiving and your name
2 was Skydiving Coolidge, I believe, correct?

3 A. I don't know. What does it say?

4 Q. Well, this says Coolidge Skydiving.

5 A. Skydive Coolidge.

6 Q. Skydive Coolidge.

7 Okay. In the agreement that you did have,
8 did you also have an agreement that you could continue to
9 use any existing advertising that had been printed for
10 Arizona Skydiving Coolidge until it ran out as this
11 paragraph 6 seems to indicate?

12 A. Correct.

13 Q. And did you also agree that, you know, you would
14 change your yellow page ads on the next cycle when they
15 came out?

16 A. Correct.

17 Q. And did you also reach an agreement sort of
18 concerning the use of ww.arizonaskydiving.com, that you
19 would continue to use it in that name, this agreement
20 says, as long as you had at least 34 percent ownership and
21 as long as you were making all the decisions running the
22 business?

23 A. Correct.

24 Q. So the website Arizonaskydiving.com --

25 A. Uh-huh.

1 Q. -- is going to remain that way and doesn't have
2 to be changed in any foreseeable future as long as you are
3 the one running this business?

4 MR. LEACH: Objection.

5 THE WITNESS: Correct.

6 MR. LEACH: Object to the form of the
7 question.

8 THE WITNESS: That was the sticking point of
9 this. I wasn't going to give up the name. The domain
10 name is different than a trade name, let's say. It is a
11 domain name and I wasn't -- everybody knows how -- how do
12 I put this? That's where people know where to find us on
13 the Internet. If I change that, they're not going find us
14 on the Internet. It is not Skydivearizona.com. It's
15 Arizonaskydiving.com. I wasn't going to give that up.
16 That was a sticking point in that agreement, and we came
17 with that compromise.

18 BY MR. PELTZ:

19 Q. And it shows up here on this on page 3. I have
20 to refer to the pages because it looks like paragraph 8,
21 page 2 and 3, is where those terms are on this agreement.

22 But what I am trying to say is that the
23 substance of your agreement with Larry Hill was that you
24 would continue with that name as long as you had
25 35 percent equity and you maintained complete control of

1 the business?

2 A. That sounds correct.

3 Q. Okay. And that's all I had about the agreement.
4 That one will be done too.

5 Now, did Mike Mullins operate his aircraft
6 for you between December 2002 to the present time?

7 A. Yes, he did.

8 Q. You envision he will continue to operate his
9 aircraft for you until next season, say, for example?

10 A. If we can come up with a more equitable
11 agreement, yes.

12 Q. Okay. What is your current agreement?

13 A. What do you mean?

14 Q. With Mike Mullins. You said, "If we can come up
15 with a more equitable agreement."

16 What is the agreement that you had?

17 A. I need to charge more for the slots. I need to
18 get more money basically.

19 Q. Well, what -- I am trying to ask you to lay out
20 for me what the agreement you had with Mike Mullins was.

21 A. During the season I paid \$12 a slot. We charged
22 13. During the now period I pay \$13 and I charge 15.

23 Q. Okay. So for Mike Mullin's past season on the
24 slots, he was charging you 12?

25 A. Correct.

1 place because he's a friend of mine. Mike was a friend of
2 mine too. I didn't want to split ties with either one of
3 them.

4 He said, "Yes. As long as you're not
5 undercutting us on the tandems on the prices, I don't see
6 why not." And I brought it to him as it could be a
7 win-win for him too. As I stated at the city meeting -- I
8 thought I said that earlier, in the city meeting, "We're a
9 different market than his. He is a big business world,
10 champion teams." This is -- and what ended up happening
11 is when we started flying here, we immediately took all
12 the small jumper business: Estrella, Buckeye, and even
13 Marana.

14 All those people that wouldn't jump there
15 anyways came here. I will say and I said it many times,
16 Skydiving Arizona is the best drop zone in the world.
17 There's no question about it. It is a big business. It
18 is a great drop zone. If you're a student jumper with 10
19 jumps, 50 jumps, whatever, it is not the best place for
20 you. Too much going on, too big airplanes. People like
21 to have more one-on-one service.

22 As an instructor there, I always strived to
23 do that over there, to give them more service. But
24 there's only so much time. You're turning, turning,
25 turning. That's why the instructors all wanted to work

1 A. We give them back. Rightfully, I should keep it.
2 I am not going to do that. It is not their fault. I
3 mean, yeah, they're not too bright, but it is not their
4 fault that somebody over there knowingly took them
5 knowing -- I mean, I threatened a couple times to Al and a
6 couple of those guys. I am going to keep the deposit, but
7 they don't care. They don't care about the students, so I
8 didn't. I've never done it. Not once have I taken a
9 deposit from anybody that went over there.

10 It makes you -- it really makes you mad when
11 you drive down here in the middle of freaking summer with
12 your daughter and your wife and get a pilot here and get
13 another instructor here and they go to the wrong place and
14 then they take them knowingly.

15 Q. And that would be more than five or six people at
16 a time? I guess you're going to book five or six before
17 you're going to go up?

18 MR. LEACH: Object to the form of the
19 question.

20 THE WITNESS: No.

21 BY MR. PELTZ:

22 Q. It could just be for two?

23 A. One or two. That's when it really makes you mad.
24 The only reason we drove down here was to take care of
25 that customer, and they went to the wrong place and they

1 ended up jumping over there.

2 Q. What were you charging for jumps on Mike
3 Mullins's aircraft on November 30th through December 20th?

4 A. \$15.

5 Q. From December 21st through March 2nd?

6 A. \$13.

7 Q. And from March 3rd to the present?

8 A. \$15.

9 Q. Now, did Larry Hill ever ask you to charge a
10 certain amount for your regular jumps at this business?

11 A. No.

12 Q. He didn't ask you to go higher or lower than 13
13 or 15 on those slots?

14 A. Yes, he did. He actually -- actually, originally
15 it was 13 the whole year and as to try to make things --
16 Larry said that his biggest problem with this place was
17 that it undercuts him so bad. So in an effort to try to
18 make things a little better, I told Mike I wanted to
19 charge 15 during the periods and Mike compromised and
20 charged 15.

21 Q. Why can't Larry Hill charge 13?

22 MR. LEACH: Object to the form of the
23 question.

24 MR. PELTZ: You can answer if you can.

25 THE WITNESS: I wouldn't do it again if I

1 your deposition, did you know that they were going to
2 require you to travel to Tucson to testify?

3 A. No. Didn't know anything about that.

4 Q. Would that have been inconvenient for you?

5 A. Yes.

6 Q. And was that the time when I told you that you
7 didn't have to attend because they didn't serve you with a
8 subpoena?

9 A. Yes.

10 Q. And that it should be at a time convenient for
11 you?

12 A. Yes. I never knew I was going to have to go to
13 Tucson. I think you were the first person -- or you were
14 the only person to ever tell me about it. I never knew
15 about it.

16 Q. Okay. Let me ask you just a couple of questions
17 about Exhibit 7. Now, the things that you thought that
18 you had some question about on Exhibit 7, it says Arizona
19 Skydiving instead of Arizona Skydiving Coolidge?

20 A. Correct.

21 Q. And it says Coolidge Skydiving instead of Skydive
22 Coolidge?

23 A. Right.

24 Q. And the first page where it says that is a page
25 that has some initials on it, right?

1 final one. We proofread it again and signed it.

2 Q. Okay. Other than those two terms, does Exhibit 7
3 accurately set forth the treatment that you entered into
4 with Larry Hill?

5 A. This Exhibit 7?

6 Q. Yes.

7 A. Other than just that wording -- and here's --
8 there's two reasons I know this. Number one, I am not
9 Arizona Skydiving and I never have been. Whether they
10 operated as Skydive Arizona -- or Arizona Skydiving, I
11 don't know, but I have always operated as Arizona
12 Skydiving Coolidge or even Arizona Skydiving Center
13 Coolidge. I never operated as Arizona Skydiving. Not one
14 piece of paper, not one E-mail, nothing has ever been
15 Arizona Skydiving. I immediately got on that. I am not
16 Arizona Skydiving. I was like, I am not Arizona Skydiving
17 and I am not signing that.

18 Second thing --

19 Q. But other than these terms, Arizona Skydiving and
20 Coolidge Skydiving, does --

21 A. Yes.

22 Q. -- does the agreement --

23 A. Yes.

24 Q. -- otherwise accurately set forth your agreement?

25 A. Yes.

1 BY MR. LEACH:

2 Q. In order to be a USPA recognized drop zone, do
3 you have to make any commitment that the drop zone is
4 going to observe the basic safety requirements that are
5 endorsed by the USPA?

6 A. Yes.

7 Q. USPA is the acronym for United States Parachute
8 Association?

9 A. Correct.

10 Q. During the time that Mike Mullins owned Arizona
11 Skydiving in Coolidge, was the drop zone a USPA recognized
12 drop zone?

13 A. No, not to my knowledge.

14 Q. Is Skydive Arizona known as a quality drop zone?

15 A. Absolutely.

16 Q. Is Skydive Arizona well known in the skydiving
17 community or market?

18 A. Yes.

19 MR. PELTZ: Object to the form, speculation,
20 foundation.

21 BY MR. LEACH:

22 Q. Is Skydive Arizona famous in the skydiving
23 market?

24 MR. PELTZ: Object to the form, speculation,
25 lacks foundation.

1 THE WITNESS: Yes.

2 BY MR. LEACH:

3 Q. How long before May 15, 2002 was it when you
4 first started your discussions with Mr. Mullins about
5 buying the skydiving operations here in Coolidge from him?

6 A. A couple weeks. It was very short. It was very
7 quick. It was an opportunity.

8 Q. And why was it an opportunity?

9 A. Because it wasn't something that I looked at. I
10 didn't come get out and say I am going to go here. When I
11 got off the parachute team and I am going to go back to
12 Skydive Arizona again until I finished my degree. It
13 should take me two semesters, one spring semester and
14 summer semester and I will be good. Then in the interim I
15 am going to work at Skydive Arizona until either my lease
16 comes through for Vegas to open a drop zone up there or
17 the Navy job which they have been trying to create for me
18 comes through. "Hey, you want to buy the drop zone dirt
19 cheap?" "Yeah."

20 Excuse me for one second. I just want to
21 tell my wife --

22 (An off-the-record discussion was held.)

23 BY MR. LEACH:

24 Q. Before you purchased the drop zone from Mike
25 Mullins, I think you indicated that you did not work in

1 MR. LEACH: Object to the form of the
2 question.

3 BY MR. PELTZ:

4 Q. Right?

5 A. Correct. Let me actually look at that. I didn't
6 even notice that before.

7 Q. Well --

8 A. It looks like paragraphs one through seven are
9 smaller font.

10 Q. Right.

11 A. And then eight and on are bigger font.

12 Q. Did you notice whether the contract that you were
13 dealing with Larry Hill at any of these times, did you
14 notice whether the fonts were different like that?

15 A. I don't remember.

16 Q. Okay. Fair enough.

17 Now, so, as I understand it, you went there
18 one time. He had the agreement. You said, look, you got
19 to change this, this, and the website. You didn't even
20 read it. You stuck it in your pocket and said no, the
21 first time?

22 A. No. The first time I went, I went in his office
23 and he handed me the contract, or maybe I didn't go in his
24 office. He gave me the contract. I didn't read it. I
25 was like, okay, I am out of here. I stuck it in my back

1 pocket and I took off.

2 Over the next couple weeks I perused through
3 it. He called me several times. Did you read the
4 agreement. No, I haven't even looked at it yet. Hey,
5 come on. We got to do something with this agreement.
6 Okay. Fine. I looked at it and faxed it to my partner.

7 That's when I was like, oh, the other stuff
8 is no big deal, but the website is a nonstart.

9 Q. Okay. So by the time that you had looked at the
10 agreement, okay, and the website wasn't in here, did you
11 notice whether or not at that time it had the correct
12 name, Arizona Skydiving Coolidge?

13 A. You mean the very first one I saw?

14 Q. Well, you got it and you put in your pack. You
15 went back and then Larry said, you got to look at it. You
16 got to look at it.

17 A. The very first one?

18 Q. The very first one.

19 A. I first one I believe said Arizona Skydiving.

20 Q. That's interesting to me. So by the time you did
21 have a chance to look at it, it said Arizona Skydiving
22 Coolidge?

23 MR. LEACH: Object to the form.

24 THE WITNESS: No. It said Arizona
25 Skydiving.

1 BY MR. PELTZ:

2 Q. Then you went back to see Larry Hill along with
3 changing the website problem, you already knew you had to
4 change some of those other problems?

5 A. No, because when I looked at it the first time I
6 read it and said okay, what does it say. Yeah. Okay. In
7 principle, it all sounds good. Fine. Just change that
8 and we will go.

9 When I went to his office and looked at it,
10 now, I am like, okay. We're going to go line by line
11 because I am not a lawyer. This is a settlement
12 agreement. Yes. It's a settlement agreement. Line by
13 line. Then I was perusing it. That's when I was like,
14 I'm not Arizona Skydiving.

15 Q. Okay. Okay. Just so I am straight on this
16 though.

17 There wouldn't be any copies hanging out
18 like this that had that change on it from the time that
19 you went to Larry's office? In other words, these changes
20 that should have been made on this were all supposed to be
21 made on the one single sitting when you were sitting in
22 Larry's office, right?

23 What I am saying is, you didn't like walk
24 out with three different versions of that contract, did
25 you?

1 A. Actually, I did.

2 Q. You did?

3 A. I walked out with two or three versions of it.

4 Q. Well, only one was signed?

5 A. Correct.

6 Q. And the only one that was signed to the best of
7 your knowledge had Arizona Skydiving Coolidge, your name
8 correct, it had the name that you were going to change to,
9 to Skydiving Coolidge? That's the one that you signed?

10 A. Absolutely.

11 Q. And what I am saying is all of those changes to
12 that contract were made in the short space of time that
13 you were at Larry's office?

14 A. Correct.

15 Q. He printed it out on his computer?

16 A. Correct.

17 Q. Printed another one off of his computer?

18 A. Correct.

19 Q. It wasn't like that he mailed you a copy and then
20 you mailed it back?

21 A. Right.

22 Q. It was done right there in that office?

23 A. Right. I actually made a specific -- I took this
24 copy on purpose. I took a copy that said Arizona
25 Skydiving on purpose.

1 they gave it to me.

2 As a matter of fact, I think they -- if I
3 remember correctly -- that's right. They were calling me
4 to manifest -- where the hell was I? They were calling
5 me. Larry is in his office waiting for you. I went in
6 there. He is like, here's this. I said, okay, got to go.
7 I grabbed it and took off. I went on the airplane and
8 stuck it in my bag and flew over here. It was a couple
9 weeks later --

10 Q. That's not my question.

11 A. I know what your question is. That's why it says
12 December 4th. So January 1st, when we signed it, I said
13 that's not the appropriate day and he said, well -- I was
14 like, I don't want to sign it. He just said put a line
15 through it and initial it.

16 Q. Is that what you did on the final copy that you
17 signed?

18 A. Yes, it is.

19 Q. All right. So there was only one copy that you
20 signed and that copy had the date December 4, 2002 struck
21 through and the date 1 January 2003 in with initials
22 besides it?

23 A. Correct.

24 Q. And these are your initials on the first page of
25 Exhibit 7, correct?

EXHIBIT E

EXHIBIT E

SETTLEMENT AGREEMENT

1. This is a Settlement Agreement between Skydive Arizona, Inc., an Arizona corporation, having a principal place of business at 4900 N. Taylor Road, Eloy, Arizona 85231 ("Skydive Arizona"), where Skydive Arizona conducts skydiving operations and runs a dropzone, Marc Hogue, an individual and resident of the State of Arizona, having a business address of 6300 North Airport Road, South Hanger, Coolidge, Arizona 85228, where Marc Hogue now conducts skydiving operations and runs a dropzone, and Skydive Force, Inc., a corporation having a principal place of business at 6300 North Airport Road, South Hanger, Coolidge, Arizona 85228 (Marc Hogue and Skydive Force, Inc., are hereinafter collectively referred to as "Marc Hogue"). The effective date of this Settlement Agreement is ~~December 4, 2002.~~ ^(MHH) JAN, 2003. ~~2002~~

2. Marc Hogue has entered into an agreement to purchase the business involving the skydiving operations previously conducted by Mike Mullins under the name of Arizona Skydiving at 6300 North Airport Road, South Hanger, Coolidge, Arizona 85228. Marc Hogue has paid valuable consideration to Mike Mullins pursuant to the purchase agreement, and has effectively taken over the skydiving operations of the business, except that the landlord has not yet approved the assignment of the lease to Marc Hogue. During the period that Marc Hogue has been operating the business, there have been occasions when customers have made a telephone reservation to do a tandem jump at either Arizona Skydiving or at Skydive Arizona, and have shown up at the other dropzone by mistake. Marc Hogue and Skydive Arizona desire to put an end to customer confusion between the two dropzones.

3. This Settlement Agreement is also intended to settle potential claims that Skydive Arizona may have against Marc Hogue in connection with the case of *Skydive Arizona, Inc. vs. Mike Mullins d/b/a Arizona Skydiving*, Civil Action No. CIV 01-1854 PHX SMM, in the United States District Court for the District of Arizona, but does not resolve any of the claims that Skydive Arizona may have against Mike Mullins.

4. Marc Hogue agrees to immediately change the name of his business to "Coolidge Skydiving," and will stop using the name "Arizona Skydiving," or any name including the word "Arizona" in combination with any form of the word "Skydive" or "Skydiving." As described more particularly below, Skydive Arizona will allow Marc Hogue a transition period to phase out use of the "Arizona Skydiving" name.

5. Skydive Arizona promises that it will not seek to add Marc Hogue as a party to the case of *Skydive Arizona, Inc. vs. Mike Mullins d/b/a Arizona Skydiving*, Civil Action No. CIV 01-1854 PHX SMM, in the United

States District Court for the District of Arizona, and will not sue Marc Hogue for an injunction or for damages for any claim of trademark infringement, trademark dilution, false designation of origin, or unfair competition based upon the use of the "Arizona Skydiving" name in connection with the business purchased by Marc Hogue from Mike Mullins.

6. Skydive Arizona agrees that Marc Hogue may continue to use existing manifest sheets, and printed material printed prior to the effective date of this Settlement Agreement, until Marc Hogue's current supply of such documents has been exhausted. Future printings of such manifest sheets will bear the new name of the business, and will not use the name "Arizona Skydiving," or any name including the word "Arizona" in combination with any form of the word "Skydive" or "Skydiving." Marc Hogue may similarly consume existing documents bearing the "Arizona Skydiving" name in his business until the supply of such documents is exhausted. Future printings of all such documents shall bear the new name of the business, and will not use the name "Arizona Skydiving," or any name including the word "Arizona" in combination with any form of the word "Skydive" or "Skydiving." Notwithstanding anything to the contrary herein, Marc Hogue agrees to cease using any documents bearing the "Arizona Skydiving" name within twelve (12) months from the Effective Date of this Settlement Agreement.

7. Marc Hogue agrees that he will immediately cease using the name "Arizona Skydiving," or any name including the word "Arizona" in combination with any form of the word "Skydive" or "Skydiving," in all promotional, marketing or advertising materials and ads, with the exception of those allowed in para. 6. Marc Hogue agrees that when it is time to renew his ad in the Yellow Pages, he will use the new name of his business in all future Yellow Pages ads, and will not use the name "Arizona Skydiving," or any name including the word "Arizona" in combination with any form of the word "Skydive" or "Skydiving," in future Yellow Pages ads. Marc Hogue agrees that, commencing immediately, the telephone at his business will be answered with the new name of the business.

8. The parties have reached a compromise concerning the domain name or website address of "www.arizonaskydiving.com" that is being used in connection with the business

involving the skydiving operations now being conducted by Marc Hogue at 6300 North Airport Road, South Hanger, Coolidge, Arizona 85228.

(a) As long as Marc Hogue has at least a 34% equity ownership of such business, and is responsible for and actively involved in the management of such business, Marc Hogue may continue to use the domain name or website address of "www.arizonaskydiving.com" in connection with such business involving the skydiving operations being conducted by Marc Hogue in Coolidge, Arizona. If either of those conditions cease to exist, (i.e., Marc Hogue no longer has at least a 34% equity ownership of such business, or is no longer responsible for and actively involved in the management of such business), then Marc Hogue agrees that the domain name or web site address of "www.arizonaskydiving.com" will be promptly assigned to Skydive Arizona.

(b) For so long as the domain name or website address of "www.arizonaskydiving.com" is used in connection with the business involving the skydiving operations conducted in Coolidge, Arizona, the first page that a user is directed to when the URL of "www.arizonaskydiving.com" is entered in any Internet browser software (and a user is connected to such web site address), including any web page designed as the "home" page for such web site, shall contain the following statement in a font and color that is reasonably readable and conspicuous: **"Not affiliated with Skydive Arizona. You can reach Skydive Arizona's web site by going to our 'Links' page under 'Resources.'**" However, if it becomes necessary or desirable for some future unforeseen reason to change the exact language of this statement, Marc Hogue may do so if he first obtains the approval of Larry Hill. In addition, the last two words of the statement, i.e., "...under 'Resources'," shall be changed if the organization of the web site

changes, and the "Links" page is no longer under the "Resources" menu, so that the statement will reflect the correct location of the "Links" page.

(c) For so long as the domain name or website address of "www.arizonaskydiving.com" is used in connection with the business involving the skydiving operations conducted in Coolidge, Arizona, the "Links" page for that web site shall contain a link to the Skydive Arizona web site at "www.skydiveaz.com" which is displayed using a font and color that are the same as the other links on the "Links" page. The following HTML code shall be used for this link: Skydive Arizona. However, additional HTML code may be included for the font and color of the displayed text, if desired, as long as the font and color are the same as the other links on the "Links" page. In addition, if it becomes necessary or desirable for some future unforeseen reason to change the exact HTML code used for the link to the Skydive Arizona web site, Marc Hogue may do so if he first obtains the approval of Larry Hill, and shall do so if he is requested by Larry Hill to change the HTML code, (for example, if the URL for the Skydive Arizona web site changes).

(d) For so long as (1) Marc Hogue has at least a 34% equity ownership of the business involving the skydiving operations now being conducted by Marc Hogue at 6300 North Airport Road, South Hanger, Coolidge, Arizona 85228, and is responsible for and actively involved in the management of such business, and (2) one or more aircraft owned by Larry Hill or Skydive Arizona is being regularly used for skydiving operations in connection with such business at the Coolidge, Arizona dropzone, Skydive Arizona will include a link to the web site at "www.arizonaskydiving.com" on the links page for

the Skydive Arizona web site (currently referred to as "Cool Links"), which is displayed using a font and color that are the same as the other links on such links page.

9. Marc Hogue agrees to promptly issue a press release announcing the change of name from "Arizona Skydiving" to "Coolidge Skydiving."

10. Nothing herein is to be construed as a license, either express or implied, under any trademark, service mark, trade name, or copyright owned by Skydive Arizona.

11. The parties acknowledge and agree that any breach of this Settlement Agreement will cause irreparable harm to the non-breaching party, and agree that the terms of this Settlement Agreement may be enforced by injunctive relief. In addition, in the event of a breach of this Settlement Agreement, the prevailing party shall be entitled to recover its attorneys fees and expenses. However, in the event of a breach of this Settlement Agreement, the non-breaching party shall give the breaching party notice of the breach, and a period of thirty (30) days to cure the breach, before taking legal action.

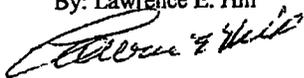
12. This Settlement Agreement constitutes the entire agreement between the parties with respect to the subject matter thereof. The undersigned have read the Settlement Agreement, fully understand its content, and have been advised by counsel of their own choosing as to the propriety and legal effect of executing same.

13. The undersigned acknowledge that this Settlement Agreement, and all questions relating to its validity, interpretation, performance and enforcement, shall be governed by and construed in accordance with the laws of the State of Arizona.

14. This Settlement Agreement shall be binding upon the parties, and their successors, heirs, devisees and assigns.

SKYDIVE ARIZONA, INC.

By: Lawrence E. Hill



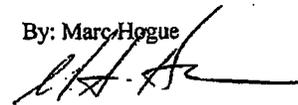
SKYDIVE FORCE INC.

By: Marc Hogue



Marc Hogue

By: Marc Hogue



EFFECTIVE ⁵ 030101

Snyder, Jan

From: COSC eFiling [efiling@cosc.maricopa.gov]
Sent: Monday, January 04, 2010 8:33 AM
To: Snyder, Jan
Cc: efiling@cosc.maricopa.gov
Subject: COSC E-Filing ACCEPTED (CV2006-015563, Filing ID: 491261)

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Filed By:

Jan Snyder
Snell & Wilmer L.L.P.
One Arizona Center 400 East Van Buren
Phoenix, AZ 85004-2202
602-382-6655 / jcsnyder@swlaw.com

Authorizing Attorney:

020223 (AZ)
clogsdon@swlaw.com

Document(s) Filed:

1. Title: Plaintiff Skydive Arizona, Inc.s Renewed Motion for Summary Judgment / Type: Motion For Summary Judgment

Document Status: Accepted

2. Title: Amended Separate Statement of Undisputed Facts in Support of Plaintiff Skydive Arizona, Inc.s Renewed Motion for Summary Judgment / Type: Statement Of Facts

Document Status: Accepted

3. Title: Exhibits A-D to Amended Separate Statement of Undisputed Facts in Support of Plaintiff Skykdiver Arizona, Inc.s Renewed Motion for Summary Judgment / Type: Exhibit

Document Status: Accepted

4. Title: Exhibits E-N to Amended Separate Statement of Undisputed Facts in Support of Plaintiff Skydive Arizona, Inc.s Renewed Motion for Summary Judgment / Type: Exhibit

Document Status: Accepted

Clerk Comments: ***MULTIPLE MAIN DOCUMENTS but accepted as filed this time.*** The Statement of Facts was filed as a supporting document. It needs to be re-filed as a main document to be processed as a separate document. Go to My Efile Page, you will see SOF is not filed in, it was filed as an exhibit. See FAQs (<https://efiling.clerkofcourt.maricopa.gov/help.asp>) for more information. MAIN DOCUMENTS are FILED stamped. SUPPORTING DOCUMENTS are exhibits or other documents you would attach or staple to another document, they will NOT have a "FILED" stamp & do not generate a separate docket entry.

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EXHIBIT H

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DISTRICT OF ARIZONA

1 Sid Leach (#019519)
2 SNELL & WILMER L L P
3 One Arizona Center
4 400 E Van Buren
5 Phoenix, AZ 85004-2202
6 Telephone (602) 382-6372
7 Facsimile (602) 382-6070
8 Attorneys for Plaintiff Skydive Arizona, Inc

9 IN THE UNITED STATES DISTRICT COURT FOR THE
10 DISTRICT OF ARIZONA

11 Skydive Arizona, Inc ,
12 *Plaintiff,*

13 vs

14 Mike Mullins d/b/a Arizona
15 Skydiving Coolidge,
16 *Defendant*

Civil Action No CV 01-1854 PHX
FJM

17 **STATEMENT OF FACTS IN**
18 **SUPPORT OF PLAINTIFF'S**
19 **MOTION FOR SUMMARY**
20 **JUDGMENT ON TRADEMARK**
21 **INFRINGEMENT CLAIM**

22 1 Larry Hill began the operation of a skydiving center or dropzone over
23 25 years ago Declaration of Lawrence E Hill ¶ 4 ("Hill Decl ")

24 2 In 1986, Larry Hill moved his skydiving business to the Coolidge
25 Airport in Coolidge, Arizona Hill Decl ¶¶ 4-5 & 7

26 3 A few months after the move to Coolidge, Plaintiff adopted and used
the mark "Skydive Arizona" in connection with its skydiving business Hill Decl
¶¶ 4-5

63

1 4 On October 15, 1986, the name of the corporation was changed to
2 Skydive Arizona, Inc Hill Decl ¶ 5, Plaintiff's Exhibit 17 (hereinafter "PX")

3
4 5 Skydive Arizona operated from the Coolidge Airport from 1986 until
5 1991 Hill Decl ¶ 7

6 6 In 1991, Skydive Arizona moved to Eloy, Arizona, and has operated
7 from the Eloy Airport continuously ever since Hill Decl ¶ 7

8
9 7 Plaintiff has been using the mark "Skydive Arizona" continuously
10 since 1986 in connection with its skydiving products and services Hill Decl ¶ 5

11
12 8 Plaintiff has invested more than a million dollars advertising and
13 promoting the Skydive Arizona mark Hill Decl ¶ 8

14 9 Skydive Arizona advertises extensively in trade publications, both in
15 the United States, and in other countries in the world Hill Decl ¶¶ 9-10 Plaintiff's
16 Exhibits 36-52 are collections of selected trade publications, arranged by year and
17 publication in chronological order These exhibits include samples of such
18 advertisements
19
20

21 10 Skydive Arizona advertises in *Parachutist* magazine (the official
22 publication of the United States Parachute Association), and has done so for years
23 The *Parachutist* magazine publication is received by every licensed skydiver in the
24 United States Hill Decl ¶ 9
25
26

1 11 Skydive Arizona also advertises in *Skydiving* magazine (United
2 States), *Air Press* (Brazil), *Para Mag* (France), *FrittFall Magazine* (Norway),
3 *Skydive the Mag* (the British Parachute Association magazine), and *Thunderbolt*
4 (Luke Air Force Base) Hill Decl ¶ 9

6 12 Skydive Arizona pays a monthly fee for advertising in the *Yellow*
7 *Pages* in Phoenix and the *Yellow Pages* in Tucson Hill Decl ¶ 9

9 13 During the school year, Skydive Arizona typically purchases
10 advertising space on the Arizona State University web site, and the University of
11 Arizona web site Skydive Arizona also regularly advertises in the *College Times*
12 (reaches over 170,000 students at more than 20 colleges throughout the Valley,
13 including Arizona State University), the *New Times*, *The State Press* (a daily
14 newspaper at Arizona State University), and the *Arizona Daily Wildcat* (University
15 of Arizona with a circulation of 17,000) Hill Decl ¶ 9

18 14 Skydive Arizona pays a monthly fee for a billboard located in the
19 Phoenix area Hill Decl ¶ 9

21 15 In addition to these regular advertisements, Skydive Arizona has
22 advertised in other publications such as *Australian Skydiver Magazine*, the official
23 magazine of the Australian Parachute Federation Skydive Arizona has printed and
24 distributed flyers and other printed promotional literature Skydive Arizona has
25
26

1 also made other types of promotional expenditures, such as providing one or more
2 free tandem skydives which were given away at a professional hockey game in
3 Phoenix Hill Decl ¶ 9, PX 20
4

5 16 Skydive Arizona currently spends \$13,882 per month on advertising
6 Over the last 34 months, Skydive Arizona has invested \$471,988 in goodwill based
7 upon advertising expenditures alone Hill Decl ¶ 10
8

9 17 Skydive Arizona uses the Internet, or World Wide Web, as a
10 significant marketing channel Skydive Arizona maintains an extensive Web site
11 on the Internet that is kept up-to-date with the latest information concerning special
12 events The Web site contains information about Plaintiff's skydiving instructional
13 services and prices Hill Decl ¶ 11, PX 18
14
15

16 18 A significant number of Plaintiff's customers call and make a
17 reservation for a tandem skydive using information from Plaintiff's Web site Hill
18 Decl ¶ 11
19

20 19 Skydive Arizona has been featured on the Discovery Wings Channel
21 Hill Decl ¶ 13, PX 1
22

23 20 Skydive Arizona has been featured on local Phoenix television
24 Channel 12 News in a segment called "Cruzing Arizona" Hill Decl ¶ 13, PX 2
25
26

1 21 Events at Skydive Arizona have been repeatedly covered in
2 *Parachutist Magazine*, the official publication of the United States Parachute
3 Association Hill Decl ¶ 13, PX 36-52

4 22 Recently, Skydive Arizona was the focus of worldwide attention when
5 it became the site where a new world record was set when 300 skydivers
6 successfully completed a predetermined formation and held it for 7 seconds during
7 freefall Hill Decl ¶ 13, PX 56 The best skydivers from all over the world came to
8 Plaintiff's facility in Arizona to participate in setting that record Hill Decl ¶ 15,
9 Burke Decl ¶ 8 The 2003 edition of the "World and United States Aviation and
10 Space Records" published by the National Aeronautic Association described this
11 event as the most memorable aviation record of 2002, stating "Topping the list is
12 the mind-boggling skydive by a formation of 300 people over Arizona on
13 December 12 " Burke Decl ¶ 8, PX 35

14 23 Since 1991, Skydive Arizona has been the host dropzone for the
15 United States National Championships of competitive skydiving on six different
16 occasions, hosted World Cup competitions on three different occasions, and hosted
17 the World Freestyle Federation Championships on two different occasions
18 Declaration of Bryan Burke ¶ 3 ("Burke Decl "), Hill Decl ¶ 15

19 24 Skydive Arizona hosted the United States National Championships in
20
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1 competitive skydiving in 1991, 1992, 1994 (formation skydiving events only), 1996
2 (canopy formation events only), 1998 (formation skydiving and artistic events), and
3
4 2001 Burke Decl ¶ 4, Hill Decl ¶ 15

5 25 The National Championships held at Skydive Arizona drew
6 competitors from all over the United States In addition, foreign teams and
7 competitors participated in the National Championships as guest competitors
8 These events were the subject of press coverage and were widely reported within
9 the niche market of skydiving A number of members of the public came to watch
10 the competition as spectators The skydiving operations conducted during these
11 national competitions at Skydive Arizona were conducted smoothly and efficiently,
12 and as a result, Skydive Arizona is regarded as having set the standard for national
13 competitions Burke Decl ¶¶ 3-4

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15
16
17 26 Skydive Arizona hosted the World Freestyle Federation
18 Championships in 1992 and 1994 Skydive Arizona hosted the 1993 World Cup of
19 Formation Skydiving, the 1998 World Cup of Canopy Formations, and the 2000
20 World Cup of Formation Skydiving and Artistic Events The World Cup and
21 World Championships drew competitors worldwide, with teams competing from
22 Europe, Asia, South Africa, Australia, and New Zealand The World Cup and
23 World Championships represent the highest level of competition in the sport of
24
25
26

1 competitive skydiving These events were the subject of press coverage and were
2 widely reported within the niche market of skydiving A number of members of the
3 public came to watch the competition as spectators Burke Decl ¶¶ 3 & 5, Hill
4 Decl ¶ 15 One of these events was the subject of a program on the Discovery
5 Wings Channel PX 1
6

7
8 27 The Collegiate Nationals competition were held at Skydive Arizona on
9 December 27, 2002, through January 1, 2003 In addition, the 1994 Collegiate
10 Nationals competition was also held at Skydive Arizona Burke Decl ¶ 6
11

12 28 For 19 years, Skydive Arizona has hosted the annual Valentine's Day
13 Money Meet This competition is the most prestigious unsanctioned formation
14 skydiving event in the world Burke Decl ¶ 7
15

16 29 In the past, Skydive Arizona sponsored the America's Cup
17 competition, and regularly hosted the first competition in the America's Cup
18 schedule (the annual Valentine's Money Meet) Hill Decl ¶ 15
19

20 30 The competition events held at Skydive Arizona were
21 contemporaneously web cast world-wide over the Internet by OmniSkore, the
22 organization that provided the computerized scoring and judging system employed
23 during the competitions Burke Decl ¶ 3
24

25 31 Skydive Arizona regularly hosts events such as the Arizona Challenge
26

1 and Mission Impossible that attract the most experienced skydivers nationwide for
2 challenging formation skydiving Hill Decl ¶ 15

3
4 32 Skydive Arizona has developed a well-deserved reputation for high
5 quality skydiving services and operations as a result of numerous events held at
6 Plaintiff's facility that have attracted skydivers from all over the world Burke Decl
7 ¶ 4
8

9 33 Skydive Arizona has made considerable expenditures sponsoring top-
10 notch competition teams The USA team that represented the United States at the
11 recent World Meet skydiving competition in Spain, as well as other competitions
12 around the world, is sponsored by Skydive Arizona That USA team (known as
13 Arizona Airspeed) wears "Skydive Arizona" patches on their jumpsuits at all times
14 The "Arizona Airspeed" team goes to skydiving competition events in the United
15 States, and each time that they compete in such an event they display the "Skydive
16 Arizona" patch on their jumpsuits that are worn during the competition The
17 "Arizona Airspeed" team has also competed in other countries, such as Japan,
18 Australia, Spain, Russia, France, and many others This has increased the prestige
19 of Skydive Arizona in the skydiving market Hill Decl ¶ 16
20
21
22
23

24 34 The "Arizona Airspeed" team also sells instructional videotapes that
25 refer to Skydive Arizona as one of their sponsors These videotapes are purchased
26

1 by skydivers around the United States who use them to improve their skydiving
2 skills. Members of Arizona Airspeed organize skydives at special events held at
3 Skydive Arizona, and provide an attraction for experience skydivers to come to this
4 facility for skydiving activities. Hill Decl ¶ 17.

6 35 Arizona Airspeed conducts regular training camps at Skydive Arizona
7 for experienced skydivers. Hill Decl ¶ 18.

9 36 Experienced skydivers from all over the world come to Skydive
10 Arizona for training camps and competitions. Skydive Arizona is well known for
11 instructional services and team training, and the national skydiving teams
12 representing the countries of Japan, France, Italy, Austria, Denmark, Finland, Great
13 Britain, Germany, Brazil, Argentina, Australia, New Zealand, Switzerland, and
14 Israel have come to Skydive Arizona to train. Hill Decl ¶ 18, Burke Decl ¶ 4,
15 Declaration of Ben Cruz ¶ 4 (“Cruz Decl”).

18 37 Skydive Arizona has made considerable expenditures to build a fine
19 training facility that accommodates competitive skydivers. Hill Decl ¶ 12, PX 21,
20 at 3 (“great skydiving facilities”).

22 38 The skydiving center offers amenities like indoor parachute packing,
23 team rooms, multi-system video equipment, creepers for practicing skydiving
24 maneuvers on the ground, covered creeping pads, multiple bathroom facilities, a
25
26

1 bunk house, phone and fax access, high speed Internet access, shower facilities,
2 laundry facilities, top-notch skydiving organizers, ATM machines, a swimming
3 pool, multiple landing areas, balloon jumps, a restaurant, a coffee shop, a bar, a
4 skydiving equipment supply store, a first-rate skydiving school, camping facilities,
5 RV hook-ups, a basketball court, a volleyball court, and sufficient aircraft so that
6 jumpers do not experience significant delays in getting to jump Hill Decl ¶ 12,
7 Declaration of Al Gramando ¶ 4 (“Al Gramando Decl ”), PX 22, at 2, PX 20

8
9
10 39 Skydive Arizona has an extensive student operation and offers first
11 jump courses 5 days a week In addition, Skydive Arizona offers tandem jumps
12 with a staff of experienced and professional tandem masters for members of the
13 public who want to experience the thrill of skydiving for the first time Al
14 Gramando Decl ¶ 5, Hill Decl ¶ 20

15
16
17 40 Experienced skydivers from all around the world regularly come to
18 Skydive Arizona to participate in skydiving activities PX 19 (“Skydivers from
19 across the world jump at Skydive Arizona ”), Hill Decl ¶ 18, Burke Decl ¶¶ 2 &
20 4, Cruz Decl ¶ 4, Declaration of Pat Patton ¶ 4 (“Patton Decl ”)

21
22 41 In addition to experienced skydivers, Skydive Arizona’s customers
23 include the general public Hill Decl ¶ 20, Al Gramando Decl ¶ 7, Declaration of
24 Kristin Gramando ¶ 4 (“Kristin Gramando Decl ”), Tony Frost Depo at 10-11
25
26

1 42 Skydive Arizona makes a significant contribution to the economy of
2 Eloy, Arizona and the surrounding community Cruz Decl ¶ 3, Declaration of Joy
3 Taylor ¶ 3 (“Taylor Decl ”), Deposition of Judge Clifford Gene Wilson, at 8-10 &
4 13-14 (“Wilson Depo ”)

6 43 Skydive Arizona is the largest skydiving center in the world Hill
7 Decl ¶ 13, Al Gramando Decl ¶ 4, Burke Decl ¶ 9, Patton Decl ¶ 4, Kristin
8 Gramando Decl ¶ 5, PX 22, PX 21, at 3, PX 1.

10 44 Skydive Arizona is known as one of the World’s premier drop zones
11 PX 19, Hill Decl ¶ 14

13 45 Skydive Arizona is famous in the niche market of skydiving
14 Deposition of Marc Hogue, at 114-115 (“Hogue Depo”), Tony Frost Depo , at 7-8
15 & 32, Hill Decl ¶¶ 13 & 15, Al Gramando Decl ¶ 4, Burke Decl ¶ 2, Cruz Decl ¶
16 4

18 46 Prior to 1998, Plaintiff was known as both “Skydive Arizona” and
19 “Arizona Skydiving ” Prior to 1998, whenever the terms “Skydive Arizona” or
20 “Arizona Skydiving” were used, both were associated by customers and the public
21 with Plaintiff Wilson Depo , at 5-7 & 11-14, Taylor Decl ¶¶ 3-6, Declaration of
22 Dennis Decker ¶¶ 3-7 (“Decker Decl ”), Declaration of Richard Horton ¶¶ 2-4
23 (“Horton Decl ”), Declaration of Leila Kathleen Moffitt ¶¶ 2-5 (“Moffitt Decl ”),
24
25
26

1 Hill Decl ¶ 6

2 47 Both "Skydive Arizona" and "Arizona Skydiving" acquired secondary
3 meaning prior to 1998 and were associated with Plaintiff Hill Decl ¶ 6, Wilson
4 Depo at 5-7 & 12, Taylor Decl ¶ 5, Horton Decl ¶ 4, Decker Decl ¶ 7, Moffitt
5 Decl ¶¶ 2-3
6

7
8 48 On occasion the mark "Arizona Skydiving" was also used in
9 connection with Plaintiff's business In instances where competing businesses are
10 listed alphabetically, the "Arizona Skydiving" mark would place Plaintiff's listing
11 at the top or beginning of the group, as compared with "Skydive Arizona," which
12 would typically appear lower down in an alphabetical listing Hill Decl ¶ 4
13

14 49 Skydive Arizona used the mark "Arizona Skydiving" in *Yellow Page*
15 ads prior to 1998 Tony Frost Depo , at 9-10 & 13-14
16

17 50 Plaintiff has never abandoned the "Arizona Skydiving" mark Hill
18 Decl ¶ 6, Tony Frost Depo , at 9
19

20 51 The "Arizona Skydiving" mark was associated with Plaintiff prior to
21 the time that Defendant started using "Arizona Skydiving Coolidge " Hill Decl ¶ 6,
22 Taylor Decl ¶¶ 3-6, Decker Decl ¶¶ 3-7, Horton Decl ¶¶ 2-4, Wilson Depo , at 5-
23 7 & 11-14, Moffitt Decl ¶¶ 2-5
24
25
26

1 52 Defendant was aware of Plaintiff's "Skydive Arizona" mark before he
2 adopted his "Arizona Skydiving Coolidge" mark PX 32 (Defendant's response to
3 request for admission No 3), Hill Decl ¶ 25
4

5 53 The skydiving services that Defendant provided in Arizona were in
6 direct competition with Plaintiff First Amended Complaint, ¶ 8 (this paragraph of
7 the amended complaint was admitted by Defendant), Hill Decl ¶¶ 22 & 26
8

9 54 Defendant started using the mark "Arizona Skydiving Coolidge" in
10 December 1998 PX 33, PX 34
11

12 55 There has been actual confusion between "Arizona Skydiving
13 Coolidge" and "Skydive Arizona " Kristin Gramando Decl ¶¶ 4-9, Hogue Depo , at
14 77 & 103-106, Al Gramando Decl ¶¶ 8-9, Burke Decl ¶¶ 10-12, Patton Decl ¶¶ 5-
15 6, Hill Decl ¶ 28, PX 16, at 1, PX 3, PX 4, PX 6
16

17 56 The problem of confusion has often been greatest with members of the
18 general public, who on many instances have shown up at one facility by mistake,
19 when they actually had made a reservation for a tandem skydive at the other
20 location Hill Decl ¶ 20, Kristin Gramando ¶ 4-6
21

22 57 There has been confusion over whether "Arizona Skydiving Coolidge"
23 was affiliated with or sponsored by "Skydive Arizona " Hogue Depo , at 106-108,
24 PX 3, Hill Decl ¶ 27
25
26

1 58 Arizona Skydiving Coolidge was only about 11 miles for Skydive
2 Arizona Patton Decl ¶ 5, Al Gramando Decl ¶ 7, Hill Decl ¶ 27

3
4 59 The goods and services of Plaintiff and Defendant are identical Hill
5 Decl ¶ 26

6 60 Both Plaintiff and Defendant use the same marketing channels Hill
7 Decl ¶ 26

8
9 61 Both Plaintiff and Defendant use the Internet, or World Wide Web, as
10 a significant marketing channel Al Gramando Decl ¶ 6, Hill Decl ¶¶ 8 & 11, PX
11 18

12
13 62 From 1986 until 1991, Skydive Arizona was associated with the same
14 Coolidge location that Defendant Mike Mullins operated from as Arizona
15 Skydiving Coolidge Hill Decl ¶¶ 4-5, 7, 21 & 25, Al Gramando Decl ¶ 7

16
17 63 Defendant took business away from Plaintiff Hill Decl ¶¶ 23 & 26

18
19 64 Defendant succeeding in diverting away 31,367 jump ticket purchases
20 by skydivers who were customers of Skydive Arizona prior to the time that
21 Defendant opened Arizona Skydiving Coolidge Supplemental Declaration of
22 Kristin Gramando ¶ 4

23
24 65 Defendant succeeding in diverting away a total of 1046 Skydive
25 Arizona customers Supplemental Declaration of Kristin Gramando ¶ 4
26

1 66 Between 80-90% of the total customers at Arizona Skydiving Coolidge
2 each day were previous Skydive Arizona customers Supplemental Declaration of
3 Kristin Gramando ¶ 5
4

5 67 Defendant's total sales during December 1998 through April 1999
6 were \$66,957 PX 33, at 2
7

8 68 Defendant's total sales during December 1999 through April 2000
9 were \$192,626 PX 33, at 2
10

11 69 Defendant's total sales during December 2000 through April 2001
12 were \$196,320 PX 33, at 2
13

14 70 Defendant's total sales during December 2001 through April 2002
15 were \$174,862 PX 33, at 2
16

17 71 Prior to December 1998, Larry Hill, the President and owner of
18 Skydive Arizona, had several run-ins with Defendant Mike Mullins Hill Decl ¶¶
19 29-32
20

21 72 Because Larry Hill was concerned about unsafe conditions created by
22 Defendant Mullins' aircraft operations, he eventually got to the point where he
23 refused to operate his aircraft at an event if Mr Mullins was also going to be
24 operating his plane at the same event Hill Decl ¶ 30
25
26

1 73 As a result of Mr Hill's concerns, Defendant Mullins was prohibited
2 from ever coming to an annual event in Fort Dodge, Iowa, where Defendant
3 Mullins had previously made money each year Hill Decl ¶ 30
4

5 74 A couple of years later, around the summer of 1998, Larry Hill
6 reached the point where he tentatively decided that he would not go to the World
7 Freefall Convention in Quincy, Illinois, that year because of concerns that Mr Hill
8 had over operating at event where Mr Mullins was also flying his plane Hill Decl
9 ¶ 31 However, it became clear that if it came to a choice between Skydive
10 Arizona's aircraft, and Mr Mullins operating his plane at the World freefall
11 Convention, the organizers were likely to take the same action as the Fort Dodge
12 event organizers a couple of years earlier Hill Decl ¶ 31 If Mullins lost the right
13 to participate in the World Freefall Convention, he would have lost substantial
14 revenue
15
16
17

18 75 As a result, during the summer of 1998, Larry Hill had a conversation
19 with Mr Mullins over Mr Hill's refusal to operate Skydive Arizona aircraft at the
20 World Freefall Convention if Mullins operated there During that conversation,
21 Defendant Mullins said he was going to get even and would show Larry Hill by
22 opening a dropzone close to Skydive Arizona This was communicated as a clear
23 threat Hill Decl ¶ 32
24
25
26

1 76 In December 1998, a few months later, Defendant opened up at the
2 Coolidge Airport using the confusingly similar name of Arizona Skydiving
3
4 Coolidge Hill Decl ¶ 35

5 77 The relationship between Larry Hill and Defendant Mullins has been,
6 to put it mildly, strained Hill Decl ¶ 34
7

8 78 Larry Hill was also informed by a number of people in the skydiving
9 community that Defendant Mullins had told them that Defendant opened Arizona
10 Skydiving Coolidge in an effort to harm Skydive Arizona and Larry Hill
11 personally Hill Decl ¶ 36
12

13 79 Gary Born owns and operates a hot air balloon business He operates
14 as an attraction at dropzones providing balloon rides and, in the case of skydivers,
15 balloon jumps Declaration of Gary V Born ¶ 3 ("Born Decl")
16

17 80 In December 1998, when Defendant opened at Arizona Skydiving
18 Coolidge, Mr Born was offering balloon rides and balloon jumps at Skydive
19 Arizona Born Decl ¶ 4
20

21 81 At about the time that the dropzone in Coolidge was opened by
22 Defendant Mullins, Mr Born was asked if he would offer balloon rides and jumps
23 at that dropzone instead of Skydive Arizona As a result, Mr Born went out to see
24 Defendant's new operation in Coolidge Because Mr Born was regularly operating
25
26

1 from Skydive Arizona at that time, Defendant would have to convince him to leave
2 Skydive Arizona in order to get him to offer balloon rides and jumps at Defendant's
3 new business in Coolidge Born Decl ¶ 5
4

5 82 While Mr Born was at Defendant's facility, Defendant started saying
6 something in his presence about the Skydive Arizona dropzone operated by Larry
7 Hill During this conversation, Defendant made a reference to Larry Hill at
8 Skydive Arizona and Defendant's new operation in Coolidge, and said in words or
9 substance "This will bite Larry in the ass " Born Decl ¶ 6
10

11 83 Defendant now claims that he always used the term "Arizona
12 Skydiving Coolidge," and insists that he never used "Arizona Skydiving "
13

14 84 However, the commercial impression created by Defendant was that
15 the name of the business was "Arizona Skydiving " A number of people in the
16 skydiving community understood that the name of Defendant's business was
17 "Arizona Skydiving " Born Decl ¶ 7
18

19 85 Defendant's own web site referred to Defendant as "Arizona
20 Skydiving " For example, Defendant's web page marked as Plaintiff's Exhibit 7
21 refers to Defendant's schedule of operations as "Arizona Skydiving Schedule " PX
22
23

24 7

25 86 Defendant Mullins maintains a web site, the first page of which is
26

1 shown in Plaintiff's Exhibit 8 If you take your mouse and pause the cursor over
2 the diagram of the State of Arizona, a "pop-up window" automatically appears
3 stating "Enter Arizona Skydiving " This is shown by two screen shots (one in color
4 and one in black & white) taken of a computer display browsing the Internet at
5 Defendant's web site PX 8, at 2-3 In order to cause this "pop-up window" to
6 appear, the source code for this page was deliberately programmed with the hidden
7 code ALT="ENTER ARIZONA SKYDIVING" PX 8, at 4
8

9
10 87 Defendant's address on the Internet World Wide Web was
11 "arizonaskydiving" The URL web site address for Defendant was
12 www arizonaskydiving com This was prominently displayed on Defendant's web
13 pages, such as those shown in Plaintiff's Exhibits 53 and 54 The commercial
14 impression created on the Internet, one of defendant's most significant marketing
15 channels, was that of "Arizona Skydiving" with only a weak connection, if any, to
16 Coolidge PX 53, PX 54, PX 7, PX 8 Moreover, Defendant Mullins did not need to
17 get a new URL for the "Arizona Skyding Coolidge" web site, he already had
18 www skydivekingair com PX 57, at 6
19
20
21

22 88 The fact that Defendant's mark created the commercial impression that
23 the business was named "Arizona Skydiving" is further demonstrated by other web
24 sites On the Internet, Performance Designs (a manufacturer of parachutes) lists
25
26

1 one of its dealers in Arizona as "Arizona Skydiving" PX 10 Another web site that
2 contains information listing dropzones in the United States, lists the dropzones in
3 Arizona as including "Arizona Skydiving" PX 9
4

5 89 Another web site on the Internet that provides information and listings
6 of dropzones, lists in the State of Arizona "Arizona Skydiving Coolidge" and
7 immediately under it "Skydive Arizona Eloy" This provides the impression that
8 "Coolidge" and "Eloy" are both simply indications of where dropzones named
9 "Arizona Skydiving" and Skydive Arizona" are located, respectively PX 12
10

11 90 A similar web site demonstrating the commercial impression of
12 Defendant's mark is shown in Plaintiff's Exhibit 13, where a dash was placed
13 between "AZ Skydiving" and the word "Coolidge" to separate them and further
14 indicate that the commercial impression that Defendant's mark provided to the
15 principals of this web site was that the word "Coolidge" is separate from "Arizona
16 Skydiving" PX 13, at 1 This is further reinforced by listing Defendant's web site
17 address "www arizonaskydiving com" immediately below it PX 13, at 1
18
19

20 91 Although Defendant may claim that it is not responsible for what
21 others do on their web sites, the point is that Defendant's mark clearly creates the
22 commercial impression that Defendant's dropzone is "Arizona Skydiving," and this
23 is reinforced by Defendant's Internet address "arizonaskydiving" The web sites
24
25
26

1 shown are all skydiving related sites. The Performance Design web site is from a
2 manufacturer of skydiving equipment, who has a dealership agreement with
3 Arizona Skydiving Coolidge. The fact is that people actively involved in the
4 skydiving industry and market had this commercial impression of the way the
5 Defendant used its mark. This provides a strong inference that the public, including
6 customers who want to purchase a tandem skydive, who are unfamiliar with the
7 skydiving market, would be more likely to perceive Defendant as "Arizona
8 Skydiving," especially in the crucial marketing channel of the Internet.

9
10
11
12 92 Other web sites associate Plaintiff with "Arizona Skydiving" or "Sky
13 Diving in Arizona." PX 14, PX 15. Under the circumstances of this case where the
14 Internet is a significant marketing channel for the goods and services at issue, this
15 evidence weighs in favor of a likelihood of confusion.

16
17 93 Mike Mullins has a job as a pilot for Federal Express, and had another
18 source of income other than Arizona Skydiving Coolidge. He was in a position to
19 subsidize his competing business at Arizona Skydiving Coolidge and operate at a
20 loss just to take business away from Skydive Arizona. Hill Decl ¶ 24. When he was
21 asked why he charged such remarkably low rates, he said "because I can." PX 57,
22 at 5.

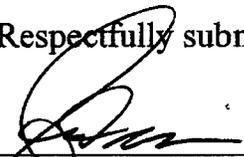
23
24
25 94 Defendant Mullins admitted that he operated at a loss. He priced his
26

1 jump tickets at \$10 each, as compared to the rate of \$17 charged by Skydive
2 Arizona PX 55

3
4 95 In May 2002, while this suit was pending, Defendant Mullins sold the
5 Coolidge skydiving center to Marc Hogue Hogue Depo , at 18-21 Mr Hogue, the
6 new owner of Arizona Skydiving Coolidge, admitted that there was confusion
7 between Plaintiff and Defendant Hogue Depo , at 77 & 103-106
8

9
10
11
12 Date June 2, 2003

Respectfully submitted,



Sid Leach
Snell & Wilmer, L L P
One Arizona Center
400 East Van Buren
Phoenix, AZ 85004-2202
(602) 382-6372

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CERTIFICATE OF SERVICE

A copy of the foregoing **STATEMENT OF FACTS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON TRADEMARK INFRINGEMENT CLAIM** was served upon counsel for Defendant by first class mail, postage prepaid, this 2nd day of June, 2003, in a sealed envelope addressed as follows

Vernon E Peltz, Esq
PMB 351
7925A N Oracle
Tucson, Arizona 85704-6316
Attorney for Defendants

By _____



EXHIBIT I

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Skydive Arizona, Inc ,
Plaintiff,
vs
Mike Mullins d/b/a Arizona Skydiving Coolidge,
Defendant

Civil Action No CV 01-1854 PHX SMM

DECLARATION OF SID LEACH

I, Sid Leach, declare as follows

1 I am over 18 years of age, and competent to testify as to the matters set forth herein I make the following statements based on my own personal knowledge

2 I am Plaintiff's attorney in this action This declaration is submitted for the purpose of authenticating certain exhibits filed with the Court Plaintiff's Exhibits 1 through 60 were filed with the Court on June 2, 2003 Plaintiff's Exhibits 61 through 64 are being filed with the Court contemporaneously herewith on June 30, 2003

3 Plaintiff's Exhibit 6 is a true and correct copy of an item of mail received at Skydive Arizona addressed to Arizona Skydiving Coolidge, 6300 N Airport Rd , Eloy, Arizona 85231 (production numbers SA001342-SA001343) 4 Plaintiff's Exhibit 7 is a true and correct copy of a web page from the Arizona Skydiving Coolidge website

86

1 (www.ArizonaSkydiving.com) (production numbers SA001293 - SA001294)

2 5 Plaintiff's Exhibit 8 includes true and correct copies of (1) a web page from
3 Defendant Mike Mullins' web site, (2) two pages showing the source code for this web
4 page showing the following code embedded in the web page ALT="ENTER ARIZONA
5 SKYDIVING", and (3) two photographs showing the hidden message that pops up when
6 you rest the mouse cursor over the image of the State of Arizona stating "ENTER
7 ARIZONA SKYDIVING" (production numbers SA001386 - SA001390)

8 6 Plaintiff's Exhibit 9 is a true and correct copy of a web page from
9 ParachutePages.com that lists drop zones in Arizona (production number SA001392).

10 7 Plaintiff's Exhibit 10 is a true and correct copy of a web page from
11 Performance Design, Inc.'s website that lists the dealers in Arizona for the company's
12 parachutes (production number SA001393)

13 8 Plaintiff's Exhibit 11 is a true and correct copy of selected pages from
14 Defendant's First Set of Interrogatories, dated September 27, 2002

15 9 Plaintiff's Exhibit 12 is a true and correct copy of a web page from
16 Dropzone.com listing dropzones in Arizona (production numbers SA001394 -
17 SA001395)

18 10 Plaintiff's Exhibit 13 is a true and correct copy of a web page from the
19 United States Parachute Association's website, listing drop zones in Arizona (production
20 numbers SA001336 - SA001337)

21 11 Plaintiff's Exhibit 14 is a true and correct copy of a web page from
22 BlueBound.com's website (production number SA001316)

23 12 Plaintiff's Exhibit 15 is a true and correct copy of a web page from the
24 AZLife.net website entitled "SKY DIVING in Arizona" (production number SA001312)

25 13 Plaintiff's Exhibit 21 are true and correct copies of web pages from
26 Dropzone.com's website (production numbers SA001372 - SA001377)

1 14 Plaintiff's Exhibit 22 are true and correct copies of web pages from
2 Dropzone com's website (production numbers SA001305 – SA001306)

3 15 Plaintiff's Exhibit 32 is a true and correct copy of select pages from
4 Defendant's Response to Requests for Admission

5 16 Plaintiff's Exhibit 33 is a true and correct copy of select pages from
6 Defendant's Answers to Skydive Arizona's First Set of Interrogatories

7 17 Plaintiff's Exhibit 34 is a true and correct copy of an article entitled "A
8 Conversation with Mike Mullins" in *Skydiving* magazine, Issue #248

9 18 Plaintiff's Exhibit 35 is a true and correct copy of the *World and United*
10 *States Aviation and Space Records* listing most memorable aviation records for 2002 and
11 stating "topping the list is the mind-boggling skydive by a formation of 300 people" over
12 Skydive Arizona in Eloy, Arizona

13 19 Plaintiff's Exhibit 36 are true and correct copies of select pages from 1987
14 *Parachutist* magazine issues referring to Skydive Arizona (production numbers
15 SA000334 – SA000351, SA000858 – SA000860)

16 20 Plaintiff's Exhibit 37 are true and correct copies of select pages from 1988
17 issues of *Parachutist* magazine (SA000352 – SA000390), *Skydiving* magazine
18 (production numbers SA000835 – SA000841, SA001019 – SA001025), and *Southwestern*
19 *Skies* newspaper (production numbers SA000854 – SA000857, SA000861 – SA000864)

20 21 Plaintiff's Exhibit 38 are true and correct copies of select pages from 1989
21 issues of *Parachutist* magazine (production numbers SA000391- SA000419) and
22 *Skydiving* magazine (production numbers SA000842 - SA000853, SA001026 -
23 SA00127)

24 22 Plaintiff's Exhibit 39 are true and correct copies of select pages from 1990
25 issues of *Parachutist* magazine (production numbers SA000420 – SA000448) and
26 *Skydiving* magazine (production numbers SA001028 – SA001064)

1 23 Plaintiff's Exhibit 40 are true and correct copies of select pages from 1991
2 issues of *Parachutist* magazine (production numbers SA000449 –SA000528), and
3 *Skydiving* magazine (production numbers SA001065 – SA001081)

4 24 Plaintiff's Exhibit 41 are true and correct copies of select pages from 1992
5 issues of *Parachutist* magazine (production numbers SA000529 – SA000587), *Skydiving*
6 magazine (production numbers SA001082 – SA001111), and *The Chuting Star* magazine
7 (production numbers SA001417 – SA001422)

8 25 Plaintiff's Exhibit 42 are true and correct copies of select pages from 1993
9 issues of *Parachutist* magazine (production numbers SA000588 - SA000598, SA000603
10 – SA000632), *Skydiving* magazine (production numbers SA001112 – SA001156), *The*
11 *Chuting Star* magazine (production numbers SA001423 – SA001442), *SkyLife* (SA001415
12 – SA001416), *Arizona Flyways* magazine (SA000865 – SA000867), and *SkyBlazin'*
13 (SA001002 – SA001003)

14 26 Plaintiff's Exhibit 43 are true and correct copies of select pages from 1994
15 issues of *Parachutist* magazine (production numbers SA000633 – SA000661), *Skydiving*
16 magazine (production numbers SA001157 – SA001195), *ParaMag* (production numbers
17 SA000868 – SA000876), *FrittFall* magazine (production numbers SA000913 –
18 SA000918), *BlueSky* magazine (production numbers SA000925 – SA000934), and
19 *Fallschirm* (production numbers SA000953 – SA000960)

20 27 Plaintiff's Exhibit 44 are true and correct copies of select pages from 1995
21 issues of *Parachutist* magazine (production numbers SA000663 – SA000669), *Skydiving*
22 magazine (production numbers SA001196 – SA001227), *ParaMag* (production numbers
23 SA000877 – SA000903), *FrittFall* magazine (production numbers SA000919 –
24 SA000924), *BlueSky* magazine (production numbers SA000935 – SA000940), *Fallschirm*
25 magazine (production numbers SA000961 – SA000968), and *Sport Parachutist* magazine
26 (production numbers SA000973 – SA000978)

1 28 Plaintiff's Exhibit 45 are true and correct copies of select pages from 1996
2 issues of *Parachutist* magazine (production numbers SA000670 – SA000675), *Skydiving*
3 magazine (production numbers SA001228 – SA001269), *ParaMag* (production numbers
4 SA000904 – SA000912), and *BlueSky* magazine (production numbers SA000941 –
5 SA000952)

6 29 Plaintiff's Exhibit 46 are true and correct copies of select pages from 1997
7 issues of *Parachutist* magazine (production numbers SA000676 – SA000682), *Skydiving*
8 magazine (production numbers SA001270 – SA001283), and *Fallschirm* magazine
9 (production numbers SA000969 – SA000972)

10 30 Plaintiff's Exhibit 47 are true and correct copies of select pages from 1998
11 issues of *Parachutist* magazine (production numbers SA000683 – SA000756), and
12 *Skydive Arizona 1998 – 1999 Information Magazine* (SA000979 – SA000998)

13 31 Plaintiff's Exhibit 48 are true and correct copies of select pages from 1999
14 issues of *Parachutist* magazine (production numbers SA000001 – SA000006, SA000757
15 – SA000792), and *Star* magazine (production numbers SA000999 – SA001001)

16 32 Plaintiff's Exhibit 49 are true and correct copies of select pages from 2000
17 issues of *Parachutist* magazine (production numbers SA000007 – SA000052, SA000793
18 – SA000804)

19 33 Plaintiff's Exhibit 50 are true and correct copies of select pages from 2001
20 issues of *Parachutist* magazine (production numbers SA000805 – SA000812, SA000053
21 – SA000123), *Skydiving* magazine (production numbers SA000268 – SA000273), and
22 *Scottsdale Aviation & Business Journal* (production numbers SA000331 – SA000332)

23 34 Plaintiff's Exhibit 51 are true and correct copies of select pages from 2002
24 issues of *Parachutist* magazine (production numbers SA000124 – SA000229, SA000813
25 – SA000821), *Skydiving* magazine (production numbers SA000266 – SA000267,
26 SA001284 – SA001286), *Australian Skydiver* (production numbers SA000249 –

1 SA000261), and *Arizona Daily Wildcat* newspaper (production numbers SA000274 –
2 SA000278)

3 35 Plaintiff's Exhibit 52 are true and correct copies of select pages from 2003
4 issues of *Parachutist* magazine (production numbers SA000230 – SA000245, SA000822
5 – SA000833, SA001406 – SA001414)

6 36 Plaintiff's Exhibit 53 is a true and correct copy of a web page from
7 Defendant's website dated February 14, 2000 (production number SA000279)

8 37 Plaintiff's Exhibit 54 is a true and correct copy of a web page from
9 Defendant's website dated February 15, 2000 (production number SA000280)

10 38 Plaintiff's Exhibit 55 is a true and correct copy of a page from Defendant's
11 Response to Revised Request for Production

12 39 Plaintiff's Exhibit 56 are true and correct copies of select pages from
13 various newspaper articles regarding the 300-Way World Record set at Skydive Arizona

14 40 Plaintiff's Exhibit 57 are true and correct copies of an article published in
15 the Swedish Skydiving magazine "*Svensk Fallskarmshoppning*", entitled "The Oasis in
16 the Desert", together with an English translation thereof

17 41 Plaintiff's Exhibit 58 is a true and correct copy of the Deposition of Judge
18 Clifford Gene Wilson dated March 31, 2003

19 42 Plaintiff's Exhibit 59 is a true and correct copy of the Deposition of Tony B
20 Frost dated January 22, 2003

21 43 Plaintiff's Exhibit 60 are true and correct copies of select pages from the
22 Deposition of Marc Hogue dated April 7, 2003

23 44 Plaintiff's Exhibit 61 is a true and correct copy of Defendant's Initial
24 Disclosure Statement dated August 29, 2002

25 45 Plaintiff's Exhibit 62 is a true and correct copy of Defendant's Notice of
26 Supplemental Disclosure and Supplemental Witness List dated April 9, 2003

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46 Plaintiff's Exhibit 63 is a true and correct copy of a letter agreement signed
by counsel for Defendant and counsel for Plaintiff dated March 25, 2003

47 Plaintiff's Exhibit 64 are true and correct copies of select pages from the
Deposition of Mike Mullins dated March 13, 2003

48 I declare under penalty of perjury that the foregoing is true and correct
Executed on June 30, 2003



Sid Leach

CERTIFICATE OF SERVICE

A copy of the foregoing **DECLARATION OF SID LEACH** was served upon counsel for Defendant by first class mail, postage prepaid, this 30th day of June, 2003, in a sealed envelope addressed as follows

Vernon E Peltz, Esq
PMB 351
7925A N Oracle
Tucson, Arizona 85704-6316
Attorney for Defendants

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EXHIBIT J

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Registration No. 3,099,847 (Application Serial No. 76/641,146)

MARK: SKYDIVE ARIZONA

Registered on the Principal Register on June 6, 2006

Marc Hogue,

Petitioner,

vs.

Skydive Arizona, Inc.,

Respondent.

Cancellation No.: 92/054,069

**DECLARATION OF SID LEACH
UNDER 37 C.F.R. § 2.20 IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

I, Sid Leach, hereby declare as follows:

1. I am an attorney at law duly licensed and in good standing to practice law before all courts of the State of Arizona, and before the United States Patent and Trademark Office (“USPTO”). I am an attorney with the law firm of Snell & Wilmer L.L.P. with an office at One Arizona Center, 400 E. Van Buren St., Phoenix, AZ 85004, which firm represents Skydive Arizona, Inc. (“Respondent”) with respect to various matters. I have been principally involved with the captioned cancellation proceeding between Petitioner and Respondent.

2. Exhibit E attached to Respondent’s Motion for Summary Judgment is a true and correct copy of excerpts from the transcript of the Deposition of Mike Mullins on March 13, 2003 in Phoenix, Arizona, in *Skydive Arizona, Inc. vs. Mike Mullins d/b/a Arizona Skydiving*, Civil Action No. CIV 01-1854 PHX SMM, in the United States District Court for the District of Arizona (the “Arizona Action”). I appeared at the deposition and conducted the examination of the witness.

3. Exhibit F attached to Respondent’s Motion for Summary Judgment is a true and correct copy of the transcript of the Deposition of Marc Hogue (“Hogue Deposition”) on April 7,

2003 in Coolidge, Arizona, in the Arizona Action. I appeared at the deposition and conducted the examination of Mr. Hogue on behalf of Skydive Arizona, Inc.

4. Exhibit D attached to Respondent's Motion for Summary Judgment is a true and correct copy of a Settlement Agreement signed by Marc Hogue, which was introduced as Exhibit 7 in the Hogue Deposition.

5. The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of his own knowledge are true; and all statement made on information and belief are believed to be true.

DATED

Sept. 6, 2011



Sid Leach
Snell & Wilmer L.L.P.
One Arizona Center
400 East Van Buren Street
Phoenix, Arizona 85004