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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-019502 02/23/2010

HONORABLE JOSEPH B. HEILMAN

CLERK OF THE COURT
T. Tankersley
Deputy

SEDONA RESORT MANAGEMENT INC PAUL A CONANT

v.

NEW ENCHANTMENT L L C JOSEPH I MCCABE JR.

RULING MINUTE ENTRY

On September 9, 2008, Sedona Resort Management, Inc. ("SRM") commenced this action by filing its Application to Confirm Arbitration Award (Verified) concerning a November 27, 2007 American Arbitration Association ("AAA") arbitration award as a judgment of the State of Arizona against defendant New Enchantment, LLC ("NELLC"). The underlying arbitration had determined what NELLC owed SRM pursuant to a Resort Management Agreement ("RMA") executed by and between them on September 23, 1996, and which had expired on January 31, 2007 pursuant to a non-renewal notice issued by NELLC to SRM on June 27, 2006. SRM operated The Enchantment Resort for NELLC during that period of time. A three member arbitration panel appointed by the AAA and comprised of Phoenix, Arizona attorneys Paul Eckstein, Gary Birnbaum and Shawn Aiken (Panel Chair) unanimously awarded SRM $7,584,321.25 in the 2007 arbitration. The Award specified that the respondent in that action (defendant in this action) NELLC pay the award in three installments which were due on January 20, 2008, August 21, 2008 and May 21, 2009. SRM's application to confirm the Award alleges that NELLC made the first payment in January 2008 and that, after NELLC did not make the second payment in August 2008, it commenced this action.

NELLC appeared and responded in this action by filing: Defendant's Application to Vacate Arbitration Award; Defendant's Request for Evidentiary Hearing; Defendant's Motion to

Continue. SRM responded with its filings opposing NELLC's requests for relief and in support of its Application to Confirm Arbitration Award (Verified).

While this action was pending, NELLC filed a separate action against SRM in Yavapai County Superior Court, also naming in that action George and Kathy Lidicker (owners of SRM) as defendants. On or about March 27, 2009, Yavapai County Superior Court Judge Michael R. Bluff transferred that case to Maricopa County. There has been no objection to the assignment/transfer of that case to the undersigned.

Oral argument on the then pending Motion to Confirm the Arbitration Award (and the related defensive filings made by NELLC) was had on April 9, 2009; at the conclusion thereof, the motions argued that day were taken under advisement by the Court as follows: (1) Plaintiff's Application to Confirm Arbitration Award (Verified) filed September 9, 2008; (2) Defendant's Application to Vacate Arbitration Award filed October 2, 2008; (3) Defendant's Request for Evidentiary Hearing filed October 2, 2008; (4) Defendant's Motion to Continue filed October 3, 2008; (5) Plaintiff's Combined Motion to Quash Defendant's Third Party Subpoenas and Requests for Production of Documents to Plaintiff and Motion for Protective Order filed November 3, 2008; (6) Joinder to Plaintiff's Combined Motion to Quash and Motion for Protective Order filed November 3, 2008; (7) Plaintiff's Combined Motion to Quash Defendant's Third Party Subpoena to Huber Erickson & Bowman LLC and Motion for Protective Order filed November 19, 2008; (8) Plaintiff's Motion for Protective Order filed December 8, 2008; (9) Defendant's Motion for Order Compelling Discovery filed January 12, 2009.

On May 4, 2009, Defendant NELLC filed a Motion for Sanctions. In relation thereto, on May 21, 2009, the Court ruled that the motions which had been taken under advisement on April 9, 2009 (see above) would not be ruled on until after defendant NELLC's Motion for Sanctions was decided by this Court.

Defendant NELLC's Motion for Sanctions argued: (1) NELLC had recently learned of an email dated November 3, 2006 from George Lidicker to a David Lewis which it alleged had been "hidden by SRM in the underlying arbitration"; (2) Lidicker allegedly testified falsely in the arbitration about the parties' intent concerning how to calculate SRM's "Contingent Fee" (a defined term under the RMA), and that the 11/03/06 email proves that he did so; (3) SRM allegedly concealed damaging evidence (i.e., the 11/3/06 email) in the 2007 arbitration in violation of its Rule 26.1 disclosure and discovery obligations; and, (4) the 11/3/06 email allegedly demonstrates that SRM is committing an alleged fraud on this Court by taking the same position here that it took in the 2007 arbitration.

Plaintiff SRM's Response argued: (1) neither SRM nor Lidicker nor SRM's counsel had hidden the November 3, 2006 in the underlying arbitration; (2) Lidicker did not testify falsely

about the parties' intent concerning how to calculate the "Contingent Fee" and, in fact, Lidicker's testimony was identical to the plain language of the RMA and in accord with other weighty evidence; (3) neither SRM nor Lidicker nor SRM's counsel concealed damaging evidence in the 2007 arbitration; and, (4) the 11/03/06 email is being wrongly interpreted by NELLC, would not have existed but for RMA-mandated settlement discussions, is therefore evidence of conduct or statements in such negotiations, and was not retained by Lidicker in the ordinary course of his affairs because he never printed it.

After Defendant NELLC's Motion for Sanctions was fully briefed, this Court heard oral argument on that Motion on June 22, 2009. Evidentiary hearings were thereafter set by the Court in relation to Defendant NELLC's Motion for Sanctions, and held on July 13 and 14, 2009. Two witnesses testified in those hearings: (1) Salt Lake City, Utah based CPA, David B. Lewis, a partner at the Huber, Erickson and Bowman accounting firm; and, (2) President of SRM, George S. Lidicker.[1]

The following Hearing Exhibits were admitted: 6, 21, 27, 36 through 41, 45, 47, 48, 50, 52, 53, 54, 55, 58, 59, 60, 61, 68, 73, 74, 75, 76, 78, 79, 80 and 81. Although the RMA was not marked as a hearing exhibit, it appears elsewhere in the record and will be referred to regularly in this document.

At the conclusion of the Evidentiary Hearing on July 14, 2009, the Court ordered the parties to simultaneously submit proposed findings of fact and conclusions of law on the issue of sanctions, final arguments not to exceed seven pages per side, and briefs which address the need for further proceedings in this matter in the event the Court finds in favor of plaintiff SRM on the issue of sanctions.

No party had previously requested findings of fact and conclusions of law.

The Court took Defendant NELLC's Motion for Sanctions under advisement on August 10, 2009.

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[1] On June 22, 2009, the Court informed counsel that it would hold an evidentiary hearing on its Motion for Sanctions and that Mr. Lidicker and Mr. Lewis should be present and testify: "They have raised a claim, that claim that I think the negotiations were a simple matter of negotiations relating to early settlement of the matters, so that arbitration would not have to be undertaken, but I want that to be under oath and testifying to that." 6/22/09 Tr. p. 50:4-8. At that time, the Court informed counsel: "Anybody else, anybody else wants to present certainly may…Do you contemplate any other witnesses that you might call?" 6/22/09 Tr. p. 50:9-14. NELLC's counsel identified one other witness, SRM's counsel Paul A. Conant; the Court ruled that it would hear Messrs. Lidicker and Lewis testify before it would consider whether Mr. Conant would testify. 6/22/09 Tr. p. 51:9-11. The Court inquired: "Anybody else? Because I need to know how long to schedule this for." 6/22/09 p. 51:14-15. Neither counsel indicated that they would call any other witnesses. 6/22/09 p. 51:15-24.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Court now makes findings of fact and conclusions of law, and makes its ruling on defendant NELLC's motion for sanctions, based upon the record in this matter, as set forth herein below.

If a finding of fact set forth herein should, instead, be a conclusion of law, then it shall be so deemed, in accord with the Court's intentions. If a conclusion of law set forth herein should, instead, be a finding of fact, then it shall be so deemed, in accord with the Court's intentions.

Finally, this order is being prepared using the format originally submitted by the Plaintiff.[2] In this regard, the parties are cautioned that the Court intends no negative implications should be drawn from this Court's editing of any of Plaintiff's original language, findings or conclusions in this final document. Any editing done to Plaintiff's original document was undertaken in an attempt to shorten what was, (and by admission remains) an extremely lengthy document. In short[3], any fact or conclusion deleted from this final draft by no means indicates that the Court could not have found it to be so, rather, only that the Court did not deem it to be material to the issue at bar.

FINDINGS OF FACT

1. SRM began operating The Enchantment Resort for NELLC in 1995. 7/14/09 Tr., 5:9-15; 5:25-6:1-9; 6:10-13; 6:21-25-7:1.

2. At the time, SRM (and/or its President George S. Lidicker) had significant experience in the national and international resort development industry. Mr. Lidicker has been the president of SRM since its creation. 7/13/09 Tr. p. 13:12-17.

3. Although SRM began operating The Enchantment Resort for NELLC in 1995, the actual RMA between SRM and NELLC was not executed by the parties until September 23, 1996. RMA, cover page and page 16.

4. Oscar Tang and Yung Wong are the principals of NELLC. 7/13/09 Tr. p. 15:13-15.

5. A substantial amount of time (fourteen months) elapsed between the time when SRM began operating the resort and when the RMA was executed between the parties. Compare

[2] A method originally deemed expedient, the true result of which has been extremely cumbersome and inordinately time consuming. The parties are reminded that this court, without clerks or other legally trained assistants, is not well suited for an exercise which requires constant reference to the record of two days of hearings.

[3] Pun fully intended.

NELLC Statement of Facts dated October 2, 2008, page 2, paragraph 2 ("NELLC retained SRM to manage the Resort beginning on 08/02/95 pursuant to an initial letter of intent."), see also Exhibit 4 thereto (July 18, 2995 "Letter of Intent"), with RMA dated September 23, 1996 (fourteen month period where SRM operated the resort before the RMA was fully executed.) See also Plaintiff's Controverting Statement of Facts, dated October 22, 2008, page 1, paragraph 2 ("Not controverted.).

6. During negotiations concerning the RMA's terms, NELLC was represented by legal counsel (Joe McCabe). "Plaintiff's Response to 'Defendant's Motion for Sanctions'", dated May 26, 2009, Exhibit 2; "Defendant's Statement of Facts" dated October 6, 2008, Exhibit 15.[4]

7. On May 8, 1996, NELLC's legal counsel (Joe McCabe)[5] proposed changes to the "contingent fee" section of the RMA: "The contingent fee section I modified substantially since it did not appear debt and equity had anything to do with this calculation. Please check this carefully to be sure it is consistent with your intent. I have indicated to George that I am acting solely as NELLC's attorney in reviewing this Resort Management Agreement." Id.

8. Later, on June 13, 1996, Dr. Yung Wong, a principal of NELLC, sent a fax from his residence in Hong Kong to both Oscar Tang (the other principal of NELLC) and to Lidicker at SRM instructing Mr. Lidicker to make his changes to the RMA; "Plaintiff's Response to 'Defendant's Motion for Sanctions'", dated May 26, 2009, Exhibit 3; "Defendant's Statement of Facts" dated October 6, 2008, Exhibit 16.

9. Dr. Wong's June 13, 1996 changes included providing the language for the calculation of SRM's "Contingent Fee" and the definition of "Terminal Value" under the RMA, language which remained unchanged through the time the parties executed the final version of the RMA on September 23, 1996. Id, compare to RMA.

10. The "Contingent Fee" and "Terminal Value" language drafted by Dr. Wong, and which appeared in the final, fully-executed version of the parties' RMA is as follows:

11. 10.1.C. Contingent Fee: …In the event of a Capital Event, the Contingent Fee will be 7.5% times the excess of the net proceeds from such Capital Event over Owner's Equity Account (as defined in Article XXV); such amount is payable within 60 days. In the event of termination

[4] Where both parties have provided the Court with identical documents or information, the Court may rely from time to time on such submissions found in the record in this matter. For example, the May 8, 1996 fax from Joe McCabe to Messrs. Tang, Wong and Lidicker is such a document, being found as support for NELLC's motion for summary judgment and SRM's response in opposition to the motion for sanctions.

[5] Mr. McCabe is also counsel to NELLC in these proceedings but was not NELLC's counsel during the 2007 AAA arbitration.

or expiration of this Agreement, the Contingent Fee will be 7.5% times the Terminal Value (as defined in Article XXV)…

12. 25.6 As referred to in Article 10.1.C, "Terminal Value," defined as the then value of the resort, will be determined (i) by mutual agreement between NELLC and SRM, failing which, (ii) by electing the Appraisal Process (as defined in Article XXV)… RMA, paragraphs 10.1.C. and 25.6.

13. As is readily apparent from the foregoing, the calculation of SRM's "Contingent Fee" under the RMA is different if the RMA ends due to a "Capital Event" as compared to a "termination or expiration." RMA, paragraphs 10.1.C. and 25.6.

14. A "sale" is one kind of "Capital Event" as the RMA defines that term. RMA, paragraph 25.5, page 14.

15. Where the RMA ends due to a "sale" (or other "Capital Event"), SRM's contingent fee is calculated by subtracting the "Owner's Equity Account" (defined in the RMA, pp. 13-14, paragraph 25.3) from the "net proceeds of such Capital Event" and multiplying that number by 7.5%. RMA, p. 6, paragraph 10.1.C.[6]

16. The next sentence in RMA paragraph 10.1.C after the sentence which describes how the "Contingent Fee" is calculated in the event of a "Capital Event" describes how the "Contingent Fee" is calculated in the event of a "termination or expiration." RMA, p. 6, paragraph 10.1.C.
In the event of "termination or expiration" the "Contingent Fee will be 7.5% times the Terminal Value (as defined in Article XXV)…" RMA, p. 6, paragraph 10.1.C.

17. Paragraph 10.1.C. provides for no subtraction from "Terminal Value" of either debt or the "Owner's Equity Account" from "Terminal Value" when calculating the "Contingent Fee" due to SRM upon "termination or expiration" of the RMA. RMA, p. 6, paragraph 10.1.C.

18. The RMA, generally and in Article XXV specifically, likewise provides for no deduction of debt or the "Owner's Equity Account" when determining "Terminal Value" for purposes of calculating the "Contingent Fee" due and owing to SRM upon a "termination or expiration." RMA, p. 14, paragraph 25.6.

19. Mr. Lidicker testified that it has always been his understanding of the RMA that following an expiration or termination of the RMA, debt and owner's equity are not to be

[6] The RMA does not provide for the subtraction of debt from the net proceeds of a "Capital Event" when determining the "Contingent Fee" due to SRM.

deducted in calculating the "Contingent Fee" due to SRM. 7/13/09 Tr. p. 21:14-19. Mr. Lidicker so testified in his pre-hearing deposition in the 2007 AAA arbitration and in his statements to this Court. 7/13/09 Tr. p. 21:14-25.

20. Mr. Lidicker acknowledged that there is evidence inconsistent with his testimony about whether debt and equity should be deducted from "Terminal Value" when computing the "Contingent Fee" due to SRM upon a termination or expiration of the RMA for The Enchantment Resort. 7/13/09 Tr. p. 23:24-25; 24:1-2 ("I guess so.")

21. Hearing Exhibit 45 was shown to Mr. Lidicker at the July 2009 evidentiary hearings as an example selected by counsel for NELLC of such an item of evidence. 7/13/09 Tr. p.24:7-12.

22. Hearing Exhibit 45 is a letter from Mr. Lidicker to Messrs. Tang and Wong of NELLC dated September 20, 1996, which bears document control numbers K NEG 000331 through 355.

23. Hearing Exhibit 45 was Hearing Exhibit 31 in the 2007 AAA arbitration. 7/13/09 Tr. 28:18-21; 7/14/09 Tr. 14:11-15.

24. Mr. Lidicker was cross-examined at length concerning Hearing Exhibit 45 (Hearing Exhibit 31 in the 2007 AAA arbitration) before a three-member panel of arbitrators: Paul Eckstein, Esq.; Gary Birnbaum, Esq.; Shawn Aiken, Esq. 7/14/09 Tr. 14:16-25 – 15:1-14.[7] There is no transcript of the 2007 AAA arbitration hearings.

25. The substance of Mr. Lidicker's testimony about Hearing Exhibit 45 (Hearing Exhibit 31 in the 2007 AAA arbitration) was that his parenthetical reference to the "Contingent Interest" decreasing was in relation to a likelihood of decrease in value due to the effort to be put into the development and expansion programs. He testified that he was trying to link the concept of a redevelopment and the concept of a new investment. He testified that he was addressing the fact that redevelopment needs to have time not only to be completed due to the disruption it causes at the resort, but also time for the marketplace to accept the renovation before the investment of time and effort can bear fruit economically. 7/13/09 Tr. 26:8-14; 27:1-7.

26. There was no evidence presented from which the Court could conclude that the substance of Mr. Lidicker's testimony in this Court concerning Hearing Exhibit 45 (Hearing Exhibit 31 in

[7] At the July 2009 hearings in this matter, Mr. Lidicker testified about Hearing Exhibit 21, which was admitted for demonstrative purposes. It consists of a chart reviewed and approved by Mr. Lidicker identifying, based on his personal knowledge, all of the documents which were marked for identification as hearing exhibits in the July 2009 evidentiary hearings in this matter, and whether they were or were not available to NELLC as of the date of the 2007 AAA arbitration. Hearing Exhibit 21; 7/14/09 Tr. p. 13-17-25; 14:1; 45:23-25; 46:1-25; 47:1-2.

the 2007 AAA arbitration) differed from the substance of his testimony in the 2007 AAA arbitration.

27. There was no evidence presented from which the Court could conclude what other evidence, if any, besides Mr. Lidicker's testimony the Panel in the 2007 AAA arbitration relied with respect to its analysis of Hearing Exhibit 45 (Hearing Exhibit 31 in the 2007 AAA arbitration), or its Final Award in that matter.

28. The Panel in the 2007 arbitration concluded in the Final Award that there was to be no deduction for either debt or equity from terminal value when calculating the "Contingent Fee" due to SRM as a percentage of the Resort's terminal value upon "termination or expiration." [8] There is substantial evidence that the resort's appreciation in value was largely due to SRM's efforts. 7/14/09 Tr. 6:17-20; 7/14/09 Tr. 6:21-25 – 8:1-3; 7/14/09 Tr. 8:4-25 – 9:1-4;

29. 2006 was the last full year that SRM managed the resort and, in October 2006, Orient Express made an offer to purchase the resort for $100,000,000.00. 7/14/09 Tr. 9:5-11. The offer was signed by the Chairman of the Board of Orient Express, a New York Stock Exchange traded company with approximately $2.7 billion in hospitality assets as of the time of the offer. 7/14/09 Tr. 9:14-25 -10:1-10. [9]

30. Annual cash returns to the owner (NELLC) from SRM's operation of Enchantment resort totaled over $16 million during its tenure. Net appreciation for the owner (NELLC) of the resort during SRM's tenure was over $7 million per year.

31. In 2000, Oscar Tang attempted to get Alan Cohen, who worked at SRM at that time, to draft and send a letter from SRM to Messrs. Tang and Wong containing a "clarification" of the "Contingent Fee" calculation for both a "Capital Event" and in the event of "termination or expiration". 7/14/09 Tr. p. 20:7-25.

32. Mr. Lidicker learned that Oscar Tang had gone around him to Alan Cohen to get the letter drafted, and was not happy about the fact that Mr. Tang had done so. 7/14/09 Tr. p. 20:18-25. The letter did not go out because it was wrong, according to Mr. Lidicker. 7/14/09 Tr. p. 20:7-25.

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[8] This is based on the Final Award attached to SRM's application for confirmation of the Final Award filed in this action, at page 1, paragraph 1. The same Final Award is also attached as Exhibit 31 to NELLC's "Statement of Facts" dated October 2, 2008.

[9] The 2007 AAA arbitration panel found that the value of the resort as of January 31, 2007 was $96.25 million, according to the Award attached to SRM's application for confirmation of the Final Award filed in this action. The same Final Award is also attached as Exhibit 31 to NELLC's "Statement of Facts" dated October 2, 2008.

33. An unsigned draft of the letter dated May 26, 2000 was admitted at the hearings in this matter on July 13, 2009. Hearing Exhibit 48.

34. There was no evidence presented to the Court that the letter was ever signed or sent by SRM or SRM personnel, no evidence that SRM agreed with its content, and no evidence that the letter was ever received by NELLC or Messrs. Tang and/or Wong (signed or unsigned).

35. A letter agreement dated January 23, 2007 on Enchantment Resort letterhead, and signed by both George S. Lidicker, acting on behalf of SRM, and Oscar L. Tang, acting on behalf of NELLC, (Hearing Exhibit 6) provides that SRM will transfer all of its files and business records to Boynton Canyon Management Company ("BCMC" became the new operator of Enchantment, and it is owned by Oscar Tang and Yung Wong and Mark Grenoble works for them; Tr. p. 17:13-25 – 18:1-11) and states as follows: "SRM will transfer all of its files and business records relating to the management of the Resort (including all employee files, and payroll books and records) to BCMC and BCMC and NELLC accept responsibility for such files and records left in BCMC's care…" Hearing Exhibit 6, page 2, paragraph (iii).

36. The draft letter (Hearing Exhibit 48) was left by SRM, along with many other documents, on the accounting office computer physically located at The Enchantment Resort when the RMA ended on January 31, 2007. Tr. 20:1-6.

37. The draft letter (Hearing Exhibit 48) was in the possession of NELLC before the time of the 2007 AAA arbitration hearing.

38. In 2000, and thereafter, Mr. Lidicker knew that Mr. Tang wanted SRM to "give in" with respect to amending the terms of the RMA so that debt, or debt and equity, would be subtracted from "Terminal Value" upon a termination or expiration of the RMA for purposes of calculating the "Contingent Fee" due to SRM, and Mr. Lidicker did not agree to make such a modification. 7/14/09 Tr. p. 21:6-14.

39. There were a number of times where Mr. Lidicker drafted documents to give to Mr. Tang what he wanted in terms of an amendment to the "Contingent Fee" calculation applied in the event of termination or expiration of the RMA, but always in exchange for something of value to SRM. 7/14/09 Tr. p. 21:15-19.

40. At no time did Mr. Tang sign anything agreeing that NELLC would give SRM something of value in exchange for SRM agreeing to amend the "Contingent Fee" calculation to be applied in the event of termination or expiration of the RMA. 7/14/09 Tr. p. 21:20-21.

41. Mr. Lidicker testified that there had been contract language negotiations with Oscar Tang about some "give and take" whereby SRM was willing to give in on the things that Mr. Tang wanted for NELLC, but NELLC had to give some things SRM needed and wanted in return; but, the Enchantment Resort RMA was never amended. 7/14/09 Tr. p.22:23-25 -23:1-7.

42. As of 2005, NELLC also internally acknowledged that, although several amendment proposals to change the RMA's language had been in the works, there had been no amendments: "…You may recall we have been trying to get Oscar to sign amendment letters for several years. Some of them, already signed by George, are still on Oscar's desk, or somewhere in his office…" Hearing Exhibit 27, April 27, 2005 email from Dr. Yung Wong to Gwenn Winkhaus (NT01129).

43. Multiple attempts to calculate the value of the resort and the financial results of a hypothetical sale of the resort were made over the years that SRM was operating the Enchantment Resort for NELLC, and to otherwise calculate annual financial results of operations.

44. Hearing Exhibit 47[10] is an example of a calculation of the financial results of a hypothetical sale of Enchantment Resort, which would be a "Capital Event" under the RMA where the "Owners' Equity Account" and debt would be subtracted from the net proceeds of a sale; such a calculation would not impact the determination of SRM's "Contingent Fee" upon termination or expiration. 7/14/09 Tr. p.19:23-25 -19:1-23. SRM's "Contingent Fee" is calculated differently for a "Capital Event" (such as a sale) than it is upon "termination or expiration." RMA, paragraph 10.1.C.

45. Hearing Exhibit 47 was not an attempt to calculate SRM's "Contingent Fee" in the event of a "termination or expiration" of the RMA. 7/13/09 Tr. p. 30:16-19.

46. Hearing Exhibit 47 was in NELLC's possession before the 2007 AAA arbitration hearings.

47. Mr. Lidicker was asked in the July 2009 evidentiary hearings about Hearing Exhibit 47 as follows: "Q Was this calculation projected to evaluate the contingent fee at the expiration of the initial term of the RMA? A No." 7/13/09 Tr. p. 30:16-19.

48. According to Mr. Lidicker's testimony, Hearing Exhibit 47 assumed a sale "in '05". 7/14/09 Tr. p. 19:13-14. According to RMA Article II, the "initial term" of the RMA was

[10] The Court notes NELLC contended that Exhibit 47 was the "smoking gun", and largely, the impetus for the instant Motion.

through January 31, 2001. Because Hearing Exhibit 47 calculated a sale in 2005, it was not a calculation of SRM's contingent fee "at the expiration of the initial term."

49. Hearing Exhibit 52 is a May 24, 2002 memorandum from George Lidicker to Oscar Tang, Yung Wong, Alan Cohen and Bryan Oldham regarding "Investor Meeting Topics." This document was in NELLC's possession before the 2007 AAA arbitration. 7/14/09 Tr. p. 24:8-10.

50. Hearing Exhibit 54 is not a calculation of SRM's "Contingent Fee" in the event of "termination or expiration" of the RMA in relation to the Enchantment Resort. 7/14/09 Tr. 6-14.

51. Hearing Exhibit 59 is a compilation of separate documents that would have been (except as indicated below) available to NELLC before the 2007 AAA arbitration. 7/14/09 Tr. p. 42:11-13. These compiled documents (except as indicated below) were taken from the "Alan Cohen DVD" which is a copy of documents left by SRM with NELLC in the accounting office at the Enchantment Resort (Hearing Exhibit 6, page 2, paragraph (iii)), and which was also produced by SRM back to NELLC in the 2007 AAA arbitration. Hearing Exhibit 40, page 4, paragraph 12. All of these compiled documents, because they refer to a sale, would only touch on the calculation (if at all) of a "Contingent Fee" in the event of a "Capital Event" (i.e., a sale) and not a situation where there was a "termination or expiration" of the subject RMA.

52. Hearing Exhibit 59 references a "Sale Proforma" for the Tides Inn on the first page, a "Tides Equity Calculation" on the second page, a "Sale Value of Tides Inn" on the third page (three times), "Gain on Sale" on the fifth page, cash flow on "Land Sale" on the sixth page.

53. On the seventh page of Hearing Exhibit 59, on the top left of the spreadsheet, there is a left hand column entitled "Max Terminal Value" showing a "Value of Enchantment Resort" of $100,000,000 from which $28,000,000 in "Owners Equity" is subtracted. There is a middle column entitled "Terminal Value" showing a "Value of Enchantment Resort" of $85,000,000 from which there is no subtraction for "Owner's Equity." And, there is a third column entitled "Capital Event" showing a "Value of Enchantment Resort" of $85,000,000 from which $28,000,000 in "Owners Equity" is subtracted.

54. The first column would be an accurate way, under paragraph 10.1.C. of the RMA, to roughly calculate SRM's "Contingent Fee" in the event of a sale (for example, to Orient Express pursuant to its written offer submitted in October 2006, 7/14/09 Tr. p. 9:5-25; 10:1-10) for $100,000,000. Such a sale would be a "Capital Event" (RMA 10.1.C.) and, if $28,000,000 was the correct number for "Owners Equity", on a "Capital Event" such an amount would be subtracted from the nets proceeds of the sale before applying the 7.5% multiplier. RMA paragraph 10.1.C.

55. The second column would be an accurate way, under paragraphs 10.1.C. and 25.6 of the RMA to roughly calculate SRM's "Contingent Fee" in the event of a termination or expiration where the "Terminal Value" had been established by mutual agreement or the appraisal process to be $85,000,000. RMA, paragraphs 10.1.C and 25.6. 7/14/09 Tr. p. 27:1-22.

56. The third column would be an accurate way, under paragraph 10.1.C., to roughly calculate SRM's "Contingent Fee" in the event of a sale for $85,000,000 – or, to roughly calculate SRM's "Contingent Fee" if Mr. Lidicker on behalf of SRM agreed to compromise on the amount of SRM's full entitlement to a "Contingent Fee" for strong business (ongoing and profitable relationship at The Tides Inn) and personal reasons. 7/14/09 Tr. p. 53:10-12.

57. Pages eight, nine and ten of Exhibit 59 are not documents from the "Alan Cohen DVD" or from the Enchantment Resort accounting office files. 7/13/09 Tr. p. 79:22-25; 80:1-15; 81:1-16. They were included by counsel for NELLC in Exhibit 59 along with other documents from another source.

58. In considering all of the testimony, the demeanor of the witnesses and the various written exhibits admitted into evidence in this matter the Court finds that at no time was there ever an intention on the part of SRM to modify the terms of the RMA to reflect a new method of calculating the value of the compensation to be paid by NELLC to SRM upon termination of the RMA before its expiration date.

59. On July 27, 2006, NELLC gave written notice to SRM that the RMA would not be renewed or extended and would expire on January 31, 2007. Defendant's Statement of Facts dated October 2, 2008, page 3, paragraph 8, Exhibit 6; see also Plaintiff's Controverting Statement of Facts dated October 22, 2008, page 4, paragraph 8 ("Not controverted").

60. The Enchantment RMA provides that, in the event of a "termination or expiration" based computation of SRM's "Contingent Fee", the parties were first to attempt to agree on the "Terminal Value" of the resort for purposes of making that computation: "As referred to in article 10.1.C., "Terminal value" is defined as the then value of the resort and will be determined (i) by mutual agreement between NELLC and SRM, failing which, (ii) be electing the Appraisal Process (as defined in Article XXV)…." RMA, paragraph 25.6, page 14.[11]

[11] The RMA also provides for arbitration in "the event any controversy or dispute arises out of or relating to" the RMA. RMA paragraph 25.11, page 15.

61. Mr. Lidicker testified that he believed that Hearing Exhibits 58 and 61 relate exclusively to settlement negotiations with Oscar Tang, either in the preparation for them or directly in the middle of the settlement negotiations themselves. 7/14/09 Tr. p. 52:6-10; 7/14/09 Tr. p. 50:19-20 ("they were background to help me prepare for settlement discussions.")

62. Beginning in the year 2000, Mr. Tang and his agents made it abundantly clear to Mr. Lidicker and SRM, that Mr. Tang wanted SRM to give in with respect to changing or modifying the RMA and to agree that debt or debt and equity would be subtracted from "Terminal Value" upon "termination or expiration" and, Mr. Lidicker had never agreed to that. 7/14/09 Tr. p. 21:6-14.

63. Thus, Mr. Lidicker's mindset in the late 2006 and early 2007 time frame was one where he was prepared mentally to make a lot of concessions to Oscar Tang: "…I knew what he wanted…." 7/14/09 Tr. p. 52:25- 53:1.

64. The concessions which Mr. Lidicker was willing to make during that time frame were concessions in the context of settlement; Mr. Lidicker was not giving up SRM's position. 7/14/09 Tr. p. 53:2-9.

65. During the latter part of 2006 and the early part of 2007, Mr. Lidicker was prepared to make concessions to Mr. Tang for family reasons as well as strong business reasons. These factors are all set forth in the 7/14/09 Tr. pp. 53-56.

66. A request to prepare an analysis to assist in settlement negotiations is how CPA David Lewis understood Hearing Exhibit 58 (the November 3, 2006 email to Mr. Lewis from Mr. Lidicker): "…My concern was primarily to calculate tax liability related to what he might end up with at the end of these negotiations." 7/13/09 Tr. p. 72:2-4.

67. Mr. Lidicker also viewed Hearing Exhibit 58 as "preparation" for settlement negotiations; he testified as follows in the July 2009 evidentiary hearings: "Q …[Hearing] Exhibits 58 and 61, did those documents relate, in your mind, exclusively to settlement negotiations with Oscar Tang? A Yes. Either the preparation for them or the – directly right in the middle of settlement." 7/14/09 Tr. p. 52:2-10.

68. Mr. Lidicker further testified about Hearing Exhibits 58 and 61 that they were to help him to prepare for settlement discussions: "…they were background to help me prepare for settlement discussions. What I might want to offer them or not, the ramifications of that, or actually advice on maybe advise is too strong, but input on some discussions that were in progress, settlement negotiations that were in progress…" 7/14/09 Tr. p. 50:19-24.

69. Mr. Lewis explained at the July 2009 hearings in this matter: "…[W]hat I took out of this paragraph was that he wanted me to calculate this net, so that he could understand what his tax ramifications might be…" 7/13/09 Tr. p. 74:2-4.

70. Hearing Exhibit 61 is an email dated March 23, 2007 from David Lewis to George Lidicker, followed by a string of emails dating back to March 17, 2007 (mostly between Mr. Lidicker and Mr. Tang).

71. Hearing Exhibit 61's earliest email is dated March 17, but refers to "March 13 Letters" which were written (according to Mr. Lidicker's March 18, 2007 email contained within Hearing Exhibit 61) "as a last attempt to resolve our differences and need to be accepted – or not – as written; not agreeing takes our offer 'off the table' and will mean that our appraised valuations and the resultant SRM Contingent Fee will be subject to a determination by third parties; perhaps it is better that way."

72. Messrs. Tang and Lidicker had been engaged in settlement negotiations well before March 23, 2007 and Mr. Lidicker was saying, by March 18, 2007, that he felt he had reached the limits of his willingness to make continued concessions -- although both Mr. Lidicker and Mr. Tang continued discussing their positions with one another after that point, according to their exchange of emails leading up to March 22, 2007. Hearing Exhibit 61.

73. On March 22, 2007, Mr. Lidicker emailed the string of email negotiations between he and Mr. Tang to SRM's accountant, David Lewis, CPA, at the Huber, Erickson & Bowman, LLC accounting firm in Salt Lake City, Utah, and made clear that he was seeking help in the settlement negotiation process with Mr. Tang:

> "I am trying to make one last effort to respond to Oscar on the issues below and wanted your help to better understand my position and to better describe it from an accounting perspective; while we have discussed these issues I do not think that I have been articulating it properly and thought that I would seek your help." Hearing Exhibit 61.

74. Mr. Lidicker's statements in the March 22, 2007 email indicate that he has previously orally requested assistance from Mr. Lewis to describe accounting issues in the context of settlement negotiations with Mr. Tang, and is seeking further help from Mr. Lewis to understand his position in those ongoing settlement negotiations so that he can make "one last effort" to respond to Mr. Tang in that context. Hearing Exhibit 61.

75. The Court has reviewed and finds that the following statements made by Mr. Lidicker in his May 26, 2009 declaration at paragraphs 12 - 35 have gone unrebutted and are supported by

and consistent with Mr. Lidicker's testimony and the evidence introduced during the July 2009 evidentiary hearings:

a. "I do not regard my November 3, 2006 email to David Lewis as an admission of any type; quite to the contrary it is very simply explained in the context of the case.

b. The November 3rd email was a response to David Lewis' October 24th email containing "preliminary projections and calculations" for my review including a line for a "NELLC Contingent Fee" estimate.

c. Those projections were being developed with the objective of preparing a range of estimates for 2007 for tax and business planning purposes. My comments to David Lewis were from that perspective.

d. For some time leading up to the Fall of 2006, Mr. Tang (on behalf of NELLC) had been trying to get SRM to "give in" and allow debt and equity to be subtracted from "Terminal Value" upon termination nor expiration when calculating the contingent fee due to SRM under the Resort Management Agreement ("RMA"), and do so without giving SRM any consideration for making such a concession.

e. At that point, there had been several times in the history of the relationship when SRM had offered to "give in" on that point in exchange for something of value and, each time, NELLC refused to give any consideration in exchange. NELLC also refused to sign (or even comment on) any of the documentation which would have (if signed) documented an exchange where SRM would get something of value in exchange for "giving in" on the issue of whether to subtract debt and equity from "Terminal Value" in the event of termination or expiration of the RMA.

f. One of the big issues for me as the person negotiating with NELLC (Oscar Tang) for SRM was to get the issue of prompt payment in full resolved as quickly as possible.

g. I knew that Oscar Tang's superior financial power would allow him to drag out the negotiation process, and the payment process, and perhaps even try to later renegotiate any deal that was struck that called for payment over time.

h. Therefore, one primary goal for me was to get the negotiations resolved as quickly as possible and to have any resulting agreement fully performed by NELLC as quickly as possible.

i. As I planned to go into negotiations with Oscar Tang, I felt that I would likely give in to Mr. Tang and allow debt and owners' equity and debt to be subtracted from "Terminal Value" when computing the contingent fee if what SRM received in exchange was prompt payment of a sufficiently large dollar amount to justify the compromise

j. I knew that Oscar Tang wanted this deduction to be made, knew that he had been trying to get it for "free" for a few years at that point, and expected that he would raise the issue again.

k. After years of observing Oscar Tang, and negotiating with him, I felt that I understood his style, and I fully expected that he would use all sorts of theories outside of the RMA in order to obtain concessions from SRM on the amount of the contingent fee due to it from NELLC.

l. For example, at the outset of the engagement, when SRM first began as the operator of The Enchantment Resort for NELLC, there was about a fourteen month contract negotiation period. SRM was actually in place, operating the resort for NELLC during that negotiation period, but the RMA was not in place.

m. During the lengthy contract negotiation period, there were many potential compensation mechanisms discussed, including the one that was finally used in the fully-signed RMA.

n. I expected that, when we negotiated, Oscar Tang would refer to some of the other compensation formulae we had discussed back during the contract negotiation period before we settled on the one contained in the fully signed version of the RMA. Even though we never agreed on any of those formulae, given how I had seen Mr. Tang operate over the years, I expected that style of negotiating outside of the contract from him.

o. Even though we had received notice in mid-2006 that NELLC had decided to allow SRM's RMA for The Enchantment Resort to expire (and not renew it) at of January 31, 2007, SRM/VA was still the operator of The Tides in for NTLLC (an affiliate of NELLC, also controlled by Oscar Tang). SRM/VA certainly wanted to maintain the best possible relations with NTLLC. For all of these reasons, that is why I say, above, that:

> "…I felt that I would likely give in to Mr. Tang and allow debt and owners' equity and debt to be subtracted from "Terminal Value" when computing the contingent fee if what SRM received in exchange was prompt payment of a sufficiently large dollar amount to justify the compromise…"

p. Because of what I initially anticipated, and because I optimistically hoped that Oscar Tang would agree to prompt payment in exchange, I asked David Lewis to prepare a draft NELLC contingent fee calculation and, to gave him a basis for doing so, referencing one of the concepts that was discussed "when we entered into the arrangement" and SRM began operating The Enchantment Resort in early August of 1995 without a contract.

q. As explained above, when we entered into the arrangement and began operating The Enchantment Resort, there was no RMA. It took over a year before the parties settled on the final contract language following a very long and drawn-out negotiation period with the RMA finally being executed on September 23, 1996.

r. As a person who is a student of the history of the approximately fourteen month long contract negotiation between SRM and NELLC for operation of The Enchantment Resort, I know that I was referring in my 11/03/08 email to David Lewis to the fact that I did not want our accountant to project the "full monetary value" of our Contingent Fee.

s. I did this because (at that time–November 2006) I was willing to compromise in order to maintain a continuing relationship with Mr. Tang for substantial business and personal reasons: prompt payment, avoidance of a dispute with him involving delays, preserving the working relationship at The Tides Inn between SRM/VA and NELLC

t. Since David and I were discussing planning going forward based on the projections, I did not want the projections on the "NELLC Contingent Interest" line to simply project only the amount as written in the agreement. I wanted to consider a range of potential outcomes from one involving a compromise with Mr. Tang, to an outcome where there was no compromise.

u. I explained to Mr. Lewis when I commented in the email that "this is not how the contract is written", but that I wanted to project the NELLC Contingent Interest (line item) as "7.5% of the amount above the equity and debt which is about $28 million". I could have easily, instead, gone into an explanation about my expectations about how negotiations with Oscar Tang would go and why I wanted a range of numbers to review, and I believe I even had such a conversation with Mr. Lewis orally. I was not admitting or conceding or even stating that the RMA does or should call for debt and equity to be subtracted from "Terminal Value" when determining the contingent fee upon termination or expiration.

v. As I testified in the 2007 Enchantment arbitration, Oscar Tang is the control person of NELLC. He is a very sophisticated, well-educated, and highly-intelligent Wall Street investment advisor and investor known as a tough negotiator. I have seen that side of him

repeatedly over the years in my interactions with him and observations of him. I knew that he wanted SRM to "give in" on certain issues related to the amount of fees owed by NELLC to SRM and, in order for us to maintain a working relationship with Mr. Tang at the Tides Resort in Virginia, and I also knew that I would have to consider compromise. I knew that he would use every means of negotiation at his disposal to try to get me (on behalf of SRM) to give him the best deal on NELLC's obligations to pay fees to SRM, including the Contingent Fee, once SRM's contract was set to expire. I also knew that, for many years, we had tried to negotiate amendments to the RMA without success, and that made me believe that Mr. Tang would push very hard to get me to agree to subtract owner's equity and debt from the resort's "Terminal Value" before determining the Contingent Fee due. If there would have been prompt payment, a continuation of the relationship at the Tides Inn, and some other important points agreed to, I was prepared to give in on those points. In my reference in the November 3, 2006 email to David Lewis to the "arrangement", I was not referring to the final RMA, but instead to the various "concepts" that were discussed during that initial period, but then ultimately discarded in favor of the actual language of the final signed RMA. At that time I felt that Mr. Tang would use all sorts of arguments based on things totally outside of the contract to persuade me to accept a lower number; indeed, I predicted that correctly and, in fact, most of Mr. Tang's negotiation points were based on things outside of the RMA. In the 11/03/06 email I make reference in the same sentence, on one hand, to "the contract" and, on the other hand, "the arrangement" separately; I am sure that "the arrangement" was not the RMA (i.e., the contract) in my mind when I typed the email. I am sure that what I was, instead, thinking was that Mr. Tang was going to attempt to negotiate with me based on some of the original (but discarded) concepts we discussed during the nearly fourteen month contract negotiation period to try to influence me to "give in" on key points, such as a more favorable calculation of the contingent fee for him. I was willing to do that.

w. Indeed, I was correct and, during our failed attempt to reach an agreement about the contingent fees that were due and owing to SRM by NELLC, Mr. Tang referred to many, many concepts outside of the actual contract, including concepts which we had (at one point) discussed but later discarded in favor of the actual language we settled on in the RMA. In summary, my November 3, 2006 email to David Lewis is being misinterpreted by NELLC today."

76. Mr. Lidicker testified that, in retrospect, he believed that Oscar Tang's attitude toward the negotiation with him over what SRM was owed following expiration of the RMA on January 31, 2007 was "in really bad faith from day one", that he did not recognize that to be the case until about late March of 2007, and stated that, had he understood what Mr. Tang was doing in those negotiations towards the beginning, he would have "filed for arbitration immediately." 7/14/09 Tr. p. 56:18-22.

77. Mr. Lidicker testified that, in the 2007 AAA arbitration, he participated in a series of conference calls with counsel wherein he received instructions to search for documents to produce and disclose in the case. 7/14/09 Tr. p. 47:10-18. The instructions were to look everywhere for any documents that might have anything to do with the pending case. 7/14/09 Tr. p. 47:19-25. He was to look in his office, briefcase, computers, wherever documents might be found, and he did that. 7/14/09 Tr. p.47:23-25 -48:1-3. Based on that search of every place where paper documents or electronically recorded documents or saved documents might be found, he came up with a universe of documents to produce or disclose in the 2007 arbitration. 7/14/09 Tr. p. 48:4-9. No documents were excluded. 7/14/09 Tr. p. 48:12-17. Once the universe of documents was collected, Mr. Lidicker organized the documents by subject matter, and organized them chronologically; this took weeks of work. 7/14/09 Tr. p. 48:10-25 – 49:1-24. In this process, Mr. Lidicker made a thorough and complete search of everyplace he could think of to collect and gather documents. 7/14/09 Tr. p. 49:25 -50:1-3.

78. The reason that Hearing Exhibits 58 and 61 were not picked up by Mr. Lidicker's substantial document production efforts was that they are both emails and he did not print and file them in his paper files at the time he sent or received them. 7/14/09 Tr. p. 50:6-9.

79. Mr. Lidicker testified that his practice was that, if he was going to save an email, he would print a hard copy of it and file it. 7/14/09 Tr. p. 50:10-13. Mr. Lidicker testified that he is confident that the only way that Hearing Exhibits 58 and 61 would have been in his files at the time of the document production and disclosure stage of the 2007 AAA arbitration was if he had printed them and placed them in a paper file. 7/14/09 Tr. 51:7-17.

80. Mr. Lidicker testified that, after the 2007 AAA arbitration was commenced in late April 2007, there would not have been any reason for him to have saved the settlement related email exchanges with Mr. Lewis (Hearing Exhibits 58 and 61) because they were background to help him in settlement discussions with Mr. Tang and, after the arbitration was filed, the decision was being put into the arbitrators' hands – whatever SRM was going to get was going to be decided by the arbitration panel. 7/14/09 Tr. p. 50:14-25 -51:1-6.

81. The following statements in the Declaration of George S. Lidicker dated May 26, 2009 (paragraphs 4-11 and 36), and concerning Hearing Exhibits 58 and 61, are unrebutted in the record and are supported by and consistent with Mr. Lidicker's testimony and the evidence introduced in the July 2009 evidentiary hearings:

82. "Before February 2006, SRM's website (www.sedona-resorts.com) was accessed by an exchange server physically located at the Enchantment Resort near Sedona, Arizona. That email server was not owned by SRM; rather, it was owned by NELLC. SRM/VA did not have an email

address separate from SRM. All of SRM/VA's email, and all of SRM's email, were accessed through that same exchange server at the Enchantment Resort.

83. Beginning in February 2006, I was switched to a new network and email exchange server physically located in Lancaster County, Virginia at The Tides Inn. That email server was owned by NELLC. It was not owned by SRM or SRM/VA. Rather, SRM and SRM/VA just had permission to be on the network and to use the email server.

84. There was always limited storage space available for email. Because there was an established system protocol that limited email storage space, in order to keep capacity available for new email traffic, it was my practice to regularly delete email older than two months. If I wanted to save an email, I would print it. I did not use my electronic email boxes for storage.
106. So, for example, any emails from November of 2006 would no longer have been saved electronically by January 2007 unless I had printed them. Additionally, for example, emails from March of 2007 would no longer have been saved by May of 2007, unless I had printed them. There may have been some exceptions to this practice where I saved emails for longer than two months, but not for much longer. The rule was that, if I was going to save an email, I would print it.

85. On June 15, 2007, SRM/VA was replaced as the Manager of The Tides Inn because the Resort Management Agreement under which SRM/VA had been operating The Tides Inn was terminated by NELLC.

86. Around the time when I moved my office out of the Tides Inn during June 2007, an information technology consultant named Jack Geier copied what was then in my Tides Inn exchange server email box over to my business laptop. Shortly thereafter, I no longer was part of the Tides Inn network and did not use the Tides exchange server.

87. When I began collecting documentation for the 2007 Enchantment arbitration, the only place for me to have located old emails would have been in paper files (e.g., a printed hard copy of the email). If I had not printed a hard copy of an email, I would no longer have had it electronically. It would not have been on my computer for the reasons noted above. I did, however, review what I had. I am sure that neither my November 2006 email to David Lewis, nor David Lewis's March 2007 email to me, were still saved electronically on my computer. Also, I am sure that I had not printed them; they were not in any of my paper files. And, by that point in time, I had no memory of those emails. In fact, I had no memory of those emails until after David Lewis's accounting firm produced them.

88. I did not destroy or conceal my November, 2006 email to David Lewis or his March 2007 email to me to hide any facts at any time. Rather, it is my belief that those emails simply would

not have been retained electronically for very long, for the reasons I have explained above. I know that I did not print them because they were not in my paper files….

89. As for producing the November 3, 2006 email, once SRM/VA was replaced at The Tides Inn, I no longer had access to the email server which I had been using. Unless I had printed an email (and in this instance I had not printed the email in question) I no longer had any access to it. Therefore, by the time SRM was required to respond to document requests in the 2007 Enchantment arbitration, I am certain that neither I nor SRM had the 11/03/06 email. Moreover, I am certain that I had no memory of that individual email at that point, over ten months after I had apparently sent it. The same is true for David Lewis's email to me from March 2007; I did not print a paper copy of it, did not have an electronic copy of it during the document production in the 2007 Enchantment arbitration, and did not have any way of retrieving it, nor did I even recall it by the point."

90. Mr. Lidicker testified that he was given extensive instructions by SRM's counsel as to the broad scope of the document search he was to make and that it took him "weeks" to comply. 7/14/09 Tr. p. 48:10-11.

91. Mr. Lewis is a CPA at the Salt Lake City, Utah accounting firm of Huber Erickson and Bowman where he has been a partner since 2003. 7/13/09 Tr. p. 88:1-13. He has done work for SRM since about 2002 or 2003. 7/13/09 Tr. p. 88:14-16.

92. Mr. Lewis testified at evidentiary hearings in July 2009 that he was aware that there had been a contention that there were emails (Hearing Exhibits 58 and 61) hidden by SRM and stated that he has never been involved in anything like that. 7/13/09 Tr. p. 106:16-19. He further testified that he is unaware of any evidence that anyone at SRM has done anything to hide or conceal any type of evidence related to the dispute between SRM and NELLC. 7/13/09 Tr. p. 107:9-12. He denied under oath that he or SRM, to his knowledge, had been involved in doing anything to conceal, for example, Hearing Exhibit 58. 7/13/09 Tr. p. 107:13-17.

93. Mr. Lewis testified that he received some advice and assistance in responding to document subpoenas related to this case, and to The Tides Inn arbitration document subpoena, from legal counsel who he regards as being a law firm with a very good reputation for doing fine work and with many attorneys who are well known in that regard in Salt Lake City, Utah (David Slaughter at Snow, Christiansen and Martineau). 7/13/09 Tr. p.95:1-22.

94. After hearing Mr. Lewis' testimony the Court is convinced that any documents which Defendants contend were hidden and or secreted from them, were in fact in their possession and available to Defendants all along, or were not produced by Plaintiffs through simple inadvertence

or excusable neglect, much of which was caused by Defendants attempting to seek production of documents through self-help methods, outside of the jurisdiction of this Court.

95. In any event, any documents which were not produced by Plaintiffs during the course of the AAA arbitration proceeding were generated by Plaintiffs or their agents in nothing more than pre-litigation attempts towards settlement of an ongoing dispute with NELLC and Tang, in the nature of the kind of evidence which would ordinarily be inadmissible pursuant to the Ariz.R.Evid., Rule 408.

96. Court is persuaded, and expressly finds and concludes, that neither SRM, nor its agents, nor its counsel withheld documents which should have been produced or disclosed in the 2007 AAA arbitration proceedings and further expressly finds and concludes that neither SRM nor its counsel presented perjurious testimony in connection with the 2007 AAA arbitration proceedings, or in this Court. (For purposes of these conclusions, the Court also expressly finds and concludes that Mr. Lidicker, to the extent that his conduct is viewed as distinct from SRM, did not withhold documents which should have been produced or disclosed in the 2007 arbitration proceedings, and that he did not present perjurious testimony in connection with the 2007 AAA arbitration proceedings, or in this Court.)

97. The Court accepts as credible Mr. Lidicker's testimony that he did not have any recall of Hearing Exhibits 58 or 61 by the time of the discovery and disclosure phase of the 2007 AAA arbitration hearing. Given the disruption in his personal and professional life that he described, in part due to NELLC's failure to pay even uncontested fees (7/14/09 Tr. p. 54:10-14), and NTLLC's termination of the Resort Management Agreement for The Tides Inn three weeks after the 2007 AAA arbitration was commenced (7/14/09 Tr. p. 53:21-22), it is understandable to the Court that recollections of background email discussions touching on unfruitful settlement discussions would not be in his mind at that time (as specifically distinguished from the offer/counteroffer emails between he and Mr. Tang).

98. The Court accepts Mr. Lidicker's explanation of his practice of only saving emails which he prints, and only printing emails which he believes are important at the time.

99. The Court understands the circumstances of Mr. Lidicker's settlement negotiations with Mr. Tang in late 2006 and early 2007 and observed in Mr. Lidicker's courtroom testimony bona fide frustration with those negotiations.

100. Particularly given the personal and professional disruption going on with respect to SRM's business and Mr. Lidicker's personal life and the numerous changes in the manner of electronic communication going on in his personal and professional life during the first half of 2007, the Court is persuaded that Mr. Lidicker did not print (and therefore did not save)

documentation of settlement negotiations with Mr. Tang and related efforts (specifically Hearing Exhibits 58 and 61) as those negotiations, although lengthy, went nowhere.

101. The Court finds and concludes, with respect to Hearing Exhibits 58 and 61, that they were not in Mr. Lidicker's business or personal records when he made a diligent search for records to produce and disclose in connection with the 2007 AAA arbitration.

102. The Court finds and concludes that there are no ill motives or bad faith which can be ascribed to SRM or Mr. Lidicker due to the fact that Hearing Exhibits 58 and 61 were not available to them as of the time of the document production and disclosure phase of the 2007 AAA arbitration.

103. The Court finds and concludes that the RMA required the parties to attempt to reach an agreement as to "Terminal Value" (RMA, paragraph 25.6(i)), which is the key number that controls the amount of SRM's 7.5% "Contingent Fee".

104. NELLC gave notice of non-renewal of the RMA on June 27, 2006. Accordingly, any work done after that time to compute or consider SRM's entitlement to payments (including the "Contingent Fee") payment under the RMA would be considered conduct or statements in settlement negotiations.

105. Discussions under RMA paragraph 25.6 (i) were clearly already under way after the June 27, 2006 notice given from NELLC to SRM to the effect that the RMA would not be renewed.

106. According to both the testimony, and the plain language of Hearing Exhibit 58, Mr. Lidicker would not have asked CPA Lewis to make calculations but for the negotiations called for by the RMA at paragraph 25.6 (i).

107. The Lewis email of March 22, 0007 (Hearing Exhibit 61) to Lidicker noted that Tang was negotiating terms outside of RMA, and advised Lidicker on negotiating points in his discussions with Tang, further confirming that Mr. Lewis was at some point advising Mr. Lidicker on settlement "behind the scenes" although his initial work may have only been to prepare a projections to give to Mr. Lidicker to use to evaluate the effect of concessions he was willing to give to Mr. Tang in the contractually-mandated negotiation process.

108. The Court finds and concludes that both Hearing Exhibits 58 and 61 are evidence of conduct and statements in settlement negotiations and would not have existed but for the settlement negotiations.

109. NELLC's counsel asked Mr. Lewis in the hearing whether he may have begun doing calculations to assist Mr. Lidicker in making the "Contingent Fee" calculation as early as August 25, 2006 and Mr. Lewis testified that "I couldn't tell you." 7/13/09 Tr. p. 81:2-4. Even if Mr. Lewis had begun his work in that regard as early as August 25, 2006, the work would still have begun at a point in time after the June 27, 2006 notice from NELLC to SRM to the effect that the RMA would not be renewed and would, therefore, expire on January 31, 2007.

110. Mr. Lidicker testified that he needed to know what the results of his compromise discussions with Mr. Tang would be and he asked for help from David Lewis to understand the tax ramifications of different compromise positions he might take and this makes the work that Mr. Lewis was doing in that regard, whenever he began it (as long as it was after June 27, 2006) part of conduct and statements in settlement negotiations.

111. Any work by David Lewis after June 27, 2006 regarding the financial or tax consequences of different, potential "Contingent Fee" calculations (upon the termination or expiration of the RMA) therefore, would have been done under the auspices of RMA paragraph 25.6(i) stating that "[a]s referred to in article 10.1.C., 'Terminal Value' is defined as the then value of the resort and will be determined (i) by mutual agreement between NELLC and SRM…"

CONCLUSIONS OF LAW

A. The scope of the July 2009 Evidentiary Hearing was limited to the issues raised in the Motion for Sanctions and the Response in Opposition Thereto, and SRM has not waived its right to arbitrate by engaging in the defense of the NELLC Motion for Sanctions.

B. The RMA is expressly governed by Arizona law (RMA 25.11).

C. The Court finds and concludes that, even if Hearing Exhibits 58 and 61 had been printed and retained by Mr. Lidicker, those documents would not have been admissible under *State ex rel. Miller v. Superior Court*, 189 Ariz. 228, 232-233, 941 P. 2d 240, 244-245 (App. 1997), including for the reason that the evidence conclusively proves that they would not have existed but for the negotiations between Lidicker and Tang. *State ex re. Miller v. Superior Court* provides, in pertinent part:

> Rule 408 of Evidence reads, in part :
>
> > "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a

> claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations."

We find that the Appraisal was prepared either: (1) for the purposes of negotiating a stipulation between ADOT and the property owners to receive immediate possession without court intervention; or (2) to provide a court with evidence to determine probable damages after application for immediate possession under A.R.S. § 12-1116(J). Rule 408 precludes the evidence in, at least, the former situation; A.R.S. § 12-1116(J) surely precludes the evidence in the latter situation.

Rule 408 precludes more than the "offer" to compromise; conduct and statements made in the pursuit of a settlement are also precluded. The Appraisal by Chierighino falls squarely within the scope of "conduct and statements" because it was done to effectuate either the stipulation or a court determination for immediate possession.

In *Ramada Dev. Co. v. Rauch*, the Fifth Circuit Court of Appeals upheld the trial court's exclusion of an architect's report**245 *233 which detailed the investigation into alleged defects in a hotel built by Ramada for Rauch, on the basis that Rule 408 precluded its admission. 644 F.2d 1097, 1106-07 (5th Cir.1981). After reviewing Rule 408, the court concluded that the architect "was commissioned by Ramada to prepare a report that would function as a basis of settlement negotiations regarding the alleged defects in the motel ... that could then be discussed in monetary terms in the negotiations." *Id*. at 1107.

The Court of Appeals found the architect's report was not within the "otherwise discoverable" exception of Rule 408 because "such an exception does not cover the present case where the document, or statement, *would not have existed but for the negotiations* ...." *Id*.(emphasis added). That court further stated "[t]he rule does not indicate that there must be a pretrial understanding or agreement between the parties regarding the nature of the report." *Id*. We find that the architect's report in *Ramada Dev. Co.* is substantially similar to the Appraisal by Chierighino.

> In *Berthot v. Courtyard Properties, Inc.*, a letter from plaintiff was excluded under Rule 408 where there was testimony that the letter allowed defendants a financial "credit" on their debt solely to get matters settled quickly. 138 Ariz. 566, 568, 675 P.2d 1385, 1387 (App.1983). Here, Chierighino's affidavit states the purpose of the Appraisal was for offer and deposit purposes, both of which fall under the purview of Rule 408. (bold emphasis added).

State ex rel. Miller v. Superior Court, 189 Ariz. 228, 232-233, 941 P. 2d 240, 244-245 (App. 1997).

D. Just as the report in *Ramada*, the letter in *Berthot* and the appraisal in *State ex. rel Miller v. Superior Court* were evidence of conduct or statements in settlement negotiations and would not have existed but for the settlement negotiations, Hearing Exhibits 58 and 61 are of the same character and therefore would not be admissible under Rule 408, Arizona Rules of Evidence.

E. Even though Hearing Exhibits 58 and 61 would have been inadmissible, there remains a question as to whether they would have been subject to disclosure or production. The Court resolves that question by finding and concluding that, even if Hearing Exhibits 58 and 61 had been within SRM's possession, custody or control, they would not have been subject to disclosure under Rule 26.1 Ariz. R. Civ. P., or any other discovery rule.

F. Rule 26.1 was utilized by the Panel in the 2007 AAA arbitration in that the Panel required the parties to provide each other with pre-hearing disclosure statements in accord with that rule.

G. Rule 26.1 only requires disclosure of witnesses who "may have relevant knowledge" and documents which "may be relevant" to a disputed issue.

H. The Court finds and concludes that there is nothing sufficiently persuasive in the record to allow the conclusion that SRM or its counsel should reasonably have concluded that David Lewis "may have relevant knowledge" or that Hearing Exhibits 58 and 61 "may be relevant", as of the 2007 AAA arbitration , or in connection with proceedings before this Court.

I. Mr. Lewis's only work related to Enchantment in 2006/2007 concerning the "Contingent Fee" was in doing computations to assist Mr. Lidicker in determining what the effects would be of any compromise agreement reached with Mr. Tang, and in commenting on Mr. Lidicker's negotiation positions to help him (Lidicker) in settlement negotiations with Mr. Tang regarding the "Contingent Fee".

J. Mr. Lewis did not work for SRM during the 1995/1996 RMA negotiation period, and so had no personal knowledge about the formation of the RM hiA.

K. Mr. Lewis was not retained as an expert or consultant relative to any issues in the 2007 AAA arbitration, or in this case.

L. After having heard the testimony and having had an opportunity to evaluate Messrs. Lewis and Lidicker's testimony in the July 2009 evidentiary hearings, the Court finds and concludes that Mr. Lewis's calculations at issue were solely for pre-arbitration settlement purposes germane to Mr. Lidicker's compromise efforts and, after the 2007 AAA arbitration was commenced, there is no evidence that Mr. Lewis had any further role of any type in the matter.

M. The Court finds and concludes that there is nothing sufficiently persuasive in the record which should have reasonably led SRM or its counsel to believe that Mr. Lewis should have been listed as a person with knowledge, or that efforts should have been made to acquire copies from Mr. Lewis (if Lidicker had even remembered them during the disclosure/discovery phase of the 2007 AAA arbitration) of his settlement related communications with Mr. Lewis, for document production or disclosure statement purposes.

N. Citing *State ex rel. Miller v. Superior Court, supra*, the Nebraska Supreme Court applied the rationale of that case to a matter pending before it, and noted that, where a statute required opposing parties to first "attempt to enter into a settlement prior to commencing [a] condemnation action", the parties conduct and statements during the required negotiations were inadmissible under Rule 408. *In Re Application of Sanitary Improvement District No. 384 of Douglas County, Nebraska,* 609 N.W. 2d 679, 688-689 (2000). Here, the RMA required the parties to attempt to reach "mutual agreement", and then use the "appraisal process (and there was always the arbitration clause as well). RMA 25.6(i). Under the same rationale used by the Nebraska Supreme Court, and *State ex rel. Miller v. Superior Court*, all of the contractually-required discussions between Lidicker and Tang are conduct and statements in settlement negotiations, protected by Rule 408, and the Court so finds and concludes.

O. A similar rationale was applied in *EEOC v. Gear Petroleum, Inc.*, 948 F. 2d 1542 (1991 10th Cir.). In that case, pre-litigation letters from the employer's counsel were at issue, and excluded by the Court on Rule 408 grounds. The Court's decision turned in part on the fact that the parties were required to engage in such discussions before litigation in an attempt to reach an agreement:

> We cannot say that the district court abused its discretion in determining that the Bauer letters were part of compromise negotiations and therefore were excludable. The ADEA statute explicitly directs the EEOC that "*[b]efore*

> instituting any action under this section" it should pursue "informal methods of conciliation, conference, and persuasion,"29 U.S.C. § 626(b) (emphasis added), and it makes no provision for a "preconciliation" investigation stage. Section 626(d) of the ADEA is even more emphatic, requiring that upon receiving a charge alleging unlawful discrimination "the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and *shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.*" (Emphasis in original).

EEOC v. Gear Petroleum, Inc., 948 F. 2d 1542, 1545 (1991 10th Cir.).

P. Because the RMA required SRM and NELLC to attempt to reach a "mutual agreement", the Court finds and concludes that the work and discussions related to that effort (*e.g.*, Hearing Exhibits 58 and 61) are protected by Rule 408 under the same rationale applied by the Nebraska Supreme Court in *EEOC v. Gear Petroleum.*

Q. The record in this case clearly shows that, as to Hearing Exhibit 58, it was prepared by David Lewis for George Lidicker as a basis for calculation of compromise figures. This exact issue was addressed, on point, by the Court in *Affiliated Manufacturer's Inv. v. Aluminum Company of America*, 56 F. 3d 521 (3rd Cir. 1995) where the Court found that an internal memoranda not shared with the opposing party was protected by Rule 408. In affirming the District Court, the Third Circuit Court of Appeals stated as follows:

> The district court found both the Lockwood and Kasprzyk memoranda, and testimony concerning these documents, to be eligible for exclusion under Rule 408. *AMI I* at 8-9. The district court declined to adopt the reasoning in *Blue Circle Atl., Inc. v. Falcon Materials, Inc.,* 760 F.Supp. 516, 522 (D.Md.1991), *aff'd without op.,* 960 F.2d 145 (4th Cir.1992), which interpreted Rule 408 to require communication of internal memoranda to an opposing party, and instead relied upon the holding in *Ramada Dev. Co. v. Rauch,* 644 F.2d 1097 (5th Cir.1981). The Court of Appeals for the Fifth Circuit in *Ramada* upheld the district court's exclusion of an internal report "made in the course of an effort to compromise." *Id.* at 1106-07. The Fifth Circuit quoted the text of Rule 408, that "*[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible. " Id*. at 1106. In construing this language, the district court here determined that the:
>
> > failure of Alcoa to communicate the internal memoranda to AMI is not dispositive in the context of a Rule 408 analysis; rather, any statements prepared by Alcoa representatives that function as the

> basis for compromise negotiations demonstrate 'evidence of conduct' in compromise negotiations.
>
> *AMI I* at 8-9. The district court further found that the memoranda served as a basis for calculation of compromise figures. Thus, the court concluded that the Rule 408 exclusion applied. *Id*. at 9.

R. The rationale in *Affiliated* that the internal memoranda in that case "served as the basis for calculation of compromise figures" and were, therefore, covered by Rule 408, is the same type of rationale which leads the Court to find and conclude here that the Lidicker/Lewis exchanges which served as the basis for Mr. Lidicker's calculation of compromise figures and his settlement discussions with Oscar Tang (Hearing Exhibits 58 and 61) are also covered by Rule 408.

S. The Court finds and concludes that Hearing Exhibits 58 and 61 would not have been admissible in the 2007 AAA arbitration to prove "invalidity" of SRM's claim or its amount.

T. The Court finds and concludes that Hearing Exhibits 58 and 61 are not admissible in the pending action to prove "invalidity" of SRM's claim or its amount, pursuant to Rule 408, Ariz. R. Evid. The Court finds and concludes that the only purpose of Hearing Exhibit 58 and 61 offered by NELLC is to seek to prove the "invalidity" of SRM's claim, or its amount, and that they are therefore inadmissible for those purposes under Rule 408, Ariz. R. Evid.

U. The Court finds and concludes that, because Hearing Exhibits 58 and 61 would not have been admissible in the 2007 AAA arbitration, if NELLC had those exhibits during the 2007 AAA arbitration, they would not have assisted NELLC in presenting its defense case.

V. The Court finds and concludes that, because Hearing Exhibits 58 and 61 are not admissible in this action, they do not assist NELLC in presenting its defense here.

W. The Court finds and concludes that, contrary to NELLC's argument, *Souza v. Fred Carries Contracts, Inc.*, 191 Ariz. 247, 955 P. 2d 3 (App. 1997) does not compel any sanctions against SRM or its counsel, let alone the serious sanctions suggested by NELLC. That case states the rule as follows:

> [L]itigants have a duty to preserve evidence which they know, or reasonably should know, "is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request."

Souza, at Ariz. 250, P. 2d 6 [citations omitted].

X. The Court finds and concludes that NELLC's citation to *Souza* is inappropriate here. As described in the Court of Appeals opinion in *Strawberry Water Company*, a sanction under the rationale of that case is only appropriate if a party is prejudiced in a "meaningful way by the loss of the evidence." *Strawberry Water Company v. Paulson*, 220 Ariz. 401, 207 P. 3d 654, 664 (App. 2008). In that case, the Court of Appeals found that the loss of evidence used by an expert to conduct a test did not meaningfully prejudice the opposing party's ability to present its defense case. Id. The Court noted that *Souza* was inapplicable because it related to willful destruction of evidence making a party's case subject to dismissal. Id.

Y. Similarly, in the Court of Appeals opinion in *Smyser v. City of Peoria*, it is explained that loss or destruction of evidence does not necessarily mandate any sanction, not even a spoliation instruction. There, the Court of Appeals found that no sanction was necessary – not even a spoliation instruction -- in a case where certain medical documentation had been lost or destroyed:

> We agreed [in *Souza*] that litigants have a duty to preserve relevant evidence, but we rejected a rigid rule for such cases as "ill-advised" and held that destruction of evidence should be evaluated case-by-case, considering a "continuum of fault" and imposing penalties accordingly. ***Id.* at 250, 955 P.2d at 6**. An innocent failure, for example, should be of less concern than intentional destruction or failure to comply with a court order or discovery obligation to preserve or produce evidence. ***Id***. We reversed the dismissal because the defendant had some warning of the car's potential destruction but did nothing to preserve it. ***Id.* at 251, 955 P.2d at 7**. Moreover, nothing showed that the defendant was unable to defend or that its expert would be unable to offer opinions on causation or to challenge the plaintiff's expert. ***Id***. We also held that the trial court erred in failing to consider less severe sanctions. ***Id***. The City argues that, as in *Brewer v. Dowling*, 862 S.W.2d 156 (Tex.App.1993), neither party intentionally or accidentally destroyed the evidence and that loss of the evidence did not prevent Catherine from presenting her case and reconstructing the events.
>
> We conclude that, when no evidence shows intentional or bad faith destruction of evidence, particularly when Catherine had other means to establish what the [cardiac monitor data] strips likely would have revealed, a spoliation instruction was not mandatory and the failure to give it was not reversible error.

Smyser v. City of Peoria, 215 Ariz. 428, 439-440, 160 P. 3d 1186, 1197-1198 (App. 2007).

Z. The Court finds and concludes that lacking Hearing Exhibits 58 and 61 did not hamper the presentation of NELLC's defenses in the 2007 AAA arbitration. For example, Hearing Exhibit 45, which was Hearing Exhibit 31 in the arbitration, provided grounds for NELLC's counsel to argue to this Court that SRM agreed with NELLC that "debt" should be subtracted from "Terminal Value" when computing the "Contingent Fee" (even though the RMA does not call for that) given Mr. Lidicker's parenthetical remarks at the bottom of the first page of that letter. Similarly, Mark Grenoble testified at the 2007 AAA arbitration hearing and NELLC has argued in this Court that his testimony is damaging to SRM's position. Similarly, Oscar Tang has given an affidavit in this case, and the record in this matter discloses that he testified at the arbitration hearing, presumably in favor of the NELLC position and against the SRM position.

AA. The Court expressly finds and concludes that SRM did not waive its right to raise a Rule 408-based objection to those documents. They were produced by counsel to Mr. Lewis and Huber, Erickson & Bowman two days before the production date at a time when SRM was in the process of securing Utah counsel to make an objection in the Utah court's issuance of subpoenas for same. The objection was to order the Huber, Erickson & Bowman production held "in trust" until after this Court had ruled on the then pending issue of whether NELLC was entitled to any discovery at all, including the third party discovery it sought vis-à-vis Huber Erickson & Bowman. SRM's counsel acted reasonably in attempting to secure an agreement to that effect from NELLC's counsel at a time when SRM believed that the production had not been disseminated. Before this Court could be requested to act, NELLC's counsel informed SRM's counsel that the production had already been disseminated. Since the first time when the Court was presented with Hearing Exhibits 58 and 61, SRM has continuously maintained that those materials were settlement materials. This Court observed as much on June 22, 2009 when it stated: "They have raised a [colorable][12] claim, that claim that I think the negotiations were a simple matter of negotiations relating to early settlement of the matters, so that arbitration would not have to be undertaken, but I want that to be under oath and [have the SRM witnesses] testifying to that….I want to resolve that question in my mind before I move further." 6/22/09 Tr. p. 50:4-11.

BB. The Court finds that there is a reasonable basis to believe that, and the Court concludes that, even if NELLC had issued a subpoena to Mr. Lewis and his accounting firm in connection with the 2007 AAA arbitration, the Panel in that matter would have granted SRM's request for a protective order with respect to Rule 408 materials such as Hearing Exhibits 58 and 61 for the reasons as described herein, had they still existed. The Court further finds and concludes that, had it been learned then that Mr. Lidicker had not kept certain emails, including Hearing Exhibits 58 and 61, there would have been no negative inference allowed as a result thereof since

[12] Although the transcript does not reflect it, the Court used the word "colorable" to describe SRM's assertion that the November 3, 2006 email and the March 23, 2007 email were settlement materials. The Court finds and concludes that, as of June 22, 2009, SRM had raised a "colorable" claim that those emails were settlement materials.

not having the settlement materials would not have prejudiced NELLC in any meaningful way as those documents are inadmissible to attempt to prove invalidity of SRM's claim (or its amount) and NELLC has only attempted to use them for those purposes.

CC. Further supporting the Court's findings and conclusions that neither SRM nor its counsel intentionally hid or failed to disclose Hearing Exhibits 58 and 61 in the 2007 AAA arbitration is Mr. Lidicker's unrebutted testimony that, by the time that SRM was working on its document production and disclosure in that matter, he had forgotten that those emails had even existed. And, when NELLC subpoenaed David Lewis's files at Huber, Erickson & Bowman, neither Mr. Lidicker nor SRM did anything to in any way influence anything about Mr. Lewis's document gathering or production effort, as discussed below. The Court finds and concludes that the record demonstrates that neither SRM nor its counsel had any role in that effort.

DD. The Court finds and concludes that SRM did nothing inappropriate to interfere with the NELLC subpoena to Huber, Erickson & Bowman. It was privileged and entitled to file with this Court its Motion to Quash/for Protective Order, and to inform Huber, Erickson & Bowman that it intended to challenge the subpoena in the Court. There is no basis for concluding that SRM in any way influenced any aspect of the Huber, Erickson & Bowman response to NELLC's Utah subpoenas.

EE. Plaintiffs attempt to categorize as contemptuous, the conduct of NELLC's counsels' activities with respect to obtaining subpoenas from a Utah court while the very issue of the scope of discovery was pending before this Court is not really relevant to the necessary findings and conclusions which the Court is called upon to make.

FF. There is nothing in the record to indicate whether NELLC's Arizona counsel informed NELLC's Utah counsel that the matter of discovery was then pending before this Court. Not having jurisdiction to comment on the Utah lawyer's obligation to inform the Court there of the pending action here, the Court will refrain from doing so. Although NELLC's Arizona counsel should have taken steps to inform the Utah lawyer of that fact so that the Utah lawyer could inform the Utah court that the issue was pending for decision here. While the conduct may well have merited some minor sanction, such as the imposition of costs incurred in attempting to fight the subpoena in Utah, the conduct, in and of itself, provides SRM with no greater edge in its defense of the motion. This is not a criminal investigative matter in which the defendant seeks to suppress the introduction of damning evidence which stems from the "fruit of the poisonous tree".

GG. In other words, the Court draws no negative inferences from counsel's conduct, for purposes of this motion.

HH. It is noted that many discovery requests were directed at Mr. Lewis in the context of the arbitration going on in Virginia simultaneous with litigation here in Arizona. During the course of this litigation this court was made aware of the fact that the Virginia arbitration had ended favorably for Mr. Lidicker and his Virginia management company. However, nothing in this decision is predicated upon that finding. It is mentioned herein only to emphasize that the various discovery requests served on Mr. Lewis in the course of the other litigation appear to be substantially broader in scope and DOS required Mr. Lewis to dig further into his records at which point in time additional documents, such as exhibits 58 and 61 were discovered.

II. Regarding the "second subpoena" to David Lewis and Huber, Erickson & Bowman issued in The Tides arbitration, it is reasonable to the Court that, alone, the addition of the request in the NTLLC subpoena for Lewis's "financial statements" files for three entities would be sufficient for accountant Lewis to have reasonably regarded the scope of the NTLLC subpoena (Hearing Exhibit 81) as being substantially broader in scope than the subpoena attorney Slaughter accepted for him on December 23, 2008. The Court so finds and concludes. Add to that request for financial statements, six other requests in the NTLLC subpoena which were not in the earlier NELLC subpoena, compels the Court to find Mr. Lewis's testimony to be completely credible.

JJ. The Court sustained objections to questions by NELLC's counsel to Mr. Lidicker about what was in Alan Cohen's mind when Mr. Cohen prepared the draft letter marked as Hearing Exhibit 48: NELLC's counsel replied that the document was discovered after Mr. Cohen was deposed. 7/13/09 Tr. p. 32:18-25; 33:1-16. Because Hearing Exhibit 48 was on the computer in the Enchantment accounting offices before SRM's RMA ended on January 31, 2007, whether that document was or was not discovered by counsel for NELLC after Alan Cohen was deposed (and whether or not NELLC's counsel decided after the deposition to use it) is not grounds for ignoring governing evidentiary rules. Alan Cohen was not identified as a witness which NELLC wanted to have testify at the July 2009 evidentiary hearings when questioned by the Court on June 22, 2009 as to who the hearing witnesses would be. See footnote #1, above.

KK. The Court finds and concludes that neither Hearing Exhibit 58 nor 61 were, or would have been responsive to NELLC's 2007 arbitration requests for production of documents. See Exhibit 3 to "Defendant's Reply In Support Of Supplemental Memorandum Regarding New Evidence In Support Of Opposition To Application To Confirm Arbitration Award And Application To Vacate Arbitration Award", dated Jun3 8, 2009.

LL. There is no request for production contained therein which can reasonably be read to seek settlement materials such as Hearing Exhibits 58 and/or 61. The Court finds and concludes that the lack of objection to production and the absence of disclosure at that time was not a violation of SRM's discovery or disclosure obligations because there was no reason for SRM or its

counsel (even if Mr. Lidicker had remembered the emails in question) to have reasonably concluded that the emails "may be relevant" or that Mr. Lewis "may have" relevant knowledge since the documents and Mr. Lewis's work all related to protected settlement discussions.

MM. As for NELLC's contention that there has been a violation of Rule 11(a), Ariz. R. Civ. P., the Court expressly finds and concludes that there has been no such violation by SRM or its counsel in either the bringing or maintenance of this action, in the 2007 AAA arbitration or in the filing of any papers with this Court.

NN. As for NELLC's contention that there has been a violation of Rule 37(d), Ariz. R. Civ. P., the Court expressly finds and concludes that there has been no such violation by SRM or its counsel.

VV. As for NELLC's contention about Rule 41(d), Ariz. R. Civ. P., the Court expressly finds and concludes that there is no basis to dismiss SRM's application for confirmation of the November 27, 2007 AAA arbitration award.

OO. As for NELLC's contention that there has been a violation of Rule 56(g), Ariz. R. Civ. P., the Court expressly finds and concludes that there have been no affidavits (or declarations) given in bad faith or for improper purposes by Mr. Lidicker or SRM's counsel.

PP. As for NELLC's contention that there have been violations of ER's 3.1 through 3.4, the Court finds and concludes that there have been no such violations by SRM's counsel in this matter or the 2007 AAA arbitration.

QQ. As for NELLC's contention that there has been a violation of ARS Section 12-341.01(C), the Court finds and concludes that there has been no such violation by SRM in this matter or in the 2007 AAA arbitration.

RR. As for NELLC's contention that there has been a violation of ARS Section 12-349, the Court finds and concludes that there has been no such violation by SRM in this matter or in the 2007 AAA arbitration.

SS. As for NELLC's contention that ARS Section 12-350 applies to SRM, the Court finds and concludes that there is no basis to apply that statute to SRM.

TT. As for NELLC's contention that there has been a violation of ARS Section 12-8644, the Court finds and concludes that SRM has not violated that statute in this matter or the 2007 AAA arbitration.

UU. As for NELLC's contention that the Court should use its "inherent powers" to sanction "bad faith" conduct, the Court finds and concludes that there is no basis to exercise its inherent powers to sanction SRM, and no basis to conclude that SRM has acted in bad faith in this matter or the 2007 AAA arbitration.

VV. The Court finds and concludes that NELLC is entitled to no relief on its Motion for Sanctions, or any of the arguments it has raised or submissions made in relation thereto. Therefore,

IT IS ORDERED denying Plaintiffs the relief requested in their Motion for Sanctions.

IT IS FURTHER ORDERED, setting this matter for a telephonic status conference for 15 minutes on **March 29, 2010 at 9:00 a.m.** for purposes of discussing the procedures regarding disposition of any issues remaining to be resolved by the Court. The Court suggested to counsel that the findings of fact and conclusions of law set forth herein are fairly dispositive of the entire matter, but will allow counsel to raise any other issues they wish have addressed at the time of the status conference.

HONORABLE JOSEPH B. HEILMAN
MARICOPA COUNTY SUPERIOR COURT
EAST COURT BUILDING
101 WEST JEFFERSON
8th FLOOR, COURTROOM 814
PHOENIX, AZ 85003
602-506-0292 TEL