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Attorneys for Plaintiff Primo Ventures

BY: G. HEVALOW, DEPUTY

6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
7 **IN AND FOR THE COUNTY OF PIMA**

8
9 PRIMO VENTURES, LLC, an Arizona
limited liability company,

10 Petitioner,

11 vs.

12 TUCSON BASEBALL, L.L.C., an Arizona
13 limited liability company; JAY S. ZUCKER
and MELINDA ZUCKER, husband and
14 wife; JAY S. ZUCKER, as TRUSTEE
under the JSZ TRUST under Agreement
15 dated 4/23/99

16 Respondents.

NO. **C20098914**

**APPLICATION TO COMPEL
ARBITRATION**

PAUL TANG

(Assigned to _____)

17 Petitioner, Primo Ventures, LLC ("Primo"), respectfully moves this court to compel
18 arbitration of the dispute between the parties covered by the Arbitration Agreement attached
19 hereto as Exhibit A. This Application is supported by the following Memorandum of Points and
20 Authorities.

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **A. UNDERLYING FACTS**

23 1. In 2004, Petitioner became a member of an LLC known as Tucson Baseball (the
24 "Company") which operated the Sidewinders franchise. The Zucker respondents were the
25 principals thereof. Essentially, Primo made a \$1 million investment for 10% interest in the
26 Company. The Operating Agreement had a provision allowing for the exercise of an Option by
27 Primo for an extra 10% of the Company.
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1 2. During the summer of 2007, Primo notified Jay Zucker, the principal of the
2 Company, of its intention to exercise the Option. Zucker in response consistently indicated that
3 he refused to accept the tender of any Option payment, and that he did not believe that Primo
4 should be allowed to effectuate the exercise of the Option. In short, Tucson Baseball would not
5 honor the exercise of the Option by Primo. In a series of face to face meetings and telephone
6 conversations, David Smallhouse, the principal of Primo, attempted to prevail upon Zucker to
7 honor the Option, but Zucker insisted that he would not recognize exercise of the Option for the
8 sharing in the proceeds of the pending sale of the franchise.

9 3. Thereafter, on or about August 15, 2007, Primo's accountants contacted the
10 Company's accountant to discuss the mechanics of the exercise of the Option only to be rebuffed
11 and told that Zucker had advised this was not going to occur.

12 4. Basically, the position taken by the Company in mid-August and early-September
13 with regard to the Option was that the Company no longer needed money because of the
14 transaction that was in the works, that Primo was in breach of the Operating Agreement and,
15 therefore, could not exercise it, and it would be a windfall for Primo to get the additional ten
16 percent on the sale.

17 5. Thereafter, Primo directed its attorney, Steven Phillips, to assert the rights under
18 the Option. Phillips was informed by James Sakrison, attorney for the Company, that Zucker
19 would not allow for the exercise and was intransigent on the issue. Ultimately, Sakrison also
20 urged Phillips to have Primo not press its rights under the Option until after closing, as the
21 Company had a good deal from the buyer which no one should do anything to upset by filing a
22 lawsuit or the like. These attempts to exercise the Option by Phillips are also set out in various
23 letters.

24 6. The closing of the transaction for the purchase of Tucson Baseball occurred
25 somewhere around September 11, 2007.

26 7. On September 20, 2007, Primo tendered the exercise amount to Tucson Baseball
27 to show that it had the wherewithal to have exercised the Option knowing it would be rejected
28 which it was.

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1 8. Thereafter, the parties agreed to submit the issue of whether Primo Ventures was
2 entitled to an additional 10% of the proceeds of the Sidewinders by virtue of the Option granted
3 to it in the Operating Agreement. *See* Arbitration Agreement attached hereto as Exhibit A.

4 9. Some, but not all, of the operative facts and dates were included in the agreement
5 to arbitrate, including the closing date and the date when the check was ultimately tendered.

6 10. The parties agreed to utilize Tom Roberts as the arbitrator and the arbitration was
7 set for November 16-17, 2009.

8 11. During the pendency of the arbitration proceeding, Tucson Baseball filed an expert
9 report by Kathryn Ludwig which, amongst other things, for the first time suggests that
10 recognizing any exercise of the Option after the closing date would somehow be contrary to tax
11 laws as a “retroactive allocation.” *See* Kathryn Ludwig’s report attached hereto as Exhibit B.
12 In other words, rather than the attempted exercise of the Option in August and September being
13 late because there was a “deal in the works” and the money was no longer needed, Respondents,
14 for the first time, were taking the position that the closing was an absolute line in the sand and
15 that the fact that the money was tendered thereafter was definitive and anything leading up to
16 that was of no moment.

17 12. In response to this position, Primo filed its own expert reports from Steve Phillips,
18 Primo’s lawyer, and Robert Hutchison, Primo’s accountant, explaining why, under all of the
19 circumstances and the efforts to exercise the Option occurring in August and September, the
20 Option was in effect, the exercise should have been accepted by the Company pre-closing, but
21 the Company could have and should have in any event accepted the check, when tendered, post-
22 closing on September 20, 2007. *See* Expert Reports of Steven Phillips and Robert Hutchison
23 attached hereto as Exhibit C and D respectively.

24 13. Supporting this notion that a post-closing exercise would be appropriate, was the
25 fact that Tucson Baseball had Chris Ludwig, its accountant, compute after the closing what it
26 would cost to pay Primo its proceeds under the Option. *See* Email between Chris Ludwig and
27 Jay Zucker, dated September 12, 2007, and attached hereto as Exhibit E. Tucson Baseball’s
28

1 response was telling, "Not a good plan. Let's just pay him his requested \$1,516,000 and tell him
2 there's no option."

3 14. Therefore, as the arbitration date approached, while there appeared to be no real
4 dispute of the underlying facts, it was clear that each party had its own particular version of how
5 the facts and the law should interplay:

6 A. Primo, on the one hand, contended that its efforts in August and September
7 to exercise the Option were effectively repudiated by Tucson Baseball, constituting an
8 anticipatory breach of its obligations under the Operating Agreement; that Primo was ready,
9 willing and able to proceed under the Option and had been told by Tucson Baseball it would not
10 accept performance, which therefore excused any requirement of a tender; and any tender at that
11 time would have been futile. It was also Primo's position that with this history, the tender of the
12 check in September could have and should have been accepted by Tucson Baseball, giving effect
13 to the earlier attempts to exercise the Option. This position was the subject of a great deal of
14 discovery in terms of production of documents, depositions, and the like. Primo's Arbitration
15 Memorandum setting out these facts and its position is attached hereto as Exhibit F.

16 B. Tucson Baseball for its part, took the position that regardless and not
17 withstanding anything that occurred prior to the closing of approximately September 11th, a post-
18 closing attempt to exercise the Option was ineffective based on tax law, etc. per Kathryn
19 Ludwig's opinion. Tucson Baseball's Arbitration Memorandum is attached hereto as Exhibit
20 G.

21 15. On the morning of the scheduled arbitration of November 16, 2009, Tom Roberts,
22 the arbitrator, asked the question of what he was supposed to decide in the arbitration.

23 16. Primo took the position that per the Arbitration Agreement, he was to determine
24 whether Primo had properly attempted to exercise the Option and that it was entitled to the
25 additional 10% of the proceeds from the sale as if Tucson Baseball had accepted the offer. To
26 that end, all of the attempted exercises of the Option and communications to and from the parties
27 ranging from late July through early September were relevant.

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1 17. Tucson Baseball on the other hand, argued that per the Arbitration Agreement,
2 anything that happened prior to the tender of the check was irrelevant and not subject to
3 arbitration. To support its position, Tucson Baseball cited to the isolated provision in the
4 Arbitration Agreement that states simply "On September 20, 2007, Primo Ventures delivered a
5 notice to exercise the Option contained in Section 6.14 to acquire additional 10% of interest in
6 the Company and tendered therewith a check in the amount of \$1,222,222.00 made payable to
7 Tucson Baseball." In other words, Respondents contend that was the end of the story and the
8 prior attempts to exercise the Option that were rebuffed, just like this tender was, were irrelevant
9 to the inquiry.

10 18. Primo's response to that position is that this provision of the Arbitration
11 Agreement, while true, does not designate that it was the only or earliest attempt to exercise the
12 Option, and that the entire history of the attempt to exercise the Option was relevant to the
13 ultimate inquiry as to whether the Option was enforceable and additional payments owed to
14 Primo.

15 19. Primo requested that the arbitrator go forward and allow in all evidence and make
16 the ultimate decision. Tucson Baseball demanded that no such arbitration take place, *ie*, one
17 taking all the evidence, but rather a truncated hearing should focus on a tiny issue. As a result,
18 Tom Roberts basically threw up his hands and indicated no arbitration could take place under
19 these circumstances.

20 **B. ARGUMENT**

21 Primo was faced with the refusal by Tucson Baseball to honor Primo's attempts to
22 exercise an Option beginning in July of 2007 going through the tender of the check on
23 September 20, 2007, and was going to pursue litigation. Rather than be sued, Tucson Baseball
24 requested that the dispute be arbitrated, and the parties agreed to that and set out a very succinct
25 agreement to that affect. The facts and circumstances surrounding these events and what went
26 on that summer are clearly germane to the Arbitration Agreement that was entered into and the
27 ultimate task of deciding whether or not Primo Ventures properly exercised the Option and
28 whether it is entitled to damages. By refusing to allow the arbitration to take place under such

1 circumstances, Tucson Baseball breached its obligations under the Agreement and should be
2 compelled to arbitration under the scenario as discussed.

3 Therefore, it is respectfully requested that this Court enter an Order compelling arbitration
4 pursuant to the Arbitration Agreement, and specifically holding that all facts surrounding
5 Primo's attempts to exercise the Option in the summer of 2007 be considered in making the
6 ultimate determination of whether or not it is entitled to an additional 10% of the sales proceeds
7 from the Sidewinders transaction. Anything short of that would be to ignore the events as they
8 took place and the truth of what occurred.

9 RESPECTFULLY submitted this 16th day of November, 2009.

RUSING & LOPEZ, P.L.L.C.


Michael J. Rusing
Attorneys for Plaintiff Primo Ventures, LLC

14 Copy of the foregoing mailed this
15 16th day of November, 2009, to :

16 James M. Sakrison, Esq.
17 Slutes, Sakrison & Rogers, P.C.
18 4801 E. Broadway, Suite 301
19 Tucson AZ 85711
20 *Attorneys Tucson Baseball, LLC,
Jay S. Zucker, Melinda Zucker,
Jay S. Zucker as Trustee under the
JSZ Trust under Agreement dated
4/23/99*

21 
22 _____

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