

ORIGINAL

LAW OFFICES OF
GOODSON AND MANLEY, PLC

A PROFESSIONAL LIABILITY COMPANY
2025 NORTH 3RD STREET
SUITE 200
PHOENIX, ARIZONA 85004
TELEPHONE (602) 252-5110
TELEFAX (602) 257-1883
TOLL FREE (800) 442-8057
info@gmdlaw.com
www.gmdlaw.com



0000013623

JOHN F. GOODSON AZ BAR
COLLEEN C. MANLEY AZ BAR

PAUL E. DELOUGHERY* AZ BAR
*Licensed also in MN
CHRISTINE S. GOODSON**
**Licensed only in FL

December 9, 2004

Securities Division
Attn: Docket Control
Arizona Corporation Commission
1300 W. Washington
Third Floor
Phoenix, Arizona 85007

Arizona Corporation Commission
DOCKETED

DEC 13 2004

DOCKETED BY	
-------------	--

RENE L. COUCH - DOCKET NO. S-03437A-03-0000

Attention Securities Division Docket Control:

Enclosed for filing please find the original and thirteen copies (collated and paper clipped together) of the following documents:

1. Notice of Motion and Motion to Produce Documents of even date; and
2. Affidavit of Rene L. Couch of even date.

Please call if you have any questions or concerns.

Sincerely yours,

GOODSON AND MANLEY, PLC

JOHN F. GOODSON
JFG/ped

cc: Rene L. Couch (w/ encl.)

Encl.: As indicated.

AZ CORP COMMISSION
DOCUMENT CONTROL

2004 DEC 13 P 4: 28

RECEIVED

ORIGINAL

GOODSON AND MANLEY, PLC
John F. Goodson (S.B.A. #01279)
2025 North Third Street, Suite 200
Phoenix, Arizona 85004
(602) 252-5110
Attorneys for Respondent Rene Couch

BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER
Chairman
JIM IRVIN
Commissioner
WILLIAM A. MUNDELL
Commissioner
JEFF HATCH-MILLER
Commissioner
MIKE GLEASON
Commissioner

Arizona Corporation Commission

DOCKETED

DEC 13 2004

DOCKETED BY 

In the Matter of:)
)
TIERRA GROUP,)
)
PRESERVATION TRUST)
CORPORATION,)
)
PARTNERSHIP PRESERVATION)
TRUST,)
)
CATERPILLAR FOUNDATION)
PROPERTIES,)
)
RENE L. COUCH,)
)
TERRY COUCH,)
)
Respondents.)
_____)

Docket No. S-03437A-03-0000

NOTICE OF MOTION AND
MOTION TO PRODUCE
DOCUMENTS

RECEIVED
2004 DEC 13 P 4: 28
AZ CORP COMMISSION
DOCUMENT CONTROL

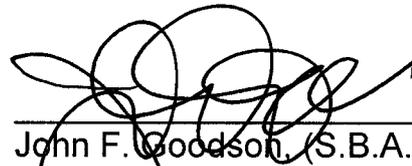
NOTICE OF MOTION

To: Jamie Palfai, attorney for Securities Division, Arizona Corporation Commission, 1200 West Washington, Phoenix, Arizona 85007.

Please take notice that the undersigned will bring on the above motion for hearing before the Administrative Law Judge of the Arizona Corporation Commission at the Commission's offices, 1200 West Washington Street, Phoenix, Arizona on January 6, 2005 at 11:30 a.m., or as soon thereafter as the matter can be heard.

Dated December 9, 2004.

GOODSON AND MANLEY



John F. Goodson, (S.B.A. #01279)
2025 North Third Street, Suite 200
Phoenix, Arizona 85004
(602) 252-5110
Attorneys for Rene Couch

MOTION FOR PRODUCTION OF DOCUMENTS

RENE COUCH, Respondent, by the undersigned, JOHN F. GOODSON, his attorney, moves the Administrative Law Officer for an order requiring Jamie Palfai, Attorney for the Securities Division, to produce at a convenient time and place, as may be directed, but within thirty (30) days from the date of such order, the following documents, books, papers and other articles for the purpose of permitting Respondent, through his attorney, to inspect and make copies of the same: All documents and things in the Arizona Corporation Commission's possession relating to its investigation of Walt Cunningham.

The above-enumerated items contain evidence that ought to be made a matter of public record pursuant to A.R.S. § 44-2402 (A), and is required by the Procedural Due Process clause of the Fifth Amendment to the U.S. Constitution, and are within the possession, custody, or control of the Arizona Corporation Commission.

This motion is based on the records of this proceeding, on the Affidavit of Rene Couch submitted with this Motion, and on the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION: The attorney for the Securities Division, Jamie Palfai, has verbally stated that the ACC will not produce documents related to its investigations of Walt Cunningham. Respondent Rene Couch claims that he needs to review these documents in order to successfully defend himself in the pending matter before the ACC. Mr. Palfai claims that A.R.S. 44-2042 protects the documents and things related to the ACC's investigation of Mr. Cunningham as "confidential." This Memorandum addresses whether Procedural Due Process requires the disclosure of such materials to Respondent.

ISSUE: IS THE SECURITIES DIVISION REQUIRED BY THE "DUE PROCESS" CLAUSE OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION TO DISCLOSE DOCUMENTS AND THINGS THAT IT IS IN ITS POSSESSION RELATING TO ITS PAST INVESTIGATIONS OF WALT CUNNINGHAM?

SHORT ANSWER: YES.

RULE: WHERE GOOD CAUSE IS SHOWN TO THE BOARD, IT SHOULD PERMIT DISCOVERY IN ORDER THAT THE RIGHTS OF ALL PARTIES MAY BE PROPERLY PROTECTED. National Labor Relations Board v. Rex Disposables, Division of DHJ Industries, Inc., 494 F.2d 588 (5th Cir. 1974).

The Rex Disposables case addressed the issue of when a court may order an administrative agency (in that case the NLRB) to produce documents to another litigant. Under some circumstances an administrative agency's decision not to provide discovery may result in unfairness. Id. at 592 (*citations omitted*). When good cause is shown to the administrative agency, it should permit discovery in order that the rights of all parties may be properly protected. Id. at

592 (*citations omitted*). A Court may “refuse to enforce administrative orders which they find to be unjust or the product of unjust administrative procedures or policies.” *Id.* at 592 (*citations omitted*). (The Court in Rex Disposables did not specifically refer to the Due Process clause. However, this is clearly the basis for its holding.)

APPLICATION:

The Respondent claims that there is likely to be potential evidence in the ACC’s documents related to Walt Cunningham. Respondent was a business associate of Mr. Cunningham’s. More importantly, Respondent claims that the actions for which Respondent is now being prosecuted were all taken by Mr. Cunningham. It would be a denial of Due Process for the ACC to adjudicate whether Respondent violated Arizona securities statutes without allowing him to rebut the evidence by showing that, in fact, another person was responsible for the acts of which he is being prosecuted.

On a related note, the Administrative Law Judge might also coordinate with the ACC to determine that a limited release of documents and things related to Walt Cunningham for use in this pending litigation would not be “contrary to the public interest” pursuant to A.R.S. §44-2042.

CONCLUSION:

In summary, the Administrative Law Judge should determine that it would

be a violation of Procedural Due Process to fail to order the production of documents and things in the ACC's possession related to its investigation of Walt Cunningham. In the alternative, the Administrative Law Judge should make a finding that it would not be "contrary to the public interest" to allow Respondent and his attorneys to view and copy documents related to the ACC's investigation of Walt Cunningham so as to allow Respondent to use such documents for his defense in this pending litigation.

Dated December 9, 2004.

GOODSON AND MANLEY



John F. Goodson (S.B.A. #01279)
2025 North Third Street, Suite 200
Phoenix, Arizona 85004
(602) 252-5110
Attorneys for Rene Couch

GOODSON AND MANLEY, PLC
John F. Goodson (S.B.A. #01279)
2025 North Third Street, Suite 200
Phoenix, Arizona 85004
(602) 252-5110
Attorneys for Respondent Rene Couch

BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER
Chairman
JIM IRVIN
Commissioner
WILLIAM A. MUNDELL
Commissioner
JEFF HATCH-MILLER
Commissioner
MIKE GLEASON
Commissioner

In the Matter of:)
)
TIERRA GROUP,)
)
PRESERVATION TRUST)
CORPORATION,)
)
PARTNERSHIP PRESERVATION)
TRUST,)
)
CATERPILLAR FOUNDATION)
PROPERTIES,)
)
RENE L. COUCH,)
)
TERRY COUCH,)
)
Respondents.)
_____)

Docket No. S-03437A-03-0000

AFFIDAVIT OF RENE L. COUCH

STATE OF ARIZONA }
County of Maricopa } ss.

RENE L. COUCH, being duly sworn upon oath, deposes and says as follows:

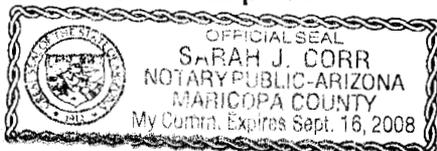
1. I am one of the Respondents in the above-captioned matter. I have personal knowledge of, or am otherwise competent to testify as to, each and every fact set forth in this Affidavit.
2. The allegations in Securities Division's Notice of Opportunity For Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order for Administrative Penalties, and for Other Affirmative Action (hereinafter "Notice") were based upon actions taken by WALT CUNNINGHAM.
3. On November 18, 2004, JAMIE PALFAI, Attorney for the Securities Division, indicated to me and my attorney, PAUL E. DELOUGHERY, that the Securities Division has documents and other things in its possession stemming from its investigation of MR. CUNNINGHAM's involvement in the various matters being alleged in this action.
4. The Securities Division has refused and failed to provide me and my attorneys with access to said documents.
5. On information and belief, these documents and things in the Securities Division's possession, concerning MR. CUNNINGHAM, contain exculpatory evidence that is essential to fully present my defense.

DATED this 9 day of December 2004.


RENE L. COUCH, Affiant

SUBSCRIBED AND SWORN to before me this _____ day of December, 2004.

My Commission Expires:




Notary Public