# JOHNSON UTILITIES, L.L.C

5230 East Shea Boulevard * Scottsdale, Arizona 85254
PH: (480) 998-3300; FAX: (480) 483-7908


0000041185

ORIGINAL

April 7, 2006

Mr. Brian Bozzo
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

RE: Johnson Utilities, L.L.C.: Compliance with Decision No. 68235
RE: Quarterly Reports on the status of the pending La Osa and Sonoran litigation
WS-02987A-05-0088

Dear Mr. Bozzo:

Pursuant to the above referenced decision, Johnson Utilities hereby submits this compliance filing in accordance with the Commission's orders. Johnson Utilities is please to inform you that the Sonoran litigation has been settled with all of the Johnson defendants and the Settlement Agreement is attached hereto as Attachment 1. This closes the compliance requirement for the quarterly reports on this case. The La Osa litigation is still ongoing and attached as Attachment 2 is the summary of the events starting from the last quarterly report. Also included with this filing is the Case Management Order No. 1, Johnson Counterclaimants' Surreply In Opposition To Counterdefendants' Motion to Dismiss, Court's Order Denying Plaintiff State of Arizona's Motion to Postpone Status Conference, Court Minute Entry Order (Johnson v. Arizona Department of Environmental Quality, et al.) State's Motion to Dismiss-Denied and State' Motion to Stay/Bifurcate Discovery- Denied, all attached hereto as Attachments 3, 4, 5, &6 respectively. If staff would like to see any of the court documents listed on the summary that are not included with this filing please let me know and they will be provided.

If you need any additional information in regards to this compliance item, please do not hesitate to contact me. Thank you for your time and consideration in this matter.

Sincerely,

Daniel Hodges
Johnson Utilities, LLC

AZ CORP COMMISSION
DOCUMENT CONTROL

2006 APR 10 A 8: 56

RECEIVED

Cc: Ernest Johnson, Director
Richard Sallquist, Sallquist, Drummond & O'Connor
Docket Control

# ATTACHMENT 1

# SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made and entered into as of the 15th day of February 2006 by and between Lennar Communities Development, Inc. ("Plaintiff and Counterdefendant"), Lennar Corporation; Alan Jones and Jodie Jones, husband and wife; Mark Bitteker and Tamara Bitteker, husband and wife; and John Sutherland ("Counterdefendants") (hereinafter Plaintiff and Counterdefendants shall collectively be referred to as "Plaintiffs") and George H. Johnson and Jana Johnson, husband and wife, and Boulevard Contracting Company, Inc. (collectively the "Johnson Defendants").

## RECITALS

A. Plaintiff Lennar Communities Development commenced a civil action in the Maricopa County Superior Court, State of Arizona against Johnson Defendants in Case No. CV 2005-002548. Johnson Defendants George Johnson and Jana Johnson filed a counterclaim against Plaintiffs. The Litigation was subsequently removed to Pinal County Superior Court, State of Arizona where it is currently pending, Case No. CV 2006-00012 (the "Litigation").

B. Plaintiffs and Johnson Defendants desire to settle the Litigation and all claims between Plaintiffs and Johnson Defendants in the manner hereinafter as set forth in this Agreement. Plaintiffs and Johnson Defendants agree that this Agreement shall be applicable only to the Johnson Defendants as set forth herein. Plaintiff Lennar shall preserve any and all claims it currently has against Sonoran Utility Services, LLC.

## AGREEMENT

NOW, THEREFORE, for and in consideration of the mutual promises and obligations set forth below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Plaintiffs and Johnson Defendants agree as follows:

1. Settlement Terms: The parties agree that in complete settlement of the Litigation and any current claims or potential claims arising therefrom, the parties shall dismiss their claims against the other parties to this Agreement and take nothing thereby. The parties further agree to mutually release each other as set forth more fully below. Each party shall be responsible for its own attorney's fees and costs incurred as a result of this Litigation.

2. Release Of Johnson Defendants: For and in consideration of Johnson Defendants' promises and covenants set forth herein, Plaintiffs hereby release and forever discharge Johnson Defendants and their respective marital communities, their attorneys, agents, servants, representatives, heirs, successors, assigns, employees, officers, directors, members, managers, and/or other related persons, from any and all claims, damages, demands, actions, causes of action, and any liability whatsoever, in any way related to the subject matter of the Litigation, including any claims or counterclaims actually brought or which could have been brought by the parties, whether known or unknown, except for matters arising out of this Agreement. The foregoing release shall not be deemed a Release of any claim Plaintiffs have or may have against Sonoran Utility Services, LLC. Plaintiff Lennar specifically preserves any and all claims it has against Sonoran Utility Services, LLC. Plaintiffs further agree that upon execution of this Settlement Agreement, Plaintiffs will execute a Stipulation of Dismissal with Prejudice of any and all claims against Johnson Defendants in Pinal County Cause No. CV 2006-00012, with each party to bear its own attorney's fees and costs.

3. Release of Plaintiffs: For and in consideration of Plaintiffs' promises and covenants set forth herein, Johnson Defendants, each of them, for themselves and their respective marital communities, hereby release and forever discharge Plaintiffs and their respective marital communities, their attorneys, agents, servants, representatives, heirs, successors, assigns, employees, officers, directors, members, managers, parent companies, subsidiaries, and/or other related persons or entities from any and all claims, damages, demands, actions, causes of action and any liability whatsoever, in any way related to the subject matter of the Litigation, including any claims or counterclaims actually brought or which could have been brought by the parties, whether known or unknown, contingent or non-contingent, except for any matters arising out of this Agreement. The foregoing release shall not be deemed a release of any claim Sonoran Utility Services, LLC may have against Lennar. All such claims are specifically preserved. Johnson Defendants further agree upon execution of this Settlement Agreement, Johnson Defendants will execute a Stipulation of Dismissal with Prejudice of any and all claims in Pinal County Superior Court Case No. CV 2006-00012, with each party to bear its own attorney's fees and costs.

4. Assignment, Predecessors, Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their legal representatives, predecessors, successors, and assigns.

5. Construction. The parties hereto hereby mutually acknowledge and represent that they have been fully advised by their respective legal counsel of their rights and responsibilities under this Agreement, that they have read, know and understand completely the contents hereof, and that they have voluntarily executed the same. The parties further mutually acknowledge that they have had input into the drafting of this Agreement and that, accordingly, in any construction to be made of this Agreement, it shall not be construed for or against any party, but rather shall be given a fair and reasonable interpretation, based on the plain language of the Agreement and the expressed intent of the parties.

6. Covenant Shall be a Defense to Action. All parties of this Agreement expressly agree that this Agreement may be treated as a defense to any action or proceeding that may be

brought, instituted or taken by the Plaintiffs against any or all of the Johnson Defendants or by any or all of the Johnson Defendants against the Plaintiffs on account of the subject matter of the litigation and shall be forever a complete bar to the commencement of the prosecution of any action or proceeding insofar as claims on account of such acts or omissions are made.

7. No Admission of Liability. By executing this Agreement, the parties are in no way admitting liability. Both the Johnson Defendants and Plaintiffs specifically deny any liability or wrongdoing in or relating to this action.

8. Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior understandings, if any, with respect thereto. There are no oral promises, conditions, representations, understandings, interpretations, or terms of any kind as conditions or inducements to the execution hereof or in effect between the parties, except as may otherwise be expressly provided herein.

9. Authority. Each person signing below on behalf of an entity hereby personally guarantees that he or she has the authority to sign this document on behalf of the entity for which he or she is signing, and that his or her signature legally binds the entity and/or his/her marital community to the terms hereof.

10. Governing Law. This Agreement shall be governed by, interpreted under, and construed and enforced in accordance with the laws of the State of Arizona.

11. Modification to be in Writing. This Agreement may only be terminated or modified by written agreement executed by all the parties.

12. Counterparts. This Agreement may be executed in any number of counterparts, and each counterpart shall constitute an original instrument, but all such separate counterparts shall constitute one and the same agreement.

13. Titles and Headings. Title and headings of sections of this Agreement are for the convenience of reference only. They are not intended to define, limit or describe the scope or intent of any provision of this Agreement. They shall not affect the construction of any provision of this Agreement.

14. Pronouns. All pronouns and any variations thereof shall be deemed to refer to the masculine, feminine, neuter, singular or plural, as the identity of the parties may require.

15. Effective Date. This Agreement shall become effective when all of the counterpart signature pages have been fully executed.

DATED AND SIGNED on this the ___ day of February 2006.

LENNAR COMMUNITIES DEVELOPMENT, INC.

By: _____

Its: VICE PRES

STATE OF ARIZONA )
) ss.
County of Maricopa )

The foregoing instrument was acknowledged before me this 13 day of February, 2006 by Alan M Jones, who is the Vice President of Lennar Communities Development, Inc.

Stacie K Small

Notary Signature Stacie K Mullen

My Commission Expires:
5·31·06

OFFICIAL SEAL
STACIE K.
Notary Public - State of Arizona
MARICOPA COUNTY
Commission
My Comm. Expires

OFFICIAL SEAL
STACIE K. SMALL
Notary Public - State of Arizona
MARICOPA COUNTY
COMMISSION #221976
My Comm. Expires May 31, 2006

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DATED AND SIGNED on this the ___ day of February 2006.

LENNAR CORPORATION

By: _____

Its: COO/Vice President

STATE OF ARIZONA )
) ss.
County of Maricopa )

The foregoing instrument was acknowledged before me this ___ day of _____, 2006 by _____, who is the _____ of Lennar Corporation.

_____

Notary Signature

My Commission Expires:

_____



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## All-Purpose Acknowledgment

State of California )
) ss
County of Orange )

On February 14, 2006 before me, Dee Baker, Notary Public, personally appeared Jonathan M. Jaffe personally known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her authorized capacities and that by her signature on the instrument the person or the entities upon behalf of which the person acted, executed the instrument.

Witness my hand and official seal.

Dee Baker

Dee Baker, Notary Public

DEE BAKER
Commission # 1478169
Notary Public - California
Orange County
My Comm. Expires Apr 19, 2008

**Description of Attached Document**

Title or Type of Document: Settlement Agreement between Lennar Corporation; Alan Jones, Jodie Jones; Mark Bitteker & Tamara Bitteker; John Sutherland and George H. Johnson and Jana Johnson

Document Date:_____ Pages :_____

Signer(s) Other Than Named Above: _____

DATED AND SIGNED on this the ___ day of February 2006.

Alan Jones

Subscribed and sworn to before me this 13 day of February 2006 by Alan Jones.

Stacie K Small
Notary Public Stacie K Mullen

My Commission Expires:

5·31·04

OFFICIAL SEAL
STACIE K. SMALL
Notary Public - State of Arizona
MARICOPA COUNTY
COMMISSION #221976
My Comm. Expires May 31, 2006

DATED AND SIGNED on this the ___ day of February 2006.

Jodie Jones

Subscribed and sworn to before me this 13 day of February 2006 by Jodie Jones.

Stacie K Small
Notary Public Stacie K Mullen

My Commission Expires:

5·31·04

OFFICIAL SEAL
STACIE K. SMALL
Notary Public - State of Arizona
MARICOPA COUNTY
COMMISSION #221976
My Comm. Expires May 31, 2006

DATED AND SIGNED on this the ___ day of February 2006.

Mark Bitteker

Subscribed and sworn to before me this 13 day of February 2006 by Mark Bitteker.

Stacie K Small
Notary Public Stacie K Mullen

My Commission Expires:

5-31-06

OFFICIAL SEAL
STACIE K. SMALL
Notary Public - State of Arizona
MARICOPA COUNTY
COMMISSION #221976
My Comm. Expires May 31, 2006

---

DATED AND SIGNED on this the 13 day of February 2006.

Tamara Bitteker

Subscribed and sworn to before me this 13 day of February 2006 by Tamara Bitteker.

Stacie K Small
Notary Public Stacie K. Mullen

My Commission Expires:

5-31-06

OFFICIAL SEAL
STACIE K. SMALL
Notary Public - State of Arizona
MARICOPA COUNTY
COMMISSION #221976
My Comm. Expires May 31, 2006

DATED AND SIGNED on this the ___ day of February 2006.

John Sutherland

John Sutherland

Subscribed and sworn to before me this 15 day of February 2006 by John Sutherland.

OFFICIAL SEAL
STACIE K. SMALL
Notary Public - State of Arizona
MARICOPA COUNTY
COMMISSION #221976
My Comm. Expires May 31, 2006

Stacie K Small

Notary Public Stacie K Mullen

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DATED AND SIGNED on this the ___ day of February 2006.

_____

George H. Johnson

Subscribed and sworn to before me this _____ day of February 2006 by George H. Johnson.

_____

Notary Public

My Commission Expires:

_____

DATED AND SIGNED on this the ___ day of February 2006.

_____
John Sutherland

Subscribed and sworn to before me this _____ day of February 2006 by John Sutherland.

_____
Notary Public

---

DATED AND SIGNED on this the 8 day of February 2006.

_____
George H. Johnson

Subscribed and sworn to before me this 8 day of February 2006 by George H. Johnson.

_____
Notary Public

My Commission Expires:

12.23.2008

CINDY L. GIBSON
Notary Public - Arizona
MARICOPA COUNTY
My Comm. Exp. 12-23-2008

DATED AND SIGNED on this the 8 day of February 2006.

Jana Johnson

Jana Johnson

Subscribed and sworn to before me this 8 day of February 2006 by Jana Johnson.

Notary Public

My Commission Expires:

12-23-2008

CINDY L. GIBSON
Notary Public - Arizona
MARICOPA COUNTY
My Comm. Exp. 12-23-2008

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DATED AND SIGNED on this the 8 day of February 2006.

BOULEVARD CONTRACTING COMPANY, INC.

By: _____

Its: President

STATE OF ARIZONA )
) ss.
County of Maricopa )

The foregoing instrument was acknowledged before me this 8 day of February, 2006 by Gerry H. Johnson, who is the President of Boulevard Contracting Company, Inc.

Notary Signature

My Commission Expires:

12-23-2008

CINDY L. GIBSON
Notary Public - Arizona
MARICOPA COUNTY
My Comm. Exp. 12-23-2008



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# ATTACHMENT 2

**STATE OF ARIZONA**
**v.**
**JOHNSON et al**

| | |
|---|---|
| 01/17/06 | Johnson Counterclaimants' Opposition to Motion to Dismiss Counterclaim |
| 01/17/06 | Johnson Counterclaimants' Opposition to Counterdefendants' Alternative Motion to Stay and Bifurcate Discovery |
| 01/26/06 | Third Party Def 3F Contracting, Inc.'s Answer to Third Party Complaint |
| 01/26/06 | Third Party Def 3F Contracting, Inc.'s Demand for Jury Trial |
| 01/26/06 | Third Party Def 3F Contracting, Inc.'s Certificate of Agreement re: Compulsory Arbitration |
| 01/20/06 | Defs Woehlecke's Motion to Continue Case Management Conference and Order re same |
| 01/27/06 | State's Response to Def Woehlecke's Motion to Continue Case Management Conference |
| 02/01/06 | State Counterdefendants' Reply in Support of Motion to Dismiss Counterclaim |
| 02/01/06 | State Counterdefendants' Reply re: Alternative Motion to Stay and Bifurcate Discovery |
| 02/07/06 | Johnson Counterclaimants' Surreply In Opposition to Counterdefendants' Motion to Dismiss |
| 02/14/06 | State Counterdefendants' Surrebuttal to Counterclaimants' Surreply |
| 02/15/06 | State's Motion for Clarification of Minute Entry |
| 02/21/06 | State's Motion to Postpone Status Conference |
| **02/22/06** | **Court's Order Denying Plaintiff State of AZ's Motion to Postpone Status Conference.** |
| 02/23/06 | Defs' Response to Pltf's Motion for Clarification of Minute Entry |
| 02/24/06 | State's Status Conference Memorandum |
| 02/24/06 | Johnson Defs' Position Statement Regarding the Proposed Case Management Order to Be Entered In This Case |

| | |
|---|---|
| 02/27/06 | State's Reply In Support of Motion for Clarification of Minute Entry |
| 02/27/06 | Joinder of Counterclaimants and Third-Party Pltfs in Support of Defs' Response to Plaintiffs Motion for Clarification of Minute Entry |
| 03/02/06 | Johnson Defs' Joinder to Counterclaimants' Opposition to Counterdefendants' Alternative Motion to Stay and Bifurcate Discovery |
| 03/06/06 | Pltf State of AZ's Joinder to Counterdefendants' Alternative Motion to Stay and Bifurcate Discovery |
| **03/20/06** | **Court Minute Entry Order (Johnson v. Goddard, Owens et al.) State's Motion to Dismiss was DENIED and State's Motion to Stay/Bifurcate Discovery was DENIED** |

# ATTACHMENT 3

**SUPERIOR COURT OF ARIZONA**
**MARICOPA COUNTY**

**No. CV 2005-002692**

HONORABLE KENNETH L. FIELDS

CLERK OF THE COURT

_____
Deputy

FILED:

STATE OF ARIZONA, et al.

v.

GEORGE H. JOHNSON and JANA S. JOHNSON, et al.

**CASE MANAGEMENT ORDER NO. 1**

After consultation with counsel and review of the pleadings submitted by counsel, the Court enters the following Case Management Order, known as Case Management Order No. 1 ("CMO1"), which may be referred to herein as the "Order." The Court attempted to meet the needs of the parties and requests of counsel when fashioning this case management order but made its own determination of the most appropriate method of managing this litigation.

Discovery shall proceed in an orderly fashion. The Arizona Rules of Civil Procedure shall govern in this case except where modified by this Order. With the exception of State and Federal Freedom of Information Act ("FOIA") requests, parties subject to this Order shall use their best efforts to ensure that discovery takes place in accordance with this Order.

This Order is meant to provide orderly and equitable management of this case. Any party to this case may seek to modify the terms of this Order where, upon good cause shown, the interests of justice require such modification. This case and all parties involved therein are subject to this Order, except as otherwise noted.

Considering this matter has been transferred to the Arizona Complex Civil Litigation Court, and in accordance with the *Initial Report of the Committee to Study Complex Litigation* dated May 17, 2002, the *Deskbook on the Management of Complex Civil Litigation* ("Complex Litigation Deskbook") prepared by the Judicial Council of California will be used to guide discovery and pre-trial proceedings in these Consolidated Cases.

The disclosure obligations set forth in Ariz. R. Civ. P. 26.1 shall be maintained and enforced, except as otherwise specifically identified or modified in this Order.

Disclosure is not phased. This Order shall not be interpreted as suspending or modifying the supplementation requirement under Ariz. R. Civ. P. 26.1, which requires additional or amended disclosures to be made seasonably, but in no event more than thirty (30) days after the information is revealed to or discovered by the disclosing party.

The duty to provide supplemental disclosures is a continuing duty, which duty is neither suspended nor superceded by this Order. The continuing duty to seasonably supplement disclosures shall also transcend the different discovery phases set forth in this Order. All parties are ordered to periodically evaluate their current disclosures to verify whether they are in compliance with their disclosure obligations and continuing duty to seasonably supplement, pursuant to Ariz. R. Civ. P. 26.1.

A party may incorporate by reference in its Initial Disclosure Statement, or any supplemental disclosure statement, any answers to Interrogatories and/or responses to Requests for Production of Documents. However, a party incorporating by reference its answers to Interrogatories and/or responses to Requests for Production of Documents shall specifically identify by page and line number the place in the Initial Disclosure Statement, or any supplemental disclosure statement, where the answer/response may be found, and the party shall specifically identify by document identification number and a description of the specific location, paragraph and line in each document where the answer/response may be found, if reference is made to a document identified in the Initial Disclosure Statement, or any supplemental disclosure statement.

References to disclosure statements and documents produced by a party (especially when voluminous documents are involved) shall not be used as a subterfuge to providing an appropriate answer/response to the Interrogatories and/or Requests for Production of Documents. Moreover, any such reference shall be in sufficient detail to permit the reviewing party to locate and to identify, as readily as can the disclosing party, the provisions of the disclosure statements and documents from which the answer/response may be derived or ascertained.

The Court expects the maximum usage of information technology from all parties to these cases, which includes digital exchange of discovery and disclosure, service of pleadings by e-mail or in digital format, and presentation of evidence at hearings and trial.

All document exchanges are to be electronic, on CD, and with an accompanying database including a tab delimited file containing the agreed upon coding identified in paragraph 3 and a "load file" (in .dii format for Summation) to allow retrieval of the

individual images as documents. While it may be necessary to exchange hard copies in the short term, as soon as practicable afterward the party should supplement with a CD. To the extent practicable, counsel shall try to minimize the number of CDs and maximize the content per CD.

The documents should be scanned, whenever possible, as either black and white single page Group IV TIFF files or color JPEG files, in non-compressed format.

The following fields and information are to be exchanged along with the images:

| Proposed Field | | Information Contained in Field |
|---|---|---|
| To | | Recipient of the document, last name first. |
| From | | Author of or from whom the document originated, last name first. |
| Date | | The date of the document. |
| Title | | The complete title of the document or, in the case of a letter or memo, the "Re:" line or subject matter of the document. |
| Type | | A description of the type of document. Examples include 'letter', 'memo', MSDS', 'pleading', 'newspaper article', etc. |
| Beg. No. | | Beginning Bates number. |
| End. No. | | Ending Bates number. |

To the extent technology allows, the image tag (image file name) and the Bates number are to be the same.

The Johnson Defendants will maintain a list of those parties that have a standing order for all CDs. Each party on the standing order list will automatically be provided with a copy of every CD produced by every party. Notice of production of CDs (including the name of the party making the production, the name of the CD and the date of the production) is to be given to all parties so any party not on the standing list may order a copy of any particular CD.

A cost of $50.00 per CD will be charged by the producing party and the cost is to be paid within ten (10) business days from the date of the CD "invoice" by each receiving party.

All copies of documents or pleadings provided to the Court after the date of this Order shall not be submitted in printed form but electronically mailed to cvj12@superiorcourt.maricopa.gov. Original pleadings to be filed with the Clerk of the

Superior Court must still be filed in paper format until the implementation of the e-filing system for these cases.

All requirements of the Local Rules of Practice for Maricopa County concerning forms of papers and the length of motions and memoranda are not waived and require prior approval of the Court to deviate from the requirements.

Due to the complexity of the issues and the voluminous nature of relevant documents, the Court will appoint a Special Discovery Master in this case. Counsel shall consult and attempt to agree on a Special Discovery Master by March 17, 2006. Upon agreement, counsel shall move this Court for an Order Appointing Special Discovery Master. If counsel cannot agree on a Special Discovery Master, then counsel should submit potential Special Discovery Masters to this Court on March 17, 2006 and the Court will appoint a Special Discovery Master.

An objection to a decision of the Special Discovery Master does not operate as a stay of the discovery order or requirement.

I. DISCOVERY PLAN

Initial Disclosure Statements under Ariz. R. Civ. P. 26.1 were to be simultaneously exchanged on November 10, 2005, which deadline was previously negotiated by the parties. The only exception with regard to Ariz. R. Civ. P. 26.1 disclosures is with respect to expert witness disclosures, which shall take place in the manner set forth hereinafter.

In the Initial Disclosure Statements exchanged on November 10, 2005, any defendant was allowed to disclose any person or entity not a party to the litigation who alleged, caused or contributed to plaintiff's claimed damages. The designation of such non-parties at fault were to meet the requirements of and be presented in accordance with Ariz. Rev. Stat. §12-2506 and Ariz. R. Civ. P. 26(b)(5). The burdens and requirements under Arizona law for designating non-parties at fault have not been modified, shifted or suspended by any provision of this Case Management Order.

The parties are to exchange all known discoverable documents and those documents identified in discovery responses and/or identified in each party's disclosures on or before March 18, 2007. All additional documents that are discoverable and/or required to be disclosed shall be produced in accordance with Ariz. R. Civ. P. 26.1, and/or in accordance with each party's discovery obligations under the Arizona Rules of

Civil Procedure.

Each party shall preserve all documents and other records containing information potentially relevant to the subject matter of this litigation. Each party shall also preserve any physical evidence or potential evidence and shall not conduct any testing that alters the physical evidence without notifying opposing counsel unless counsel stipulate to the test or upon Order of this Court. The parties shall not erase or otherwise destroy or alter electronic evidence including computer files of documents and electronic mail except upon Order of this Court.

The parties may begin non-expert written discovery, including interrogatories, requests for production of documents, and requests for admissions on March 1, 2006. The parties agree that the presumptive limits on numbers of written discovery requests set forth the in Ariz. R. Civ. P. 33.1, 34(b), and 36(b) should not apply. No party shall engage in unreasonable discovery and the parties shall attempt to avoid duplicative requests. Each party shall individually respond to every request directed to it or make it clear that they are individually joining in another party's response.

The parties shall meet and confer on or before March 17, 2006 to determine those fact witnesses expected to be called to testify at trial and develop a list of witnesses to be deposed. A list of witnesses "expected" to be called to testify at trial should be narrower and more restrictive than a "may call" witness list (including that provided with a party's Ariz. R. Civ. P. 26.1 disclosure statement), but not as restrictive as a "will call" witness list.

Each party shall delegate one person to confer with other such delegates in order to schedule depositions. The parties shall employ a round robin or similar approach to ensure that each party has a fair opportunity to depose persons on their respective lists in, as much as possible, the order in which the putative deponents were set forth on the parties' lists.

Depositions witnesses shall be conducted in three week cycles beginning no later than April 3, 2006 and shall continue according to the following schedule:

Cycle 1 –May 1, 2006 through May 19, 2006
Cycle 2 – May 30, 2006 through June 16, 2006
Cycle 3 – June 26, 2006 through July 14, 2006
Cycle 4 – July 24, 2006 through August 11, 2006
Cycle 5 – August 21, 2006 through September 8, 2006
Cycle 6 – September 18, 2006 through October 6, 2006

Cycle 7 – October 16, 2006 through November 3, 2006
Cycle 8 – November 13, 2006 through December 1, 2006

Additional depositions may be taken starting January 8, 2007 and continuing through December 7, 2007. The parties will submit a schedule on or before December 1, 2006 regarding the cycles for conducting such depositions.

Only upon the consent of all parties or upon a showing of good cause to the Special Discovery Master may additional witnesses or corporate deposition topics be added to the list developed at the March 17, 2006 meeting. The parties may double-track witnesses in order to expedite completion of discovery.

Each cycle contains three weeks of depositions. The first week of depositions in each cycle shall be designated for the defendants, the second week of depositions shall be designated for the plaintiffs, and the third week of depositions shall be designated for the third party defendants. This format shall continue for the remaining weeks allowed for the deposition of fact witnesses.

The parties shall meet and confer on or before July 14, 2006 regarding their duty to consider alternative dispute resolution under Ariz. R. Civ. P. 16(g)(2). The parties shall jointly submit a report to the Court regarding the Ariz. R. Civ. P. 16(g)(2) conference on or before July 28, 2006. The report shall identify and discuss all stipulations and agreements entered regarding the parties' duty to consider alternative dispute resolution, and/or the respective positions of the parties if stipulations or agreements regarding alternative dispute resolution could not be reached during the conference.

Deposition notices should be delivered at least two weeks before the week scheduled for the depositions identified in the notices. In the event that any group of parties does not designate witnesses to be deposed for their designated week or any portion of that week, then any other group of parties may notice depositions, at least ten days before the deposition date, on the unused days without compromising its right to take depositions during its regularly designated week.

The parties may also inspect lands related to this case as provided by Ariz. R. Civ. P. 34 and 35.

The parties shall conclude all factual discovery, including depositions, no later than December 31, 2007 ("Factual Discovery Cutoff"). Upon motion or stipulation of one or more of the parties, reasonable extensions may be permitted by the Special Discovery Master. All fact trial witnesses should be identified ninety (90) days before

the Factual Discovery Cutoff to ensure a reasonable opportunity for discovery. For trial witnesses not so identified, related discovery may proceed after the cutoff.

Plaintiff and Counterclaimants shall disclose all testifying experts and expert reports regarding liability and damages issues on or before January 18, 2008. Any interested party shall also disclose all testifying liability experts and expert reports supporting the claims and designations of fault or comparative fault against third party defendants or non-parties at fault on or before January 18, 2008.

Defendants and Counterdefendants shall disclose all testifying experts and expert reports regarding liability and damages issues on or before February 22, 2008. Any interested party shall disclose testifying liability experts and expert reports refuting the claims and designations of fault or comparative fault against third party defendants or non-parties at fault on or before February 22, 2008.

Plaintiff and Counterclaimants shall disclose testifying rebuttal experts and rebuttal expert reports regarding liability and damages issues on or before March 28, 2008. Any interested party shall disclose testifying rebuttal liability experts and rebuttal expert reports for claims and designations of fault or comparative fault against third party defendants or non-parties at fault on or before March 28, 2008.

Expert disclosures shall be in the format prescribed by Fed. R. Civ. P. 26(a)(2)(B).

All parties shall exchange lists of expert witnesses whose depositions will be taken during the first two weeks of expert depositions on or before February 29, 2008. The parties shall then meet and confer on or before March 14, 2008 to develop a schedule for the first two weeks of expert depositions. The parties shall also deliver notices of deposition for the first two weeks of expert depositions on or before March 17, 2008.

Expert witness depositions shall begin on March 31, 2008. The expert witness depositions will be conducted every other week beginning on this date, with the parties to coordinate and schedule depositions according to subject matter, so as to minimize the cost to the parties and allow opposing experts to be in attendance at the depositions. The expert depositions should be taken in an order similar to the production of the expert disclosures, with depositions of plaintiff's and counterclaimants' experts being taken first, defendants', counterdefendants' and third-party defendants' experts being taken second, and rebuttal experts being taken third. Deposition notices for the expert depositions shall be delivered at least two weeks before the week scheduled for the depositions, except with respect to the first two weeks of depositions as set forth

hereinabove. Expert depositions shall be completed by June 27, 2008.

All discovery shall be completed by August 29, 2008.

II. PRE-TRIAL PREPARATION. MOTION PRACTICE, AND JURY TRIAL

At least one hundred twenty (120) days prior to trial, but no earlier than June 27, 2008 unless approved in advance by the Court, the parties shall file all dispositive motions and motions relating to the admissibility of expert witness testimony or other evidence.

At least seventy (70) days prior to trial, the parties shall participate in a mandatory joint settlement conference or mediation regarding all issues and claims. If the parties cannot agree on a settlement conference judge or mediator, then the settlement conference or mediation shall take place before the Court or an individual appointed by the Court.

At least sixty (60) days prior to trial, each party shall file its final list of "will call" witnesses and its final list of exhibits. The parties may take the depositions of any witness identified in the final "will call" witness lists that had not been deposed during previous discovery. All depositions must be completed no later than thirty (30) days prior to trial.

At least sixty (60) days prior to trial, the parties shall meet and confer to discuss stipulations on exhibits and use of depositions during trial, and the parties shall also exchange all exhibits and depositions to be used during trial.

At least forty-five (45) days prior to trial, all parties shall participate in a final pre-trial conference before the Court.

At least thirty (30) days prior to trial, the parties may each provide proposed jury instructions and a proposed jury verdict form to the Court.

At least thirty (30) days prior to trial, and depending upon whether the Court will allow the parties to directly voir dire the jury venire, the parties may submit requested questions for voir dire.

At least thirty (30) days prior to trial, each party may submit a memorandum regarding objections to trial exhibits on which the parties could not reach a stipulation or

agreement. Each party may also file a memorandum regarding objections to the admissibility of any deposition testimony on which the parties could not reach a stipulation or agreement.

At least fifteen (15) days prior to trial, each party shall deliver to the Court a Bench Book. At this time, deposition testimony excerpts to be used during trial shall be delivered to the Court.

The Court anticipates that the jury trial will begin in September of 2008.

## III. DISCLOSURE REQUIREMENTS, INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND INDEPENDENT MEDICAL EXAMINATIONS

The rules regarding voluntary disclosure, as set forth in Ariz. R. Civ. P. 26.1 shall remain in effect except as specifically modified by this Order. The parties shall seek, to the greatest extent practicable, to avoid serving duplicate interrogatories, document production requests, and requests for admissions on any party. Where appropriate, parties are to coordinate written discovery to accomplish this objective.

During any phase of discovery, any party obtaining documents from any federal, state, municipal or other government agency for purposes of this litigation, by means of the Freedom of Information Act or any similar federal, state or local law, shall serve a copy of the written request used to obtain such documents on all other parties to the litigation.

Public records requests for information from a public agency party must be made through the attorney representing that party. Any prior information received from such a party through a public request for information must be disclosed and identified as such within 40 days of the entry of this Order.

## IV. CONFIDENTIAL INFORMATION

The parties recognize that discovery in these cases may include information and documents constituting and containing trade secrets and other confidential research, development or commercial information within the meaning of Ariz. R. Civ. P. 26(c). Such information and documents shall be provided subject to the terms of a Protective Order.

All information and documents containing confidential information relating to Plaintiff's archaeology claim shall be provided subject to the terms of the Archaeology Confidentiality Order submitted concurrently with this proposed Order.

Documents may be imaged in a mutually acceptable format and with a minimal database included and may be produced in this format. All imaged documents and the minimal included database shall provide at the very least a reasonably complete and accurate description of each imaged document using the document fields as aforementioned. Reproductions shall be made at cost, and the expense of such reproductions shall be borne by the party making the request. Originals and hard copies are to be maintained by the party producing them. Originals are to be kept in a designated office, and shall be made available for inspection at a mutually convenient agreed upon time. Scanned images of a document are deemed, absent evidence to the contrary, to be accurate and correct copies of the original. Such scanned images may be admissible as the original, and no foundational objection may be made on that basis, absent evidence to the contrary. However, the parties reserve the right to object to the authenticity or admissibility of the original document from which the scanned image is made.

## V. DEPOSITIONS

Prior to the taking of non-expert depositions, each party shall identify in advance a list of witnesses that they wish to depose. Counsel shall consult in advance with opposing counsel and proposed deponents in an effort to schedule depositions at a mutually convenient time and place. Notices of Deposition may be served by facsimile and/or e-mail on all parties, but must be received by all parties at least 14 days in advance of the deposition. Any party intending to use the statement, affidavit or declaration of a witness at deposition must provide the deponent (through counsel) and all counsel with a copy of the statement, affidavit or declaration ten days prior to the deposition.

Except by agreement of counsel or by leave of Court, for good cause shown, non-expert depositions shall be limited to a total of not more than eight hours per witness. The parties will endeavor to complete non-expert depositions within four hours whenever possible. Expert depositions shall be limited to a total of not more than 12 hours per witness. The parties shall always exercise due diligence to expedite the depositions and no party shall conduct the depositions for purposes of delay or to harass the witness of a party. Parties intending to examine a witness shall make reasonable efforts to confer and coordinate their examination in this regard.

The Court expects the parties and the parties' trial witnesses over whom the party has control, including expert witnesses (and former employees where practicable), to present them for deposition on notice (without the issuance of a subpoena) once a mutually convenient date for the deposition (within the time frame set forth above) has been agreed upon. Failure to do so without good cause may result in a Court sanction of non-compliant witnesses.

Except for good cause shown, all fact witness depositions shall be taken in Phoenix, Arizona. Corporate directors and officers of any party, however, may be taken at or near the director's or officer's principal office.

Within three business days before any deposition, the party presenting or representing the witness shall advise the party noticing the deposition of the need for an interpreter.

The parties have agreed upon a single court-reporting firm to handle all depositions. Exhibits to depositions taken in this litigation shall be numbered sequentially. The original exhibits shall be maintained by the court-reporting agency at a single central location. The exhibits are to be logged and described on a single index.

Upon proper notice, depositions may be videotaped or may be conducted telephonically. Additionally, pursuant to Ariz. R. Civ. P. 30, 31, and 32, counsel are authorized to take video-conferenced depositions as outlined below, provided that any party who desires to do so may participate in the video-conference deposition by teleconference at that party's expense:

1. Counsel will use Griffin & Associates (G&A) and Legal Video Specialists ("LVS") to set up all video-conferencing depositions.

2. G&A would be responsible for coordinating the logistics of the videoconferencing, including making arrangements for parties who chose to do so to participate by teleconference. Because these logistics are more complicated than for ordinary depositions, counsel must have decided upon a video-conferenced deposition before sending out the notices of deposition, and this should simply be part of the normal deposition scheduling process between the parties. All discussions concerning video-conferenced depositions must include discussions with G&A *before* the actual notices are distributed.

3. The notices of depositions should indicated, "Notice of Video-conference Deposition," and should contain itemized pricing information from counsel and

G&A as set forth below:

| | | | |
|---|---|---|---|
| Host Location | | Facility and Address | |
| Remote Location | | Facility and Address | |
| Host Cost | | | /hr(e.g., 250/hr.) |
| Remote Cost | | | /hr (e.g., $250/hr.) |
| Transmission Cost | | | /hr (e.g., $150/hr.) |
| Estimated Deposition Length | | | Hours |
| Estimated Total Cost of Video-conferencing | | | |

**Itemized Pricing**

4. The total video-conferencing costs associated with a video-conferenced deposition (including the Host Cost, Remote Cost and Transmission Cost) will be equally split equally among the parties attending and/or participating in the video-conferenced deposition from the host location. Parties electing to travel to the remote location or participate only by teleconference will not be charged any video-conferencing costs. Video-conferencing costs include both the host and remote locations, and can extend to the use of counsels' video-conferencing facilities. The maximum hourly cost is expected to be no more than $600/hr (host location charging $250/hr, remote location charging $250/hr, and a $100/hr transmission/long distance charge). The minimum hourly cost is expected to be $100/hr for the transmission/long distance charge. The actual costs will be determined by G&A as they explore the availability of different facilities and different locations – host and remote. Whatever the final arrangements, all cost information would then be communicated by G&A to counsel for inclusion in the notice of video-conferenced deposition. In that manner, all counsel can fairly evaluate whether they will travel to the remote location, participate in the video-conference from the host location, or not participate at all. Each party participating in the video-conference deposition via teleconference will pay its own teleconference costs.

5. Video-conferencing costs include cancellation costs. The party scheduling the video-conferenced deposition would be charged with the responsibility for canceling it in a timely fashion. Timely cancellation is at least 48 hours notice to G&A before the commencement of the deposition.

6. Video-conferencing costs include charges for unused time. If a deposition concludes in less than the amount of time reserved for the deposition, participants could be charged full price for the full amount of unused time, or a percentage thereof.

7. Issues relating to use of video-conferenced depositions will be directed to the Special Discovery Master.

Real time reporting may be used at the option of the parties. No part of a videotaped deposition shall be released or made available to any member of the public unless the witness has been given at least twenty (20) days written notice of the intent to release the videotape. In no event shall excerpts from a videotaped deposition covering confidential material be released to anyone who has not signed the Protective Order.

The Arizona Rules of Civil Procedure shall govern objections made during depositions. Any claim of privilege or work product must be expressed with sufficient precision as to the claim to allow the parties (and later the Court and/or Special Discovery Master) to assess the applicability of the privilege or protection. An objection made by one attorney shall be considered as an objection on behalf of all attorneys.

## VI. MOTIONS

No dispositive motions (Motions for Summary Judgment) shall be filed until after the completion of expert discovery except for good cause shown. The date for filing Motions to Dismiss has passed and none will be filed. All motions relating to the admissibility of expert witnesses' testimony or other evidence, shall be filed at least ninety (90) days before trial.

Any party who has not joined in a motion, pleading or other document may join such motion, pleading or other document by filing with the Court a "Statement of Joinder" clearly identifying the document joined. The answer or response of the opposing party to the motion, pleading or document shall be deemed the answer or response to all parties who have filed such a Statement of Joinder, but the opposing party shall have the right, at its election, to respond separately to additional facts or argument made by any joining party.

## VII. COMMUNICATIONS BETWEEN COUNSEL

The Court recognizes that cooperation among the parties is essential for the

orderly and expeditious resolution of this litigation. Communication among counsel shall not be deemed a waiver of the attorney-client privilege or the protection afforded by the work product doctrine, or of any other privilege to which a party may be entitled, and shall be protected by a joint privilege. Cooperative efforts in the prosecution and defense of this litigation shall not be construed as a waiver of any right or defense of any party, and shall not be communicated to any jury. Court and counsel acknowledge that this cooperation may be formalized in a joint agreement, which, itself shall be deemed privileged, confidential and not subject to disclosure.

VIII. STATUS CONFERENCES

The Court shall schedule status conferences approximately every ninety (90) days. At the status conferences, the parties shall be prepared to discuss the status of discovery, all motions pending before the Court, and any issues the parties believe the Court needs to address. A Joint Status Conference Report shall be prepared for each status conference. In accordance with the Complex Litigation Deskbook, frequent informal conferences between the judge and the attorneys also should be encouraged because it promotes communication among counsel and the judge and tends to resolve problems before they result in the filing of motions.

DONE IN OPEN COURT the_____day of_____, 2006.

_____
Honorable Kenneth L. Fields

**SUPERIOR COURT OF ARIZONA**
**MARICOPA COUNTY**

**No. CV 2005-002692**

**EXHIBIT A**

1. Although additional protective orders may be contemplated in this case, this Order is limited to documents and other tangible things, regardless of the storage media, and the information contained therein, which relate to the location of archaeological discoveries, places, or objects and are obtained as a result of the above captioned litigation ("the Documents"). The Documents will be marked ARCH-PROT.

2. The Documents shall remain confidential, protected, and non-public, except as authorized by this stipulation.

3. The Defendants and Third Party Defendants (the "Defendants") shall disclose the Documents only to:

a. attorneys or co-counsel of firms involved in this litigation; or
b. staff, law clerks, or paralegals of firms involved in this litigation; or
c. Registered Professional Archaeologists or Archaeologists who hold appropriate permits from the Arizona State Museum; or
d. pursuant to stipulation of the Parties; or
e. as otherwise ordered by the Court.

4. Defendants' Counsel and Third Party Defendants' Counsel shall be responsible for maintaining the confidentiality of the Documents in their possession, shall ensure that the Documents are disseminated only to those individuals authorized by this Order, shall instruct those individuals as to the confidential, protected, and non-public nature of the Documents, and shall obtain their agreement to maintain the confidential, protected, and non-public nature of the Documents.

5. Any Defendant or Third Party Defendants to this action may send the Documents to an outside entity to be copied or converted to electronic media, provided

that said outside entity is provided with a copy of this Order, instructed regarding the confidential, protected and non-public nature of the Documents, and agrees to abide by this Order.

6. The Documents may be disclosed to witnesses during a deposition, provided that the witness is first informed of the confidential, protected, and non-public nature of the Documents or information and agrees to maintain that confidentiality, and that any Documents attached as exhibits to the deposition are kept under seal. Court reporters and videographers must be provided with a copy of this Order, instructed regarding the confidential, protected and non-public nature of the Documents, and agree to abide by this Order. This Order shall not otherwise restrict the use of the Documents during depositions.

7. The Documents, and information contained in the Documents, may be disclosed to the Court, provided such Documents are disclosed in camera or filed under seal. Any papers filed with the Court that contain excerpts or descriptions of the Documents shall be filed under seal.

8. If any Defendant wishes to disclose one or more of the Documents to individuals other than those authorized by the Order, such Defendant shall first seek a stipulation of the Parties to this action to authorize such use or disclosure. Any individual to which the documents are disclosed must be provided with a copy of this Order, instructed regarding the confidential, protected and non-public nature of the Documents, and agree to abide by this Order. If no stipulation is reached, the objecting Defendant may seek review by the Court to determine whether the Document or Documents should remain confidential.

9. This Order may be enforced by any Party to this litigation, and the Court may impose appropriate sanctions for violations of this Order.

10. This Order supersedes any prior agreement of the parties or previous orders issued by this Court related to the subject matter of this Order.

# ATTACHMENT 4

Michael K. Jeanes, Clerk of Court
***Electronically Filed***
Michelle Paigen
Transaction ID 10523645
Feb 7 2006 6:16PM MST

Lat J. Celmins (004408)
Michael L. Kitchen (019848)
**MARGRAVE CELMINS WHITEMAN, P.C.**
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*Attorneys for George H. Johnson and Jana S. Johnson, The George H. Johnson Revocable Trust and George H. Johnson and Jana Johnson, co-trustees, The Ranch at South Fork, LLC, General Hunt Properties, Inc., and Atlas Southwest, Inc.*

**SUPERIOR COURT OF ARIZONA**

**COUNTY OF MARICOPA**

| | |
|---|---|
| STATE OF ARIZONA, *et.al.*,<br><br>Plaintiffs,<br><br>v.<br><br>JOHNSON INTERNATIONAL, INC., *et. al.*<br><br>Defendants. | Case No. CV2005-002692<br><br>**COUNTERCLAIMANTS' SURREPLY IN OPPOSITION TO COUNTERDEFENDANTS' MOTION TO DISMISS**<br><br>(*Assigned to the Honorable Kenneth L. Fields*) |

Counterdefendants previously admitted that a Notice of Violation ("NOV") is "nothing but a letter." But, **for the first time in their Reply**, Counterdefendants attempted to defend Arizona Department of Environmental Quality ("ADEQ") Director Stephen Owens' defamatory statements on grounds that NOVs equate to criminal offenses. Principles of fairness and justice allow Counterclaimants an opportunity to respond.

Counterdefendant Owens admits that he accused the Johnson entities of "deliberately choosing not to comply" with environmental laws and "violat[ing] them on numerous occasions in the past." Reply at 7. In their Reply, Counterdefendants allege that their defamatory statements are true "based upon the historical record" because the Johnson entities had received NOVs in the past. Counterdefendants' prior words and conduct flatly contradict the notion that an NOV evidences deliberate violations of law.

Mr. Owens, as ADEQ's Director, knows the "historical record" concerning the La Osa and King Ranches in Pinal County. The "historical record" shows that ADEQ issued an NOV to Johnson International, Inc. ("JI") regarding its activities on the La Osa and King Ranches. In response, JI filed a declaratory action against ADEQ to invalidate the NOV. During discussions related to the NOV and the declaratory action, Assistant Attorney General Mitchell Klein expressly stated that an NOV is "**nothing but a letter, and it has no force or effect in law.**"[1] *See* March 17, 2004 Letter from Mitchell Klein, attached at Exhibit 1 (emphasis added). Mr. Klein's characterization of the NOV as "nothing but a letter" admits that NOVs do not constitute evidence of "violations of law." The NOVs do not support Mr. Owens' defamatory statements.

Mr. Klein memorialized the ADEQ position in a Stipulation for Dismissal of the declaratory action lawsuit by reiterating that the NOV is "simply a letter." *See* Stipulation to Dismiss at ¶ 1 (attached as Exhibit 2). The same Stipulation, which Mr. Klein signed on behalf of Counterdefendants, also admits that

> [t]he NOV does not compel any action by [JI] ... and does not prohibit [JI] from doing anything on or with any property owned by [JI] ... , including clearing, grading, excavating, stockpiling and other land use activities. *Id.* at ¶ 2.

Counterdefendants made it clear both in the letter and the Stipulation that the NOV had "no force or effect in law" and that the NOV did not preclude JI from continuing its activities on the ranches. *See* Exhibit 1; Exhibit 2 at ¶ 1-2. Counterdefendants cannot in good faith claim that Mr. Owens' statements are "based on the historical record," which in fact consists of:

a) "[N]othing but a letter"; and

---

[1] In that letter, Mr. Klein also stated that "the NOV letter involved does not compel any action on the part of your client, and does not prevent your client from doing anything on or with his property." Further, it "does not have any affect [sic] on your client's rights, duties or privileges ...." Exhibit 1.

b) Several assurances by Mr. Klein that the NOV did not preclude JI from continuing its activities.

Nothing in Mr. Klein's correspondence or the Stipulation evidences "deliberate non-compliance."

Mr. Owens knew his statements were false. He maligned Johnson International to the public and the press knowing that "the historical record" did not support his comments. Qualified immunity does not protect defendants who exhibit such flagrant disregard for the truth.

DATED this 7th day of February, 2006.

**MARGRAVE CELMINS WHITEMAN, P.C.**

By /s/ Lat J. Celmins

Lat J. Celmins
Michael L. Kitchen
*Attorneys for Johnson Defendants and Counterclaimants*

**Copy** of the foregoing delivered via LexisNexis File and Serve this 7th day of February, 2006 to:

Honorable Kenneth L. Fields
**MARICOPA COUNTY SUPERIOR COURT**
201 West Jefferson
Phoenix, Arizona 85003

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By Michael L. Kitchen

# ATTACHMENT 5

**Denied** **Judge Kenneth Fields**
*Judge of Superior Court*

Michael K. Jeanes, Clerk of Court
***Electronically Filed***
Michelle Paigen
Transaction ID 10635174
Feb 22 2006 1:21PM MST

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Attorneys for Plaintiff

**ARIZONA SUPERIOR COURT**

**MARICOPA COUNTY**

| | |
|---|---|
| STATE OF ARIZONA et al.,<br>Plaintiff,<br>-VS-<br>GEORGE H. JOHNSON and JANA S. JOHNSON, husband and wife, et al.<br>Defendants.<br>GEORGE H. JOHNSON and JANA S. JOHNSON, husband and wife, et al.,<br>Third Party Plaintiffs,<br>-VS-<br>3F CONTRACTING, INC. et al.,<br>Third-Party Defendants. | Case No: CV2005-002962<br><br>**PLAINTIFF STATE OF ARIZONA'S MOTION TO POSTPONE STATUS CONFERENCE**<br><br>**(EXPEDITED CONSIDERATION REQUESTED)**<br><br>(Non-Classified Civil–Complex)<br><br>(Assigned to the Hon. Kenneth L. Fields) |

GEORGE H. JOHNSON et al.,

Counterclaimants,

-VS-

ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY et al.,

Counter Defendants.

The State of Arizona, by and through its Attorney General, Terry Goddard ("the State"), and on behalf of the Arizona Department of Environmental Quality, the Arizona Department of Agriculture, the Arizona State Land Department, the Arizona State Museum, and the Arizona Game and Fish Commission, hereby request that the Court postpone the Status Conference currently set for February 27, 2006, for the reasons set forth below. The State requests expedited consideration of this Motion for the reason that the Status Conference is only four days away.

## Introduction

The State reluctantly requests that the Court postpone its Status Conference, currently set for February 27, 2006, at 4:00 p.m., for thirty (30) days on the grounds that after two months of discussing and circulating drafts of *joint* case management order, the Defendants/Counterclaimants have just served the State with a complex and lengthy document (25 single spaced pages) that bears no resemblance to the negotiated version, and contains over 50 new provisions, most of which concern topics that have not been discussed by the parties. Given the breadth and complexity of the new document, there is simply not time before next Monday's Status Conference for the five plaintiff agencies ("the State") to meaningfully analyze the new provisions, let alone to develop and propose joint alternatives with respect to those that the State finds unacceptable.

## The Pertinent Facts

In the Court's May 13, 2005 minute entry, the Court ordered: "In advance of [the Court's next status conference], counsel shall meet and confer and prepare a Joint Scheduling Statement setting out those areas of agreements and disagreements with regard to a proposed schedule of ongoing discovery."

1. In anticipation of the status conference (then scheduled for January 9, 2006), the Defendants prepared a draft of a case management order (CMO) addressing the topics contemplated by the Court's minute entry. The State and Defendants met on December 2, 2005 to discuss the draft.

2. Following the December 2, 2005, conference, the State prepared a red-lined revision of Defendants' draft that proposed modifications and made various comments. The State circulated the red-lined draft to all parties on December 12, 2005.

3. The parties met again on December 15, 2005 and discussed the December 12 draft. At that meeting the parties identified three areas of disagreement for briefing (whether defendants should be entitled to use public records requests in addition to document discovery, whether the Court should appoint a discovery master, and the effect of the CMO on the counterclaims), and appeared to converge on a mutually acceptable structure for the proposed CMO.

4. After a subsequent telephonic discussion with defense counsel to address loose ends, the State circulated a revised draft on December 21, 2005, and requested comments. Neither Defendants nor Counterclaimants indicated any disagreement with the December 21, 2005 draft. In the interim, the Court postponed the status conference until February 13, 2005.

5. On January 25, 2006, in anticipation of the February 13, 2006 status conference, the State again circulated the December 21, 2005 draft to all counsel, stating that:

> On December 21 we circulated a draft of the [CMO] requesting your comments. To date we have received no response. We are currently scheduled for a Case Management Conference with Judge Fields on February 13, 2006 (unless the Court grants Harry's motion to continue), and we would like to provide the Court with the proposed CMO (noting areas of disagreement, as in the current draft) at least a week in advance. Please try to provide proposed revisions and inserts by the end of the week to facilitate this process. . . . [Emphasis added.]

6. Once again, no party indicated any substantive disagreement with the December 21, 2005 draft. Indeed, on the day the State circulated the above e-mail, defense counsel left a message for State's counsel indicating that his firm would get its modifications to the State by the end of the week and that he had given his changes to a colleague who would respond. The only change mentioned by counsel was to request that the State transfer the parties' discussion of the three disputed issues (public records requests, special masters, and effect of the CMO on the counterclaim) to a separate joint brief, so that the draft would be easier to read. Counsel further indicated that he had no other real substantive changes to the document but he would ask his colleague where he was at. Thereafter, neither counsel proposed additional changes.

7. On February 10, 2006, with the status conference set for February 21, 2006, the State again circulated the December 21, 2005 draft to all counsel, stating, *inter alia,* that:

> The case management conference with Judge Fields is set for February 27, and it is contemplated that the proposed CMO be agreed to the extent possible. Let's circulate any additional comments/proposed inserts by noon on February 15, so that we may attempt to resolve any outstanding issues and still give the Court

adequate time [to] review. We propose to submit the CMO on February 21. Thanks in advance for your cooperation."

8. By noon on February 15, 2006, the State had received no response from Defendants/Counterclaimants. On the following day, the State called defense counsel to discuss the matter and was informed for the first time that the Defendants/Counterclaimants had been preparing a different draft and circulating it among themselves. The State inquired as to when the Defendants/Counterclaimants planned to share the draft with the State and pressed them to do so as soon as possible. The draft arrived on February 17, 2005, the Friday afternoon of President's Day weekend—four business days before the scheduled status conference.

The Defendants New CMO

The lengthy new document submitted by Defendants (25 single-spaced pages) bears no resemblance to the draft negotiated by the parties during the past two months. It not only fails to include some provisions discussed without disagreement (including one requested by Defendants' themselves), it includes over 50 new provisions and numerous topics never before mentioned by either party, some of which could have a major effect on the conduct of the litigation. The new provisions include:

- Incomplete assertions concerning the status of disclosure.
- Self-serving and unnecessary statements regarding the effect of legal defenses raised in Defendants' disclosure.
- Unacceptable procedures and deadlines for identifying witnesses to be deposed and corporate deposition topics.
- Detailed new procedures for managing order of non-expert depositions.
- Self-serving procedures and unreasonable deadlines for listing corporate deposition topics.

- A provision outlining the powers to be accorded a Special Discovery Master.
- Expert procedures completely different from those set forth in the parties' negotiated CMO and Joint Management Conference Memorandum, including new provisions (i) governing disclosure of experts and expert reports, (ii) adopting staged disclosure, (iii) governing the manner of taking expert depositions, (iv) governing the timing of expert depositions, and (v) governing the completion of expert depositions.
- Provisions restricting disclosure of information claimed by defendants to be "confidential."
- Provisions governing reproduction of documents, including (i) imaging of documents, (ii) imposing cost of reproductions on the party making the request, (iii) setting procedures for maintenance of originals, and (iv) establishing standards for the admissibility of scanned images and objections to authenticity.
- A provision governing expert and non-expert depositions that is contrary to those adopted in the negotiated CMO.
- A provision prohibiting the admissibility of joint defense agreements and protecting such agreements from disclosure.
- A provision incorporating a California manual on complex litigation.
- Two provisions addressing incorporation by reference in disclosure statements, interrogatories and requests for production of documents.
- A provision imposing an obligation to use "information technology" to the "maximum" extent for disclosure, discovery and presentation of evidence at trial.
- Procedures governing the manner of document exchanges and mandating certain technology to be used for document exchanges.
- A provision mandating the manner in which documents are to be scanned.
- A provision requiring that certain fields of information be provided with images exchanged between the parties.
- A provision mandating identity between image tags and bates numbers.

- A protocol for CD distribution.
- A provision imposing cost for CD's and a method of payment.
- A provision requiring a manner of filing and service that is different from that called for in the Rules of Complex Litigation.
- Procedures for the selection of a Special Discovery Master.
- Procedures regarding rulings by a Special Discovery Master.
- A provision that may be read to impose deadlines for production of documents after those mandated by the Rules of Civil Procedure.
- An obligation to preserve digital versions of e-mails, even if already printed in hard copy form, which is contrary to the directive previously imposed by this Court.
- Procedures for alternative dispute resolution.
- New and different protocols for notices of deposition.
- A deadline for motions relating to the admissibility of expert witnesses or other evidence.
- Procedures concerning settlement and mediation.
- A deadline for witness lists.
- Procedures governing late depositions of witnesses.
- A deadline for stipulations on exhibits and use of depositions during trial.
- A deadline for the exchange of exhibits and depositions to be used during trial.
- A deadline for a final pretrial conference.
- A deadline for voir dire questions.
- A deadline for objections to trial exhibits and memoranda concerning objections.
- A deadline for submission of "bench books" and submission of deposition testimony excerpts to be used during trial.

- Procedures governing service of copies of information obtained through FOIA requests.
- Further provisions governing the taking of non-expert depositions, notices of depositions, service of notice, and procedures governing use of statements, affidavits or declaration of witness at depositions.
- A provision requiring parties to produce deponents without subpoenas.
- A provision requiring the parties to take depositions in certain locations.
- A provision governing notification of need for interpreters.
- A provision authorizing parties to take video-conferenced depositions and telephonic depositions.
- A provision requiring the parties to use particular vendors for video conferencing depositions.
- Procedures for video-conferenced depositions.
- A provision prescribing a form of notice for video-conferenced depositions.
- A provision governing cost of video-conferenced depositions and cost sharing procedures.
- A provision governing cancellation costs of video conferenced depositions, including deadlines for notification.
- A provision governing video-conferencing costs for unused time.
- A provision vesting the Special Discovery Master with powers over issues relating to video-conference depositions.
- A provision authorizing real-time reporting.
- A provision establishing procedures for and limitations on parties' abilities' to release videotaped procedures to the public.
- A procedure governing objections at depositions.
- Deadlines for all motions relating to the admissibility of expert witness testimony or other evidence.

- A provision governing joinder of motions.
- A provision governing communications between counsel.

The Court's May 13, 2005 directive that the parties "meet and confer to prepare a Joint Scheduling Statement setting out those areas of agreements and disagreements with regard to a proposed schedule of ongoing discovery" recognizes the profound effect that such documents can have on the conduct of a complex litigation. The minute entry contemplated a meaningful procedure that would culminate with a joint negotiated document and briefing on areas of disagreement. Here Defendants and Counterclaimants were engaging in such a process (*i.e.*, meeting with the State and developing a joint draft of a CMO), but for whatever reason, they switched courses—four days before the status conference—and presented the State with an entirely new document that is much longer, much broader, and decidedly different than anything previously discussed by the parties. The problem is exacerbated by the fact that there are multiple parties in this litigation, including the five plaintiff agencies, each of which is represented by different counsel, and all of which have an obligation to analyze the effects of the case management order on their respective client agencies.

In the circumstances, there will not be adequate time over the next four days for the five plaintiff agencies to meaningfully analyze the voluminous new provisions, let alone develop and propose acceptable alternatives on areas of disagreement. To provide such time, the State respectfully requests the Court to postpone its Status Conference for thirty (30) days to provide the State with a meaningful opportunity to review the new CMO submitted by the Defendants, and direct the parties to (i) enter into meaningful discussions and propose a joint case management order, and (iii) present a joint draft to the court identifying areas agreement and disagreement.

DATED this 21st day of February, 2006.

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The Honorable Kenneth L. Fields
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# ATTACHMENT 6

Michael K. Jeanes, Clerk of Court
***Electronically Filed***
Michelle Paigen
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Mar 20 2006 9:00AM MST

ARIZONA SUPERIOR COURT
MARICOPA COUNTY

| | |
|---|---|
| STATE OF ARIZONA, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>GEORGE H. JOHNSON and JANA S. JOHNSON, husband and wife, et al.,<br><br>Defendants. | Case No: CV 2005-002692 |
| GEORGE H. JOHNSON, et al.,<br><br>Counterclaimants,<br><br>v.<br><br>ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY, et al.,<br><br>Counterdefendants. | Ruling and Order re:<br><br>Motion to dismiss defendants' counterclaim and counterdefendants' motion to stay and bifurcate discovery |

The Court has under advisement the counterdefendants' motions to dismiss defendants' counterclaim and to stay and bifurcate discovery. After consideration of the pleadings, the Court rules as follows.

It is ordered denying the counterdefendants' motion to stay and bifurcate discovery. While it is correct that the counterclaim is in the nature of a permissive counterclaim that was filed without permission of Court as required pursuant to Rule 13 (e), Ariz. Rules of Civil Procedure, and in violation of this Court's order that all such actions be filed no later than June 17, 2005, it would not be in the interest of judicial economy to dismiss this action as a sanction or to stay/bifurcate discovery. The Court will entertain a request for attorneys' fees and costs by counterdefendants associated with these violations since defendants/counterclaimants did not explain their violations.

There will probably be a separate trial of the counterclaims apart from

plaintiff's action against defendants should any of the counterclaims survive pre-trial motions for summary judgment. The counterclaimants and counterdefendants only may file motions for summary judgment on or after counterdefendants file an answer. This is not permission for any other party to file motions for summary judgment.

It is ordered granting and denying counterdefendants' motion to dismiss in part. The Counterclaimants here are George and Jana Johnson, George H. Johnson Revocable Trust and Johnson International.

Any claim by Johnson International and the George H. Johnson Revocable Trust for false light invasion of privacy is dismissed since those rights are personal and can only be held by humans. *Godbehere v. Phoenix Newspapers, 162 Ariz. 335 (1989) and Medical Lab Consultants v. ABC, 931 F. Supp 1487 (D. Ariz. 1996).*

The motion is granted as to any claim by any other Johnson entity or any claim of selective and arbitrary enforcement since counterclaimants did not dispute those positions in the motion to dismiss.

The balance of the motion is denied in all respects. The Court agrees with counterclaimants that much of the basis of the motion to dismiss rests on disputed facts. The Court also agrees with counterclaimants that neither the Attorney General nor Director of the Arizona Department of Environmental Quality has an absolute privilege (immunity) but only a qualified immunity.

Counterdefendants shall file a response pleading to the counterclaim within 20 days of this order.

Done this 20th day of March 2006

*/s/Kenneth L. Fields*
Kenneth L. Fields