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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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In the matter of:

Reserve Oil & Gas, Inc., a Nevada corporation
3507 North Central Avenue, Suite 503
Phoenix, Arizona 85012

Allen and Jane Doe Stout, Sr., husband and wife
1309 West Portland Street
Phoenix, Arizona 85007-2102

Allen and Jane Doe Stout, Jr., husband and wife
1309 West Portland Street
Phoenix, AZ 85007-2102

Respondents.

Docket No. S-20437A-05-0925

**REPLY IN SUPPORT OF MOTION TO
PRECLUDE AND MEMORANDUM OF
LAW IN SUPPORT OF EXCLUSION
OF HEARSAY TESTIMONY**

Arizona Corporation Commission

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NOW COMES the Respondents, Reserve Oil & Gas, Inc., Allen C. Stout, Eugenia Stout, and Allen L. Stout, and file this, their Reply to Motion to Preclude and Memorandum of Law in Support of Exclusion of Hearsay Testimony and, in support thereof, respectfully show the as follows:

I.

PRELIMINARY STATEMENT

The Division's disregard for the rights of the Respondents in this proceeding is clear from its pleadings. This is demonstrated by the fact that the first quote in the Division's Response states, in part:

Every person who is a party to such proceedings shall have the right to be represented by counsel, to submit evidence in open hearing and **shall have the right of cross-examination.**

See, Response at p.2, quoting Article 6 of the Arizona Administrative Procedure act ("APA").

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1 The Division ignores this right to cross-examination and spends the rest of its Response
2 trying to explain why this right should not be afforded Respondents. The Division's callous
3 disregard for Respondents' rights is further demonstrated when it advocates that the "Respondents
4 will have the opportunity to cross-examine the witness and to attempt to show that the evidence is
5 untrustworthy or unreliable." Response at p. 3. This logic would preclude any Respondent from
6 ever cross-examining the author of a statement because the Division could simply have the
7 investigator testify about statements made by third-parties. All the while, denying Respondents the
8 opportunity and right to cross-examine the authors of those statements to probe "for possible errors
9 in perception, memory, sincerity, or clarity." *Larsen v. Decker*, 196 Ariz. 239, 242; 995 P.2d 281,
10 283 (Ariz. Ct. App. 2000).

11 The decision on this Motion is straight-forward, although the Division does its best to make
12 it convoluted. Section 41-1062(A)(1) of the Arizona Administrative Procedure Act ("APA")
13 provides that every person who is a party to an administrative proceeding in a contested case "shall
14 have the right of cross-examination." *See also* Arizona Administrative Code, § R2-19-115(A).
15 Respondents simply request that the Administrative Law Judge apply this language which is not
16 ambiguous or unclear.

17 II.

18 **THE CASES CITED BY THE DIVISION ARE INAPPOSITE AND**
19 **ORTIZ V. EICHLER IS ON POINT**

20 The Division's reliance on *Begay v. Ariz. Dept. of Economic Sec.*, 128 Ariz. 407, 626 P2d
21 137 (App. 1981) is curious. In *Begay*, the Court of Appeals actually reversed the decision of the
22 Appeals Board of the Department of Economic Security because "proper evidentiary safeguards
23 [were not] provided." *Begay*, 128 Ariz. at 411. The court concluded that although hearsay may
24 form the foundation for an administrative decision, such evidence must "possess [the] probative
25 value commonly accepted by reasonably prudent persons in the conduct of their affairs." The
26 hearsay evidence relied upon in *Begay* did not meet this standard, and neither does the hearsay
27 testimony of the Division's investigators with respect to investor statements.

1 The Division claims that Respondents' reliance on *Ortiz v. Eichler*, 794 F.2d 889 (3rd Cir.
2 1986, is somehow "improper." There is nothing improper about citing a case to the Administrative
3 Law Judge from another jurisdiction, particularly where the case is on point and well-reasoned. In
4 *Ortiz*, the Court interpreted the plain language of a rule that provided Respondents the right to
5 "confront and cross-examine witnesses." *Ortiz*, 794 F.2d at 895. The Court of Appeals found this
6 language "devoid of ambiguity." *Id.*

7 The Division apparently attempts to distinguish this case on the basis that the rule in *Ortiz*
8 provided for confrontation and cross-examination, while the APA guarantees the right to
9 cross-examination. The Division fails to explain how this difference is meaningful in the present
10 matter. If testimony is allowed regarding statements made by investors to Division investigators,
11 Respondents will be denied the right to cross-examination, in direct violation of the plain language
12 of the APA.

13 The Division relies heavily on *Coulter v. Industrial Comm'n of Ariz.*, 198 Ariz. 384, 10
14 P.3d 642 (App. 2000). *Coulter* is distinguishable from the present case. The most notable flaw in
15 the Division's use of *Coulter*, is the foundation of the right of cross-examination itself. The Court
16 of Appeals notes that the right of cross-examination in Industrial Commission cases has been born
17 through Court decisions interpreting the need for "substantial justice" in Industrial Commission
18 cases:

19 Although the right to cross-examination in Industrial Commission proceedings stems
20 from the statutory standard of "substantial fairness," the right is subject to reasonable
21 procedural rules. [] The Commission's rules, however, also fail to address this
22 situation squarely.

23 *Coulter*, 198 Ariz. at 387.

24 The *Coulter* Court, however, failed to consider the express statutory right to
25 cross-examination found in A.R.S. § 41-1062(A), as well as the rule guaranteeing the same found
26 in the Arizona Administrative Code § R2-19-115(A). Whatever the reason, it is clear that both
27 statutory law, and adopted rules provide the right of cross-examination.

The Court of Appeals did not rule that the written report of a deceased doctor was
admissible. The Court instead returned the case to the Administrative Law Judge and ordered that

1 the Administrative Law Judge should consider (1) the reliability of the evidence, (2) the reason for
2 the witnesses unavailability, (3) the availability of similar evidence that would preserve the right of
3 cross-examination, (4) the importance of cross-examination, and (5) any other factor that may
4 affect the analysis of "substantial justice." *Coulter*, 198 Ariz. at 388.

5 Should the Administrative Law Judge in this matter conclude it is appropriate to disregard
6 the plain language of the Statutes and Rules guaranteeing Respondents' right to cross-examination,
7 then an analysis of these issues also weighs in favor of exclusion. The reliability and completeness
8 of any statement made by the now deceased Mangurian is suspect. It is impossible to know
9 whether Mangurian harbored some grudge against Respondents encouraging him to embellish his
10 story. It is impossible to know if Mangurian, or any other investor, was asked all the relevant
11 questions by a Division investigator. As noted in Respondents' Motion, it is always more difficult
12 to tell a lie to a person to his face as opposed to behind his back. This factor weighs in favor of
13 exclusion. Mangurian is truly unavailable, a factor in favor of admission. Next, the Division has
14 conceded this is not the only evidence upon which it will rely, and exclusion of such evidence will
15 not be fatal to the Division's case, as it was in *Coulter*. There is allegedly other evidence the
16 Division will introduce which may be subject to cross-examination. *See* Response at p. 4. A factor
17 in favor of exclusion. The importance of cross-examination cannot be understated. Even in
18 *Coulter*, the Court identified a number of cases speaking to the importance of cross-examination.
19 *See Coulter*, 198 Ariz. at 387. (Collecting cases.) Together with the statutory mandate that cross-
20 examination be allowed, this factor weighs overwhelmingly in favor of exclusion of testimony
21 about statements made by Mangurian. Finally, there are other reasons why allowing such
22 testimony would not afford "substantial justice." For example, allowing the testimony would be a
23 direct violation of the Respondents' right to due process of law. The Division fails to even address
24 this argument, although it was raised in the Respondents' Motion.

25 The APA is clear that Respondents have a **right** to cross-examination. Even considering
26 the factors outlined in the case relied upon by the Division, exclusion of testimony about
27 Mangurian's statements is warranted.

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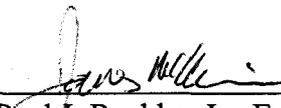
III.

CONCLUSION

For each of the foregoing reasons, Respondents respectfully request that all hearsay testimony and hearsay documentary evidence be precluded, particularly statements made by Mangurian to Division investigators.

RESPECTFULLY SUBMITTED this 7th day of November, 2006.

ROSHKA DeWULF & PATTEN, PLC

By 

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ORIGINAL and thirteen copies of the foregoing filed this 7th day of November, 2006 with:

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