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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS:

- MARC SPITZER, Chairman
- JIM IRVIN
- WILLIAM A. MUNDELL
- JEFF MATCH-MILLER
- MIKE GLEASON

Arizona Corporation Commission

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ARIZONA CORPORATION COMMISSION DOCUMENT CONTROL

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In the matter of:

MUTUAL BENEFITS CORPORATION,

Respondent.

DOCKET NO. S-03464A-03-0000

RESPONDENT'S REPLY IN SUPPORT OF ITS MOTION TO QUASH SUBPOENA

Respondent Mutual Benefits Corporation ("MBC") hereby replies to the Securities Division's (the "Division") Opposition to Mutual Benefits' Motion to Quash the Subpoena of Debbie Brugliera (the "Subpoena"). This Reply is supported by, (i) the attached Memorandum of Points and Authorities, and (ii) the Commission's entire file in this matter, which is incorporated herein by this reference.

MEMORANDUM OF POINTS AND AUTHORITIES

I. The Commission Must Quash the Subpoena of Debbie Brugliera.

The issue with respect to the Motion to Quash is straightforward: Can the Division take testimony in this administrative proceeding (i) without providing notice to MBC, and (ii) while excluding MBC or its counsel during the testimony? The answer, provided by the Rules of Procedure for Practice before the Commission (the "Commission's Rules"), and the Rules of Civil Procedure for the Superior Court of Arizona, is no. Rather, when the Division attempts to take formal testimony during an administrative proceeding, it must provide notice, and allow MBC or its counsel to be present.

Since it did not receive notice of the Subpoena, MBC filed its Motion to Quash. In its Opposition, the Division takes the position that it can take testimony under its continuing

1 “investigative powers” without providing notice to MBC, or allowing MBC to participate. The
2 Division advances six (6) arguments in its Opposition: (1) the Rules of Civil Procedure do not
3 apply, (2) the law does not limit the Commission’s constitutional and statutory investigative
4 powers because a formal proceeding has been initiated, (3) MBC is not entitled to access the
5 Division’s investigation, (4) MBC has no standing to bring a motion to quash the investigative
6 subpoena, (5) there is no justiciable controversy, and (6) MBC has not met its burden. These
7 arguments are either irrelevant, or without merit.
8

9 **A. The Division must comply with A.A.C. R14-3-109(P), and the Arizona Rules of
10 Civil Procedure.**

11 The Division’s first argument appears to be that the Rules of Civil Procedure don’t apply,
12 and relatedly, that there is no constitutional right to pretrial discovery in administrative
13 proceedings. (Opposition at 2-3) These arguments fail because, (i) the Rules of Civil Procedure do
14 apply, and (ii) the Division’s constitutional argument is irrelevant.

15 **i. The Rules of Civil Procedure Apply.**

16 The Division argues that the Rules of Civil Procedure do not apply because the
17 Commission Rules address discovery. (Opposition at 3) The Division cites the rule relating to
18 prehearing conferences and concludes that this prevents the application of the Rules of Civil
19 Procedure. This argument is wrong for two reasons, first, A.A.C. R14-3-109(P) specifically
20 requires that depositions in administrative proceedings be taken in accordance with the Rules of
21 Civil Procedure, and second, the prehearing conference rule is not a discovery rule.
22

23 The Division concedes that a “formal administrative proceeding” has been initiated against
24 MBC. (Opposition at 1). The Division has thus attempted to take a “Formal Interview” *in this*
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1 *proceeding.*¹ This attempt violates the Commission's Rules. A "Formal Interview" is appropriate
2 only as part of an "investigation or examination." A.A.C. R14-4-302. The absence of the words,
3 "administrative proceedings" from this provision, makes clear that a "Formal Interview" is not
4 appropriate after commencement of an administrative proceeding. Rather, an attempt to compel
5 testimony in an administrative proceeding is governed by A.A.C. R14-3-109(P). The Division
6 implicitly concedes this point through its attempt to cast the Subpoena as a request for a "Formal
7 Interview" in connection with an ongoing investigation into "viatical sales in general." This
8 poorly disguised attempt to circumvent the rules should be rejected, and the Division should be
9 required to comply with A.A.C. R14-3-109(P).
10

11 During an administrative proceeding, attempts to take testimony are governed by A.A.C.
12 R14-3-109(P). This provision clearly requires that depositions in administrative proceedings must
13 be conducted in accordance with the Rules of Civil Procedure. Notwithstanding the Division's
14 arguments to the contrary², the Rules of Civil Procedure, including those governing notice, and
15 opportunity to participate in the deposition apply.
16

17 In its Opposition the Division argues that the Rules of Civil Procedure are inapplicable
18 since the Commission's rules provide for discovery through A.A.C. R14-3-108, the prehearing
19 conference rule. The prehearing conference rule is not a discovery rule, it is a mechanism for
20 streamlining the hearing process. It makes no provision for the manner in which testimony is to be
21 taken in an administrative proceeding. The prehearing conference rule does not prevent application
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24 _____
25 ¹ The Division claims that the subpoena issued to Debbie Brugliera is part of its "ongoing investigations into viatical
26 sales in general." (Opposition at 1, n.1) This characterization is disingenuous. The Subpoena itself references this
27 administrative proceeding. The Division's attempt to explain this as for "convention and file convenience" does not
pass the "smell test." Clearly, the Subpoena was issued for the purpose of obtaining information for use in this
administrative proceeding.

² The Division's argument that it should not be forced to bargain for depositions is not well taken. Rule 30 of the
Rules of Civil Procedure provides for depositions to be authorized by the Administrative Law Judge. The Division
would not be forced to bargain for depositions that were necessary and proper.

1 of the Rules of Civil Procedure, especially where the Commission's Rules expressly adopt the
2 procedures outlined in the Rules of Civil Procedure, as is the case here.

3 **ii. The Divisions Constitutional Arguments are irrelevant.**

4 The Division cites several decisions from other jurisdictions for the proposition that there is
5 no constitutional right to prehearing discovery in administrative proceedings. (Opposition at 2-3)
6 These cases are irrelevant.

7 As noted more fully in Section I(A)(i) *supra*, MBC is entitled to notice and an opportunity
8 to participate in the depositions pursuant to the Commission's Rules. There is no need to resort to
9 the United States Constitution to provide the right because it has already been provided. This
10 argument, and the authorities cited in support of it, are irrelevant.

11 **B. MBC Does not Seek to Limit the Division's Investigative Powers.**

12 The Division claims that MBC seeks to restrict the Division to the discovery rules once an
13 administrative proceeding has been initiated. This argument is based upon a faulty premise. The
14 Division's statement is a mischaracterization of MBC's position. Nowhere does MBC claim that
15 the Division is precluded from continuing its investigation, or doing so only in accordance with the
16 discovery rules. Rather, MBC argues that with respect to testimony to be taken during an
17 administrative proceeding, the Commission's Rules with respect to such testimony be followed.
18

19 The Division is free to continue with its investigations, provided it does so in accordance
20 with applicable rules. MBC does not argue otherwise. The Division's arguments, and the cases
21 cited in support thereof, are again, irrelevant.
22

23 **C. Access to the Division's Investigations.**

24 The Division's third argument appears related to its second. Again, MBC does not allege a
25 Due Process violation, and the Division's arguments directed to this point are not relevant. MBC is
26 not seeking additional procedural safeguards. Rather, MBC is simply asking that the Division
27

1 comply with the procedural safeguards already in place. Specifically, those relating to taking
2 testimony in an administrative proceeding.

3 While MBC does not allege the current rules amount to a violation of Due Process, MBC
4 does anticipate harm if the Division is allowed to take testimony during this proceeding while
5 excluding MBC or its counsel. This harm is not speculative, it is real. MBC is entitled to appear at
6 these depositions, and to participate as provided for by the Commission's Rules. The Division's
7 attempts to exclude MBC will harm MBC's ability to defend itself against the allegations made by
8 the Division.
9

10 **D. MBC has Standing to Move to Quash the Subpoena.**

11 The Division's standing arguments are based upon the premise that the subpoena issued to
12 Ms. Brugliera was an "investigative subpoena." (Opposition at 6-7) However, as explained more
13 fully in Section I(A), *supra*, the Subpoena was clearly issued in connection with an administrative
14 proceeding. As such, the Division's arguments premised upon the issuance of an "investigative
15 subpoena" are unavailing.
16

17 The Division also argues that MBC should wait for the Division to bring an action to
18 enforce the subpoena, rather than seek to require the Division to comply with the Commission's
19 Rules. (*See Id.*) This approach would lead to the Division taking testimony without MBC present.
20 There is no reason to expect that the unusual circumstances surrounding Ms. Brugliera's failure to
21 appear, and MBC's subsequent knowledge of the subpoena, are going to repeat themselves.³
22 Waiting for the Division to bring an action to enforce the subpoena is simply not a practical means
23 of protecting MBC's rights. Furthermore, such a procedure is not required by the Commission's
24 Rules as noted more fully in Section I(A), *supra*.
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27 ³ The circumstances surrounding Ms. Brugliera's failure to appear for her testimonial session are outlined more fully
in the Motion to Quash at 1-2.

1 Finally, the Division suggests that should MBC be required to contest the subpoena, it
2 could then meet the requirements of Rule 24 of the Rules of Civil Procedure. It is ironic that the
3 Division seeks to rely on the Rules of Civil Procedure only when it suits the Division, while
4 ignoring the Commission's Rules direct incorporation of the Rules of Civil Procedure in this case.

5 **E. The Motion to Quash is Ripe for Adjudication.**

6 The Division contends that the Motion is not ripe for adjudication. (Opposition at 7) This is
7 incorrect. The issue is ripe for decision since, as noted in the Motion, the Division will likely
8 attempt to reinstate this subpoena if it is not quashed.
9

10 The Division does not deny that it intends to reinstate the subpoena. Instead, it argues that
11 any damage to MBC as a result of the subpoena is speculative and uncertain. MBC will suffer
12 harm if the Commission does not quash the subpoena. If there is no ruling on this issue, MBC will
13 not receive notice of future attempts by the Division to take testimony, whether it be Ms. Brugliera
14 or someone else.

15 Where the injury is likely to reoccur, as it is here, the issue is ripe for adjudication. *Miceli*
16 *v. Industrial Comm'n of Arizona*, 135 Ariz. 71, 73, 659 P.2d 32, 32 (1983). The issue of ripeness
17 turns on the constitutional consideration of "whether the plaintiffs face a realistic danger of
18 sustaining a direct injury" from the challenged act, *City of Auburn v. Qwest Corp.*, 260 F.3d 1160,
19 1171 (9th Cir. 2001) (internal quotation marks omitted) and on whether the issue is fit for decision
20 and whether parties will suffer hardship if the court declines to consider it. *Id.* at 1172-73. In
21 addition, the uncertain state of the law is sufficient hardship to prompt judicial review, *see Thomas*
22 *v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985). Here, each of these considerations
23 favors ruling on the Motion, and as such, the Motion is ripe for adjudication.
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1 **F. MBC Has Met its Burden to Quash the Subpoena.**

2 MBC has satisfied its burden to quash the Subpoena. As outlined more fully above, the
3 Division is attempting to take testimony in an administrative proceeding without giving notice to
4 MBC and without providing MBC or its counsel an opportunity to appear and participate therein.
5 The Division's attempted use of the subpoena under the auspices of a "Formal Interview" in an
6 allegedly unrelated investigation into "viatical sales in general" is improper.

7 Improper purpose, alone, is grounds for quashing the subpoena. *Carrington v. Arizona*
8 *Corp. Comm'n*, 199 Ariz. 303,305, 18 P.3d 97,99 (App. 2001). MBC has demonstrated that the
9 Divisions use of the Subpoena is improper. The Subpoena must, therefore, be quashed.

10 **II. Conclusion**

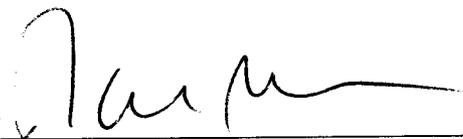
11 The Division has issued a Subpoena to compel testimony during an administrative
12 proceeding. As a result, the Division must comply with the Commission Rules relating to
13 depositions during administrative proceedings. The Commission's Rules, in turn, require the
14 Division to give notice when it intends to take testimony, and to allow MBC or its counsel to be
15 present and participate in the questioning. The Division's arguments to the contrary are unavailing,
16 and the Commission should quash the Subpoena and enter an order requiring the Division to
17 comply with these rules for all future testimony to be taken in connection with this administrative
18 proceeding.
19 proceeding.
20 proceeding.

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RESPECTFULLY SUBMITTED this 24th day of June, 2003.

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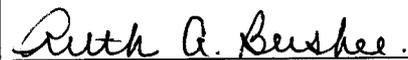
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