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May 2, 2008

2008 MAY -5 A 11:19

Docket Control
Arizona Corporation Commission
1200 W. Washington
Phoenix, Arizona 85007

AZ CORP COMMISSION
DOCKET CONTROL

Docket No. WS-02987A-08-0049

Dear Sir or Madam:

Enclosed for filing are an original and 13 copies of the Motion Compel of Swing First Golf, LLC. Please time-stamp the extra copy and return it to me in the enclosed stamped and addressed envelope.

Thank you.

Very truly yours,

Craig A. Marks

Enclosures

Arizona Corporation Commission
DOCKETED

MAY -5 2008

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MIKE GLEASON, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

IN THE MATTER OF THE FORMAL
COMPLAINT OF SWING FIRST GOLF LLC
AGAINST JOHNSON UTILITIES LLC

DOCKET NO. WS-02987A-08-0049

**SWING FIRST GOLF LLC'S
MOTION TO COMPEL**

1 Pursuant to Commission Rule R14-3-106-K and Rule 37(a)(2) of the Arizona Rules of
2 Civil Procedure, Swing First Golf LLC (“Swing First”) hereby moves for an order compelling
3 discovery responses from Johnson Utilities LLC (“Utility”), the defendant in this case.

4 In support of its motion, Swing First states as follows:

5 **I BACKGROUND**

6 On March 19, 2008, the Commission issued a procedural order in this docket
7 (“Procedural Order”). It provided (in part):

- 8 a. discovery shall be permitted by law and the rules and regulations of the Commission;
9 b. for discovery requests made through May 1, 2008, any objection to discovery
10 requests shall be made within 3 days of receipt;
11 c. responses to discovery requests shall be made within 7 days of receipt; and
12 d. the response time may be extended by mutual agreement.

13 On April 11, 2008, Swing First tendered its first data requests to Utility. Exhibit A to this
14 motion is a copy of Swing First’s first data requests. As a courtesy to Utility, Swing First
15 provided Utility an additional seven days—until April 25, 2008—to respond to the data requests.

16 On April 25, 2008, Utility responded by e-mail to Swing First’s data requests by
17 objecting to each question and providing none of the requested data. Exhibit B is a copy of
18 Utility’s April 25, 2008, e-mailed letter.

1 Utility did not at any time contact undersigned counsel to try to resolve any issues that it
2 had with the first data requests.

3 Swing First apologizes in advance for taking up the Administrative Law Judge's time
4 with a discovery dispute. However, Swing First believes that any efforts to resolve this dispute
5 informally would have been fruitless, given:

- 6 • Utility's prior treatment of Swing First and Mr. Ashton;
- 7 • Utility's reputation for dealing with other litigants;
- 8 • Utility's failure to provide even one bit of the requested data;
- 9 • Utility's flouting of the Procedural Order's three-day deadline to raise discovery
10 objections;
- 11 • Utility's bad-faith abuse of the generous one additional week provided to respond to
12 the data requests; and
- 13 • Utility's spurious, untimely, objections to Swing First's legitimate, narrowly drawn,
14 data requests.

15 **II ARGUMENT**

16 **A Utility Waived Any Discovery Objections**

17 As stated above, the Procedural Order provided: "for discovery requests made through
18 May 1, 2008, any objection to discovery requests shall be made within 3 days of receipt ..."¹
19 Swing First's discovery requests were made on April 11, 2008, so Utility was required to object
20 to any of the data requests by April 14, 2008. Because April 11 was a Friday, Swing First would
21 have been willing to extend the deadline for objections to April 16, 2008, but Utility never asked
22 for any additional time. Accordingly, Utility waived any objections to the data requests and was
23 obligated to respond fully to each data request by April 25, 2008.

¹ Procedural Order at 2:2-3.

1 **B Utility's Waived Objections Are Meritless**

2 Even if Utility had timely objected to the data requests, its objections are meritless. For
3 the convenience of the Commission, Swing First will quote each data request and Utility's
4 response, and then discuss why Utility's response is meritless.

- 5 1. ***Please provide copies of all bills rendered by Johnson Utilities to Swing First from***
6 ***December 2004 to the present.***

7
8 Utility Response: Objection. All relevant bills for calendar 2006 and 2007 have already
9 been provided. Prior bills, from December 2004 to December 2005, are irrelevant as they
10 have been paid, and are not even alleged as in error in the Complaint. Further, effluent
11 was not being produced in Complainant's vicinity during that time.

12 Utility does not allege that it does not have these bills or that it would be burdensome to
13 provide them. Concerning the 2006 and 2007 bills, the bills provided to Swing First have
14 regularly been revised or otherwise been altered by Utility, which has made it very difficult to be
15 sure that Swing First has the actual, final bills in its possession. Swing First is entitled to copies
16 of what Utility believes to be the actual, correct, bills it provided to Swing First. The
17 information sought is clearly relevant to this matter.

18 Concerning the 2004 and 2005 bills, Swing First's Amended complaint alleged: "Utility
19 has refused to deliver copies of its bills or meter-reading records for 2004 and 2005, which
20 makes it difficult to calculate the exact amount it overcharged as a result of its failure to correctly
21 bill Swing First." Also "[f]or 2004 and 2005, Swing First estimates that it overpaid Utility an
22 additional \$34,487.46." Finally Swing First sought the following relief:

- 23 B. The Commission to hold a hearing to determine the actual amount that Utility
24 should have charged Swing First over the period of November 2004 to the
25 present, compare this to amount Swing First has provided Utility during this
26 period, and order Utility to provide a refund to Swing First, together with
27 appropriate interest; (Emphasis added.)

28 Therefore, Utility errs: Swing First has definitely alleged that the 2004 and 2005 bills are likely
29 in error. These bills are clearly relevant.
30

1 2. *Please provide copies of any drafts of the agreement between Swing First and Johnson*
2 *International (or any affiliated party) whereby Swing First Golf agreed to manage the*
3 *Golf Club at Oasis ("the Oasis"), including the version sent by e-mail to Brian*
4 *Tompsett in early 2006.*

5
6 Utility Response: Objection. There is no agreement. Draft documents establish no legal
7 relationship between Complainant and any party, let alone the Respondent. Evidenced by
8 a copy to the Respondent, Complainant emailed the objectionable draft document to the
9 Commission Staff. Moreover, any discussions, negotiations or agreements between or
10 among Complainant and third parties regarding the subject of that draft, or for non-utility
11 service that was not proposed to be provided by the Respondent, is not relevant to this
12 simple billing dispute.

13 Utility does not allege that it does not have these drafts or that it would be burdensome to
14 provide them. Nor does it deny that Swing First managed the Oasis Golf Club for Utility's
15 affiliate or that Utility provided water credits (until later reversed) as compensation for those
16 services. Utility and Johnson International are owned by the same entity and have chosen to
17 disregard any corporate distinctions in their dealings with Swing First. Swing First is not certain
18 that it has copies of all drafts and is entitled to ask for any copies in the possession of Utility or
19 its affiliates.

20 Swing First will allege that Mr. Johnson stated that there was no need to actually execute
21 the agreement, because he always did business on a handshake basis. The parties' handshake
22 completed an oral agreement for the parties to perform under the terms of the final draft
23 agreement. The oral agreement bound Utility, Utility's affiliate, and Swing First. Mr. Ashton
24 trusted Mr. Johnson and performed in accordance with its terms. Further, Utility evidenced its
25 acceptance by providing the agreed-upon billing credits.

26 Utility confuses admissibility with relevance. Rule 26(b)(1) is quite clear: "It is not
27 ground for objection that the information sought will be inadmissible at the trial if the
28 information sought appears reasonably calculated to lead to the discovery of admissible
29 evidence." If Swing First does offer any draft agreements into evidence, Utility has the right to
30 object to its admission at that time. The drafts are relevant and should be provided.
31

1 3. *Please provide copies of checks associated with payments (and any other evidence of*
2 *such payments) made to Swing First in late 2007 to buy equipment and to pay for fuel*
3 *purchased for the benefit of Johnson International while Swing First was managing*
4 *the Oasis in 2006.*

5
6 Utility Response: Objection. Respondent did not pay Complainant any amount to buy the
7 alleged items or any other item or service. Any transaction by the Complainant with a
8 third party is not relevant to the Complaint.

9 Utility does not allege that it does not have these copies or that it would be burdensome
10 to provide them. Copies of any checks or other evidence of payments made to Swing First are
11 easily obtainable. They are clearly relevant, as they evidence the three-way agreement between
12 Swing First, Utility, and Utility's affiliate.

13
14 4. *Please provide copies of any contracts that obligate Johnson Utilities to deliver effluent*
15 *to any customer.*

16
17 Utility Response: Objection. There are no such contracts. The Respondent has no
18 "obligation" to deliver effluent. Unreliable and unpredictable services such as effluent
19 and CAP Water are provided by the Respondent to customers, including Complainant,
20 pursuant to which the customer obtains the privilege of purchasing a beneficial service
21 not otherwise available to many turf irrigators in Arizona. Copies of contracts between
22 Respondent and its other customers are not relevant to this proceeding. Furthermore, that
23 information is privileged information possibly containing proprietary information about
24 those customers operations that will not be released by the Respondent.

25 This is an extremely confusing response. Utility says that there are no such contracts, but
26 then says that such contracts are not relevant, that they are privileged, and that they may contain
27 proprietary information. Given Utility's protests, it seems likely that the contracts do exist; after
28 all, Utility does have other effluent customers. Further, Swing First would not object at this time
29 if Utility redacts any information that would allow the customer to be identified. However,
30 Swing First is entitled to discover the terms under which Utility agreed to provide effluent to
31 other customers, particularly the terms concerning when Utility's obligation began (and ended)
32 and the amount of the obligation.
33
34

1 5. *For each month during the period of 2004 to the present, please provide the amount of*
2 *effluent generated within the Johnson Utilities Certificate of Convenience and*
3 *Necessity.*

4
5 Utility Response: Objection. Irrelevant. As stated in the Respondent's Answer and
6 Counterclaim, it was not physically possible to deliver effluent to Complainant during the
7 majority of the period in question because the only near-by wastewater treatment plant
8 capable of delivers to Complainant did not produce any effluent until early 2006.
9 Moreover, Complainant has no contractual right to demand any effluent produced by the
10 Respondent (See Response 4).

11 Utility does not allege that it does not have this information or that it would be
12 burdensome to provide it. As alleged more fully in the Amended Complaint, Swing First had the
13 "right to purchase the first effluent generated by Utility's treatment of wastewater collected
14 within the geographic area covered by Utility's Certificate, or Exchange Water." Physical
15 deliverability was not a prerequisite to Swing First's purchase right, because Utility had the right
16 to, and did) instead deliver exchange water (to be priced at Utility's effluent rate). Therefore, the
17 amount of treated effluent generated by Utility by month within its CC&N is a key issue to be
18 determined in this case. The requested data could hardly be more relevant.

19
20 6. *For each month during the period of 2004 to the present, please provide, by customer*
21 *(including the Oasis), the amount of effluent delivered by Johnson Utilities.*

22
23 Utility Response: See Response 4. Other customer's information and/or data will not be
24 provided to the Complainant.

25 Utility does not allege that it does not have this information or that it would be
26 burdensome to provide it. For the reasons stated in the above discussion concerning data
27 requests 4 and 5, this data is clearly relevant. Further, Swing First is informed and believed that
28 the Oasis Golf Course is owned by a Utility affiliate. Therefore, Swing First is entitled to
29 investigate whether Utility has illegally discriminated in favor of an affiliate. As to the
30 remaining customers (including the Oasis if it is not owned by a Utility affiliate), Swing First
31 would not object at this time if Utility withholds any information that would allow the customer
32 to be identified. Utility could simply identify customers by letter or number.

1 7. *For the Oasis, please provide copies of all bills and payments for effluent during the*
2 *period of 2004 to the present.*

3
4 Utility Response: Objection. See Responses 4 and 6.

5 Utility does not allege that it does not have this information or that it would be
6 burdensome to provide it. For the same reasons stated in the above discussion concerning data
7 requests 4, 5, and 7, this data is clearly relevant. Swing First only requests billing and payment
8 information concerning the Oasis, owned by a Utility affiliate. Swing First is certainly entitled
9 to investigate whether Utility has illegally discriminated in favor of an affiliate by providing it
10 discounts, bill write-offs, or credits.

11
12 8. *For the period of January 2006, to the present, please provide copies of all e-mails*
13 *from any Johnson Utilities employee to or from David Ashton, or any other person*
14 *affiliated with Swing First. This includes, but is not limited to, copies of e-mails from*
15 *Brian Tompsett's personal account, including recent requests by Swing First Golf for*
16 *Johnson Utilities to cease flooding the lake at the Golf Club at Johnson Ranch.*

17
18 Utility Response: Objection. Complainant has in its possession all requested emails,
19 many of which are further objectionable because they deal with a separate and distinct
20 disagreement Complainant has with a third party pertaining to matters unrelated to the
21 Complaint.

22 Utility does not allege that it does not have this information or that it would be
23 burdensome to provide it. Swing First is not certain that it has copies of all the requested e-
24 mails. Further, receiving copies from Utility establishes the existence of the e-mails and Utility's
25 knowledge of the information contained therein.

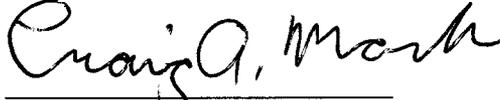
26 Utility again confuses admissibility with relevance. Rule 26(b)(1) is quite clear: "It is not
27 ground for objection that the information sought will be inadmissible at the trial if the
28 information sought appears reasonably calculated to lead to the discovery of admissible
29 evidence." If Swing First does offer any of the e-mails into evidence that Utility believes are
30 objectionable, Utility has the right to object to its admission at that time. The e-mails are
31 relevant and should be provided.

1 **III REQUESTED RELIEF**

2 Swing First asks:

- 3 A. The Commission to order Utility to promptly provide the information requested in
4 Swing First's First Data Requests;
- 5 B. The Commission to extend the discovery deadline by a period equal to the number of
6 days from which the information was due (April 25, 2008) until the date the
7 information is actually provided; and
- 8 C. For such further relief as the Commission deems appropriate.
- 9

10 RESPECTFULLY SUBMITTED on May 2, 2008.

11 

12
13
14 Craig A. Marks
15 Craig A. Marks, PLC
16 3420 E. Shea Blvd
17 Suite 200
18 Phoenix, Arizona 85028
19 (602) 953-5260
20 Craig.Marks@azbar.org
21 Attorney for Swing First Golf LLC

22 **Original and 13 copies mailed**
23 on May 2, 2008, to:

24
25 Docket Control
26 Arizona Corporation Commission
27 1200 West Washington
28 Phoenix, Arizona 85007

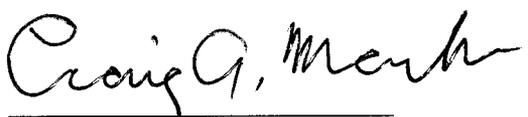
29
30 **Copy of the foregoing mailed**
31 on May 2, 2008, to:

32
33 Yvette B. Kinsey
34 Administrative Law Judge
35 Arizona Corporation Commission
36 1200 West Washington
37 Phoenix, Arizona 85007
38
39

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14

Copy of the foregoing e-mailed and mailed
on May 2, 2008, to:

Richard L. Sallquist
Sallquist, Drummond & O'Connor PC
4500 S. Lakeshore Drive
Suite 39
Tempe, Arizona 85282

By: 
Craig A. Marks

CRAIG A. MARKS PLC

Exhibit A

CRAIG A. MARKS
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Phoenix, Arizona 85028

(602) 953-5260
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Cell: (480) 518-6857
Craig.Marks@azbar.org

April 11, 2008

Richard L. Sallquist
Sallquist, Drummond & O'Connor PC
4500 S. Lakeshore Drive
Suite 39
Tempe, Arizona 85282

Re: Docket No. WS-02987A-08-0049
First Data Requests

Dear Mr. Sallquist:

Attached is the first set of Data Requests from Swing First Golf LLC ("Swing First") to Johnson Utilities LLC ("Johnson Utilities") in the above-captioned case. We expect to receive your responses by Friday, April 25, 2008.

Please indicate for each response the witness to whom questions regarding the response should be directed. These responses are continuing in nature.

As I am certain that you are aware, your client has a continuing obligation to preserve all files, e-mails, documents and other evidence that may be relevant to this matter.

If you have any questions, please contact me by phone or e-mail. Thank you for your cooperation in this matter.

Very truly yours,



cc: Dave Ashton

1. Please provide copies of all bills rendered by Johnson Utilities to Swing First from December 2004 to the present.
2. Please provide copies of any drafts of the agreement between Swing First and Johnson International (or any affiliated party) whereby Swing First Golf agreed to manage the Golf Club at Oasis ("the Oasis"), including the version sent by e-mail to Brian Tompsett in early 2006.
3. Please provide copies of checks associated with payments (and any other evidence of such payments) made to Swing First in late 2007 to buy equipment and to pay for fuel purchased for the benefit of Johnson International while Swing First was managing the Oasis in 2006.
4. Please provide copies of any contracts that obligate Johnson Utilities to deliver effluent to any customer.
5. For each month during the period of 2004 to the present, please provide the amount of effluent generated within the Johnson Utilities Certificate of Convenience and Necessity.
6. For each month during the period of 2004 to the present, please provide, by customer (including the Oasis), the amount of effluent delivered by Johnson Utilities.
7. For the Oasis, please provide copies of all bills and payments for effluent during the period of 2004 to the present.
8. For the period of January 2006, to the present, please provide copies of all e-mails from any Johnson Utilities employee to or from David Ashton, or any other person affiliated with Swing First. This includes, but is not limited to, copies of e-mails from Brian Tompsett's personal account, including recent requests by Swing First Golf for Johnson Utilities to cease flooding the lake at the Golf Club at Johnson Ranch.

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RICHARD L. SALLQUIST

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E-MAIL dick@sd-law.com

April 25, 2008

EMAIL

Craig Marks
3420 E Shea Blvd. Suite 200
Phoenix, Arizona 85028

Re: Swing First vs. Johnson Utilities Company

Dear Mr. Marks:

We are in receipt of your Data Request dated April 11, 2008. Enclosed herewith are the Company's Responses, provided serially without repeating the Request:

1. Objection. All relevant bills for calendar 2006 and 2007 have already been provided. Prior bills, from December 2004 to December 2005, are irrelevant as they have been paid, and are not even alleged as in error in the Complaint. Further, effluent was not being produced in Complainant's vicinity during that time.
2. Objection. There is no agreement. Draft documents establish no legal relationship between Complainant and any party, let alone the Respondent. Evidenced by a copy to the Respondent, Complainant emailed the objectionable draft document to the Commission Staff. Moreover, any discussions, negotiations or agreements between or among Complainant and third parties regarding the subject of that draft, or for non-utility service that was not proposed to be provided by the Respondent, is not relevant to this simple billing dispute.
3. Objection. Respondent did not pay Complainant any amount to buy the alleged items or any other item or service. Any transaction by the Complainant with a third party is not relevant to the Complaint.
4. Objection. There are no such contracts. The Respondent has no "obligation" to deliver effluent. Unreliable and unpredictable services such as effluent and CAP Water are provided by the Respondent to customers, including Complainant, pursuant to which the customer obtains

the privilege of purchasing a beneficial service not otherwise available to many turf irrigators in Arizona. Copies of contracts between Respondent and its other customers are not relevant to this proceeding. Furthermore, that information is privileged information possibly containing proprietary information about those customers operations that will not be released by the Respondent.

5. Objection. Irrelevant. As stated in the Respondent's Answer and Counterclaim, it was not physically possible to deliver effluent to Complainant during the majority of the period in question because the only near-by wastewater treatment plant capable of delivers to Complainant did not produce any effluent until early 2006. Moreover, Complainant has no contractual right to demand any effluent produced by the Respondent (See Response 4).
6. Objection. See Response 4. Other customer's information and/or data will not be provided to the Complainant.
7. Objection. See Responses 4 and 6.
8. Objection. Complainant has in its possession all requested emails, many of which are further objectionable because they deal with a separate and distinct disagreement Complainant has with a third party pertaining to matters unrelated to the Complaint.

Sincerely,

/s/

Richard L. Sallquist