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AZ CORP COMMISSION  
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Arizona Corporation Commission

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MAR - 5 2009

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

DOCKET NO. WS-02987A-08-0049

**JOHNSON UTILITIES LLC'S  
RESPONSE TO SWING FIRST  
GOLF LLC'S MOTION TO QUASH  
DEPOSITIONS AND CROSS  
MOTION TO COMPEL  
DEPOSITION TESTIMONY OF  
DAVID BRUCE ASHTON**

*(Expedited Ruling Requested)*

Snell & Wilmer

LLP  
LAW OFFICES  
One Arizona Center, 400 E. Van Buren  
Phoenix, Arizona 85004-2202  
(602) 382-6000

Johnson Utilities, LLC, dba Johnson Utilities Company ("Johnson Utilities" or the "Company"), by and through its undersigned counsel, hereby opposes the Motion to Quash Depositions ("Motion to Quash") filed by Swing First Golf, LLC, ("SFG") and hereby files its Response to SFG's Motion to Quash and its Cross-Motion to Compel Deposition Testimony of David Ashton ("Response and Cross-Motion"). The Motion to Quash should be denied for SFG'S failure to comply with Rule 26(g) of the Arizona Rules of Civil Procedure. Additionally, the Motion to Quash should be denied and David Ashton ("Mr. Ashton") should be compelled to testify in a deposition on a date certain<sup>1</sup> because the discovery requests at issue are within the broad scope contemplated, intended and permitted by the Arizona Rules of Civil Procedure. Thus, Johnson Utilities

<sup>1</sup> Johnson Utilities had originally scheduled Mr. Ashton's deposition for March 3, 2009. Johnson Utilities has postponed Mr. Ashton's deposition pending resolution of the Motion to Quash.

1 requests that that the Administrative Law Judge (“ALJ”) enter an order compelling Mr.  
2 Ashton’s attendance at his deposition for a date certain.

3 Johnson Utilities has also served Michael White (Mr. White”) via subpoena  
4 issued by the Third District Court, State of Utah, pursuant to Rule 45 of the Utah Rules  
5 of Civil Procedure, Rules 26 and 30 of the Arizona Rules of Civil Procedure, and  
6 Arizona Administrative Code R14-3-109. Because Mr. White’s deposition is currently  
7 scheduled for March 13, 2009, Johnson Utilities respectfully requests an expedited  
8 ruling on its Cross-Motion.

9 **I. INTRODUCTION.**

10 On December 5, 2008, counsel for Johnson Utilities requested that SFG make Mr.  
11 Ashton available for a deposition in the above captioned case.<sup>2</sup> In response, counsel for  
12 SWG agreed and noted that in spring 2008, SFG already informed the ALJ and previous  
13 counsel for Johnson Utilities that SFG intended to take depositions in this case.<sup>3</sup> On  
14 February 2, 2009, counsel for Johnson Utilities telephoned counsel for SFG requesting  
15 dates in which Mr. Ashton would be available to appear for his deposition. Counsel for  
16 Johnson Utilities was informed that because Mr. Ashton lived out of the country, he  
17 would not be available for a deposition until June. In response, counsel for Johnson  
18 Utilities informed counsel for SFG that although Johnson Utilities would make  
19 reasonable accommodation for Mr. Ashton (including a telephonic deposition), delaying  
20 the deposition of the primary witness for SFG until June was unreasonable and  
21 unacceptable, especially given the fact that that Mr. Ashton is a witness on behalf of  
22 SFG in the Johnson Utilities rate case and would be flying into Phoenix to testify in that  
23 case in April.<sup>4</sup>

24  
25 <sup>2</sup> See e-mail from Jeff Crockett to Craig Marks dated December 5, 2008, attached as Exhibit A.

26 <sup>3</sup> See e-mail from Craig Marks to Jeff Crockett, attached as Exhibit A.

<sup>4</sup> Mr. Ashton is scheduled to testify in Docket No. WS-02987A-08-0180 on April 27, 2009.

1 By February 4, 2009, counsel for Johnson Utilities did not hear from counsel for  
2 SFG and followed up with a letter<sup>5</sup> requesting available dates for Mr. Ashton in order to  
3 schedule his deposition within the next 30 days. In response, on February 9, 2009,  
4 counsel for SFG responded by again indicating that Mr. Ashton would not be available  
5 until June.<sup>6</sup>

6 Because SFG was unwilling to discuss a reasonable deposition schedule, Johnson  
7 Utilities had no other option but to file the Notices of Deposition of Messrs. Ashton and  
8 White on February 18, 2009. Without good-faith consultation, on February 26, 2009,  
9 SFG filed with the Arizona Corporation Commission (“Commission”) its Motion to  
10 Quash.

11 **II. SFG’S MOTION TO QUASH SHOULD BE DENIED BECAUSE SFG FAILED**  
12 **TO COMPLY WITH ARIZ. R. CIV. P. 26(G) WHICH REQUIRES PERSONAL**  
13 **CONSULTATION AND THE EXERCISE OF GOOD FAITH EFFORTS IN**  
14 **RESOLVING DISCOVERY MATTERS BEFORE FILING DISCOVERY**  
15 **DISPUTE MOTIONS.**

16 With regard to discovery disputes, Rule 26(g) of the Arizona Rules of Civil  
17 Procedure states that: “No discovery motion will be considered or scheduled unless a  
18 separate statement of moving counsel is attached thereto certifying that, after personal  
19 consultation and good faith efforts to do so, counsel have been unable to satisfactorily  
20 resolve the matter.” Ariz.R.Civ.P. 26(g) (emphasis added). Depositions are most  
21 certainly a discovery device. Accordingly, a motion to quash that relates to a deposition  
22 is a discovery dispute within the ambit of Ariz.R.Civ.P. 26(g).

23 Under Rule 26(g), SFG was required to conduct a personal consultation and  
24 exercise good faith efforts in resolving the alleged dispute before filing its Motion to  
25 Quash. However, SFG made no such attempt to consult with Johnson Utilities' counsel  
26 to work out a reasonable deposition schedule, but instead insisted that Mr. Ashton would

<sup>5</sup> See letter from Jeff Crockett to Craig Marks dated February 4, 2009, attached as Exhibit B.

<sup>6</sup> See letter from Craig Marks to Jeff Crockett dated February 9, 2009, attached as Exhibit C.

1 not make himself available until June 2009. Counsel for Johnson Utilities even  
2 proposed the possibility of a telephonic deposition, but counsel for SFG rejected that  
3 idea. Regarding Mr. White's deposition, the only consultation provided by counsel for  
4 SFG was the filing of the Motion to Quash.

5 SFG has not attempted in good faith to resolve this discovery matter other than by  
6 filing a Motion to Quash, which contravenes its obligations under Rule 26(g)  
7 Ariz.R.Civ.P. Accordingly, the ALJ should dismiss the Motion to Quash in its entirety  
8 for SFG's failure to comply with the provisions of Rule 26(g) and instead enter an order  
9 compelling Mr. Ashton's deposition at a date certain, as set by the ALJ.

10 **III. In The Event The ALJ Considers The Merits Of The Motion To Quash, The**  
11 **Motion To Quash Should Be Denied Because Johnson Utilities' Discovery**  
12 **Requests Are Within The Scope Of Discovery Permitted Under The Arizona Rules**  
13 **of Civil Procedure.**

14 **A. The Information Sought From Depositions Falls Within the Wide Range of**  
15 **Discovery Permitted Under Rule 26(b), Arizona Rules of Civil Procedure.**

16 Rule 26(b) provides in pertinent part that "Parties may obtain discovery regarding  
17 any matter, not privileged, which is relevant to the subject matter involved in the  
18 pending action." Ariz. R. Civ. P. 26(b). This rule is to be construed broadly. *See Cornet*  
19 *Stores v. Superior Court In and For Yavapai County*, 108 Ariz. 84, 86, 492 P.2d 1191,  
20 1193 (1972). In addition, the purpose of discovery is to avoid surprise and prevent the  
21 trial from being a "guessing game." *Watts v. Superior Court*, 87 Ariz. 1, 5, 347 P. 2d  
22 565, 567 (1959).

23 Mr. Ashton will be SFG's primary witness in this case. Mr. Ashton clearly  
24 possesses information "reasonably calculated to lead to the discovery of admissible  
25 evidence." In fact, insofar as the present matter is concerned, Mr. Ashton is quite  
26 possibly the main source of information necessary for SFG to present its claims in this  
case. It was Mr. Ashton who filed the Affidavit in Support of Response to the Motion  
for Summary Judgment filed by SFG. Moreover, upon information and belief, Mr.

1 White's testimony will go directly to the credibility and veracity of Mr. Ashton, which is  
2 directly relevant to refute SFG's claims.

3 **B. SFG's Objection that the Requested Depositions will be Unduly**  
4 **Burdensome is Without Merit.**

5 Ariz. R. Civ. P. 26(b)(1) permits the court to restrict the use of discovery methods  
6 if the court determines that: "(i) the discovery sought is unreasonably cumulative or  
7 duplicative, or obtainable from some other source that is either more convenient, less  
8 burdensome, or less expensive, (ii) the party seeking discovery has had ample  
9 opportunity ... to obtain the information sought; or (iii) the discovery is unduly  
10 burdensome or expensive, given the needs of the case...." None of these grounds justify  
11 quashing Johnson Utilities' Notices of Deposition and the ALJ should reject SFG's  
12 challenge accordingly.

13 SFG argues that the deposition of Mr. Ashton should not be taken because Mr.  
14 Ashton will not be in the United States until June so the scheduling of his deposition is  
15 not possible. However, Mr. Ashton will be in Arizona on April 27, 2009, to testify in  
16 the Johnson Utilities rate case. In addition, counsel for Johnson Utilities offered to  
17 explore the idea of a telephonic deposition, but counsel for SFG refused to consider the  
18 idea. A telephonic deposition would significantly reduce the costs and any burden on  
19 SFG.

20 Counsel for SFG also argues that he would be unable to defend the deposition of  
21 Mr. Ashton over the next three months because he is a sole practitioner and has a heavy  
22 workload. Yet SFG does not provide any legal authority that would support a lawyer's  
23 caseload as justification for restricting discovery under Rule 26(b)(1).

24 With respect to the deposition of Mr. White, SFG objects because it was  
25 scheduled without consultation with counsel for SFG and that counsel is unavailable on  
26 the scheduled date. Yet under Rule 26(g), the burden was on SFG to try to resolve the

1 discovery dispute before filing its Motion to Quash. On February 18, 2009, Johnson  
2 Utilities filed its Notices of Deposition. Mr. White's deposition was not scheduled until  
3 March 13, 2009 (23 days later). The only consultation received from SFG was to inform  
4 Johnson Utilities that SFG would be filing the Motion to Quash. SFG never made any  
5 effort to discuss alternate dates for Mr. White.

6 C. SFG's Objection that the Requested Depositions Should Not be Taken  
7 Because Depositions are Rarely Used at the Commission is Without Merit  
8 and Inconsistent with SFG's Actions in this Case.

9 Counsel for SFG argues that the depositions of Mr. Ashton and Mr. White should  
10 not be taken because depositions are rarely used at the Commission. Yet, the taking of  
11 depositions is clearly allowed pursuant to Arizona Administrative Code R14-3-109(P)  
12 and Rules 26 and 30 of the Arizona Rules of Civil Procedure. In addition, counsel for  
13 SFG previously informed the ALJ and Johnson Utilities in the spring of 2008 that he  
14 would be conducting depositions in this case. SFG now suddenly wants to raise as an  
15 argument to support its Motion to Quash the fact that depositions are rarely used at the  
16 Commission. However, both the Commission's rules and the Arizona Rules of Civil  
17 Procedure allow Johnson Utilities to conduct discovery, including depositions, necessary  
18 to vigorously defend against the claims brought by SFG. Finally, although depositions  
19 are not common in Commission rate cases, they are used in complaint cases.

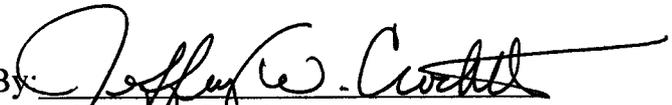
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1 **IV. CONCLUSION.**

2 For the reasons set forth above, SFG's Motion to Quash should be denied and  
3 Johnson Utilities' Cross Motion to compel a date certain for the deposition of Mr.  
4 Ashton should be granted.

5 RESPECTFULLY submitted this 5th March, 2009.

6 SNELL & WILMER

7  
8 By:   
9 Jeffrey W. Crockett  
10 Bradley S. Carroll  
11 400 East Van Buren  
12 One Arizona Center  
13 Phoenix, Arizona 85004-2202  
14 Attorneys for Johnson Utilities, LLC

15 ORIGINAL and thirteen (13) copies of the  
16 foregoing filed this 5th March, 2009, with:

17 Docket Control  
18 ARIZONA CORPORATION COMMISSION  
19 1200 West Washington  
20 Phoenix, Arizona 85007-1104

21 COPY of the foregoing hand-delivered  
22 this 5th March, 2009 to:

23 Yvette B. Kinsey, Administrative Law Judge  
24 Hearing Division  
25 ARIZONA CORPORATION COMMISSION  
26 1200 West Washington Street  
Phoenix, Arizona 85007

Ernest Johnson, Director  
Utilities Division  
ARIZONA CORPORATION COMMISSION  
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COPY of the foregoing sent via U.S. Mail and E-Mail this 5th March, 2009, to:

Craig A. Marks  
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Craig.Marks@azbar.org  
Attorney for Swing First Golf LLC



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9594263.1

# **EXHIBIT A**

**Crockett, Jeff**

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**From:** Craig Marks [craig.marks@azbar.org]  
**Sent:** Friday, December 05, 2008 7:08 PM  
**To:** Crockett, Jeff  
**Subject:** RE: Motion for Summary Judgment  
**Attachments:** Craig A Marks2.vcf

Jeff,

Sure. We should be able to find a date for Mr. Ashton. Of course it will have to be sometime after we get Brian's and George's depositions completed. I told Dick and the ALJ last spring that we would be taking depositions after data requests were finished. I will likely have some additional DRs in the complaint case. When would your witnesses be available?

Craig



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**From:** Crockett, Jeff [mailto:jcrockett@swlaw.com]  
**Sent:** Friday, December 05, 2008 5:20 PM  
**To:** Craig Marks  
**Subject:** RE: Motion for Summary Judgment

I will likely want to take Mr. Ashton's deposition. Will you please provide me with dates when he can be in the country for a deposition.

# **EXHIBIT B**

**Snell & Wilmer**  
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February 4, 2009

DENVER  
LAS VEGAS  
ORANGE COUNTY  
PHOENIX  
SALT LAKE CITY  
TUCSON

**VIA E-MAIL AND U.S. MAIL**

Craig A. Marks  
Craig A. Marks PLC  
3420 East Shea Blvd.  
Suite 200  
Phoenix, Arizona 85028

**Re: *Swing First Golf v. Johnson Utilities, LLC***  
***Docket WS-02987A-08-0049 (Complaint Proceeding)***

Dear Craig:

As we discussed in our February 2, 2009, telephone conversation, Johnson Utilities needs to take the deposition of David Ashton and that needs to occur within the next 30 days. You stated that Mr. Ashton is living and working in Europe (with an extended vacation planned in Egypt) and may not be available for a deposition until late May or early June. I explained that Johnson Utilities cannot wait several months to take the deposition, and you stated that you would communicate our position to Mr. Ashton.

It is our understanding that Mr. Ashton will be Swing First Golf's primary witness in the complaint case. Moreover, Mr. Ashton has already filed an Affidavit in Support of Swing First Golf's Response to the Motion for Summary Judgment. As Swing First Golf is the complainant in this matter, it is unreasonable to require Johnson Utilities to wait 3 or 4 months to depose Mr. Ashton. I, therefore, have no choice but to formally request that Swing First Golf provide dates for the deposition of Mr. Ashton to be taken within the next 30 days.

I would appreciate if you would respond to this request by Friday, February 6, 2009.

Very truly yours,

SNELL & WILMER

  
Jeffrey W. Crockett

JWC:gdb  
9474330.1  
cc: Brian Tompsett

# **EXHIBIT C**

# CRAIG A. MARKS PLC

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February 9, 2009

Jeffrey W. Crockett, Esq.  
Snell & Wilmer LLP  
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Phoenix, Arizona 85004

Re: Swing First Golf v. Johnson Utilities, LLC  
Docket WS-02987A-08-0049 (Complaint Proceeding)

Dear Jeff:

I am responding to your February 4, 2009, request to depose Mr. Ashton within the next month. As I explained to you on the phone, this is not possible. Mr. Ashton resides and works in Europe. Other than his travel here to testify in the Johnson Utilities Rate Case, he will not be in the United States until June.

Further, preparing for and representing Mr. Ashton at a deposition would be very burdensome for me, a sole practitioner, over the next three months. Along with my normal workload, I will be participating in three rate cases during that time period, including representing Arizona-American in its seven-district rate case, which will go to hearing next month.

It is difficult for me to understand your sudden zeal to conduct discovery in this case, given you and your client's incredible delays (up to six months) in replying to data requests, your bad-faith responses, and you having twice forcing me to file motions to compel.

Finally, I do not see the need for you to depose Mr. Ashton at this time, if at all. As you know, depositions are rarely part of discovery practice at the Commission. If you still feel that you need to take a deposition after Mr. Ashton has actually filed testimony in this case, and you have conducted whatever additional discovery you believe is warranted, then we could revisit this issue.

Very truly yours,

/s/ Craig A. Marks

Cc: Robin Mitchell