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**COMMISSIONERS:**

KRISTIN K. MAYES, Chairman  
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2009 MAR 24 P 4: 22

Arizona Corporation Commission

**DOCKETED**

ARIZONA CORP COMMISSION  
DOCKET CONTROL

MAR 24 2009

DOCKETED BY 

In the matter of:

Docket No. S-20600A-08-0340

MARK W. BOSWORTH and LISA A.  
BOSWORTH, husband and wife;  
  
STEPHEN G. VAN CAMPEN and DIANE V. VAN  
CAMPEN, husband and wife;  
  
MICHAEL J. SARGENT and PEGGY L.  
SARGENT, husband and wife;  
  
ROBERT BORNHOLDT and JANE DOE  
BORNHOLDT, husband and wife;  
  
MARK BOSWORTH & ASSOCIATES, LLC, an  
Arizona limited liability company;  
  
3 GRINGOS MEXICAN INVESTMENTS, LLC, an  
Arizona limited liability company;

**RESPONDENTS  
MICHAEL J. SARGENT  
AND PEGGY L. SARGENT'S**

**REPLY IN SUPPORT OF  
NOTICE OF FILING  
IN SUPPORT OF  
MOTION TO STAY**

**(Oral Argument Requested)**

Respondents.

Respondents Michael J. Sargent and Peggy L. Sargent (collectively, the "Sargents") respectfully provide this Reply in support of their February 24, 2009 Notice of Filing in Support of Motion to Stay (the "Notice"). The Division portrays its February 18<sup>th</sup> subpoena as a typical "custodian of records" subpoena. This argument has two critical flaws. First, the Division's subpoena is not limited to the records of 3 Gringos, but seeks the records of 21 other entities. It is far beyond a true "custodian of records" subpoena. In any event, Mr. Sargent is not the custodian of records of 3 Gringos. Accordingly, the Divisions' response should be disregarded, and the Sargent's Motion to Stay should be granted.

1 **I. Mr. Sargent is not the custodian of records of 3 Gringos.**

2 The Division states that it has “good reason to believe” that Mr. Sargent is the custodian of  
3 records of 3 Gringos because Mr. Bosworth has not responded to a similar subpoena.<sup>1</sup> But the  
4 record is clear that Mr. Bosworth was the central figure in these matters. The fact that he failed to  
5 comply with the subpoena does not establish that Mr. Bosworth is not the custodian of records.  
6 Mr. Sargent affirmatively states he is not the custodian of records of 3 Gringos.<sup>2</sup>

7 The Division’s plan seems to be to randomly serve subpoenas upon people formerly  
8 connected with 3 Gringos, in the hopes of eventually hitting the custodian of records. This is not  
9 permissible. Again, Mr. Sargent denies that he is the custodian of records, and the Division has  
10 offered no creditable evidence to the contrary. The Division bears the burden of proof in all  
11 matters (A.A.C. R14-3-109.G), and it has failed to establish that Mr. Sargent is the custodian of  
12 records of 3 Gringos.

13 **II. The 3 Gringos subpoena clearly implicates Mr. Sargent’s right to remain silent.**

14 The Division states that the custodian of records of an entity may not assert the 5<sup>th</sup>  
15 amendment in response to a subpoena directed to the entity’s records, citing *Braswell v. United*  
16 *States*, 487 U.S. 99 (1988). That’s true, as far as it goes. But as noted above, Mr. Sargent is not the  
17 custodian of records of 3 Gringos. Thus, *Braswell* is inapplicable. Closer to the mark are *In re*  
18 *Grand Jury Proceedings (Mora)*, 71 F.3d 723 (9<sup>th</sup> Cir. 1995) and *In re Three Grand Jury*  
19 *Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d 173, 182-83 (2<sup>nd</sup> Cir. 1999). Those  
20 cases hold that former employees are not covered by the “collective entity” rule approved in  
21 *Braswell*. These cases hold that former employees may assert the right to remain silent in response  
22 to subpoenas for corporate records. *Id.* *Braswell* was predicated on the concept that the custodian  
23 of records acts as an agent of the corporation, rather than on his or her own behalf. These two more  
24 recent cases note that former employees are no longer agents of the corporation, and thus their acts  
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27 <sup>1</sup> Division Response at 2:1.

<sup>2</sup> See the Sargents’ Motion to Quash filed March 17, 2009.

1 in responding to subpoenas are directly attributable to themselves. Here, Mr. Sargent is thus more  
2 like a former employee, rather than the custodian of records in *Braswell*.

3 It is well established that a person's act of producing documents in response to a subpoena  
4 "may have incriminating testimonial aspects." *In re Grand Jury Subpoena dated April 18, 2003*,  
5 383 F.3d 905, 909-910 (9<sup>th</sup> Cir. 2003). For example, by producing documents, the witness "admits  
6 that the documents exist, are in his possession or control, and are authentic." *Id.* These concerns  
7 are lessened when the subpoena is narrowly drawn to refer to a few, specific documents that the  
8 government can show by other means are in the witness's possession. *Id.* In contrast, these 5<sup>th</sup>  
9 Amendment concerns are heightened when the subpoena is broadly drawn, because a broad  
10 subpoena requires the witness to make more testimonial admissions. *Id.* Thus, it is appropriate to  
11 quash a broad subpoena directed to a former employee seeking corporate records. *Id.*

12 Moreover, the February 18, 2009 subpoena commands Mr. Sargent not just produce  
13 documents, but to produce a sworn affidavit affirmatively stating several things regarding the  
14 documents. To comply, Mr. Sargent would have to take an oath before a notary public, who would  
15 then notarize the affidavit. There can be no doubt that statements made under oath are  
16 "testimonial."

17 The Division states that the February 18 subpoena "is for the records of 3GMI."<sup>3</sup> The  
18 Division fails to mention that the February 18 subpoena was not limited to the records of 3 Gringos  
19 – to the contrary, it also requests all documents relating to 21 other entities. The Division has never  
20 alleged that Mr. Sargent is the custodian of records for these 21 other entities. *Braswell* establishes  
21 that a custodian of records of an entity may not claim the right to remain silent with respect to a  
22 subpoena for that entity's records. Thus, Mr. Sargent may assert his right to remain silent in  
23 response to the Division's radically broad subpoena, which requests documents relating to 21 other  
24 entities in addition to 3 Gringos.

25 In sum, Mr. Sargent is not the custodian of records of 3 Gringos, so *Braswell* does not  
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27 <sup>3</sup> Division Response at 2:13.

1 apply. Mr. Sargent may assert his right to remain silent in response to subpoenas for documents.  
2 Moreover, the extremely broad nature of the February 18<sup>th</sup> subpoena ensures that any response  
3 would be highly testimonial. Further, by including 21 other entities in the subpoena, the Division  
4 has eliminated its ability to rely on *Braswell*.

5 **III. Mr. Sargent reasonably fears criminal prosecution.**

6 The Division states that the issuance of an investigatory subpoena does not “necessarily”  
7 mean “that a criminal investigation is underway.”<sup>4</sup> The Commission need not surmise the existence  
8 of a criminal investigation; the Attorney General’s office has told Mr. Sargent’s criminal counsel  
9 that one is underway, and that Mr. Sargent is a target of the investigation. This fact is substantiated  
10 by an affidavit from Mr. Sargent’s criminal counsel. The Division has not submitted a  
11 controverting affidavit. And the Division has very carefully avoided denying the existence of a  
12 criminal investigation.

13 Moreover, the subpoena specifically states that Mr. Sargent “may, in accordance with the  
14 rights guaranteed to you by the Fifth Amendment of the Constitution of the United States, refuse to  
15 give any information that might establish a direct link in a chain of evidence leading to your  
16 criminal convention.” This language is not included in the Division’s normal litigation subpoenas.  
17 The only reason to include it is to preserve the ability to use the responses in a criminal proceeding.

18 Mr. Sargent need only show a “realistic threat of criminal prosecution” in order to invoke  
19 the 5th Amendment. *Wohlstrom v. Buchanan*, 180 Ariz. 389, 391 n. 2, 884 P.2d 687, 689 (Ariz.  
20 1994). The affidavit from criminal counsel, combined with the statements in the subpoena,  
21 demonstrate a “realistic threat.” And the February 18<sup>th</sup> subpoena shows that Mr. Sargent continues  
22 to be faced with demands from the Division that he engage in testimonial acts – thus risking a  
23 waiver of his constitutional right to remain silent.

24 **IV. Conclusion.**

25 Mr. Sargent is not the custodian of records of 3 Gringos. The Division’s case law regarding  
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<sup>4</sup> Id. at 2:25-26.

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1 custodians of records is therefore inapplicable. Moreover, the February 18<sup>th</sup> subpoena is not  
2 limited to the records of 3 Gringos. Rather, it seeks records for 21 entities other than 3 Gringos.  
3 Mr. Sargent has a reasonable fear of criminal prosecution, and Mr. Sargent should not be forced to  
4 choose between his rights under the United States and Arizona Constitutions to remain silent, and  
5 his ability to mount a defense in this case. Thus, the Sargnets' motion to stay should be granted.

6 RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of March, 2009.

7 ROSHKA DeWULF & PATTEN, PLC

8  
9 By 

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19 ORIGINAL and thirteen copies of the foregoing  
20 filed this 24th day of March, 2009 with:

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23 1200 West Washington Street  
24 Phoenix, Arizona 85007

25 Copy of the foregoing hand-delivered  
26 this 24th day of March, 2009 to:

27 Marc E. Stern, Administrative Law Judge  
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27 Sargent.ACC/pld/Reply to Response to NOF re 3GI Subponea.doc