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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

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KRISTIN K. MAYES, Chairman
GARY PIERCE
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SANDRA D. KENNEDY
BOB STUMP

AZ CORP COMMISSION
DOCKET CONTROL

In the matter of:)
KYLE SCHMIERER, individually and doing))
business as AMADIN, and JANE DOE))
SCHMIERER, husband and wife,))
Respondents.))

DOCKET NO. S-20651A-09-0029

RESPONSE TO:
1) MOTION FOR CONTINUANCE;
AND 2) MOTION TO COMPEL
DISCOVERY

On August 21, 2009, Respondent filed a Motion for a Continuance and a Motion to Compel Discovery. Both Motions should be denied for the reasons outlined in the attached Memorandum of Points and Authorities.

Respectfully submitted this 25th day of August, 2009.

By: Wendy Coy
Wendy Coy
Attorney for the Securities Division of the
Arizona Corporation Commission

Arizona Corporation Commission
DOCKETED

AUG 25 2009

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **Motion for Continuance**

3 Respondent has requested a continuance for 120 days to allow him to prepare for the
4 administrative hearing. Pursuant to A.A.C. Rule R14-3-109(Q), a continuance may only be granted
5 for good cause. In this case, the Respondent has had ample time to prepare for the hearing.

6 Pursuant to the Third Procedural Order dated May 19, 2009, the administrative hearing was
7 scheduled to begin on August 31, 2009. The witness and exhibit list was to be exchanged on June
8 19, 2009. The Securities Division provided the Respondent with its witness and exhibit list as
9 ordered. Pursuant to the Fourth Procedural Order dated June 19, 2009, the Securities Division was
10 to provide a witness and exhibit list on June 19, 2009 and the Respondent was to provide his
11 witness and exhibit list on July 10, 2009.

12 Respondent now asserts that he is unavailable to attend the hearing although he has had 120
13 days to prepare for the scheduled hearing. Respondent has had access to the witness and the
14 exhibits the Securities Division plans to introduce at the scheduled hearing for 90 days. Respondent
15 has had ample to prepare for the scheduled hearing. There is no good cause to continue this matter.

16 **Motion to Compel Discovery**

17 Respondent asserts that he is unable to have a fair hearing in this matter because the
18 Securities Division failed to disclose evidence. Respondent cited to *Brady v. Maryland* 373 U.S. 83
19 (1963). *Brady* was a criminal case that established that due process gives a defendant the right of
20 access to any evidence favorable to the defense and material to either guilt or punishment. *Id.* at
21 238. *Brady* does not apply to this proceeding. The administrative process has specific rules related
22 to discovery.

23 The legislature has mandated that contested cases before the Arizona Corporation
24 Commission (“Commission”) are governed by Arizona Revised Statutes. *See* A.R.S. §§ 41-1067
25 and 41-1092.02(A)(4). Specifically, A.R.S. § 41-1061(A)(1) states: “Every person who is a party
26 to such proceedings shall have the right to be represented by counsel, to submit evidence in open

1 hearing and shall have the right of cross-examination.” Also, A.R.S. § 41-1062(A)(4) states:
2 “Prehearing depositions and subpoenas for the production of documents may be ordered by the
3 officer presiding at the hearing, provided that the party seeking such discovery *demonstrates* that
4 the party has *reasonable need* of the deposition testimony or materials being sought. . . .
5 Notwithstanding the provisions of section 12-2212, no subpoenas, depositions or other discovery
6 shall be permitted in contested cases *except as provided by agency rule or this paragraph.*”
7 Emphasis added. The Arizona Corporation Commission has specific rules related to discovery,
8 A.A.C. Rule R14-3-101 et seq.

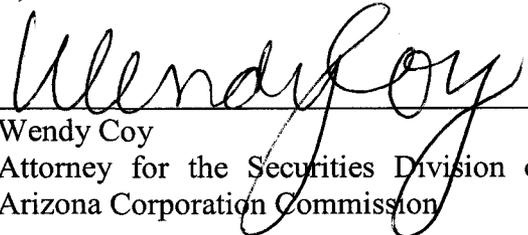
9 The Respondent is entitled to due process in this matter. “The fundamental requirement of
10 due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”
11 *Mathews v. Eldridge*, 96 S. Ct. 893 (1976) quoting *Armstrong v. Manzo*, 380 U.S. 545 (1965).
12 There is no basic constitutional right to pretrial discovery in administrative proceedings. *Silverman*
13 *v. Commodity Futures Trading Commission*, 549 F.2d. 28, 33 (7th Cir. 1977); *See also Starr v.*
14 *Commissioner of Internal Revenue*, 226 F.2d. 721,722 (7th Cir. 1955), cert. denied, 350 U.S. 993,
15 76 S.Ct. 542 (1955); *National Labor Relations Board v. Interboro Contractors, Inc.*, 432 F.2d 854,
16 857 (2nd Cir. 1970); *Miller v. Schwartz*; 528 N.E.2d 507 (N.Y. 1988). “[T]he evidence used to
17 prove the Government’s case must be disclosed to the individual so that he has an opportunity to
18 show that it is untrue. ... We have formalized these protections in the requirements of confrontation
19 and cross-examination.” *Green v. McElroy*, 79 S. Ct. 1400 (1959). “The Constitution does not
20 require that a respondent in an administrative proceeding be aware of all evidence, information and
21 leads to which opposing counsel might have access.” *Pet v. Dept. of Health Services*, 207 Conn.
22 346, 542 A.2d 672 (1988) quoting *Federal Trade Commission v. Anderson*, 631 F.2d 741, 748
23 (D.C. Cir. 1979). “This does not mean that a party can be denied due notice of the hearing, the
24 right to produce relevant evidence, the right to cross-examine witnesses produced by his adversary,
25 and the right to be fairly apprised of the facts upon which the agency will act.” *Id.*

1 Respondent has the right to cross-examine the witnesses against him. Further, Respondent
2 has the ability, pursuant to A.A.C. Rule R14-3-109(O), to subpoena those witnesses that he believes
3 have testimony relevant to the allegations in the Temporary Order to Cease and Desist and Notice of
4 Opportunity for Hearing ("TC&D"). The witnesses listed by the Respondent are employees of the
5 Commission and are available during business hours at the offices of the Commission. . Respondent
6 does not the have right to personal information of the Commission's employees.

7 **Conclusion**

8 Respondent has provided no good cause to continue the scheduled hearing. The Securities
9 Division's witness will be available for cross-examination. The Respondent has the right to subpoena
10 those witnesses he believes may have information related to the allegations in the TC&D.
11 Respondent's Motions should be denied.

12 Respectfully submitted this 25th day of August, 2009.

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14 By: 
15 Wendy Coy
16 Attorney for the Securities Division of the
17 Arizona Corporation Commission
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1 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
2 filed this 25th day of August, 2009 with:

3 Docket Control
4 Arizona Corporation Commission
5 1200 W. Washington St.
6 Phoenix, AZ 85007

7 COPY of the foregoing hand-delivered
8 filed this 25th day of August, 2009 to:

9 Mr. Marc E. Stern
10 Administrative Law Judge
11 Arizona Corporation Commission/Hearing Division
12 1200 W. Washington St.
13 Phoenix, AZ 85007

14 COPY of the foregoing mailed
15 this 25th day of August, 2009 to:

16 Kyle Schmierer
17 220 West Behrend Dr.
18 Phoenix, AZ 85027

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