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BEFORE THE ARIZONA CORPORATION COMMISSION

2009 NOV 12 P 4: 42 Arizona Corporation Commission
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COMMISSIONERS

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

In the matter of: SIR MORTGAGE & FINANCE OF ARIZONA, INC., an Arizona corporation, GREGORY M. SIR (a/k/a "GREG SIR"), and ERIN M. SIR, husband and wife, Respondents.	DOCKET NO. S-20703A-09-0461 **SECURITIES DIVISION'S OBJECTION TO RESPONDENTS' REQUEST FOR ISSUANCE OF ADMINISTRATIVE SUBPOENAS FOR TESTIMONY AND DOCUMENTS**

Pursuant to R.14-3-109(O) of the Rules of Practice and Procedure before the Corporation Commission ("Commission"), the Securities Division ("Division") objects to RESPONDENTS' unsupported request for administrative subpoenas for:

1. Testimony of Paula Brody to take place at the office of RESPONDENTS' counsel on Friday, December 11, 2009, beginning at 9:30 a.m.; and
2. Testimony of Melvin I. Brody to take place at the office of RESPONDENTS' counsel on Friday, December 10, 2009, beginning at 9:30 a.m. (collectively, the "Subpoenas for Testimony"),

and

1. Documents to be produced to RESPONDENTS by Paula Brody on December 2, 2009; and
2. Documents to be produced to RESPONDENTS by Melvin I. Brody on December 2, 2009 (collectively, the "Subpoenas for Documents").

RESPONDENTS have not complied with the applicable procedure for procuring lawfully issued subpoenas for documents and testimony in administrative proceedings before the Commission.

R14-3-109(O) provides that RESPONDENTS' requests for the issuance of the Subpoenas for Testimony and Documents must be supported by an "application" submitted to the Administrative Law Judge.[1]

Rule 14-3-106(F) states that an application "shall contain the facts upon which the application, with such exhibits as may be required or deemed appropriate by the applicant."

Further, the parameters of discovery in administrative proceedings is set forth in the chapter on Administrative Procedure, A.R.S. § 41-1001, *et seq.* Under Article 6 of this chapter, covering "Adjudicative Proceedings," Arizona law provides as follows:

> *A.R.S. § 41-1062:* *Hearings; evidence; official notice; power to require testimony and records; Rehearing*
>
> A. Unless otherwise provided by law, in contested cases the following shall apply:
>
> ...
>
> 4. The officer presiding at the hearing may cause to be issued subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence and shall have the power to administer oaths.... *Prehearing depositions and subpoenas for the production of documents may be ordered by the officer presiding at the hearing, provided that the party seeking such discovery demonstrates that the party has reasonable need of the deposition testimony or materials being sought.... Notwithstanding the provisions of section 12-2212, no subpoenas, depositions or other discovery shall be permitted in contested cases except as provided by agency rule or this paragraph.*

(emphasis added). Thus, the only forms of pre-trial discovery permitted in administrative proceedings are: (a) subpoenas, based on a showing of need and authorized by the administrative

[1] Moreover, the authority to pursue discovery during the course of an administrative proceeding is not conferred as a matter of right. In fact, courts have repeatedly recognized that there simply is no basic constitutional right to pretrial discovery in administrative proceedings. *Silverman,* 549 F.2d. at 33 (7th Cir. 1977). The federal Administrative Procedures Act echoes this point by offering no provision for pretrial discovery during the administrative process. 1 Davis, *Administrative Law Treatise* (1958), § 8.15, p. 588; see also, *See, e.g.,* 73A C.J.S. *Public Administrative Law and Procedure,* § 124 (1983)("Insofar as the proceedings of a state administrative body are concerned, only the methods of discovery set forth by the pertinent statute are available, and the methods not set forth therein are excluded"); *see also* 2 Am.Jur.2d. *Administrative Law § 327* (2d. ed. 1994)(In the context of administrative law, any right to discovery is grounded in the procedural rules of the particular administrative agency).

hearing officer; (b) depositions, based on a showing of need and authorized by authorized by the hearing officer; and (c) any other discovery provision specifically authorized under the individual agency's rules of practice and procedure.

Applied here, RESPONDENTS' request for the issuance of the Subpoenas for Testimony and Documents must be quashed because it is not supported by an application or motion demonstrating, for example, the facts underlying their request, or an appropriate citation to any exhibits. RESPONDENTS have also failed to set forth any facts or arguments demonstrating that they have a "reasonable need" to obtain documents and testimony from Mr. Brody and/or Ms. Brody.

Based on the foregoing, the Division respectfully requests that RESPONDENTS' request for issuance of the Subpoenas for Testimony and Documents be denied.

RESPECTFULLY SUBMITTED this 12th day of November, 2009.

Mike Dailey, Esq.
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ORIGINAL AND THIRTEEN (13) COPIES of the foregoing filed this 12th day of November, 2009 with:

Docket Control
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Copy of the foregoing hand-delivered this 12th day of November, 2009 to:

Marc E. Stern, Administrative Law Judge
Arizona Corporation Commission
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