ORIGINAL

0000105280

BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

2009 NOV 20 P 2: 08

AZ CORP COMMISSION
DOCKET CONTROL

Arizona Corporation Commission
DOCKETED
NOV 20 2009
DOCKETED BY

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 OBJECTION TO AND MOTION TO QUASH RESPONDENTS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS**

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") objects to RESPONDENTS' "First Request for Production of Documents" ("Request") and requests that it be quashed because it is not supported by fact or law.[1] The Request is also overbroad, unduly burdensome and unnecessary in light of the Administrative Law Judge's ("ALJ") Second Procedural Order (the "Existing Order") requiring the parties to exchange their list of witnesses and exhibits by January 4, 2010. Finally, the Request should be quashed because it conflicts with the confidentiality statute of the Arizona Securities Act ("Act"), A.R.S. § 44-2042.

[1] The rule cited by RESPONDENTS in support of their summary Request is "A.C.C. R14-3-101." (Request, p.1:12-13). That rule does not permit RESPONDENTS to request all of the documents contained in the Division's investigative file. Other than a vague citation to "et seq.," the Request is not supported by an appropriate citation to any other specific rule, statute or case law. To the extent RESPONDENTS are relying on specific authority to support their sweeping request for all of the Division's documents found somewhere within the Arizona Securities Act ("Act"), the Arizona Administrative Procedures Act or elsewhere, it is incumbent on RESPONDENTS to cite to such authority. In the absence of a proper invocation of any authority providing for such a broad, summary demand, the Request must be quashed.

1. RESPONDENTS Have Not Complied With Available Procedures for Procuring the Reasonable Discovery of Documents in Administrative Proceedings Before the Commission.

Discovery during the course of an administrative proceeding is not conferred as a matter of right. Courts have repeatedly recognized that there simply is no basic constitutional right to pretrial discovery in administrative proceedings. *Silverman v. Commodity Futures Trading Comm'n,* 549 F.2d. 28, 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.

In accordance with these findings, discovery within the confines of an administrative proceeding is authorized only to the extent that it is explicitly provided for in a separate statute or rule. *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).

As noted in the Division's pending November 12, 2009, "Objection to RESPONDENTS' Request for Issuance of Administrative Subpoenas for Testimony and Documents," established procedures exist for procuring reasonable discovery in administrative proceedings before the Commission. RESPONDENTS' summary Request for all of the Division's documents and information does not comply with these procedures.

R14-3-109(O) provides that RESPONDENTS' Request must be supported by an "application" submitted to the ALJ. Rule 14-3-106(F) states that an application "shall contain the facts upon which the application is based, 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 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 must be quashed because it is not supported by an application or motion setting forth any facts or arguments demonstrating that they have a "reasonable need" to obtain any documents from the Division. They cannot do so, primarily because the factual allegations identified in the TC&D are based on RESPONDENTS' own loan and mortgage files, title and escrow documents they caused to be generated and public records. RESPONDENTS also have the ability to communicate with their investors. RESPONDENTS' lack of need to obtain information from the Division is further demonstrated by their failure to identify an allegation in the TC&D that they cannot confirm or deny by reviewing their business records, communicating with their investors or through their own reasonable investigation.

Based on the foregoing, the Division respectfully requests that RESPONDENTS' summary Request for all of the Division's documents and information be quashed.

2. <u>These Rules and Procedures Governing Discovery for Administrative Proceedings Before the Commission Comport with Principles of Due Process</u>.

As discussed above, there is simply no constitutional right to discovery in administrative proceedings. Nor does the Constitution require that a respondent in an administrative proceeding be aware of all evidence, information and leads to which opposing counsel might have access. *Pet v. Dep't of Health Serv.,* 207 Conn. 346, 542 A.2d 672 (1988) *quoting Federal Trade Comm'n v. Anderson*, 631 F.2d 741, 748 (D.C.Cir. 1979); *Cash v. Indus. Comm'n of Arizona*, 27 Ariz. App. 526, 556 P.2d 827 (App. 1976). Despite this, the concept of due process is still germane to the procedures of governmental actions such as the administrative proceeding at issue. As the Supreme Court noted in *Willner v. Comm. on Character and Fitness,* 373 U.S. 96, 107 (1963), a respondent must be adequately informed of the evidence against him and be afforded an adequate opportunity to rebut this evidence. For instance, a denial of pre-hearing depositions is not a denial of due process because respondent had ample opportunity to cross-examine the witnesses at a full hearing. *Electomec Design & Dev. Co. v. NLRB*, 409 F.2d 631 (9th Cir. 1969).

Courts have already considered what types of procedures do in fact comply with due process in the context of administrative proceedings. It is well-settled that procedures designed to ensure "rudimentary requirements of fair play" are sufficient to meet the due process requirements in administrative adjudications. *Mitchell v. Delaware Alcoholic Beverage Control Comm'n*, 193 A.2d 294, 313 (Del.Super. 1963), *rev'd on other grounds*, 196 A.2d 410 (Del.Supr. 1963); *see also Matthews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)("the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner"); *Swift & Co. v. U.S.*, 308 F.2d 849, 851 (7th Cir. 1962)("due process in an administrative proceeding, of course, includes a fair trial, conducted in accordance with fundamental principles of fair play and applicable procedural

standards established by law"); 73A C.J.S. *Public Administrative Law and Procedure, § 60 (1983); see also Adamchek v. Board of Educ.*, 387 A.2d. 556 (Conn. 1978)(although the Uniform Administrative Procedures Act does not expressly provide for pre-trial discovery, the procedures required for the UAPA still exceed the minimal procedural safeguards mandated by the due process clause).

Persons have unsuccessfully sought to challenge this due process standard for administrative proceedings. For instance, in *Cimarusti v. Superior Court*, 79 Cal.App.4th 799, 94 Cal.Rptr.2d 336 (2000), a petitioner argued that his due process rights were compromised through the lower court's curtailment of his discovery requests. The court rejected this claim, reasoning that the pre-hearing discovery and hearing procedures as provided under the state's Administrative Procedures Act fully satisfied the petitioner's due process rights. Similarly, in *Silverman,* 549 F.2d 28, a petitioner argued that he was denied due process in connection with the prehearing production of documents by the CTFC. In noting that the petitioner received copies of all proposed exhibits, a list of all proposed witnesses, the identity of the government employees who had investigated the case, and copies of memoranda reflecting petitioner's own statements to administrative representatives, the court ruled that the proceedings did not involve a denial of due process. Responding to a similar appeal, a Texas court found that due process in administrative proceedings mandates notice, a hearing, and an impartial trier of facts, but not various methods of discovery. *Huntsville Mem'l Hosp. v. Ernst*, 763 S.W.2d 856, 859 (Tex.App. 1988).

These cases demonstrate that, in order to comport with procedural due process in the context of an administrative proceeding, an agency need only enforce the guidelines of applicable administrative statutes and rules while using the discretion inherent in these guidelines to ensure a level of fundamental fairness. See *Pacific Gas and Elec. Co. v. Federal Energy Regulatory Comm'n,* 746 F.2d 1383 (9th Cir. 1984)("If an agency has adopted rules providing for discovery in its proceedings, **the agency is bound by those rules** and must ensure that its procedures meet

due process requirements.")(emphasis added).

As discussed above, the extent of discovery to which a party to an administrative proceeding is entitled is primarily determined by the particular agency; the rules of civil procedure are inapplicable. *See, e.g., Pacific Gas and Elec. Co.,* 746 F.2d at1387*; see also LTV Steel Co. v. Indus. Comm'n*, 748 N.E.2d 1176 (Ohio 2000) (discovery as generally provided by the rules of civil procedure in court proceedings is not available in administrative proceedings). This point is particularly obvious in light of the fact that the Arizona legislature and Corporation Commission have enacted and adopted specific statutes and rules, respectively, to govern discovery procedure in this administrative forum.

Despite these explicit rules on discovery, RESPONDENTS are attempting to use the civil discovery rules set forth in the Arizona Rules of Civil Procedure in this administrative proceeding. RESPONDENTS appear to rely on Rule 14-3-101(A) of the Rules of Practice and Procedure to justify their position on discovery. In pertinent part, this provision states: "In all cases in which procedure is set forth *neither by law, nor by these rules, nor by regulations or order of the Commission*, the Rules of Civil Procedure for the Superior Court of Arizona as established by the Supreme Court of Arizona shall govern." (Emphasis added). However, this catch-all provision provides a secondary procedural resource only *where there is nothing in the law or rules governing a particular procedure*.[2] As pointed above, however, there is already plenty of governing authority with respect to discovery procedure in administrative proceedings within Arizona. Indeed, both laws **and** rules explicitly outline the proper discovery procedures for administrative proceedings in this state. Thus, there is neither need nor justification to charge into the civil rules of procedure for guidance on discovery.

The discovery procedures discussed above and available to RESPONDENTS are more than adequate in satisfying any due process concerns. RESPONDENTS' unsupported attempt to invoke far-reaching civil discovery rules in this administrative forum is misplaced and must be

[2] Note that this Commission rule references different types of ***procedures*** (e.g. "service," "time computation," "motion practice", etc.), and not just specific "discovery procedures."

denied. Because RESPONDENTS have failed to use available and constitutionally valid procedures for asking for information from the Division, their overbroad Request must be quashed.

3. <u>The Request is Overbroad, Unduly Burdensome and Unnecessary</u>.

RESPONDENTS' unlimited Request orders the Division to produce all documents and information contained in the Division's investigative file not only in this case, but in a wholly unrelated matter with a file number of 7844. (*See*, Request, at Documents to be Produced, p.12, ¶48).

The Request includes fifty-six (56), sweeping and overlapping requests for documents and information. That RESPONDENTS are asking for all documents in the Division's confidential investigative file is demonstrated by just the following request number four (4) out of their fifty-six (56) such requests:

> 4. All documents in the possession or under the control of the Securities Division relating to the Respondents.

RESPONDENTS further define[3] the "documents" they want the Division to produce as follows:

> 6. The terms "document" or "documents" include, without limiting their generality, all contracts, agreements, correspondence, letters, files, memoranda, messages, handwritten notes, e-mail, inter- or intra-departmental or office or firm communications, telephone logs, telephone messages, computer disks, hard drives, telegrams, newsletters or other publications, stock certificates, stock options, promissory notes, appraisal reports, expressions of opinion as to value use of real or personal property, valuation estimates of any kind, financial data, *pro formas* estimates, financial projections, statements, credit and loan applications, accounting records and worksheets, financial statements, diaries, calendars, logs, desk diaries, appointment books, feasibility studies, recordings, notes of conversations, notes of meetings, notes of conferences, notes of investigations, notes of opinions, notes of interviews, written statements, recorded or taped interviews or statements, drafts of reports, preliminary reports, final reports, studies, forecasts, prospectuses, charts, graphs, maps, drawings or other representations or depictions, telephone records, motion picture film, audio or video tape recordings, facsimile copies, computer printouts, data card programs or other input or output of data processing systems, photographs (positive print,

[3] The Request further includes a total of twelve (12) discrete "Definitions."

slides or negatives), microfilm or microfiche, or other data compilations from which information can be obtained or translated through detection devices into reasonably usable form, whether originals or copies, altered or unaltered, made by any means. The terms "document" and "documents" also include all copies which are, in any manner, not identical in content to the originals. Any comment or notation appearing on any document, and not a part of the original text, is to be considered a separate "document." Any draft, or any other preliminary form of any document, is also to be considered a separate "document."

7. The term "all documents" means every document, as defined above, known to you and every document [that apparently can possibly exist] which can be located or discovered by reasonably diligent efforts. (emphasis in original).

Based only on request for production number four (4) and definitions six (6) and seven (7) above, it is difficult, if not impossible, to imagine a broader request. Coupled with the *remaining fifty-five categories of requests*, the Request is objectively overbroad and unduly burdensome and must be quashed. Indeed, such requests are not acceptable in any known federal or state civil or criminal litigation, let alone in administrative proceedings like this one designed to be speedy and cost effective.[4] *See e.g.*, R14-3-101(B)(rules applicable to administrative proceedings before the Commission shall be interpreted to "secure the just and speedy determination of all matters presented…"

Compounding this broadness are twenty-one discrete, unduly burdensome "Instructions" on exactly how the Division is supposed to respond to the Request. There are even instructions addressing documents that are not actually discoverable and/or have not been made public. For instance, the Request directs the Division to perform a myriad of tasks relating to information that is protected by the confidentiality statute of the Act, A.R.S. § 44-2042, and the attorney-client and work-product privileges, as follows:

---

[4] Because they derive from an entirely distinct process, the rules of civil procedure for discovery **do not** apply in administrative proceedings. *See, e.g., Pacific Gas and Elec. Co.,* 746 F.2d 1383, 1387 (9th Cir. 1984)*; Silverman v. Commodity Futures Trading Comm'n,* 549 F.2d. 28, 33 (7th Cir. 1977)*; NLRB v. Vapor Blast Mfg. Co.,* 287 F.2d 402, 407 (7th Cir. 1961). Indeed, merging civil discovery rules into the administrative arena would have many deleterious results, including: (1) allowing respondents to access confidential investigative information far removed from the witnesses and exhibits relevant to the active case against them; (2) allowing respondents to protract the proceedings indefinitely; (3) allowing respondents to excessively consume scarce but vital resources better expended on other matters necessary for the protection of the public; and (4) allowing respondents to force the agency into the position of a civil litigant rather than into its proper role as a governmental regulatory authority.

H. In the event that you seek to withhold any documents, things or information on the basis that it is properly subject to some limitation on discovery, you shall supply Respondents with a list of the documents and things for which limitation of discovery is claimed, indicating:

(1) The name of each author, writer, sender or initiator of such document or thing, if any;

(2) The name of each recipient, addressee or party for whom such document or thing was intended, if any;

(3) The name of the person in custody or charge or possession of each such document;

(4) The date of each such document, if any, or an estimate thereof and so indicated as an estimate;

(5) The general subject matter as described in each such document, or, if no such description appears, then such other description sufficient to identify said document;

(6) The name, business address and position of each person who has seen, or has access to or knowledge of, the contents or nature of any such document; and

(7) The claimed grounds for limitation of discovery (e.g., "attorney-client privilege").

Preparing just the detailed response to the Request as to documents that are not even discoverable as directed by RESPONDENTS would entail an enormous amount of unnecessary time and expense. Thus, because the Request is unduly burdensome and overbroad, it should be quashed.

Further, the Request is unnecessary in light of the ALJ's Existing Order that requires the parties to disclose their list of witnesses and exhibits on or before January 4, 2010.

Moreover, RESPONDENTS already possess the information sought in the overbroad Request. By way of limited example, paragraphs twenty-one and twenty-two of the TC&D allege:

> 20. As discussed further below, RESPONDENTS further prepare, and require investors to execute a standard form document called, "Beneficiary Instructions and Authorizations" ("Agency Agreements") that permit RESPONDENTS to perform a multiple Loan related tasks on behalf of investors.

> 21. As documented, in part, by the Agency Agreements, RESPONDENTS also collect a portion of the monthly Loan interest payments made by Loan borrowers in the form of an "interest participation" fee of, for instance, as little as ".25%" (*i.e.*, one-quarter of one percent) up to ".30%" (*i.e.*, 3/10 of one percent). RESPONDENTS sometimes also have investors execute an "Irrevocable Money Assignment" in favor of RESPONDENTS and/or one of SIR's other companies that allows RESPONDENTS and/or one of SIR's other companies to retain, for instance, one-half of one percent (*i.e.*, ".50%") of all Loan interest payments made by a Loan borrower under a Loan Note.

These paragraphs, pled to establish the vertical commonality element of an investment contract security analysis, were drafted based on the plain language of RESPONDENTS' own "Beneficiary Instructions and Authorizations."

Because: (a) the Division will provide RESPONDENTS with copies of all of the documents and evidenced identified in the TC&D as already ordered by the ALJ; and (b) the evidence referred to in the TC&D can be found in RESPONDENTS' own business records, the Request must be quashed in its entirety.

4. <u>The Request Improperly Violates the Confidentiality Statute of the Securities Act</u>.

By way of limited example, and regardless of whether such information is actually related to an allegation contained in the TC&D, RESPONDENTS' Request demands the following information:

> 8. All correspondence regarding or referring to the Respondents.
>
> 9. All documents or other information provided to the Securities Division by any individual or entity regarding any of the Respondents.
>
> ***
>
> 11. All documents evidencing telephone calls made by the Securities Division or anyone acting on its behalf to lenders, including, but not limited to, (i) documents sufficient to identify each telephone call made by the Securities Division, (ii) who authorized each telephone call, (iii) who placed the telephone calls, (iv) the scripts or outlines used by the individuals who placed or received these calls; and (v) any notes, transcripts, tapes or other memoranda memorializing the telephone calls.

RESPONDENTS' overbroad Requests clearly requests the Division to disclose protected confidential information obtained during the course of its investigation. Under A.R.S. § 44-2042, information and documents obtained by the Division during the course of investigations under

the Securities Act are confidential and may not be disclosed, unless such documents and information are made public by the Director of the Division if such disclosure is in the public interest.[5]

The confidentiality mandate supersedes the disclosure standards under the Securities Act. The policy purpose underlying the prohibition of dissemination of information obtained during the investigation of a matter, unless such information is made a matter of public record, includes the protection of the innocent from disclosure of private information as well as protection of the integrity of the regulatory enforcement process. RESPONDENTS' Request seeks to improperly chill the Division's ongoing investigative process. Because the Request improperly seeks to obtain confidential information protected by the confidentiality provision of the Securities Act, the ALJ must quash the Request.

5. <u>Conclusion</u>.

Because RESPONDENTS' unsupported Request: (a) fails to comply with established, constitutional procedures for seeking reasonable discovery; (b) is overbroad, unduly burdensome and unnecessary; and (c) violates the confidentiality provision of the Securities Act, A.R.S. § 44-2042, the Division respectfully requests the ALJ to quash the Request in its entirety.

---

[5] Specifically, A.R.S. § 44-2402(A) states:

> The names of complainants and all information or documents obtained by any officer, employee or agent of the commission, including the shorthand reporter or stenographer transcribing the reporter's notes, in the course of any examination or investigation are confidential unless the names, information or documents are made a matter of public record. An officer, employee or agent of the commission shall not make the confidential names, information or documents available to anyone other than a member of the commission, another officer or employee of the commission, an agent who is designated by the commission or director, the attorney general or law enforcement or regulatory officials, except pursuant to any rule of the commission or unless the commission or the director authorizes the disclosure of the names, information or documents as not contrary to the public interest.

RESPECTFULLY SUBMITTED this 20th day of November, 2009.

Mike Dailey, Esq.
Staff Attorney
Securities Division
1300 West Washington, Third Floor
Phoenix, Arizona 85007

ORIGINAL AND THIRTEEN (13) COPIES of the foregoing filed this 20th day of November, 2009 with:

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

Copy of the foregoing hand-delivered this 20th day of November, 2009 to:

Marc E. Stern, Administrative Law Judge
Arizona Corporation Commission
Hearing Division
1200 West Washington
Phoenix, Arizona 85007

Copy of the foregoing mailed this 20th day of November, 2009 to:

Paul Roshka, Esq.
Tim Sabo, Esq.
Roshka DeWulf & Patten
One Arizona Center
400 East Van Buren Street
Suite 800
Phoenix, Arizona 85004
Attorneys for Respondents