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BEFORE THE ARIZONA CORPORATION COMMISSION

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2009 DEC -1 P 4: 21
AZ CORP COMMISSION
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Arizona Corporation Commission

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DEC -1 2009

In the matter of:

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SIR MORTGAGE & FINANCE OF ARIZONA,
INC., an Arizona corporation,

Docket No. S-20703A-09-0461

GREGORY M. SIR (a/k/a "GREG SIR"), and
ERIN M. SIR, husband and wife,

Respondents.

RESPONDENTS' RESPONSE TO:

- (1) SECURITIES DIVISION'S OBJECTION TO AND MOTION TO QUASH FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND;**
- (2) SECURITIES DIVISION'S OBJECTION TO RESPONDENT'S REQUEST FOR ISSUANCE OF ADMINISTRATIVE SUBPOENAS FOR TESTIMONY AND DOCUMENTS**

I. Introduction.

In its Objections, the Securities Division (the "Division") flatly refuses to provide any discovery to the Respondents. The Division makes no effort to negotiate the scope of discovery, or to address any specific concerns. Instead, the Division makes sweeping boilerplate challenges to the discovery rights of all parties in all proceedings before the Commission and argues that little or no discovery is permitted in any administrative proceedings and provided the Respondents with nothing – not a single document. The Division's position conflicts with numerous Administrative Law Judge ("ALJ") rulings permitting broad discovery under the Commission's procedural rules. The Commission's procedural rules and the Arizona Rules of Civil Procedure grant broad discovery. The ALJ should, once again, firmly reject the Division's position.

The Division also objects that the request for production is overbroad, and that the request for subpoenas is inadequate. As discussed below, the documents requested by Respondents are

1 highly relevant, are reasonably calculated to lead to the discovery of admissible evidence, and
2 necessary to prepare for their defense. Furthermore, the request for subpoenas complies with the
3 requirements of the controlling statutes, rules and regulations.¹

4 **II. The Commission's procedural rules provide broad discovery rights for all parties.**

5 The Commission's Rules of Practice and Procedure ("Procedural Rules") are set forth in
6 A.A.C. R14-3-101 et seq. The Procedural Rules apply to both Securities Division and Utilities
7 Division cases. A.A.C. R14-3-101.A. There is no distinction between Securities and Utilities
8 cases with respect to the Procedure Rules. *Id.* The Procedural Rules expressly incorporate the
9 Arizona Rules of Civil Procedure, including those rules governing discovery. *Id.* Thus, discovery
10 in the Division's cases is governed by the Commission's own Procedure Rules and the Arizona
11 Rules of Civil Procedure.

12 Numerous Commission decisions have noted the broad discovery rights available under the
13 Procedural Rules.² Likewise, many Commission Procedural Orders describe the broad discovery
14 rights available under the Procedural Rules. As Assistant Chief ALJ Nodes noted in a recent
15 Procedural Order, "[t]he standard for conducting discovery is intentionally broad to allow parties to
16 a proceeding to prepare for hearing or trial and to mitigate the necessity for unnecessary discovery-
17 based cross-examination on the witness stand."³ Judge Nodes specifically applied the Rules of
18 Civil Procedure, including the rule allowing all discovery requests "reasonably calculated to lead to
19 the discovery of admissible evidence."⁴ ALJ Rodda applied that same standard in denying a

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21 ¹ See A.R.S. § 40-244 (The "Commission, or a commissioner, or any party, may take depositions as in a
22 court of record."); A.A.C. R14-3-109(P)("The Commission, a commissioner, or any party to any proceeding
before it may cause the depositions of witnesses to be taken in the matter prescribed by law and of the civil
procedure for the Superior Court of the state of Arizona.").

23 ² See e.g. Decision No. 70355 (May 16, 2008) at Finding of Fact No. 9 (noting granting of motion to
24 compel) and Decision No. 66984 (May 11, 2004) at Finding of Fact No. 55 (same); Decision No. 70011
25 (Nov. 27, 2007) at 48 (rejecting new argument raise by utility due to. "insufficient time to conduct
discovery."); Decision No. 67454 (January 4, 2005)(discussing "reasonably calculated to lead to the
26 discovery of admissible evidence" discovery standard); Decision No. 65121 (August 23, 2002) (at Finding
of Fact No. 8)(noting that a hearing was vacated and rescheduled in order to allow for further discovery).

27 ³ Procedural Order dated November 23, 2009 in Docket Nos. SW-01428A-09-0103 at p. 5.

⁴ *Id.*, citing Arizona R. Civ. Pro. 26(b)(1)(A).

1 motion to quash a subpoena in another recent Procedural Order.⁵ To the same effect is Judge
2 Nodes' earlier Procedural Order applying the Rules of Civil Procedure to a motion to compel.⁶
3 These Procedural Orders all recognize that the Commission's Procedural Rules incorporate the
4 Rules of Civil Procedure and allow the same broad discovery allowed in civil cases.

5 For this reason, the Securities Division's sweeping attack on discovery has been rejected in
6 numerous cases. For example, the Division was required to provide discovery in the recent
7 Hockensmith case, Docket No. S-20631A-08-0503. Likewise, the Division was compelled to
8 provide discovery in the Yucatan case, Docket No. S-03539A-03-0000 and in the Reserve Oil case,
9 Docket No. S-20437A-05-0925. Despite losing this argument time after time, the Division persists
10 in refusing to provide discovery in case after case until ordered to comply.

11 The Division spends numerous pages arguing that discovery is not constitutionally required
12 in administrative cases. Respondents have made no constitutional claims in this case. Rather, the
13 Respondents simply request the Division comply with discovery under the Commission's own
14 Procedural Rules and the Arizona Rules of Civil Procedure, as has been done in case after case.

15 The Division also argues that the Administrative Procedure Act only provides for limited
16 discovery under A.R.S. § 41-1062. But Respondents' discovery requests specifically cite the
17 Procedural Rules and do not cite or rely on the Administrative Procedure Act. Moreover, A.R.S. §
18 41-1062 expressly contemplates agencies providing greater discovery rights by rule (as the
19 Commission has done here). The statute provides that discovery is not allowed except "as provided
20 by agency rule or this paragraph." A.R.S. § 41-1062(A). There is no question that agencies may
21 enact rules providing for additional discovery. Indeed, Judge Nodes' recent Procedural Order
22 firmly rejects the idea that A.R.S. § 41-1062 limits the broad discovery allowed by the Procedural
23 Rules.⁷

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26 ⁵ Procedural Order dated November 13, 2009 in Docket Nos. RT-00000H-97-0137 at p. 2.

27 ⁶ Procedural Order dated August 11, 2006 in Docket No. T-03632A-06-0091.

⁷ Procedural Order dated November 23, 2009 in Docket Nos. SW-01428A-09-0103 at p. 5.

1 The Division next points to A.R.S. § 44-2042 and argues that this confidentiality statute
2 blocks all discovery from the Division. But the Division’s argument is misplaced as this statute
3 expressly excludes disclosures “pursuant to any rule of the commission,” A.R.S. § 44-2042.A.
4 Thus, discovery required by the Commission’s Procedural Rules is not covered by the
5 confidentiality statute. And even if the statute did apply, the Division confuses privilege and
6 confidentiality. They are distinct concepts, and confidentiality statutes do not create privilege
7 because “legislative bodies know how to specify materials that will be privileged, and not subject to
8 disclosure, as opposed to [materials that are] confidential but nonetheless subject to disclosure.”
9 *Catrone v. Miles*, 215 Ariz. 446, 455, 160 P.3d 1204, 1213 (App. 2007). Statutory interests in
10 confidentiality are typically satisfied by measures such as protective orders, sealing of the record,
11 closing the courtroom to certain portions of the trial and the like. *Id.* Indeed, that is exactly how
12 confidential matters are handled under the parallel confidentiality statute for utility matters, A.R.S.
13 § 40-204.C. Often, these issues are addressed through a confidentiality agreement. That was how
14 confidentiality issues were addressed in the recent Hockensmith securities case (Docket No. S-
15 20631A-08-0503). Respondents are willing to agree to a confidentiality agreement, a stipulated
16 protective order, or other reasonable measures to preserve the confidentiality of any documents the
17 Division believes are confidential.

18 **III. The Request for Production is not overbroad.**

19 The Division argues that the Request is “overbroad and unduly burdensome.”⁸ While the
20 Division does not specify how most of the requests are overbroad or burdensome, it does offer a
21 few examples. First, the Division objects to request for “a wholly unrelated matter with a file
22 number of 7844.”⁹ The file number is simply a typo; it should be File No. 9699, which is the
23 Division’s file number for the Respondents. The Division could have clarified that with a simple
24 phone call to Respondents’ counsel.

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26 ⁸ Division “Objection to and Motion to Quash Respondents’ First Request for Production of Documents,” at
27 p. 8.

⁹ *Id.* at p. 7.

1 The Division also objects to the request for “all documents in the possession or under the
2 control of the Securities Division relating to the Respondents.”¹⁰ But documents “relating to the
3 Respondents” are “reasonably calculated to lead to the discovery of admissible evidence,” which is
4 the discovery standard at the Commission.¹¹ By way of example, this category of documents would
5 include statements by lenders or notes of interviews with them. Such statements could show their
6 level of involvement in the loans, a key factor in determining whether a “security” exists. Indeed,
7 at hearing the Respondents intend to introduce evidence of the highly active management role of
8 the lenders referenced in the Notice. The requested documents could provide key corroborating
9 evidence of that active role. And if the Division did not collect such lender statements or
10 interviews, that too would be telling, especially in this case where the Division took the
11 extraordinary step of issuing a Temporary Commission Order against the Respondents.

12 Moreover, there are a number of methods the Division could use to limit any “burden”
13 imposed on it. For example, the Division need not produce to the Respondents the same
14 Bates-numbered documents the Respondents produced to the Division. It can simply note the
15 Bates-numbers it possesses. Likewise, it is common practice that if some of the documents are
16 public records, the responding party may describe the specific documents rather than producing
17 copies.

18 The Division also complains that the request for production contains detailed definitions
19 and “instructions for use.” But that is commonplace. *See e.g. 2 Arizona Practice, Civil Trial*
20 *Practice* § 16.42, Form – Request for production of documents; *Arizona Legal Forms: Civil*
21 *Procedure* (3rd ed. 2002) at § 34.1.

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26 ¹⁰ *Id.*

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¹¹ *See e.g.* Decision No. 67454 (January 4, 2005)(discussing “reasonably calculated to lead to the discovery of admissible evidence” discovery standard); Procedural Order dated November 23, 2009 in Docket Nos. SW-01428A-09-0103 at p. 5.

1 **IV. The request for subpoenas complies with Commission rules.**

2 The Division argues that Respondents' proposed subpoenas do not comply with A.A.C.
3 14-3-109(O). That rule requires only two things: (1) that the application for subpoena be "in
4 writing;" and (2) that the application "specify, as clearly as possible, the books, waybills, papers,
5 accounts or other documents desired." The rule does not require any specific form for the
6 application, nor does it require any detailed description of why the information is needed. Instead,
7 the rule allows for a motion to quash a subpoena after issuance if the subpoena is "unreasonable or
8 oppressive." Here, the Respondents' application was in writing (a letter) and clearly specified the
9 requested documents. Thus, it complies with A.A.C. 14-3-109(O).

10 While the Respondents are not required to make a detailed showing of need, they note that
11 the proposed subpoenas are for Melvin I. Brody and Paula Brody. The Notice ¹² is replete with
12 references to the Brodys, although not by name. For example, the Brodys are lenders for the loans
13 "Specific Loan Investment No. 1" and "Specific Loan Investment No. 2" in the Notice.¹³ Thus, the
14 proposed subpoenas directed to the Brodys will likely to lead to the production of highly relevant
15 documents and testimony. In addition, they most certainly will lead to the discovery of admissible
16 evidence.

17 **V. Conclusion.**

18 The Commission's Procedural Rules incorporate the Rules of Civil Procedure and thus
19 allow for broad discovery, as confirmed by numerous Procedural Orders. The Division's
20 arguments to the contrary have been rejected time after time. The ALJ should require the Division
21 to respond to discovery, and should find that the request for production is not overbroad, and that
22 the proposed subpoenas should be issued.

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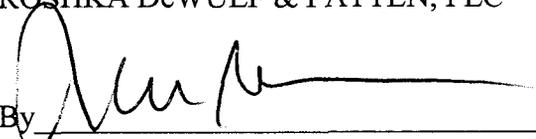
27 ¹² Securities Division Temporary Order to Cease and Desist and Notice of Opportunity for Hearing.

¹³ *Id.* at ¶¶ 42-51.

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1 RESPECTFULLY SUBMITTED this 1st day of December, 2009.

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3
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