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BEFORE THE ARIZONA CORPORATION COMMISSION

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

2010 APR 28 P 4: 15
AZ CORP COMMISSION
DOCKET CONTROL

In the matter of:
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.

Docket No. S-20600A-08-0340

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

MOTION TO SEVER

Arizona Corporation Commission
DOCKETED
APR 28 2010

DOCKETED BY

Respondents Michael J. Sargent ("Mr. Sargent") and Peggy L. Sargent (collectively, the "Sargents") respectfully request that the Commission, through its assigned Administrative Law Judge, sever (i.e. bifurcate) the hearing concerning them from the hearing concerning Mr. Mark A. Bosworth, Lisa A. Bosworth, Mark Bosworth & Associates, LLC and 3 Gringos Mexican Investments, LLC (collectively, the "Bosworth Respondents"). The hearing concerning the Bosworth Respondents will likely be lengthy and complex; a separate hearing for the Sargents will be much simpler and less complex. Severing these hearings will promote judicial economy, reduce the risk of prejudice, and reduce the burden of these proceedings on the Sargents. Severance is supported by the Arizona Rules of Civil Procedure as well as Commission precedent.

1 **I. The Sargents' case should be tried separately for reasons of efficiency and fairness.**

2 **A. Judicial economy and access to counsel.**

3 The hearing against the Bosworth Respondents will likely be long and complex. In
4 contrast, a separate hearing concerning the Sargents will be shorter and simpler. The Securities
5 Division ("Division") intends to call numerous witnesses. Few of these witnesses are relevant to
6 the Division's claims against the Sargents. For example, we understand that the Division intends to
7 call numerous investors as witnesses to establish that the Bosworth Respondents offered and/or
8 sold securities "from or within Arizona." But the Division has not disclosed any evidence of Mr.
9 Sargent offering or selling securities "from or within Arizona", so these witnesses are irrelevant to
10 the Sargents. There is no need for the Sargents or their counsel (with meter running) to sit through
11 a lengthy parade of irrelevant witnesses.

12 Likewise, the Division has listed 103 exhibits for the hearing in this docket. And in reality,
13 that understates the number of exhibits, because many exhibits include multiple documents
14 combined together and listed as lettered sub-exhibits in the Division's exhibit list. If these sub-
15 exhibits are counted separately, the Division has 264 exhibits. The vast majority of these exhibits
16 appear to pertain to the Bosworth Respondents. The Division has not specified which, if any,
17 exhibits the Division believes are applicable to their case against the Sargents. The Sargents will
18 be able to focus their defense, and preserve their resources, by having a separate hearing with only
19 the exhibits actually applicable to them.

20 Moreover, the Division's Notice of Opportunity includes wide-ranging allegations against
21 all of the respondents, without specifying which allegations apply to which respondent. If the
22 Division attempts to prove those allegations in the same manner, the Sargents will be greatly
23 disadvantaged by not knowing which allegations they must defend against, nor which witnesses
24 and exhibits they should contest. A separate hearing will enable the Division to put forward a more
25 focused and coherent case against the Sargents, and enable the Sargents to more effectively and
26 efficiently defend themselves.

27 Separate hearings also make for a cleaner record. For example, in separate hearings it will

1 be clear which respondents a witness is testifying against, while in a combined hearing the witness
2 may not be precise in describing who did what. A clearer, cleaner record will enable the ALJ and
3 the Commissioners to more efficiently evaluate the Division's claims against the Sargents. Thus,
4 separate hearings will promote judicial or administrative economy.

5 Separate hearings will also protect the Sargents from significant expense and
6 inconvenience. This is not a trivial concern – to the contrary, it goes directly to the fairness of the
7 proceedings and the ability of the Sargents to present an effective defense. The Sargents do not
8 have unlimited resources, nor do they have an in-house team of attorneys and litigation
9 professionals available to them. They must pay for their defense, and their ability to do so is
10 directly related to the length and complexity of the proceedings. The Sargents may be effectively
11 denied counsel and the ability to present a defense if they are subjected to long, complex
12 proceedings involving allegations, witnesses, and exhibits that have little or no relevance to the
13 claims against them.

14 **B. Further economic considerations.**

15 Moreover, even if the Sargents are able to scrape together the resources to fund their
16 defense, economic considerations are still important. If the Sargents prevail in a combined hearing,
17 they will have lost significant funds defending against meritless allegations from the Division. In
18 effect, the government will have taken that money away from them without cause. And even if the
19 Division prevails against the Sargents in a consolidated hearing, the funds available to pay any
20 restitution or penalties ordered by the Commission will have been reduced, or perhaps eliminated.

21 **C. Possible resolution without hearing against the Sargents.**

22 In addition, separate hearings may eliminate the need for the Sargents to go to hearing at all.
23 As noted above, as of yet, the Division has not disclosed any evidence that Mr. Sargent offered or
24 sold securities “from or within Arizona.” Instead, the Division appears to be relying on some sort
25 of participant-liability theory (although no such theory is alleged in the Division's Notice of
26 Opportunity). Thus, if the Bosworth Respondents prevail because the Division is unable to prove
27 an offer or sale, or prove that the offers or sales were made “from or within Arizona”, or the

1 Bosworth Respondents prevail for some other reason, there would be no basis for a hearing against
2 the Sargents. In other words, proving violations by the Bosworth Respondents will be necessary,
3 but not sufficient, to proving alleged violations by the Sargents. In such cases, separate hearings
4 are especially appropriate – “Usually, an issue which involves a bar to the action will be tried
5 separately.” McAuliff & Wahl, 2 Arizona Practice, Civil Trial Practice § 17.10 (2nd ed., current
6 through 2009 update).

7 **D. Issues unique the Sargents.**

8 In addition, there may be issues and evidence that apply only to the Sargents. For example,
9 Mr. Sargent was instrumental in settling a related civil proceeding. Robert C. May (an investor and
10 a witness listed by the Division), stated that “Mr. Sargent demonstrated enormous integrity and
11 professionalism.... His strong personal commitment... was integral to the resolution of the above
12 mentioned settlement agreement.”¹ Mr. May’s comments were made as official spokesperson for
13 the relevant investors. This settlement is relevant, at a minimum, to the amount of restitution (due
14 to set-off) and penalties (through mitigation) that the Commission orders, in the event the Division
15 is able to prove its charges against the Sargents. It would be more efficient to deal with these issues
16 in a separate hearing concerning the Sargents, rather than lumping them into one consolidated
17 mega-hearing.

18 **II. Severance is widely used to promote judicial economy and prevent prejudice in cases**
19 **with multiple defendants.**

20 **A. The Arizona Rules of Civil Procedure support severance.**

21 The Commission’s rules incorporate the Rules of Civil Procedure (“Civil Rules”). *See*
22 A.A.C. R14-3-101.A (incorporating Civil Rules by reference); A.A.C. R14-3-106.K (“Motions
23 shall conform insofar as practicable with the Rules of Civil Procedure...”). Thus, Procedural
24 Orders issued by the Commission’s ALJs frequently refer to the Civil Rules.²

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27 ¹ *See* July 30, 2009 Letter from Robert C. May to the Arizona Corporation Commission, docketed
on August 5, 2009.

² *See e.g.* Procedural Order dated November 23, 2009 in Docket Nos. SW-01428A-09-0103 at p. 5;

1 The Civil Rules provide broad authority to sever hearings. Rule 42(b) provides that the
2 court “in the furtherance of convenience or to avoid prejudice, or when separate trials will be
3 conducive to expedition and economy, may order a separate trial.” These factors mirror the
4 concerns discussed above. Note that the rule is disjunctive – separate hearings may be ordered “to
5 “further convenience”, to “avoid prejudice” or for “expedition and economy.” The parallel Federal
6 Rule 42(b) has been described as a “very flexible and useful instrument for... avoiding prejudice....
7 and [for] disposing of litigation as fairly and quickly as possible.” Write & Miller, 9A *Federal*
8 *Practice and Procedure* (3d ed.) Civ. § 2387 (citation omitted). Severance is appropriate were the
9 claims involve different evidence. *See e.g. Morley v. Superior Court*, 131 Ariz. 85, 87, 638 P.2d
10 1331, 1333 (1981)(affirming separate trials on liability and damages). And severance is especially
11 appropriate in cases against multiple defendants where a claim against one defendant will be barred
12 if the other defendants prevail. *See Mulhern v. City of Scottsdale*, 165 Ariz. 395, 398, 799 P.2d 15,
13 18 (Ct. App. 1990)(separate trials “served the purposes of Rule 42 by achieving judicial economy
14 and avoiding prejudice.”)

15 **B. Commission precedent also supports separate hearings.**

16 Sometimes a separate hearing will be more efficient because of different evidence or
17 distinct issues, or for other reasons. For example, the Commission has severed (bifurcated)
18 hearings in the following matters:

- 19 ● The Commission severed the issue of Palo Verde’s nuclear decommissioning costs
20 from other Palo Verde rate matters.³
- 21 ● The Commission severed its consideration of the sale of U.S. West’s San Carlos
22 exchange from the sale of eleven other exchanges.⁴
- 23 ● The Commission severed the issue of the proposed Arsenic Cost Recovery
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26 Procedural Order dated November 13, 2009 in Docket Nos. RT-00000H-97-0137 at p. 2;
Procedural Order dated August 11, 2006 in Docket No. T-03632A-06-0091.

27 ³ Decision No. 54886 (Feb. 5, 1986) at 2.

⁴ Decision No. 58763 (Sept. 1, 1994) at 6.

1 Mechanism from the remainder of Arizona Water Company's rate case.⁵

- 2 ● The Commission severed the fire flow accounting order issue from the remainder of
- 3 Arizona-American Water Company's rate case.⁶
- 4 ● The Commission severed the consideration of additional school-based distributed
- 5 generation from the remainder of APS's REST implementation plan.⁷

6 The Commission has also approved separate hearings in securities cases. For example, in
7 Decision No. 55213 (Oct. 1, 1986), the Commission noted that it had severed the hearing because
8 some Respondents failed to answer and had been deemed to have admitted the allegations. It was
9 appropriate to have a separate hearing for the remaining respondents who did answer, because that
10 hearing would be free of those admissions. Later, when the Commission allowed the non-
11 answering respondents to contest the charges, the severance was reversed.

12 The Commission also approved separate hearings in Decision No. 56449 (April 5, 1989).
13 In that case, two parties filed motions to sever, which Judge Stern granted. The Division appealed
14 to the Commission, and the Commission affirmed Judge Stern's decision. *Id.*; see also Decision
15 No. 57365 (May 2, 1991)(describing prior proceedings). The Commission noted that there was no
16 evidence that the two parties "offered or sold the securities in question." Decision No. 56449
17 (April 5, 1989) at 2-3. The Commission approved severance, explaining that "it is logical to sever
18 Cornell and Holliday from the main proceeding so that the Commission can first decide the portion
19 of the case involving [the other parties] and thereby determine whether there is any basis to proceed
20 with a hearing for Cornell and Holliday.... To do otherwise... would cloud the issues, unduly
21 lengthen the hearing, and cause evidence to be prematurely taken...." *Id.* at 4. Here, there is no
22 evidence of the Sargents offering or selling securities within or from Arizona, just like Cornell and
23 Holliday from the prior case. Thus, it is logical to sever the Sargents "so that the Commission can
24 first decide" the issues against the Bosworth Respondents. And like the Cornell and Holliday case,

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26 _____
27 ⁵ Decision No. 64282 (Dec. 28, 2001) at 23.

⁶ Decision No. 68303 (Nov. 14, 2005) at 1-2.

⁷ Decision No. 71275 (Sept. 17, 2009) at 2.

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1 here a combined hearing would "cloud the issues," while separate hearings will present a more
2 clear record.

3 **III. Conclusion.**

4 The Division has yet to disclose any evidence that the Sargents offered or sold securities to
5 investors from or within Arizona. Thus, the case against the Sargents involves very different issues
6 than the case against the Bosworth Respondents. Separate hearings will: (1) provide a clearer
7 record; (2) serve judicial or administrative economy; (3) promote access to counsel; (4) preserve
8 the Sargents' resources; (5) and enable the Sargents to present a more effective and efficient
9 defense.

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12 RESPECTFULLY SUBMITTED this 28th day of April, 2010.

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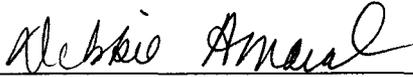
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