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BEFORE THE ARIZONA CORPORATION COMMISSION

2010 MAY 10 P 1:16

COMMISSIONERS

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

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, L.L.C., an Arizona limited liability company;
3 GRINGOS MEXICAN INVESTMENTS, L.L.C., an Arizona limited liability company;
Respondents.

DOCKET NO. S-20600A-08-0340

SECURITIES DIVISION'S OBJECTION TO AND MOTION TO QUASH RESPONDENT BOSWORTH'S REQUEST FOR ISSUANCE OF ADMINISTRATIVE SUBPOENAS FOR DOCUMENTS

(Assigned to the Honorable Marc E. Stern)

Arizona Corporation Commission
DOCKETED

MAY 10 2010

DOCKETED BY [Signature]

Respondent Bosworth ("Respondent") has filed a request for issuance of administrative subpoenas ("the Subpoenas") for all of the documents related to 26 persons/entities contained in the records of the Arizona Republic/Republic Media, the Arizona Department of Real Estate ("ADRE"), and the Corporation Commission ("Commission"). The overly expansive request does not comply with the procedures for engaging in discovery in administrative proceedings before the Commission. The Securities Division ("Division") objects to the issuance of the Subpoenas and requests that they be quashed because they are not supported by fact or law;<sup>1</sup> they

<sup>1</sup> The statutes and rules cited by Respondent in the Subpoenas do not permit Respondent to request all of the documents related to 26 persons/entities contained in the records of the Arizona Republic/Republic Media, ADRE, and Commission. In fact, R.14-3-210 is a rule dealing with practice and procedure before the Power Plant and Transmission Line Siting Committee. Unless Respondent can cite to specific

1 are overbroad, unduly burdensome, and both untimely and unnecessary in light of the procedural  
 2 order setting the hearing date and requiring the parties to exchange their lists of witnesses and  
 3 exhibits ("Procedural Order"); and, the subpoena to the Commission conflicts with the  
 4 confidentiality statute of the Arizona Securities Act ("Act"), A.R.S. § 44-2042.

5  
 6 **1. Respondent Has Not Complied With the Only Available Procedures for**  
 7 **Engaging in Reasonable Discovery in Administrative Proceedings Before the**  
 8 **Commission.**

9 Courts have often had occasion to consider the limits of discovery in administrative  
 10 proceedings. Through these deliberations, two salient points have become evident. The first of  
 11 these is the fact that, because they derive from an entirely distinct process, the rules of civil  
 12 procedure for discovery **do not** apply in administrative proceedings.<sup>2</sup> See, e.g., *Pacific Gas and*  
 13 *Electric Company*, 746 F.2d 1383, 1387 (9<sup>th</sup> Cir. 1984); *Silverman v. Commodity Futures*  
 14 *Trading Commission*, 549 F.2d. 28, 33 (7<sup>th</sup> Cir. 1977); *National Labor Relations Board v. Vapor*  
 15 *Blast Mfg. Co.*, 287 F.2d 402, 407 (7<sup>th</sup> Cir. 1961); *In re City of Anaheim, et al.* 1999 WL 955896,  
 16 70 S.E.C. Docket 1848 (the federal rules of civil procedure do not properly play any role on the  
 17 issue of discovery in an administrative proceeding).

18 The second of these points is that the authority to pursue discovery during the course of  
 19 an administrative proceeding is not conferred as a matter of right. In fact, courts have repeatedly  
 20 recognized that there simply is no basic constitutional right to pretrial discovery in administrative  
 21 proceedings. *Silverman v. Commodity Futures Trading Commission*, 549 F.2d. 28, 33 (7<sup>th</sup> Cir.  
 22 1977); See also *Starr v. Commissioner of Internal Revenue*, 226 F.2d. 721,722 (7<sup>th</sup> Cir. 1955),

23 authority in the Arizona Securities Act, in the Arizona Administrative Procedures Act, or elsewhere, the  
 24 Subpoenas must be quashed.

25 <sup>2</sup> This principle is particularly important from a policy standpoint. Indeed, merging civil discovery rules  
 26 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.

1 cert. denied, 350 U.S. 993, 76 S.Ct. 542 (1955); *National Labor Relations Board v. Interboro*  
 2 *Contractors, Inc.*, 432 F.2d 854, 857 (2<sup>nd</sup> Cir. 1970); *Miller v. Schwartz*; 528 N.E.2d 507 (N.Y.  
 3 1988); *Pet v. Department of Health Services*, 542 A.2d 672 (Conn. 1988). The federal  
 4 Administrative Procedures Act echoes this point by offering no provision for pretrial discovery  
 5 during the administrative process. 1 Davis, *Administrative Law Treatise* (1958), § 8.15, p. 588.

6 In accordance with these findings, discovery within the confines of an administrative  
 7 proceeding is only authorized to the extent that it is explicitly provided for in a separate statute or  
 8 rule. See, e.g., 73A C.J.S. *Public Administrative Law and Procedure*, § 124 (1983) (“Insofar as  
 9 the proceedings of a state administrative body are concerned, only the methods of discovery set  
 10 forth by the pertinent statute are available, and the methods not set forth therein are excluded”);  
 11 See also 2 Am.Jur.2d. *Administrative Law* § 327 (2d. ed. 1994)(In the context of administrative  
 12 law, any right to discovery is grounded in the procedural rules of the particular administrative  
 13 agency).

14 Following these precepts, the state of Arizona has enacted both statutes and agency rules  
 15 to address the issue of discovery in the context of administrative proceedings. Indeed, both the  
 16 Arizona Revised Statutes and the Arizona Rules of Practice and Procedure before the Commission  
 17 (“Rules of Practice and Procedure”) contain explicit provisions addressing discovery procedures in  
 18 contested administrative adjudications. A party may engage in reasonable discovery in an  
 19 administrative proceeding before the Commission only through these procedures.

20 The statute setting forth the parameters of discovery in administrative proceedings is found  
 21 in the chapter on Administrative Procedure, A.R.S. § 41-1001, *et seq.* Under Article 6 of this  
 22 chapter, covering “Adjudicative Proceedings,” Arizona law provides as follows:

23 A.R.S. § 41-1062: Hearings; evidence; official notice; power to require testimony and  
 24 records; Rehearing

25 A. Unless otherwise provided by law, in contested cases the following shall apply:

26 ...

4. The officer presiding at the hearing may cause to be issued

1 subpoenas for the attendance of witnesses and for the production of  
2 books, records, documents and other evidence and shall have the  
3 power to administer oaths.... *Prehearing depositions and*  
4 *subpoenas for the production of documents may be ordered by the*  
5 *officer presiding at the hearing, provided that the party seeking*  
6 *such discovery demonstrates that the party has reasonable need of*  
7 *the deposition testimony or materials being sought....*  
8 *Notwithstanding the provisions of section 12-2212, no subpoenas,*  
9 *depositions or other discovery shall be permitted in contested*  
10 *cases except as provided by agency rule or this paragraph.*

7 (emphasis added). The plain import of this provision is that, in Arizona, the only forms of pre-  
8 trial discovery permitted in administrative proceedings are: (a) subpoenas, based on a showing of  
9 need and authorized by the administrative hearing officer; (b) depositions, based on a showing of  
10 need and authorized by the administrative hearing officer; and (c) any other discovery provision  
11 specifically authorized under the individual agency's rules of practice and procedure.

12 The Rules of Practice and Procedure, *R14-3-101, et seq.*, serve to augment the available  
13 means of pre-trial discovery in administrative proceedings before the Commission. Under these  
14 rules, the presiding administrative law judge may convene pre-hearing conferences regarding  
15 proposed exhibits, witness lists, and/or expert testimony and may order the parties to exchange  
16 copies of exhibits prior to a hearing. *See Arizona Administrative Code, Title 14, R-14-3-108(A) and*  
17 *R-14-3-109(L)*. Indeed, Commission administrative law judges often call upon these rules and do in  
18 fact order parties to file and provide to the other parties lists of witnesses and exhibits in advance of  
19 hearings, thereby facilitating the hearing preparation process.

20 Respondent's request for issuance of the Subpoenas does not comply with these, above-  
21 described procedures for engaging in reasonable discovery in administrative proceedings before the  
22 Commission. Rule 14-3-109(O) provides that Respondent's request for issuance of the  
23 Subpoenas must be supported by an "application" submitted to the administrative law judge and  
24 Rule 14-3-106(F) states that the application "shall contain the facts upon which the application is  
25 based, with such exhibits as may be required or deemed appropriate by the applicant."  
26

1 Respondent's request for issuance of the Subpoenas is not supported by an application  
2 setting forth facts that demonstrate a "reasonable need" to obtain all of the documents related to  
3 26 persons/entities contained in the records of the Arizona Republic/Republic Media, ADRE, and  
4 Commission. Respondent states simply that he "cannot properly and adequately prepare for the  
5 hearing scheduled in this matter without knowing the evidence that will be presented against  
6 [him];" that "the documents will provide the basis the State of Arizona is seeking this  
7 hearing...;" and that "the information will also verify the extent of other documentation that is in  
8 the possession of other Respondents...that may not have been within the files of [Respondent]  
9 Bosworth..."

10 Pursuant to the Procedural Order, the Division provided to Respondent copies of all  
11 exhibits and a list of witnesses. As such, Respondent knows precisely what evidence will be  
12 presented against him at the hearing. About the "basis [for]...seeking this hearing," the Notice of  
13 Opportunity for Hearing ("Notice") states precisely what the Division alleges that Respondent  
14 did that violates the Arizona Securities Act and it is essentially a guide map of what the Division  
15 intends to prove at the hearing, but it is important to note and for Respondent to remember that it  
16 is he who requested the hearing. As for the argument about documents "in the possession of  
17 other Respondents" but not in the files of Respondent Bosworth, Respondent seems to want  
18 discovery from the other Respondents and perhaps he could get it from them, but this is no  
19 reason for the discovery sought by the Subpoenas.

20 None of these arguments lays out reasonable need to obtain all of the documents related  
21 to 26 persons/entities contained in the records of the Arizona Republic/Republic Media, ADRE,  
22 and Commission. In fact, none of these arguments even pertain to discovery from the Arizona  
23 Republic/Republic Media and ADRE. As such, Respondent's request for issuance of the  
24 Subpoenas should be quashed.

1  
2       **2. The Rules and Procedures Governing Discovery in Administrative Proceedings Before the Commission Comport with Principles of Due Process.**

3       As discussed above, there is no constitutional right to discovery in administrative  
4 proceedings. Nor does the Constitution require that a respondent in an administrative proceeding  
5 be aware of all evidence, information and leads to which opposing counsel might have access.  
6 *Pet v. Dep't of Health Serv.*, 207 Conn. 346, 542 A.2d 672 (1988) quoting *Federal Trade*  
7 *Comm'n v. Anderson*, 631 F.2d 741, 748 (D.C.Cir. 1979); *Cash v. Indus. Comm'n of Arizona*, 27  
8 Ariz. App. 526, 556 P.2d 827 (App. 1976). Despite this, the concept of due process is still  
9 germane to the procedures of governmental actions such as the administrative proceeding at  
10 issue. As the Supreme Court noted in *Willner v. Comm. on Character and Fitness*, 373 U.S. 96,  
11 107 (1963), a respondent must be adequately informed of the evidence against him and be  
12 afforded an adequate opportunity to rebut this evidence. For instance, a denial of pre-hearing  
13 depositions is not a denial of due process because respondent had ample opportunity to cross-  
14 examine the witnesses at a full hearing. *Electomec Design & Dev. Co. v. NLRB*, 409 F.2d 631  
15 (9<sup>th</sup> Cir. 1969).

16       Courts have already considered what types of procedures do in fact comply with due  
17 process in the context of administrative proceedings. It is well-settled that procedures designed  
18 to ensure "rudimentary requirements of fair play" are sufficient to meet the due process  
19 requirements in administrative adjudications. *Mitchell v. Delaware Alcoholic Beverage Control*  
20 *Comm'n*, 193 A.2d 294, 313 (Del.Super. 1963), *rev'd on other grounds*, 196 A.2d 410 (Del.Supr.  
21 1963); *see also Matthews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong v. Manzo*,  
22 380 U.S. 545, 552 (1965)("the fundamental requirement of due process is the opportunity to be  
23 heard at a meaningful time and in a meaningful manner"); *Swift & Co. v. U.S.*, 308 F.2d 849, 851  
24 (7<sup>th</sup> Cir. 1962)("due process in an administrative proceeding, of course, includes a fair trial,  
25 conducted in accordance with fundamental principles of fair play and applicable procedural  
26 standards established by law"); 73A C.J.S. *Public Administrative Law and Procedure*, § 60

1 (1983); see also *Adamchek v. Board of Educ.*, 387 A.2d. 556 (Conn. 1978)(although the Uniform  
2 Administrative Procedures Act does not expressly provide for pre-trial discovery, the procedures  
3 required for the UAPA still exceed the minimal procedural safeguards mandated by the due  
4 process clause).

5       These cases demonstrate that, in order to comport with procedural due process in the  
6 context of an administrative proceeding, an agency need only enforce the guidelines of applicable  
7 administrative statutes and rules while using the discretion inherent in these guidelines to ensure  
8 a level of fundamental fairness. See *Pacific Gas and Elec. Co. v. Federal Energy Regulatory*  
9 *Comm'n*, 746 F.2d 1383 (9<sup>th</sup> Cir. 1984)(“If an agency has adopted rules providing for discovery  
10 in its proceedings, **the agency is bound by those rules** and must ensure that its procedures meet  
11 due process requirements.”)(emphasis added). The extent of discovery to which a party to an  
12 administrative proceeding is entitled is primarily determined by the particular agency; the rules  
13 of civil procedure are inapplicable. See, e.g., *Pacific Gas and Elec. Co.*, 746 F.2d at 1387; see  
14 also *LTV Steel Co. v. Indus. Comm'n*, 748 N.E.2d 1176 (Ohio 2000) (discovery as generally  
15 provided by the rules of civil procedure in court proceedings is not available in administrative  
16 proceedings). This point is particularly obvious in light of the fact that the Arizona legislature  
17 and Commission have enacted and adopted specific statutes and rules, respectively, to govern  
18 discovery procedure in this administrative forum.

19       Despite these explicit rules on discovery, Respondent cites Rule 45 of the Arizona Rules  
20 of Civil Procedure in, and presumably as authority for, the Subpoenas. However, as pointed out  
21 above, the discovery procedures available to Respondent are more than adequate in satisfying  
22 any due process concerns and there is neither need nor justification to charge into the civil rules  
23 of procedure for guidance on discovery. Respondent’s unsupported attempt to invoke far-  
24 reaching civil discovery rules in this administrative forum is misplaced and must be denied.  
25 Because Respondent has failed to use available and constitutionally valid procedures for engaging  
26 in reasonable discovery in administrative proceedings before the Commission, the overbroad

1 Subpoenas must be quashed.

2  
3 **3. The Request is Overbroad, Unduly Burdensome, and Both Untimely and Unnecessary.**

4 Overbroad and unduly burdensome discovery requests are not acceptable in any known  
5 federal or state civil or criminal litigation, let alone in administrative proceedings like this one  
6 designed to be speedy and cost effective. *See e.g., R14-3-101(B)*(rules applicable to  
7 administrative proceedings before the Commission shall be interpreted to “secure the just and  
8 speedy determination of all matters presented...”

9 Respondent’s request for issuance of the Subpoenas seeks the production of all of the  
10 documents related to 26 persons/entities contained in the records of the Arizona  
11 Republic/Republic Media, ADRE, and Commission. It is overbroad and unduly burdensome in  
12 that Respondent has not identified the documents sought, but only the information desired, which  
13 Respondent believes *may* be contained in records in the possession of the Arizona  
14 Republic/Republic Media, ADRE, and Commission. Respondent seeks copies of confidential  
15 records, through which personnel would be required to search in order to identify records that  
16 may contain the sought-for information, which information may or may not be contained in the  
17 confidential records.

18 Respondent may not by subpoena require more of the Division than to produce  
19 documents for inspection. *Cf. Schwartz V. Superior Court in and For County of Maricopa*, 186  
20 Ariz. 617, 925 P.2d 1068 (Ct. App. 1996) (nonparty cannot be compelled to take affirmative  
21 action beyond production of documents as they exist). Respondent’s request for issuance of the  
22 Subpoenas is essentially an attempt to discover what documents and information are in existence  
23 rather than to obtain access to inspect specified records. Respondent is imposing their  
24 investigative burden on the Arizona Republic/Republic Media, ADRE, and Commission and it is  
25 obvious that Respondent has not expended his own resources sufficiently to identify the records  
26 or the material for which he has substantial need that cannot be otherwise met without undue

1 hardship. *See e.g. Helge v. Druke* 136 Ariz. 434, 440, 666 P.2d 534, 540 (Ct. App. 1983)  
2 (requesting party should identify documents and then seek a subpoena duces tecum to have them  
3 produced).

4 Further, the request is both untimely and unnecessary in light of the Procedural Order,  
5 pursuant to which the Division provided Respondent on November 19, 2009 with copies of all  
6 exhibits and a list of witnesses. Respondent was ordered to produce his copies of exhibits and  
7 list of witnesses to the Division by January 18, 2010, but he did not do so. Instead, by and  
8 through his request for issuance of the Subpoenas, Respondent argues that he needs the documents  
9 sought thereby to adequately defend himself against the Division's allegations in the Notice;  
10 however, those allegations have never changed since the filing of the Notice on July 7, 2008.

11 Since July 7, 2008, Respondent has been apprised of the allegations against him and, since  
12 November 19, 2009, Respondent has known precisely what evidence will be presented against  
13 him at the hearing. Notwithstanding these facts, Respondent has his own duty of due diligence if he  
14 plans to refute and defend against any or all of the allegations in the Notice, upon his request for a  
15 hearing, and Respondent has had ample time to obtain documents to do so. However, from August  
16 21, 2009 (the date of the Procedural Order) through January 18, 2010 (the date by which  
17 Respondent was to make disclosure of his exhibits and witnesses) and even through to this date (just  
18 three weeks before the hearing!), Respondent has not once objected to the evidence disclosure  
19 timeline as being inadequate. Rather, he has waited until this late date to improperly request  
20 issuance of the overbroad and unduly burdensome Subpoenas, two of which are directed to the  
21 Arizona Republic/Republic Media and ADRE who may object themselves and cause further  
22 delay. As such, Respondent's request for issuance of the Subpoenas should be quashed because  
23 they are overbroad, unduly burdensome, and both untimely and unnecessary.

1           **4.     The Request Improperly Violates the Confidentiality Statute of the Securities**  
2           **Act.**

3           Respondent's request for issuance of the Subpoenas seeks the production of confidential  
4 information obtained during the course of the Division's investigation. Under A.R.S. § 44-2042,  
5 information and documents obtained by the Division during the course of investigations under  
6 the Securities Act are confidential<sup>3</sup> and may not be disclosed, unless such documents and  
7 information are made public by the Director of the Division if such disclosure is in the public  
8 interest. The confidentiality statute prohibits the Commission's officers, employees, and agents  
9 from making such information or documents available to anyone other than members or agents of  
10 the Commission, the attorney general, or law enforcement officials.

11           A.R.S. § 44-2042 reflects the balance of the due process rights of persons regulated by the  
12 Commission; the broad investigative powers of the Commission; the various privacy interests of  
13 complainants, investors, witnesses, registered and licensed financial professionals, and  
14 investigated persons; the general public's interest in public agency conduct; the general public's  
15 interest in a fraud-free investment environment; the interests of other regulatory agencies in  
16 sharing information and their own investigative integrity; and the Commission's mandate to  
17 enforce the Arizona Securities Act.

18           The policy purpose underlying the prohibition of dissemination of information obtained  
19 during the investigation of a matter, unless such information is made a matter of public record,  
20 includes the protection of the innocent from disclosure of private information as well as

21           <sup>3</sup> Specifically, A.R.S. § 44-2402(A) states:

22           The names of complainants and all information or documents obtained by any officer, employee  
23 or agent of the commission, including the shorthand reporter or stenographer transcribing the  
24 reporter's notes, in the course of any examination or investigation are confidential unless the  
25 names, information or documents are made a matter of public record. An officer, employee or  
26 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.

1 protection of the integrity of the regulatory enforcement process. Here, the confidential records  
2 of the Division have not been made a matter of public record and disclosure is not authorized by  
3 Commission rule. As such, the Commission should not be compelled to produce confidential  
4 records. Also, disclosure would be contrary to the public interest, for the following reasons:

5 1) the state's interest in the integrity of the administrative process;

6 2) the public's interest in joint regulatory actions – effective and efficient regulation of  
7 people who offer or sell securities requires interagency cooperation among state, federal, and self-  
8 regulatory agencies. *Cf. Keegan*, 201 Ariz. at 349, 35 P.3d at 110 (public interest includes  
9 consideration of how disclosure would adversely affect agency's mission). The private  
10 investigations of those agencies, the privacy interests of those whose records may be included in  
11 the many records and information available to those agencies, and the willingness of those agencies  
12 to share information are dependent upon the ability to retain confidentiality;

13 3) the ability of the Division to fulfill its statutory mandate – the methods used, the  
14 information obtained, the resources available to the Division depend upon the fact that confidences,  
15 privacy interests, and privileges are maintained; and,

16 4) the personal or private information of third parties – in the course of an investigation or  
17 examination, the Division may obtain information or documents regarding various third parties,  
18 such as friends, relatives, investors, employees, or victims. The otherwise private information of  
19 those parties should not be generally available to the public. *Cf. Stabasefski v. U.S.*, 919 F. Supp.  
20 1570, 1575 (M.D. Ga. 1996) quoting *U.S. Dep't of Justice v. Reporters Comm'n*, 489 U.S. 749,  
21 773, 109 S. Ct. 1468, 1482 (1989) (“The public interest does not include the disclosure of  
22 information about private citizens that is accumulated in various governmental files but that reveals  
23 little or nothing about an agency's own conduct.”).

24

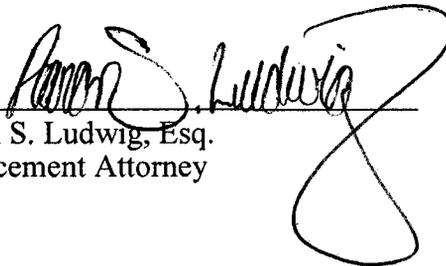
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26

1 Based on the foregoing, the Division respectfully requests that Respondent's request for  
2 issuance of the Subpoenas be denied.

3 RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of May 2010.

4  
5 **SECURITIES DIVISION** of the  
6 **ARIZONA CORPORATION COMMISSION**

7   
8 \_\_\_\_\_  
9 Aaron S. Ludwig, Esq.  
Enforcement Attorney

10 **ORIGINAL** and **8 COPIES** of the foregoing filed  
11 this 10<sup>th</sup> day of May 2010 with:

12 Docket Control  
13 Arizona Corporation Commission  
14 1200 W. Washington St.  
15 Phoenix, AZ 85007

16 **COPY** of the foregoing mailed/delivered  
17 this 10<sup>th</sup> day of May 2010 to:

18 The Honorable Marc E. Stern  
19 Hearing Division  
20 Arizona Corporation Commission  
21 1200 W. Washington St.  
22 Phoenix, AZ 85007

23 Paul J. Roshka, Jr., Esq.  
24 ROSHKA DeWULF & PATTEN, PLC  
25 One Arizona Center  
26 400 E. Van Buren St., Ste. 800  
Phoenix, AZ 85004  
Attorneys for Michael J. Sargent and  
Peggy L. Sargent

Mark W. Bosworth  
Lisa A. Bosworth  
18094 N. 100<sup>th</sup> St.  
Scottsdale, AZ 85255

By:   
\_\_\_\_\_