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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 MAY 24 P 4: 31  
AZ CORP COMMISSION  
DOCKET CONTROL

In the matter of:

Docket No. S-20600A-08-0340

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.

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

**RESPONSE TO THE  
SECURITIES DIVISION'S  
MOTION TO QUASH**

Arizona Corporation Commission

**DOCKETED**

MAY 24 2010

DOCKETED BY

Respondents Michael J. Sargent ("Mr. Sargent") and Peggy L. Sargent (collectively, the "Sargents") respectfully respond in opposition to the motion to quash filed by the Securities Division ("Division"). The Division's motion has no basis in Commission precedent, and its arguments have been rejected by the Commission or its assigned Administrative Law Judges many times. Indeed, the Division makes the remarkable claim that no civil discovery is available in Commission proceedings, despite numerous rulings to the contrary. 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. The Division's refusal to participate in discovery is particularly disconcerting given

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1 the hearing in this matter is scheduled to begin only eight business days from today.

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

9 Numerous Commission decisions have noted the broad discovery rights available under the  
10 Procedural Rules.<sup>1</sup> Likewise, many Commission procedural orders describe the broad discovery  
11 rights available under the Procedural Rules. As Assistant Chief ALJ Nodes noted in a recent  
12 procedural order, "[t]he standard for conducting discovery is intentionally broad to allow parties to  
13 a proceeding to prepare for hearing or trial and to mitigate the necessity for unnecessary discovery-  
14 based cross-examination on the witness stand."<sup>2</sup> Judge Nodes specifically applied the Rules of  
15 Civil Procedure, including the rule allowing all discovery requests "reasonably calculated to lead to  
16 the discovery of admissible evidence."<sup>3</sup> Judge Rodda applied that same standard in denying a  
17 motion to quash a subpoena in another recent procedural order.<sup>4</sup> To the same effect is Judge  
18 Nodes' earlier procedural order applying the Rules of Civil Procedure to a motion to compel.<sup>5</sup>  
19 These Procedural Orders all recognize that the Commission's Procedural Rules incorporate the  
20 Rules of Civil Procedure and allow the same broad discovery allowed in civil cases.

21 \_\_\_\_\_  
22 <sup>1</sup> See e.g. Decision No. 70355 (May 16, 2008) at Finding of Fact No. 9 (noting granting of motion  
23 to compel) and Decision No. 66984 (May 11, 2004) at Finding of Fact No. 55 (same); Decision No.  
24 70011 (Nov. 27, 2007) at 48 (rejecting new argument raised by utility due to "insufficient time to  
25 conduct discovery."); Decision No. 67454 (January 4, 2005)(discussing "reasonably calculated to  
lead to the 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).

26 <sup>2</sup> Procedural Order dated November 23, 2009 in Docket Nos. SW-01428A-09-0103 at p. 5.

27 <sup>3</sup> *Id.*, citing Arizona R. Civ. Pro. 26(b)(1)(A).

<sup>4</sup> Procedural Order dated November 13, 2009 in Docket Nos. RT-00000H-97-0137 at p. 2.

<sup>5</sup> Procedural Order dated August 11, 2006 in Docket No. T-03632A-06-0091.

1           The Division’s sweeping attack on discovery has been rejected in numerous cases. For  
2 example, the Division was required to provide discovery in the recent Hockensmith case, Docket  
3 No. S-20631A-08-0503, and in the Sir case, Docket No. S-20703A-09-0461. Likewise, the  
4 Division was compelled to provide discovery in the Yucatan case, Docket No. S-03539A-03-0000  
5 and in the Reserve Oil case, Docket No. S-20437A-05-0925. This is not a recent trend; more than  
6 20 years ago Judge Stern denied the Division’s motion for a waiver of civil discovery.<sup>6</sup> Despite  
7 losing this argument time after time, the Division persists in refusing to provide discovery in case  
8 after case until ordered to comply.

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

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

22           Thus, overwhelming administrative precedent supports denying the Division’s motion. The  
23 Division does not cite a single Commission decision or procedural order in support of its blanket  
24 denial of discovery. Not only is the Division’s motion inconsistent with Commission decisions and  
25 procedural orders, it is inconsistent with the Division’s other filings in this case. Only a few days  
26

27 <sup>6</sup> See Procedural Order dated February 10, 1989 in Docket No. S-2430-I, at pp. 4-5.  
<sup>7</sup> Procedural Order dated November 23, 2009 in Docket Nos. SW-01428A-09-0103 at p. 5.

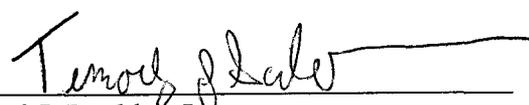
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1 after the Division filed its motion, it filed a motion to compel against another respondent, Mr.  
2 Bosworth. In that motion, the Division states that Bosworth should be compelled to “immediately  
3 produce information regarding certain of his witnesses” including related documents, summaries  
4 and expert reports in order for the Division to “properly and fully prepare for the hearing.”<sup>8</sup> But in  
5 response to the Sargents’ discovery, the Division asserts that it does not have to provide any  
6 discovery before the hearing, because the Sargents will have “the opportunity to confront and cross-  
7 examine the Division’s witnesses.”<sup>9</sup> In other words, the Division wants discovery from Bosworth  
8 to prepare for the hearing, but it does not want to allow the Sargents’ the same opportunity to  
9 prepare.

10 In sum, the Commission’s Procedure Rules incorporate the Civil Procedure Rules, which  
11 allow for broad discovery. For decades, on this basis, the Commission has allowed broad discovery  
12 in utilities and securities cases. The Division’s motion is inconsistent with the Commission’s  
13 decisions and procedural orders, and the Division’s own motion to compel in this docket. The  
14 Division’s motion to quash should be denied.

15 RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of May, 2010.

16 ROSHKA DeWULF & PATTEN, PLC

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26 <sup>8</sup> Securities Division “Objection to Respondent Bosworth’s List of Witnesses and Exhibits and  
27 Motion to Compel...” at 2:1 and 3:15.

<sup>9</sup> Division Motion to Quash at 8:9.

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1 ORIGINAL and thirteen copies of the foregoing  
filed this 24<sup>th</sup> day of May, 2010 with:

2 Docket Control  
3 Arizona Corporation Commission  
1200 West Washington Street  
4 Phoenix, Arizona 85007

5 Copy of the foregoing hand-delivered  
this 24<sup>th</sup> day of May, 2010 to:

6 Marc E. Stern, Administrative Law Judge  
7 Hearing Division  
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10 Aaron S. Ludwig, Esq.  
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13 Copy of the foregoing mailed  
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