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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

ARIZ CORP COMMISSION
DOCKET CONTROL

In the matter of:
THEODORE J. HOGAN & ASSOCIATES,
LLC a.k.a. TED HOGAN AND
ASSOCIATES, an Arizona limited liability
company,
THEODORE J. HOGAN a.k.a. TED KILLS
IN THE FOG, a married man
and
CHRISTINA L. DAMITIO a.k.a.
CHRISTINA HOGAN, a married woman
Respondents.

DOCKET NO. S-20714A-09-0553

**SECURITIES DIVISION'S RESPONSE
TO MOTION TO DISMISS**

(Assigned to the Hon. Marc E. Stern)

The Securities Division ("Division") of the Arizona Corporation Commission hereby files its Response to the Motions to Dismiss filed by Respondents Theodore J. Hogan and Christina Damitio. For the reasons listed below, the Respondents' Motions to Dismiss should be denied.

Respectfully submitted this 25th day of May, 2010.

By Wendy Coy
Wendy Coy
Attorney for the Securities Division of the
Arizona Corporation Commission

Arizona Corporation Commission
DOCKETED

MAY 25 2010

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MEMORANDUM OF POINTS AND AUTHORITIES

3 **I. INTRODUCTION**

4 On December 8, 2009, the Securities Division of the Arizona Corporation Commission
5 (“Commission”) filed a Notice of Opportunity for Hearing against respondents Theodore J. Hogan
6 & Associates, LLC, a.k.a. Ted Hogan and Associates (“Hogan & Associates”), Theodore J. Hogan
7 a.k.a. Ted Kills In The Fog (“Hogan”), and Christina L. Damitio a.k.a. Christina Hogan
8 (“Damitio”). On December 22, 2009, Hogan and Damitio filed a Request-Order for Discovery-
9 Answer and requested a hearing. On January 7, 2010, the Securities Division filed a Response to
10 the Request-Order For Discovery-Answer. On February 1, 2010, Administrative Law Judge Stern
11 issued a Procedural Order scheduling an evidentiary hearing for June 15, 2010. Pursuant to the
12 Procedural Order, the Securities Division was to provide its witness list and exhibits to the
13 Respondents by April 23, 2010. The Respondents were to provide its witness list and exhibits to
14 the Securities Division by May 21, 2010. The Securities Division filed a Notice of Compliance
15 with Procedural Order on April 27, 2010.

16 **II. MOTION TO DISMISS**

17 After reviewing the Motions to Dismiss¹, it appears that the Respondents are asserting that
18 they did not offer and sell securities within or from the state of Arizona therefore, the Securities
19 Division would have no jurisdiction. Further, it seems the Respondents argue that since there was
20 no discovery, the matter should be dismissed.

21 **A. Respondents Offered And Sold Securities Within Or From The State Of
22 Arizona.**

23 The Arizona Securities Act applies to those persons who offer and sell securities within or
24 from the state of Arizona. As will be presented at the hearing, the Respondents reside in Sedona,
25 Arizona (Notice of Opportunity paragraphs 3, 4, 7 and 9). Respondent Hogan & Associates is an
26 Arizona limited liability company (Notice of Opportunity paragraph 2). A number of investors

¹ To the extent that the Respondents may claim that they raised other issues in their Motions to Dismiss that were not addressed, the Securities Division reserves the right to respond to the additional issues.

1 reside in Arizona (Notice of Opportunity paragraph 7). If, as alleged, the Respondents offered and
2 sold securities and the offer and sale took place in Arizona, they would be subject to the Arizona
3 Securities Act.

4 At the upcoming hearing, the Securities Division will provide evidence that the investment
5 opportunity offered and sold by the Respondents was a security as defined by the Arizona
6 Securities Act. Further, the Securities Division will provide evidence that the offer and sale of
7 securities did take place within or from the state of Arizona. The Respondents will have the
8 opportunity to provide evidence that they believe will support their position.

9 There are no grounds to dismiss this matter due to lack of jurisdiction.

10 **B. The Securities Division Provided Copies of Its Witness List And Exhibits To**
11 **Respondents.**

12 The Respondents are entitled to know the evidence that will be used against them at
13 hearing. They are not allowed free access to the Securities Division's investigative file. A.A.C.
14 R14-3-104 reiterates a respondent's rights set forth in § 41-1061, by stating: "At a hearing a party
15 shall be entitled to enter an appearance, to introduce evidence, examine and cross-examine
16 witnesses, make arguments, and generally participate in the conduct of the proceeding."

17 The Respondents are entitled to due process in this matter. "The fundamental requirement
18 of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 96 S. Ct. 893 (1976) quoting *Armstrong v. Manzo*, 380 U.S. 545 (1965).
19 There is no basic constitutional right to pretrial discovery in administrative proceedings. *Silverman*
20 *v. Commodity Futures Trading Commission*, 549 F.2d. 28, 33 (7th Cir. 1977); *See also Starr v.*
21 *Commissioner of Internal Revenue*, 226 F.2d. 721,722 (7th Cir. 1955), cert. denied, 350 U.S. 993,
22 76 S.Ct. 542 (1955); *National Labor Relations Board v. Interboro Contractors, Inc.*, 432 F.2d 854,
23 857 (2nd Cir. 1970); *Miller v. Schwartz*; 528 N.E.2d 507 (N.Y. 1988). "[T]he evidence used to
24 prove the Government's case must be disclosed to the individual so that he has an opportunity to
25 show that it is untrue. ... We have formalized these protections in the requirements of confrontation
26 and cross-examination." *Green v. McElroy*, 79 S. Ct. 1400 (1959). "The Constitution does not

1 require that a respondent in an administrative proceeding be aware of all evidence, information and
2 leads to which opposing counsel might have access.” *Pet v. Dept. of Health Services*, 207 Conn.
3 346, 542 A.2d 672 (1988) quoting *Federal Trade Commission v. Anderson*, 631 F.2d 741, 748
4 (D.C. Cir. 1979). “This does not mean that a party can be denied due notice of the hearing, the
5 right to produce relevant evidence, the right to cross-examine witnesses produced by his adversary,
6 and the right to be fairly apprised of the facts upon which the agency will act.” *Id.*

7 The legislature has mandated that contested cases before the Arizona Corporation
8 Commission (“Commission”) are governed by Arizona Revised Statutes. *See* A.R.S. §§ 41-1067
9 and 41-1092.02(A)(4). Specifically, A.R.S. § 41-1061(A)(1) states: “Every person who is a party
10 to such proceedings shall have the right to be represented by counsel, to submit evidence in open
11 hearing and shall have the right of cross-examination.” Also, A.R.S. § 41-1062(A)(4) states:
12 “Prehearing depositions and subpoenas for the production of documents may be ordered by the
13 officer presiding at the hearing, provided that the party seeking such discovery *demonstrates* that
14 the party has *reasonable need* of the deposition testimony or materials being sought. . . .
15 Notwithstanding the provisions of section 12-2212, no subpoenas, depositions or other discovery
16 shall be permitted in contested cases *except as provided by agency rule or this paragraph.*”
17 Emphasis added. The Commission has specific rules related to discovery. *See* A.A.C. Rule R14-3-
18 101 et seq.

19 Respondents have the right to cross-examine the witnesses against them. Further,
20 Respondents have the ability, pursuant to A.A.C. Rule R14-3-109(O), to call witnesses that they
21 believe have testimony relevant to the allegations in the Notice.

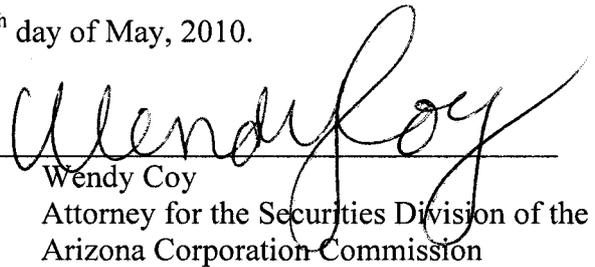
22 Other than the exchange of a witness list and the exhibits, “[t]here is no basic constitutional
23 right to pretrial discovery in administrative proceedings.” *Silverman v. Commodity Futures*
24 *Trading Commission*, 549 F.2d 28 (7th Cir. 1977). Respondents received the Securities Division’s
25 witness and exhibit list prior to the scheduled hearing as ordered by the Administrative Law Judge.
26 The Respondents are entitled to receive the evidence the Securities Division plans to introduce at

1 the evidentiary hearing. The Respondents are not entitled to every piece of information contained
2 within the Securities Division's files. The Motions to Dismiss should be denied.

3 **III. CONCLUSION**

4 There is no basis to grant the Respondents' Motions to Dismiss. The Securities Division
5 and the Respondents have an opportunity to provide evidence to support their respective positions
6 at the administrative hearing currently scheduled for June 15, 2010. The Respondents have copies
7 of the evidence the Securities Division plans to introduce to support its allegations in the Notice of
8 Opportunity. The Motions to Dismiss should be denied.

9 RESPECTFULLY SUBMITTED this 25th day of May, 2010.

10
11 By 

12 Wendy Coy

13 Attorney for the Securities Division of the
Arizona Corporation Commission

14 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
15 filed this 25th day of May, 2010, with

16 Docket Control
17 Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007

18 COPY of the foregoing hand-delivered this
19 25th day of May, 2010, to:

20 ALJ Marc Stern
21 Arizona Corporation Commission/Hearing Division
1200 West Washington
Phoenix, AZ 85007

22 3 COPIES of the foregoing mailed
23 this 25th day of May, 2010, to:

24 THEODORE J. HOGAN & ASSOCIATES
25 THEODORE J. HOGAN, and
CHRISTINA L. DAMITIO
460 Andante
Sedona, Arizona 86336

26 By: 