

ORIGINAL



0000113037

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS:

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

2010 JUN 16 P 3:59

ARIZONA CORPORATION 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**

**MOTION TO QUASH
ADMINISTRATIVE SUBPOENA
ISSUED TO MICHAEL J. SARGENT**

Arizona Corporation Commission
DOCKETED

JUN 16 2010

DOCKETED BY *[Signature]*

Respondents Michael J. Sargent ("Mr. Sargent") and Peggy L. Sargent (collectively, the "Sargents") respectfully move that the Commission, though its assigned Administrative Law Judge ("ALJ"), quash the Administrative Subpoena issued to Michael J. Sargent on June 9, 2010.

The Administrative Law Judge has the power to quash the subpoena under A.A.C. R14-3-103(O). The subpoena should be quashed because: (1) the subpoena is "unreasonable or oppressive" because it was issued extremely late, after the hearing was scheduled to start, and after the close of discovery; (2) the Division failed to provide the required witness fee; and (3) the required subpoena application is insufficient and not even in the record.

The Sargents served Requests for Admissions and Interrogatories on May 3, 2010. The Commission's 12th Procedural Order in this docket quashed the Sargents' Requests for Admissions

1 and Interrogatories as untimely, and scheduled the hearing to begin on Monday, June 7, 2009. The
2 ALJ then recessed the hearing until Wednesday, June 9, 2010 to allow for settlement discussions.
3 The settlement discussions were not successful, and the ALJ began the hearing on June 9 by
4 considering various procedural issues raised by the parties. The ALJ ruled that testimony must be
5 delayed by one day to allow Mr. Sargent and his counsel a chance to review the Division's last-
6 minute disclosure of new and reformulated exhibits. The ALJ also ruled that any subpoena to Mr.
7 Sargent must be served on his counsel, as required by A.A.C. R14-3-104(D). The Division then
8 served a subpoena on Mr. Sargent's counsel on the afternoon of June 9, 2010. A copy of the
9 subpoena was not filed with the Commission's docket control, as required by A.A.C. R14-3-
10 107(A), so a copy is attached as Exhibit A, for the ALJ's review.

11 **I. This belated subpoena is unreasonable or oppressive.**

12 The Commission's rules allow the ALJ to quash a subpoena if it is "unreasonable or
13 oppressive." A.A.C. R14-3-109(O). Here, the subpoena is unreasonable and oppressive because it
14 was issued after the hearing began on Wednesday, June 9, 2010. Absent extraordinary
15 circumstances, it is not appropriate to subpoena witnesses on or after the day the hearing is set to
16 begin. As the Arizona Supreme Court explained, a subpoena to a witness ordinarily should be
17 issued in "sufficient time in advance of trial so that proper service can be made in ample time."
18 *Sam v. State*, 33 Ariz. 383, 412-413, 265 P. 609, 619 (1928). Only if "good cause can be shown for
19 the apparent neglect" is the delay "not fatal." *Id.*

20 To the same effect is *Parkinson v. Farmers Insurance Co.*, 122 Ariz. 343, 344, 596 P.2d
21 1039, 1040 (Ct. App. 1979), which held that an "application for writ of habeas corpus ad
22 testificandum" (i.e. a subpoena issued to a prisoner) "is not timely" when it was "made the day
23 assigned for the trial of a cause... where the applicant has known for a considerable period the
24 whereabouts of the witness and that the case is set for trial on such day."

25 The Division cannot show good cause for its extreme delay. Mr. Sargent has been on the
26 Division's witness list from the beginning; if the Division wanted to compel his testimony, it
27 should have issued and properly served him a subpoena long ago. Mr. Sargent is a respondent in

1 this case; it's not like the Division just learned that he might have relevant testimony to give.

2 The extreme lateness of the subpoena is shown by the Commission's 12th Procedural Order
3 in this case. In that order, the ALJ denied Respondent Bosworth's request for subpoenas, stating
4 that "At this time, further delay would result from granting these late-filed Motions or the issuance
5 of subpoenas requested by Respondents."¹ The Sargents' Requests for Admissions and
6 Interrogatories were denied on the same basis. It would be contradictory, inconsistent and unjust
7 for these requests to be denied as untimely, while upholding the Division's even-later subpoena.
8 Indeed, more than a month ago, the Division objected to Mr. Bosworth's subpoenas, arguing that
9 subpoenas were "untimely" because Bosworth "has his own duty of due diligence" to prepare for
10 the hearing, which he did not meet by "wait[ing] until this late date to improperly request" the
11 subpoenas.² The Division has no basis to argue that its subpoena – issued a month after it made
12 those statements – is timely.

13 **II. The statutory witness fees were not provided.**

14 The Commission's subpoena rule provides that "Witnesses who are summoned are entitled
15 to the same fees as are paid for like service in the courts of the state of Arizona, such fees to be paid
16 by the party at whose instance the witness is subpoenaed." A.A.C. R14-3-109(O). The "same
17 fees" referenced in the rule are specified in A.R.S. § 12-303. The Division has not proffered the
18 required witness fees; and accordingly the subpoena should be quashed.

19 The Division may respond that the failure to pay the witness fee is a mere technicality. But
20 rules have the force of law, and the Commission must follow its own rules. *Gibbons v. Arizona*
21 *Corp. Comm'n*, 95 Ariz. 343, 347, 390 P.2d 582, 585 (1964). Courts have rejected the arguments
22 that witness fees are a de minimis payment, and that quashing a subpoena for failure to pay allows
23 form to trump over substance. *In re Marriage of Dauwe*, 148 P.3d 282, 286 (Colo. App.
24 2006)(affirming trial court ruling quashing subpoena). Rather, it is incumbent on those attempting
25

26 ¹ 12th Procedural Order at 5:3-4.

27 ² Division "Object to and Motion to Quash Respondent Bosworth's Request for Issuance of
Administrative Subpoenas for Documents" at 9, filed May 10, 2010.

1 to rely on a subpoena rule to compel a witness to testify, to themselves comply with that rule. *Id.*

2 The witness fees must be delivered simultaneously with the service of the subpoena. *CF&I*
3 *Steel Corp. v. Mitsui & Co. (U.S.A.), Inc.*, 713 F.2d 494, 496 (9th Cir. 1983). Failure to
4 simultaneously tender the witness fees when the subpoena is served renders the subpoena invalid.
5 *Id.*; *Smith v. Midland Brake, Inc.*, 162 F.R.D. 683, 686 (D. Kan. 1995)(holding that “[f]ailure to
6 tender the witness fee and mileage allowance renders the subpoena invalid”, and that the witness
7 fee must be simultaneously tendered with the service of the subpoena.)

8 Here, the Division did not tender the witness fees and mileage allowance; thus the subpoena
9 is invalid.

10 **III. The subpoena application is insufficient and not in the record.**

11 As the Division recently explained in its May 10, 2010 objection to Mr. Bosworth’s request
12 for subpoenas:

13 Rule 14-3-109(O) provides that ...[a] request for issuance of the
14 Subpoenas must be supported by an “application” submitted to the
15 administrative law judge and Rule 14-3-106(F) states that the application
“shall contain the facts upon which the application is based, with such
exhibits as may be required or deemed appropriate by the applicant.”³

16 The Division also stated that a subpoena application must contain a statement of “reasonable
17 need.”⁴ Here, the Division did not docket an application specifying the facts supporting the
18 issuance of the subpoena, such as the topics that the witness will be expected to testify to, the need
19 for the testimony of the witness, whether similar testimony could be obtained from other witnesses,
20 and the justification for the extreme delay in requesting the subpoena. The Division refuses to
21 docket the application as required by the Commission’s rules. A.A.C. R14-3-107(A). Indeed, the
22 Division contends that Sargents’ counsel have no right to a copy of the application.⁵

23 However, the Division nevertheless provided a copy of the application, which consists, in
24

25 ³ Division “Object to and Motion to Quash Respondent Bosworth’s Request for Issuance of
26 Administrative Subpoenas for Documents” at 4:22-25.

27 ⁴ *Id.* at 5:2.

⁵ June 16, 2010 email from Ms. Julie Coleman, attached as Exhibit B.

1 its entirety, of the following sentence: “The Securities Division of the Arizona Corporation
2 Commission requests the issuance of a subpoena to MICHAEL J. SARGENT in connection with
3 the Administrative Hearing in the above-captioned action.” To the extent this non-record
4 application is considered, it is wholly insufficient by the standard the Division itself articulated in
5 its May 10 objections. The application contains: (1) no facts; (2) no exhibits; (3) no explanation of
6 the need for the testimony; and (4) no justification of – or even mention of – the lateness of the
7 application. Thus, even if the non-record application is considered, it is insufficient and the
8 subpoena should be quashed.

9 In the absence of an application in the record, the subpoena must be quashed – as the
10 Division itself argued in response to Mr. Bosworth’s subpoenas. And even if the application is
11 considered, the application fails to meet the subpoena application standard the Division itself stated
12 in its May 10 objection.

13 **IV. Conclusion.**

14 The subpoena to Mr. Sargent should be quashed, because: (1) it is untimely; (2) the
15 Division failed to tender the required witness fees, thus rendering the subpoena invalid; and (3)
16 there is no subpoena application in the record, and the non-record subpoena application is
17 insufficient, under the standard the Division articulated on May 10.

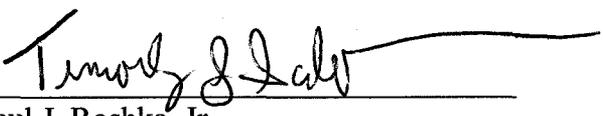
18
19
20
21
22
23
24
25
26
27

ROSHKA DeWULF & PATTEN, PLC
ONE ARIZONA CENTER
400 EAST VAN BUREN STREET - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

RESPECTFULLY SUBMITTED this 16th day of June, 2010.

ROSHKA DeWULF & PATTEN, PLC

By 

Paul J. Roshka, Jr.
Jeffrey D. Gardner
Timothy J. Sabo
One Arizona Center
400 East Van Buren Street, Suite 800
Phoenix, Arizona 85004
602-256-6100 (telephone)
602-256-6800 (facsimile)

Attorneys for Respondents
Michael J. Sargent and Peggy L. Sargent

ORIGINAL and thirteen copies of the foregoing
filed this 16th day of June, 2010 with:

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

Copy of the foregoing hand-delivered
this 16th day of June, 2010 to:

Marc E. Stern, Administrative Law Judge
Hearing Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Aaron S. Ludwig, Esq.
Securities Division
Arizona Corporation Commission
1300 West Washington Street, 3rd Floor
Phoenix, Arizona 85007

ROSHKA DEWULF & PATTEN, PLC
ONE ARIZONA CENTER
400 EAST VAN BUREN STREET - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

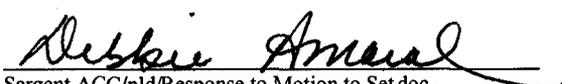
1 Copy of the foregoing mailed
2 This 16th day of June, 2010 to:

3 Robert D. Mitchell, Esq.
4 Joshua R. Forest, Esq.
5 Julie M. Beauregard, Esq.
6 Mitchell & Forest, P.C.
7 1850 North Central Avenue, Suite 1715
8 Phoenix, Arizona 85004
9 Attorneys for Respondent Robert Bornholdt

10 Norman C. Keyt, Esq.
11 Keyt Law Offices
12 3001 E. Camelback Road, Suite 130
13 Phoenix, Arizona 85016
14 Attorneys for Respondents
15 Stephen G. and Diane V. Van Campen

16 Mark W. and Lisa A. Bosworth
17 18094 North 100th Street
18 Scottsdale, Arizona 85255
19 Pro Per

20
21
22
23
24
25
26
27

15 
16 Sargent.ACC/pld/Response to Motion to Set doc

EXHIBIT

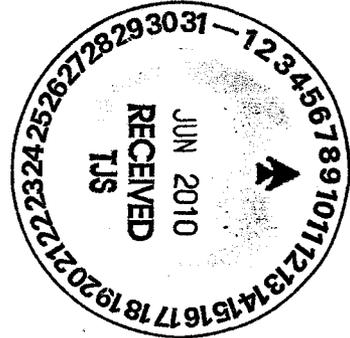
"A"

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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



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
ADMINISTRATIVE SUBPOENA

TO: Michael J. Sargent
77 E. Missouri, #3
Phoenix, AZ 85012

YOU ARE HEREBY COMMANDED, pursuant to Ariz. Rev. Stat. Ann § 44-1823 and A.A.C. Rule R14-3-109 to appear at the Office of the Arizona Corporation Commission, 1200 West Washington, First Floor, Hearing Room No. 1, Phoenix, Arizona on June 23 and 24, 2010 at 9:30 a.m., to testify under oath in connection with the Administrative Hearing in the above-captioned action.

1 DISOBEDIENCE OF THIS SUBPOENA MAY SUBJECT YOU TO FURTHER
2 PROCEEDINGS AND PENALTIES UNDER LAW, INCLUDING, BUT NOT LIMITED TO,
3 CONTEMPT OF COURT.

4
5 DATED this 9th day of June, 2010



6
7
8 
9 ERNEST G. JOHNSON
EXECUTIVE DIRECTOR
Arizona Corporation Commission

10
11 Persons with a disability may request a reasonable accommodation such as a sign language
12 interpreter, as well as request this document in an alternative format, by contacting Shaylin A.
13 Bernal, Executive Assistant to the Executive Director, voice phone number 602/542-3931, e-mail
14 sabernal@azcc.gov. Requests should be made as early as possible to allow time to arrange the
15 accommodation.
16
17
18
19
20
21
22
23
24
25
26

EXHIBIT

"B"

Tim Sabo

From: Julie Coleman [Jcoleman@azcc.gov]
Sent: Wednesday, June 16, 2010 11:00 AM
To: Tim Sabo; Jeff Gardner
Cc: Aaron Ludwig
Subject: RE: Subponea Application
Importance: High
Attachments: 2010 06-09 Sargent_administrative subpoena.pdf; 2010 02-19 Sargent_administrative subpoena.pdf

Gentlemen:

The Division does not have any obligation to provide a copy of an application for the issuance of an administrative hearing subpoena under A.A.C. Rule R-14-3-109(O), the original of which is maintained by the Executive Director, nor does the Division understand the reason for your office making such a request. Nevertheless, the Division will honor your request and I have received an authorization to disclose pursuant to A.R.S. 44-2042 in which to do so. Accordingly, attached is a copy of the application, administrative subpoena, and affidavit of service for the Feb. 19, 2010 administrative subpoena personally served on Mr. Sargent and for the June 9, 2010 administrative subpoena served on your office as Mr. Sargent's attorneys of record.

Julie A. Coleman
Chief Counsel of Enforcement
Arizona Corporation Commission, Securities Division
1300 W. Washington St., Third Floor
Phoenix, AZ 85007
Direct Phone: (602) 542-0639
Fax: (602) 594-7427
Email: jcoleman@azcc.gov

From: Julie Coleman
Sent: Wednesday, June 16, 2010 10:10 AM
To: Tim Sabo
Cc: Aaron Ludwig
Subject: RE: Subponea Application

Tim:

Why do you need a copy of the Division's application for issuance of a subpoena requiring Mr. Sargent to appear at an administrative hearing issued pursuant to A.R.S. 44-1823 and A.A.C. Rule R-14-3-109(O)?

Julie

From: Aaron Ludwig
Sent: Wednesday, June 16, 2010 9:40 AM
To: Julie Coleman
Subject: FW: Subponea Application

6/16/2010

From: Tim Sabo [mailto:tsabo@rdp-law.com]
Sent: Tuesday, June 15, 2010 3:53 PM
To: Aaron Ludwig
Cc: Jeff Gardner
Subject: Subponea Application

I would like a copy of the subpoena application pertaining to the June 9, 2010 subpoena issued to Mr. Sargent.

Timothy J. Sabo
Roshka DeWulf & Patten, PLC
One Arizona Center
400 East Van Buren, Suite 800
Phoenix, AZ 85004
Phone: 602.256.6100
Fax: 602.256.6800
Email: tsabo@rdp-law.com

For more information about Roshka DeWulf & Patten, please see our website at www.rdp-law.com. This message and any of the attached documents contain information from the law firm of Roshka DeWulf & Patten, PLC and may be confidential and/or privileged. If you are not the intended recipient, you may not read, copy, distribute or use this information and no privilege has been waived by your inadvertent receipt. If you have received this transission in error, please notify the sender by reply e-mail and then delete this message. Thank you.

===== This footnote confirms that this email message has been scanned to detect malicious content. If you experience problems, please e-mail postmaster@azcc.gov =====