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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION  
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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

RESPONSE TO RESPONDENTS MICHAEL J. SARGENT AND PEGGY L. SARGENT'S MOTION TO QUASH ADMINISTRATIVE SUBPOENA ISSUED TO MICHAEL J. SARGENT

(Assigned to the Honorable Marc E. Stern)

Arizona Corporation Commission

DOCKETED

JUN 21 2010

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The Securities Division ("the Division") of the Arizona Corporation Commission ("the Commission") hereby responds to Respondents Michael J. Sargent and Peggy L. Sargent's Motion to Quash Administrative Subpoena Issued to Michael J. Sargent ("Sargent") ("the Motion") and requests that it be denied because the June 9, 2010 administrative hearing appearance subpoena for Sargent ("June subpoena") was issued in accordance with A.A.C. Rule R14-3-109(O).

Respondents argue the June subpoena should be quashed because: (1) the June subpoena was not issued timely; (2) the June subpoena is analogous to a discovery subpoena, which was quashed; (3) the Division did not tender witness fees; and (4) the Division did not docket the June subpoena application. However, the June subpoena should not be quashed because: (1) Sargent was

1 on notice that his appearance to give testimony at the administrative hearing could be required as  
 2 early as November 19, 2009 and would be required as of February 23, 2010; (2) a request for the  
 3 authority to issue a discovery subpoena is governed by A.R.S § 41-1062 and requires a showing of  
 4 reasonable need. A request for an administrative hearing appearance subpoena issued by the  
 5 Commission is governed by A.A.C. R14-3-109(O); (3) by law, the Division is not required to tender  
 6 statutory witness fees; and (4) an application for the issuance of an administrative hearing  
 7 appearance subpoena is not a Formal Document and, therefore, is not required to be filed with the  
 8 Commission.

9 ***I. The June subpoena is not unreasonable nor oppressive.***

10 Respondents Michael J. Sargent and Peggy L. Sargent (“Respondents”) argue that the June  
 11 subpoena should be quashed because it was issued “extremely late, after the hearing was scheduled  
 12 to start, and after the close of discovery.”<sup>1</sup> A subpoena may be quashed if compliance therewith  
 13 may be “unreasonable or oppressive.” A.A.C. R14-3-109(O). The burden to establish that a  
 14 subpoena is unreasonable and oppressive is on the party who seeks to have it quashed. *Helge v.*  
 15 *Druke*, 136 Ariz. 434, 438, 666 P.2d 534, 538 (App. 1983). In support of their argument,  
 16 Respondents simply assert that it should be quashed because it was “untimely,” rather than to  
 17 explain how compelling a *party’s* appearance to testify at a scheduled administrative hearing is  
 18 unreasonable or oppressive.<sup>2</sup>

19 ...

20 ...

21 ...

22 ...

23 \_\_\_\_\_  
 24 <sup>1</sup> Motion at 1:22-24

25 <sup>2</sup> Respondents cite *Sam v. State*, 33 Ariz. 383, 412-413, 265 P. 609, 619 (1928) in support of their argument that “good  
 26 cause” must be shown that the delay in issuing the subpoena was not due to neglect by the requesting party.  
 Respondents cite to *Parkinson v. Farmers Insurance Company of Arizona*, 122 Ariz. 343, 344, 594 P.2d 1039, 1040  
 (App. 1979) in support of their argument that a subpoena is not timely when it is issued to a *non-party* on the day of  
 trial. However, neither decision is applicable to this matter because in both of these decisions the court was  
 determining whether the issuance of a trial subpoena to a *non-party witness* was unreasonable or oppressive pursuant  
 of Rule 45 of the Arizona Rules of Civil Procedure.

1           A.     *Sargent has been on notice that his appearance to give testimony at the*  
2                     *administrative hearing could be required as early as November 19, 2009 and*  
3                     *would be required as of February 23, 2010.*

4           As Respondents point out in their Motion, Sargent was disclosed by the Division as a  
5           potential witness in this matter in its Witness and Exhibit List<sup>3</sup> on November 19, 2009. Sargent  
6           was personally served with an administrative hearing appearance subpoena on February 23, 2010  
7           (the "February subpoena").<sup>4</sup> Respondents, however, waited until June 9, 2010, after a two day  
8           recess from the scheduled commencement of the administrative hearing, to *first* raise an *oral*  
9           motion to quash the February subpoena on the basis that Respondents' attorneys were to be  
10          served with the February subpoena rather than upon Sargent personally. Administrative Law  
11          Judge Stern agreed, and quashed the February subpoena. The June subpoena was then issued by  
12          the Commission and served by the Division on Respondents' attorneys on the same day.<sup>5</sup> The  
13          only reason why the June subpoena was issued after the commencement of the administrative  
14          hearing was because Respondents chose to wait almost four months and two days after the  
15          scheduled commencement of the administrative hearing to request that the February subpoena be  
16          quashed based *solely* upon whom it was served.

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

26          <sup>3</sup> Motion at 2:25-27. The Respondents were provided the Division's preliminary witness list on or about November 19, 2009.

<sup>4</sup> See Exhibit "A," p. 3, Affidavit of Service.

<sup>5</sup> Motion at 2:6-8

1 Sargent is a party to these proceedings. Sargent was has been on notice from the Division that he  
 2 is a potential witness in excess of seven months and on notice that he was going to be called to  
 3 testify at the administrative hearing for over four months. Sargent has undoubtedly been  
 4 assisting his attorneys in preparation for the administrative hearing. No documents are required  
 5 to be produced by Sargent in the June subpoena. Therefore, the issuance of the June 2010  
 6 subpoena comports with the due process rights of Sargent.

7 *B. A request for issuance of an administrative hearing appearance subpoena by the*  
 8 *Commission is governed by A.A.C. R14-3-109(O). The issuance of a discovery*  
 9 *subpoena on behalf of a respondent is governed by A.R.S. § 41-1062.*

10 Respondents fail to distinguish between the denial by Administrative Law Judge Stern of  
 11 their May 3, 2010 *discovery* requests<sup>6</sup> and Respondent Bosworth's May 3, 2010 *discovery*  
 12 requests<sup>7</sup> pursuant to A.R.S. §41-1062 and issuance of subpoena compelling a witness to testify  
 13 and/or produce documents at an administrative hearing pursuant to A.A.C. R14-4-109(O). The  
 14 Arizona Revised Statutes and the Arizona Rules of Practice and Procedure before the Commission  
 15 ("Rules of Practice and Procedure") contain explicit provisions addressing discovery procedures in  
 16 contested administrative adjudications. A party may engage in reasonable discovery in an  
 17 administrative proceeding before the Commission *only* through these procedures.

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

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

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

24 ...

25 4. The officer presiding at the hearing may cause to be issued  
 26 subpoenas for the attendance of witnesses and for the production of  
 books, records, documents and other evidence and shall have the  
 power to administer oaths... *Prehearing depositions and*

<sup>6</sup> 12<sup>th</sup> Procedural Order at 3:20-25.

<sup>7</sup> 12<sup>th</sup> Procedural Order at 3:6-14

1                    *subpoenas for the production of documents may be ordered by the*  
 2                    *officer presiding at the hearing, provided that the party seeking*  
 3                    *such discovery demonstrates that the party has reasonable need of*  
 4                    *the deposition testimony or materials being sought....*  
                      *Notwithstanding the provisions of section 12-2212, no subpoenas,*  
                      *depositions or other discovery shall be permitted in contested*  
                      *cases except as provided by agency rule or this paragraph.*

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

10                    Respondents May 3, 2010 *discovery* requests<sup>8</sup> and Respondent Bosworth's May 3, 2010  
 11 *discovery* requests<sup>9</sup> did not comply with these, above-described procedures for engaging in  
 12 reasonable discovery in administrative proceedings before the Commission because they did not  
 13 contain a showing of reasonable need for the desired discovery. Furthermore, the discovery  
 14 requests sought to go beyond the scope of the very limited discovery that the administrative law  
 15 judge *could*, but not necessarily would, order had Respondents shown reasonable need. As such,  
 16 both discovery requests were quashed.

17 ***II. The Division is not required to tender statutory witness fees.***

18                    A.A.C. R14-4-109(O) states that "[w]itnesses who are summoned are entitled to the same  
 19 fees as are paid for *like service* in the courts of the state of Arizona, such fees to be paid by the  
 20 party at whose instance the witness is subpoenaed." (Emphasis added.) In support of their  
 21 argument that the Division is required to tender statutory witness fees to Sargent at the time of  
 22 service of the June subpoena, the Respondents rely solely on A.R.S. § 12-303, the general statute  
 23 governing the courts which sets forth the *amount* of the daily witness fee and mileage allowance.  
 24 However, Respondents completely ignore Rule 45(b)(2) of the Arizona Rules of Civil Procedure  
 25 which states that the witness fee and mileage allowance are *not* required to be tendered when: (1)

26 <sup>8</sup> 12<sup>th</sup> Procedural Order at 3:20-25.

<sup>9</sup> 12<sup>th</sup> Procedural Order at 3:6-14

1 the subpoena commands the appearance of a *party* at trial or hearing; *or* (2) the subpoena is issued  
2 *on behalf of* a state agency. A.R.C.P. Rule 45(b)(2). The June subpoena was issued on behalf of the  
3 Division. The June subpoena compels the appearance of Sargent, a party, to appear for testimony at  
4 the administrative hearing. Therefore, Sargent is not entitled to any statutory witness fees.

5 **III. *The application for issuance of an administrative hearing subpoena is not a Formal***  
6 ***Document.***

7 Respondents argue that the “application” for the issuance of an administrative hearing  
8 subpoena pursuant to A.A.C. R14-4-109(O) is a “Formal Document” as defined under A.A.C. R14-  
9 3-106 and, therefore, should be filed with the Commission and a copy served upon them pursuant to  
10 A.A.C. R14-3-107(A). The Division disagrees.

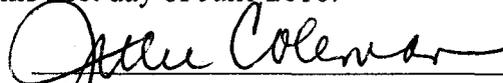
11 The Rules of Practice and Procedure define “Formal Documents” to include “applications.”  
12 A.A.C. R14-3-106. An “Application” is defined as a “*request for a right, authority or other*  
13 *affirmative relief.*”<sup>10</sup> A.A.C. R14-3-106(F)(emphasis added). For example, the Respondents  
14 submitted a Formal Document Application when they requested for hearing pursuant to A.R.S. § 44-  
15 1972 and A.A.C. R14-4-306 seeking the denial of the relief sought against them in the Division’s  
16 Notice. Likewise, a utility submits a Formal Document Application to request that the Commission  
17 grant the utility the authority to raise its rates. By contrast, an application for issuance of an  
18 administrative hearing subpoena is not a Formal Document Application because the party is not  
19 asking the Commission to grant any right, authority, or remedy. The requesting party is  
20 procedurally asking the Commission to exercise *its* right and power to require someone to appear to  
21 testify and/or produce documents at an administrative hearing. A.A.C. R14-3-109(A). Since the  
22 June 9, 2010 application for issuance of an administrative hearing subpoena is not a Formal  
23 Document, the Division is not required to file it with the Commission.

24 ...  
25 \_\_\_\_\_  
26 <sup>10</sup> Arguably, a *motion* filed by a respondent seeking discovery is an Application because it seeks authority in which to  
conduct discovery. The Commission already has the right to conduct an investigation and issue subpoenas pursuant to  
A.R.S. 44-1823. Furthermore, the Rules of Practice and Procedure do not apply to any investigation by the  
Commission or its divisions. A.A.C. R14-4-101(A).

1 **IV. Conclusion.**

2 For the reasons set forth herein, the Division requests that Respondents Michael J. Sargent  
3 and Peggy L. Sargent's Motion to Quash Administrative Subpoena Issued to Michael J. Sargent be  
4 denied because the June subpoena was properly issued in accordance with A.A.C. Rule R14-3-  
5 109(O).

6 RESPECTFULLY SUBMITTED this 21st day of June 2010.

7 

8 Julie Coleman  
9 Chief Counsel of Enforcement for the Securities  
10 Division of the Arizona Corporation Commission

11 **ORIGINAL and 13 COPIES** of the foregoing filed  
12 this 21<sup>st</sup> day of June, 2010 with:

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

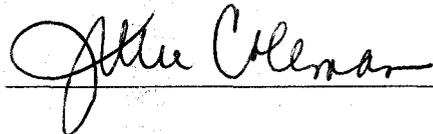
17 **COPY** of the foregoing hand delivered  
18 this 21<sup>st</sup> day of June, 2010 to:

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

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

**COPY** of the foregoing mailed  
this 21<sup>st</sup> day of June, 2010 to:

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

By: 

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**EXHIBIT "A"**

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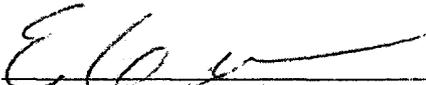
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1 DISOBEDIENCE OF THIS SUBPOENA MAY SUBJECT YOU TO FURTHER  
2 PROCEEDINGS AND PENALTIES UNDER LAW, INCLUDING, BUT NOT LIMITED TO,  
3 CONTEMPT OF COURT.

4 DATED this 19<sup>th</sup> day of February, 2010

5  
6  
7   
8 ERNEST G. JOHNSON  
9 EXECUTIVE DIRECTOR  
10 Arizona Corporation Commission

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](mailto:sabernal@azcc.gov). Requests should be made as early as possible to allow time to arrange the  
15 accommodation.  
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