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BEFORE THE ARIZONA CORPORATION COMMISSION

2010 DEC 15 P 2:50

COMMISSIONERS

KRISTIN K. MAYES, Chairman  
GARY PIERCE  
PAUL NEWMAN  
SANDRA D. KENNEDY  
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AZ CORP COMMISSION  
DOCKET CONTROL

In the matter of:

JOSEPH COSENZA and ANDREA  
BENSON, husband and wife;

U.S. MEDIA TEAM, LLC, an Arizona  
limited liability company;

THOMAS BRANDON and DIANE M.  
BRANDON, husband and wife;

CELL WIRELESS CORPORATION, a  
Nevada corporation, formerly known as U.S.  
SOCIAL SCENE, a Nevada corporation;

DAVID SHOREY and MARY JANE  
SHOREY, husband and wife;

Respondents.

DOCKET NO. S-20763A-10-0430

RESPONSE TO MOTION TO CONTINUE  
PRE-HEARING CONFERENCE

Arizona Corporation Commission  
**DOCKETED**

DEC 15 2010

DOCKETED BY

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") responds to David Shorey, Cell Wireless Corporation, and Thomas Brandon's ("Respondents") motions to continue the pre-hearing conference scheduled for December 16, 2010. Respondents cite a lack of documents from the Division and an inability to retain legal counsel as support for their motions.

The Respondents' cite of a lack of documents appears to be a disguised motion for discovery. Regardless, this request is premature as the parties have not had an opportunity to exchange their lists of witnesses and exhibits, and falls outside acceptable discovery limits as permitted for administrative

1 proceedings under both the Arizona Revised Statutes and Arizona Rules of Practice and Procedure  
2 before the Commission. Accordingly, the Division requests that this Commission deny the demands  
3 included in the Respondents' motions. The Division will comply with appropriate discovery requests  
4 that comport with the prescribed discovery rules for administrative adjudications. This Response is  
5 supported by the following Memorandum of Points and Authorities.

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. Discussion**

- 8 A. Respondents' motions are premature because the Administrative Law Judge has  
9 yet to convene an initial pre-hearing conference to order a date by which the  
10 parties must exchange their list of witnesses and exhibits ("LWE")

11 Administrative Law Judge Stern ("ALJ Stern") issued an initial Procedural Order on  
12 November 18, 2010, that set December 16, 2010, as the date for the first pre-hearing conference.  
13 At the first pre-hearing conference, the parties usually discuss any issues in the case and set dates  
14 for the exchange of the LWE and the hearing. Since the parties have not yet appeared at the first  
15 pre-hearing conference, there has not been an opportunity for the parties to exchange their LWE.

- 16 B. Discovery for Administrative Proceedings within Arizona is available only within  
17 the limits defined by statute and agency rule in administrative proceedings.

18 Respondents' request is effectively for the Division's entire investigative file. Their  
19 request states they are requesting "all of the information, testimony, records, documents, emails,  
20 deposition transcripts, legal research in the commission files about this case, any commission  
21 personnel notes written during any occurrence in this case, and any and all records of verbal or  
22 telephone testimony received by the commission in this case, and anything in this case not  
23 mentioned herein."

24 This request does not fall within the limits defined by statute or agency rule in  
25 administrative proceedings. Courts have often had occasion to consider the limits of discovery in  
26 administrative proceedings. Through these deliberations, two salient points have become evident.

1 The first of these is the fact that, because they derive from an entirely distinct process, the rules of  
2 civil procedure for discovery **do not** apply in administrative proceedings.<sup>1</sup> See, e.g., *Pacific Gas*  
3 *and Electric Company*, 746 F.2d 1383, 1387 (9<sup>th</sup> Cir. 1984); *Silverman v. Commodity Futures*  
4 *Trading Commission*, 549 F.2d. 28, 33 (7<sup>th</sup> Cir. 1977); *National Labor Relations Board v. Vapor*  
5 *Blast Mfg. Co.*, 287 F.2d 402, 407 (7<sup>th</sup> Cir. 1961); *In re City of Anaheim, et al.* 1999 WL 955896,  
6 70 S.E.C. Docket 1848 (the federal rules of civil procedure do not properly play any role on the  
7 issue of discovery in an administrative proceeding).

8 The second of these points is that the authority to pursue discovery during the course of an  
9 administrative proceeding is not conferred as a matter of right. In fact, courts have repeatedly  
10 recognized that there simply is no basic constitutional right to pretrial discovery in administrative  
11 proceedings. *Silverman v. Commodity Futures Trading Commission*, 549 F.2d. 28, 33 (7<sup>th</sup> Cir.  
12 1977); See also *Starr v. Commissioner of Internal Revenue*, 226 F.2d. 721,722 (7<sup>th</sup> Cir. 1955), cert.  
13 denied, 350 U.S. 993, 76 S. Ct. 542 (1955); *National Labor Relations Board v. Interboro*  
14 *Contractors, Inc.*, 432 F.2d 854, 857 (2<sup>nd</sup> Cir. 1970); *Miller v. Schwartz*; 528 N.E.2d 507 (N.Y.  
15 1988); *Pet v. Department of Health Services*, 542 A.2d 672 (Conn. 1988). The federal  
16 Administrative Procedures Act echoes this point by offering no provision for pretrial discovery  
17 during the administrative process. 1 Davis, *Administrative Law Treatise* (1958), § 8.15, p. 588.

18 In accordance with these findings, discovery within the confines of an administrative  
19 proceeding is only authorized to the extent that it is explicitly provided for in a separate statute or  
20 rule. See, e.g., 73A C.J.S. *Public Administrative Law and Procedure*, § 124 (1983)(“Insofar as the  
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22 <sup>1</sup> This principle is particularly important from a policy standpoint. Indeed, merging civil  
23 discovery rules into the administrative arena would have many deleterious results, including: 1)  
24 allowing respondents to access confidential investigative information far removed from the  
25 witnesses and exhibits relevant to the active case against them; 2) allowing respondents to protract  
26 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 proceedings of a state administrative body are concerned, only the methods of discovery set forth  
2 by the pertinent statute are available, and the methods not set forth therein are excluded”); *See also*  
3 2 Am.Jur.2d. *Administrative Law* § 327 (2d. ed. 1994)(In the context of administrative law, any  
4 right to discovery is grounded in the procedural rules of the particular administrative agency).

5 Following these precepts, the state of Arizona has enacted both statutes and agency rules to  
6 address the issue of discovery in the context of administrative proceedings. Indeed, both the  
7 Arizona Revised Statutes and the Arizona Rules of Practice and Procedure before the Corporation  
8 Commission (“Rules of Practice and Procedure”) contain explicit provisions addressing discovery  
9 procedures in contested administrative adjudications. Only by observing these controlling provisions  
10 can a party effectively pursue discovery in an administrative matter before the Arizona Corporation  
11 Commission.

12 The statute setting forth the parameters of discovery in administrative proceedings is, not  
13 surprisingly, found in the chapter on Administrative Procedure, A.R.S. § 41-1001, *et seq.* Under  
14 Article 6 of this chapter, covering “Adjudicative Proceedings,” Arizona law provides as follows:

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

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

18 [...]

19 4. The officer presiding at the hearing may cause to be issued  
20 subpoenas for the attendance of witnesses and for the production of  
21 books, records, documents and other evidence and shall have the  
22 power to administer oaths. [...]. *Prehearing depositions and*  
23 *subpoenas for the production of documents may be ordered by the*  
24 *officer presiding at the hearing, provided that the party seeking*  
25 *such discovery demonstrates that the party has reasonable need of*  
26 *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.*

1 (Emphasis added). The plain import of this provision is that, in Arizona, the only forms of pre-trial  
2 discovery permitted in administrative proceedings are 1) subpoenas, based on a showing of need  
3 and authorized by the administrative hearing officer; 2) depositions, based on a showing of need  
4 and authorized by the hearing officer; and 3) any other discovery provision specifically authorized  
5 under the individual agency's rules of practice and procedure.

6 The Rules of Practice and Procedure, *R14-3-101, et seq.*, thus serve to augment the  
7 available means of pre-trial discovery within the Corporation Commission. Under these rules, the  
8 presiding administrative law judge may also direct a pre-hearing conference wherein an  
9 arrangement is made for the exchange of proposed exhibits, witness lists, or prepared expert  
10 testimony. *See Arizona Administrative Code, Title 14, R-14-3-108(A)*. These rules also provide  
11 that a party may gain access to additional pre-hearing materials by way of a discretionary ALJ  
12 order requiring that the parties interchange copies of exhibits prior to hearing. *See Arizona*  
13 *Administrative Code, Title 14, R-14-3-109(L)*. Indeed, Corporation Commission administrative  
14 law judges often call upon these rules in ordering parties to file a list of witnesses and exhibits at a  
15 time and date in advance of the hearing, thereby facilitating the hearing preparation process. Here,  
16 ALJ Stern has yet to order the Division and Respondents to exchange their LWE. Once ALJ Stern  
17 orders the exchange, the Division will provide those documents that support its case to the  
18 Respondents.

19 It is clear that Arizona statute and the Rules of Practice and Procedure establish that only  
20 certain, specified methods of discovery are sanctioned in administrative proceedings before the  
21 Commission, and that such methods of discovery are often both limited and discretionary. As  
22 discussed below, the confidentiality statute would also apply to all documents or information  
23 obtained during the course of the Division's investigation. Though Respondents have been unable  
24 to point out why the confidentiality provision does not apply, assuming *arguendo* that it was not in  
25  
26

1 issue, the Respondents still have not made a requisite showing of "reasonable need" as required by  
2 A.R.S. § 41-1062(A)(4).

3 C. The Division is bound by Arizona statute that explicitly prohibits the Division's  
4 disclosure of certain information unless an applicable exception applies, which  
5 Respondents' have failed to show.

6 The Respondents again fail to cite any Arizona statute or Rules of Practice and Procedure  
7 that would require the Division to disclose all information and documents that the Division may  
8 have obtained from its investigation. Arizona law provides as follows:

9 A.R.S. § 44-2042: Confidentiality

10 **The names of complainants and all information or documents obtained by any officer,**  
11 **employee or agent of the commission,** including the shorthand reporter or stenographer  
12 **transcribing the reporter's notes, in the course of any examination or investigation are**  
13 **confidential unless the names, information or documents are made a matter of public record.**  
14 **An officer, employee or agent of the commission shall not make the confidential names,**  
15 **information or documents available to anyone other than a member of the commission,**  
16 **another officer or employee of the commission, an agent who is designated by the commission**  
17 **or director, the attorney general or law enforcement or regulatory officials, except pursuant to**  
18 **any rule of the commission or unless the commission or the director authorizes the**  
19 **disclosure of the names, information or documents as not contrary to the public interest.**  
20 *(emphasis added).*

21 Respondents fail to realize that compliance with the confidentiality statute is not discretionary but  
22 mandatory under the law. There has been no rule of the Commission cited by Respondents that  
23 would obviate the Division's required compliance with the confidentiality statute nor an  
24 authorization by the Commission or director authorizing disclosure of names, information or  
25 documents as not contrary to public interest. Unless and until those documents and information are  
26 made public, the confidentiality provision still applies.

D. Notes and information created by a Division's Special Investigator or Counsel is  
protected by the work-product doctrine.

Documents, reports, memos, investigatory records and other information prepared by a  
special investigator or counsel in anticipation of an administrative action are work product material  
and are protected from discovery by the work-product doctrine. The work-product doctrine

1 originated in *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385 (1947). The *Hickman* court stated  
2 that the general policy against invading the privacy of an attorney's preparation is essential to an  
3 orderly working of the system of legal procedure. *Id.* at 512. Material such as witness statements  
4 taken during the course of litigation preparation and materials that reflect the attorney's mental  
5 impressions or opinions about a case receive protection from disclosure. *Longs Drug Stores v.*  
6 *Howe*, 134 Ariz. 424, 428, 657 P.2d 412, 416 (1983) citing *Hickman*, 329 U.S. at 511. Arizona  
7 practice conforms to *Hickman*. *Longs Drug Stores v. Howe*, 134 Ariz. 424, 428, 657 P.2d 412, 416  
8 (1983). The doctrine extends to trial preparation material prepared by a party's representatives,  
9 including investigators. *Id.* at 430, 657 P.2d at 418. The doctrine also applies during an  
10 investigative stage if the parties may well become adversaries in litigation. *State v. Weaver*, 140  
11 Ariz. 123, 129, 680 P.2d 833, 839 (Ct. App. 1984). The harm to the state's ability to prepare an  
12 enforcement action as a result of disclosure of work product outweighs any public interest in  
13 disclosure of the work product.

14 Finally, in the context of an administrative discovery, even if confidentiality protections  
15 and privacy interests are not at issue, disclosure should be restricted to matters that are relevant and  
16 to instances where there is a requisite showing of "reasonable need." A.R.S. § 41-1062(A)(4). At  
17 this time the Respondents have not demonstrated "reasonable need" for the Division's entire  
18 investigative file.

## 19 **II. Respondents have had adequate time to retain legal counsel**

20 Respondents cited an inability to retain counsel as one of their arguments. David Shorey and  
21 Cell Wireless stated in both their Requests for Hearing (filed on November 5, 2010) and their  
22 Answers (filed November 29, 2010) that they had legal counsel. Now, the Division is hearing for the  
23 first time that both have not been able to retain counsel.

24 Thomas Brandon indicated in his Request for Hearing filed on November 15, 2010, that he  
25 would have legal counsel file his Answer. On December 8, 2010, Thomas Brandon filed an Answer  
26

1 on his own behalf. Like David Shorey and Cell Wireless, Thomas Brandon claims he needs more  
2 time to retain counsel.

3 The Respondents have had several weeks to retain counsel. Any counsel eventually retained  
4 by the Respondents can appear after this initial pre-hearing conference.

5 **III. Conclusion**

6 The discovery rules for contested administrative proceedings in Arizona are expressly  
7 provided by statute and agency rule, and in the context of an administrative discovery, even if  
8 confidentiality protections and privacy interests are not at issue, disclosure should be restricted to  
9 matters that are relevant and to instances where there is a requisite showing of "reasonable need."  
10 A.R.S. § 41-1062(A)(4). Additionally, the Respondents have had sufficient time to retain counsel.  
11 Therefore, the Commission should deny Respondents disguised discovery request and request for a  
12 continuance of the pre-hearing conference.

13 RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of December, 2010.

14  
15  
16 By 

Aikaterine Vervilos  
Attorney for the Securities Division of the  
Arizona Corporation Commission

1 ORIGINAL AND EIGHT (8) COPIES of the foregoing  
2 filed this 15th day of December, 2010, with

3 Docket Control  
4 Arizona Corporation Commission  
5 1200 West Washington  
6 Phoenix, AZ 85007

7 COPY of the foregoing hand-delivered this  
8 15th day of December, 2010, to:

9 Administrative Law Judge Marc Stern  
10 Arizona Corporation Commission/Hearing Division  
11 1200 West Washington  
12 Phoenix, AZ 85007

13 COPY of the foregoing mailed  
14 this 15th day of December, 2010, to:

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26