

ORIGINAL



0000134085

1 Robert D. Mitchell, 011922  
 2 Sarah K. Deutsch, 026229  
 3 MITCHELL & ASSOCIATES  
 4 A Professional Corporation  
 5 Viad Corporate Center, Suite 2030  
 6 1850 North Central Avenue  
 7 Phoenix, Arizona 85004  
 8 Telephone (602) 468-1411  
 9 Fax (602) 468-1311  
 10 [robertmitchell@mitchell-attorneys.com](mailto:robertmitchell@mitchell-attorneys.com)  
 11 [sarahdeutsch@mitchell-attorneys.com](mailto:sarahdeutsch@mitchell-attorneys.com)  
 12 [www.mitchell-attorneys.com](http://www.mitchell-attorneys.com)

RECEIVED

2012 FEB -3 P 2:54

AZ CORP COMMISSION  
DOCKET CONTROL

8 Michael D. Kimerer, 45439  
 9 221 East Indianola Ave.  
 10 Phoenix, Arizona 85012  
 11 Telephone (602) 279-5900  
 12 [mdk@kimerer.com](mailto:mdk@kimerer.com)

Arizona Corporation Commission  
**DOCKETED**

FEB - 3 2012

11 Timothy J. Galligan - Cal 92174  
 12 5 Borealis Way  
 13 Castle Rock, Colorado 80108  
 14 Telephone (650) 504-7788  
 15 [timothyjgalligan@yahoo.com](mailto:timothyjgalligan@yahoo.com)

DOCKETED BY

15 Counsel for Respondents

**BEFORE THE ARIZONA CORPORATION COMMISSION**

18 In the matter of:  
 19  
 20 DAVID PAUL SMOOT,  
 21 MARIE KATHLEEN SMOOT,  
 22 NATIVE AMERICAN WATER, LLC, dba  
 23 NATAWA, NATAWA CORPORATION,  
 24 dba NATAWA AND AMERICAN INDIAN  
 25 TECHNOLOGIES INTERNATIONAL, LLC,  
 26 aka AITI,  
 27  
 28 Respondents.

Docket No. S-20814A-11-0313

**RESPONDENTS' BRIEF TO  
 COMPEL THE EXCHANGE  
 OF ARIZ. R. CIV. P. 26.1  
 DISCLOSURE STATEMENTS**

26 As authorized by Administrative Law Judge Marc E. Stern during the January 18, 2012 pre-  
 27 hearing conference in the above captioned matter, Respondents David Paul Smoot, Marie Kathleen  
 28

1 Smoot, Native American Water, LLC, Natawa Corporation and American Indian Technologies  
2 International, LLC (“Respondents”), by and through their undersigned counsel, hereby respectfully  
3 submit their brief to compel the exchange of disclosure statements pursuant to Ariz. R. Civ. P. 26.1.  
4

5 I. **ARIZ. R. CIV. P. 26.1 APPLIES TO AND GOVERNS ACTIONS PENDING**  
6 **BEFORE THE ARIZONA CORPORATION COMMISSION.**

7 Ariz. R. Civ. P. 26.1 requires the prompt and comprehensive disclosure of the following  
8 information within 40 days after the filing of a responsive pleading to a complaint:

9 (1) the factual basis for each claim or defense; (2) the legal theory upon which each  
10 claim or defense is based including, where necessary for a reasonable understanding  
11 of each claim or defense, citations of pertinent legal or case authorities; (3) the  
12 names, addresses and telephone numbers of any witnesses whom the disclosing party  
13 expects to call at trial with a fair description of the substance of each witness’  
14 expected testimony; (4) the names and addresses of all persons that may have  
15 knowledge or information relevant to the events, transactions, or occurrences that  
16 gave rise to the action, and the nature of the knowledge or information each such  
17 individual is believed to possess; (5) the names and addresses of all persons who  
18 have given statements, whether written or recorded, signed or unsigned, and the  
19 custodian of the copies of those statements; (6) the name and address of each person  
20 whom the disclosing party expects to call as an expert witness at trial, the subject  
21 matter on which the expert is expected to testify, the substance of the facts and  
22 opinions to which the expert is expected to testify, a summary of the grounds for  
23 each opinion, the qualifications of the witness and the name and address of the  
24 custodian of copies of any reports prepared by the expert; (7) a computation and the  
25 measure of damage alleged by the disclosing party, the documents or testimony  
26 supporting the computation and measure of damages, and the names, addresses and  
27 telephone numbers of all damage witnesses; (8) the existence, location, custodian,  
28 and general description of any tangible evidence, relevant documents, or  
electronically stored information that the disclose party plans to use at trial; and (9) a  
list of the documents or electronically stored information, or in the case of  
voluminous documentary information or electronically stored information, a list of  
the categories of documents or electronically stored information, known by a part to  
exist whether or not in the party’s possession, custody or control and which the party  
believes may be relevant to the subject matter of the action, and those which appear  
reasonably calculated to lead to the discovery of admissible evidence, and the date(s)  
upon which those documents or electronically stored information will be made, or  
have been made, available for inspection, copying, testing or sample.

26 See Ariz. R. Civ. P. 26.1(a)-(b). In short, “the disclosure statement is the primary vehicle by which  
27 the parties are informed of their opponent’s case” and must “fairly expose the facts and issues to be  
28

1 litigated, as well as the witnesses and exhibits to be relied upon.” Bryan v. Riddel, 178 Ariz. 472,  
2 477, 875 P.2d 131, 136 (1994). “The purpose of the disclosure rule is [to] give to the parties ‘a  
3 reasonable opportunity to prepare for trial or settlement’ . . . and to ‘maximize the likelihood of a  
4 decision on the merits.’” Gerow v. Covill, 192 Ariz. 9, 18, 960 P.2d 55, 64 (Ct. App. 1998)  
5 (quoting Bryan, 178 Ariz. at 476 n.5, 875 P.2d at 135 n.5; Allstate Ins. Co. v. O’Toole, 182 Ariz.  
6 284, 287, 896 P.2d 254, 257 (1995)).  
7

8 The Arizona Rules of Civil Procedure, including Ariz. R. Civ. P. 26.1 are expressly and  
9 broadly incorporated into the Rules of Practice and Procedure (A.A.C. R14-3-101, *et seq.*), which  
10 govern all cases before the Arizona Corporation Commission (“Commission”). *See* A.A.C. R14-3-  
11 101(A). “In all cases in which procedure is set forth neither by law, nor by these rules, nor by  
12 regulations or orders of the Commission, the Rules of Civil Procedure for the Superior Court of  
13 Arizona as established by the Supreme Court of the state of Arizona *shall* govern.” *Id.* (emphasis  
14 added). Arizona courts have not hesitated to apply the Arizona Rules of Civil Procedure, including  
15 Ariz. R. Civ. P. 26 and 26.1, to actions brought by the Commission. *See, e.g., Slade v. Schneider*,  
16 212 Ariz. 176, 180-82 129 P.3d 465, 469-71 (Ct. App. 2006) (relying on Ariz. R. Civ. P. 26 and  
17 26.1 to allow petitioners in action brought by Commission to obtain discovery of Commission’s  
18 accounting expert’s entire case file, disclosure of investors’ names, information and documents used  
19 by Commission’s investigator, and take deposition of Commission’s investigator).  
20  
21

22 Further, the Rules of Practice and Procedure including A.A.C. R14-3-101(A), which clearly  
23 incorporates the Arizona Rules of Civil Procedure, “*shall be liberally construed to secure just and*  
24 *speedy determination of all matters presented to the Commission.*” *Id.* R14-3-101(B).  
25

26 Respondents and their counsel are not aware of any procedure set forth by law, the Rules of  
27 Practice and Procedure, or Commission regulations or orders regarding the disclosure of any  
28

1 information, let alone the prompt disclosure of comprehensive information as required by Ariz. R.  
2 Civ. P. 26.1. Thus, pursuant to the express incorporation of the Arizona Rules of Civil Procedure in  
3 R14-3-101(A) and its *liberal* construction to secure the *just* determination of this matter, and the  
4 non-existence of any other law, rule, regulation or order governing such disclosures, Ariz. R. Civ. P.  
5 26.1 governs this matter and compels the parties' exchange of disclosure statements thereunder.  
6

7 **II. NOTHING ELSE IS A SUFFICIENT SUBSTITUTE FOR THE EXCHANGE**  
8 **OF DISCLOSURE STATEMENTS UNDER ARIZ. R. CIV. P. 26.1.**

9 The Commission may argue, as it did at the pre-hearing conference, that its Notice of  
10 Opportunity for Hearing ("NOH") is sufficiently detailed to satisfy the disclosure requirements set  
11 forth in Ariz. R. Civ. P. 26.1. However, the length of the NOH and the broad allegations therein  
12 does not make up for its complete lack of Ariz. R. Civ. P. 26.1 substance. A brief review of the  
13 NOH and comparison to the nine categories of very specific information set forth in Ariz. R. Civ. P.  
14 26.1 shows that the NOH falls far short of satisfying Ariz. R. Civ. P. 26.1 and fails to disclose the  
15 factual basis of each claim, legal theory upon which each claim is based, lay and expert witnesses  
16 for trial and the subject matter of their testimony, all persons with relevant information and  
17 statements, a computation and measure of damages, and all trial exhibits and relevant documents.  
18

19 For example, as Respondents recently raised at the pre-hearing conference, the Commission  
20 alleges that "Respondents ultimately failed to either retain an independent and/or licensed CPA to  
21 conduct the audit or prepare an accounting conforming to GAAP." See NOH ¶ 105. However,  
22 Respondents did retain a CPA, Candia R. Grunwald, who prepared an initial accounting report that  
23 has already been produced to the Commission. Accordingly, Respondents need to know the factual  
24 and legal basis for this continuing allegation in order to have the opportunity to timely, fully and  
25 properly prepare their defenses for the evidentiary hearing.  
26  
27  
28

1 Another example that Respondents raised at the pre-hearing conference is the Commission's  
2 allegations that the signed development and funding contracts were tantamount to "non-binding,  
3 conditional and/or unenforceable letters-of-intent," because they did not have a clause regarding  
4 "stipulated or liquidated damages or similar termination fees." See NOH ¶¶ 81, 87. Indeed, the  
5 alleged lack of a liquidated damages clauses and thus alleged invalidity of the contracts is a major  
6 part of the Commission's securities fraud claim. See NOH ¶ 124. However, the Commission has  
7 not disclosed the legal theory, including citations to pertinent legal and case authorities, to support  
8 its allegation that a contract must have a liquidated damages clause or the entire contract is rendered  
9 unenforceable and non-binding and turns the whole transaction into a scheme or artifice to defraud.  
10

11 Accordingly, Judge Stern should order the Commission to supplement its NOH by promptly  
12 disclosing the information listed in Ariz. R. Civ. P. 26.1, which Respondents are also willing to do  
13 in good faith in the interest of justice. The Rules of Practice and Procedure expressly incorporate  
14 the Arizona Rules of Civil Procedure, including Ariz. R. Civ. P. 26.1, no other law, rule, regulation  
15 or order provides for such disclosures, and Ariz. R. Civ. P. 26.1 does not contradict any other law,  
16 regulation or order. In fact, Ariz. R. Civ. P. 26.1 is consistent with Arizona law regulating  
17 administrative adjudicative proceedings, which provides that "upon application a more definite and  
18 detailed statement [of NOH] shall be furnished." A.R.S. § 41-1061(B)(4) (emphasis added).  
19

20 The Commission may also argue that the simultaneous exchange of exhibits and list of  
21 witnesses 30 days before the evidentiary hearing—which is what the Commission requested at the  
22 pre-hearing conference despite also claiming that the Commission was in favor of early  
23 disclosures—satisfies the Ariz. R. Civ. P. 26.1 disclosure requirements. While this exchange does  
24 provide Respondents with a small portion of the information required by Ariz. R. Civ. P. 26.1(a)(3)  
25 and (6)-(8), it does not provide all of the information. For example, identifying the Commission's  
26  
27  
28



1 relevant documents and information in their possession, and review that discovery. The  
2 Respondents should not have to subpoena and depose 12 witnesses just 30 days before the  
3 evidentiary hearing that will decide the Respondents' future and significantly affect their livelihood  
4 and reputation. Instead, Respondents should have the discovery well in advance of 30 days before  
5 the evidentiary hearing, be able to review the discovery and prepare their defenses and identify and  
6 disclose their trial exhibits and witnesses based on that discovery and the Commission's disclosures,  
7 including any rebuttal witnesses (like an expert witness to rebut the Commission's accounting  
8 expert), and then be able to focus on preparing for the hearing. Otherwise, Respondents will have  
9 to spend the majority of those 30 precious days before the evidentiary hearing issuing, compelling  
10 (if the Commission opposes), and taking discovery. During that time, Respondents may discover  
11 additional documents and information that support Respondents' defenses, which Respondents will  
12 want to add to their list of witnesses and exhibits, which may then affect the Commission's list of  
13 witnesses and exhibits, and will ultimately cause a snowball effect to occur from there.

16 Finally, the exchange of exhibits and list of witnesses still does not provide Respondents  
17 with the remaining information under Ariz. R. Civ. P. 26.1(a), including: (1) the factual basis for  
18 each claim, like the alleged lack of audited financial statements; (2) the legal theory upon which  
19 each claim is based, like the alleged invalidity and fraudulent nature of the contracts from lacking a  
20 liquidated damages clause; (4)-(5) persons who the Commission may not call as witnesses at the  
21 evidentiary hearing but, unbeknownst to Respondents, may have relevant knowledge or information

---

23 *See* NOH ¶ 21. The Commission also argues that the majority of the documents that they plan to use came  
24 from Respondents. However, Respondents provided the Commission with thousands of pages of documents,  
25 and therefore should also not have to guess which documents the Commission intends to use at the  
26 evidentiary hearing and cannot guess which documents they are. Indeed, Respondents believe that their  
27 documents prove their innocence, and therefore the disclosures are necessary for Respondents to understand  
28 how the Commission believes the same documents support its claims. Furthermore, the Commission has  
tacitly admitted that some of the documents did not come from Respondents, and Respondents should not  
have to wait until 30 days before the hearing to receive them, especially if Respondents need to discuss the  
documents with the witnesses they are entitled to depose or retain an expert to rebut any of the documents.

1 or have given relevant statements; and (9) relevant documents that the Commission may have in its  
2 possession (and used in connection with its NOH), but, unbeknownst to Respondents, are not being  
3 used at the evidentiary hearing. In other words, without the comprehensive disclosure, Respondents  
4 cannot understand the Commission's factual and legal positions in this action, and the Commission  
5 may never have to disclose, and Respondents will never discover, persons with relevant knowledge  
6 and information and relevant documents that may actually support Respondents' defenses or at least  
7 contradict or discredit the Commission's claims.<sup>6</sup> All of this information will substantially affect  
8 Respondents' preparation for, presentation at, and participation in the evidentiary hearing, and they  
9 were entitled to the Ariz. R. Civ. P. 26.1 disclosures after 40 days from the filing of their Answer.  
10

11 In short, neither the NOH nor the exchange of exhibits and witness lists 30 days before the  
12 evidentiary hearing provides Respondents with the information set forth in Ariz. R. Civ. P. 26.1 and  
13 thereby affords Respondents the opportunity to timely and adequately prepare their defenses for the  
14 evidentiary hearing, including what primary or rebuttal documentary evidence and lay or expert  
15 testimony to present and the cross-examination of lay and expert witnesses. Instead, the evidentiary  
16 hearing will essentially be "litigation by ambush," what is exactly what Ariz. R. Civ. P. 26.1 was  
17 intended to prevent.<sup>7</sup> Instead, the disclosures will give Respondents a reasonable opportunity to  
18  
19  
20

---

21 <sup>6</sup> For example, the Commission is only calling 10 of approximately 70 investors (*see* NOH ¶ 21), but  
22 based upon information and belief, the Commission interviewed more than just those 10 investors.  
23 Therefore, it is possible that the Commission discovered information adverse to its position while  
24 interviewing certain investors and thus has chosen not to call them as witnesses. Respondents are entitled  
25 under Ariz. R. Civ. P. 26.1 to know the identities of those investors. Thus, the Commission should disclose  
26 the names of all persons they interviewed as well as all documents and information that they reviewed and  
27 consulted in preparing the NOH, even if they are not going to be used at the trial as witnesses and exhibits.

28 <sup>7</sup> *See* Ariz. R. Civ. P. 26.1 Court Comment to 1991 Amendment ("In September, 1990 the  
Committee proposed a comprehensive set of rule revisions, designed to make the judicial system in Arizona  
more efficient, more expeditious, less expensive, and more accessible to the people. It was the goal of the  
Committee to provide a framework which would allow sufficient discovery of facts and information to avoid  
'litigation by ambush.'"); *Bryan*, 178 Ariz. at 476 n.5, 875 P.2d at 135 n.5 ("[t]he object of disclosure, as  
with all discovery, is to permit the opponent a reasonable opportunity to prepare for trial").

1 prepare for the evidentiary hearing and maximize the likelihood of a decision on the merits.<sup>8</sup> Such a  
2 fair and balanced approach will benefit both parties, and will not prejudice them in any way or at  
3 least not remotely close to the extent that Respondents would be prejudiced without the disclosures.

4 If Respondents are not provided with the prompt disclosure of information under Ariz. R.  
5 Civ. P. 26.1, Respondents will not be able to timely, fully and effectively prepare their defense for  
6 the evidentiary hearing, thereby depriving Respondents of their due process rights under the U.S.  
7 and Arizona Constitution,<sup>9</sup> as well as their right to a fair hearing under Arizona law, which includes  
8 an opportunity to present all evidence and arguments and examine and cross-examine witnesses.  
9 See A.R.S. § 41-1061(C);<sup>10</sup> A.R.S. § 41-1062(A)(1);<sup>11</sup> A.A.C. R14-3-104(A).<sup>12</sup> Indeed,  
10 Respondents may be entitled to a rehearing if they are deprived of a fair hearing, there is any  
11 accident or surprise, newly discovered material evidence or errors of law or decisions contrary to  
12 the law. See A.A.C. R14-3-112(C).<sup>13</sup> However, all of these potential violations of Respondents'  
13  
14  
15

---

16 <sup>8</sup> See Gerow, 192 Ariz. at 18, 960 P.2d at 64 (“The purpose of the disclosure rule is [to] give to the  
17 parties ‘a reasonable opportunity to prepare for trial or settlement’ . . . and to ‘maximize the likelihood of a  
18 decision on the merits.’”) (quoting Bryan, 178 Ariz. at 476 n.5, 875 P.2d at 135 n.5; Allstate, 182 Ariz. at  
19 287, 896 P.2d at 257).

20 <sup>9</sup> No person shall be deprived of life, liberty, or property without due process of law. See U.S. Const.  
21 amend. V & XIV, § 1; Ariz. Const. art. II, § 4; State v. Bible, 175 Ariz. 549, 567, 858 P.2d 1152, 1170  
22 (1993) (“A fair trial is a fundamental liberty secured by the United States and Arizona Constitutions.”); State  
23 v. Melendez, 172 Ariz. 68, 71, 834 P.2d 154, 157 (1992) (“The touchstone of due process under both the  
24 Arizona and federal constitutions is fundamental fairness.”).

25 <sup>10</sup> “Opportunity *shall* be afforded all parties to respond and present evidence and argument on *all*  
26 issues involved.” A.R.S. § 41-1061(C) (emphasis added).

27 <sup>11</sup> “Every person who is a party to such [administrative] proceedings *shall* have the right to be  
28 represented by counsel, to submit evidence in opening hearing and shall have the right of cross-  
examination.” A.R.S. § 41-1062(A)(1) (emphasis added).

<sup>12</sup> “At a hearing a party *shall* be entitled to enter an appearance, to introduce evidence, examine and  
cross-examine witnesses, make arguments, and generally participate in the conduct of the proceeding.”  
A.A.C. R14-3-104(A) (emphasis added).

<sup>13</sup> “A rehearing of the decision may be granted for any of the following causes materially affecting  
the moving party’s rights: 1. Irregularity in the proceedings before the Commission or any order or abuse of  
discretion, whereby the moving party was deprived of a fair hearing; 2. Misconduct of the Commission, its  
staff or its hearing officer or the prevailing party; 3. Accident or surprise which could not have been  
prevented by ordinary prudence; 4. Newly discovered material evidence which could not with reasonable  
diligence have been discovered and produced at the original hearing; 5. Excessive or insufficient penalties; 6.

1 rights under the federal and state constitution, statutes and administrative rules, can be avoided if  
2 the parties were simply ordered to exchange disclosure statements. The disclosure of information  
3 pursuant to Ariz. R. Civ. P. 26.1 may also enable the parties to resolve this matter and avoid an  
4 evidentiary hearing altogether, which is another express purpose of Ariz. R. Civ. P. 26.1.<sup>14</sup>

5  
6 **III. THE INFORMATION SUBJECT TO DISCLOSURE UNDER ARIZ. R. CIV. P. 26.1 IS NO LONGER CONFIDENTIAL UNDER A.R.S. § 44-2042.**

7 The Commission may argue that the information and documents subject to disclosure under  
8 Ariz. R. Civ. P. 26.1 are confidential under A.R.S. § 44-2042. A.R.S. § 44-2042 provides that:  
9

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

21 A.R.S. § 44-2042 (emphasis added). The italicized exceptions to confidentiality all apply here.

22 First, the confidentiality of complainants' names and information or documents only applies  
23 "in the course of any examination or investigation." *Id.* This, however, is a full blown action  
24 brought by the Commission against Respondents, and no longer an examination or investigation.  
25 The same concerns that may be present during an investigation or examination (*e.g.*, prevent  
26 respondents from derailing the investigation, harassing complainants and witnesses, destroying,  
27

---

28 Error in the admission or rejection of evidence or other errors of law occurring at the hearing; 7. That the decision is not justified by the evidence or is contrary to law." A.A.C. R14-3-112(C).

<sup>14</sup> See Ariz. R. Civ. P. 26.1 Committee Comment to 1991 Amendment ("The Committee has endeavored to set forth those items of information and evidence which should be promptly disclosed early in the court of litigation in order to avoid unnecessary and protracted discovery as well as to encourage early evaluation, assessment and possible disposition of the litigation between the parties."); *Bryan*, 178 Ariz. at 476 n.5, 875 P.2d at 135 n.5 ("[t]he object of disclosure, as with all discovery, is to permit the opponent a reasonable opportunity to prepare for trial *or settlement*") (emphasis added).

1 | hiding or spoiling evidence, and preparing for their examinations) are not present during an action  
2 | and therefore the same need to maintain confidentiality does not exist. If the legislature wanted to  
3 | enable the Commission to maintain confidentiality during an action, they could have easily drafted  
4 | and enacted the confidentiality statute to include “any examination, investigation or action,” but  
5 | notably they did not and limited the scope of confidentiality to “any examination or investigation.”  
6 |

7 |         Second, the information and documents have already been “made a matter of public record”  
8 | through the filing of the NOH with the Commission, a public tribunal, which published the NOH  
9 | online and made it publicly available on their eDocket,<sup>15</sup> and thus the confidentiality statute no  
10 | longer applies to the complainants, documents and information used or referenced therein. *See*  
11 | A.A.C. R14-3-109(Z);<sup>16</sup> *Slade*, 212 Ariz. at 182, 129 P.3d at 471.<sup>17</sup> The complainants’ testimony and  
12 | the information and documents will also be made a public record at the evidentiary hearing. *See*  
13 | A.A.C. R14-3-109(V).<sup>18</sup> There is no need to prevent the Respondents from obtaining the identity of  
14 | witnesses, information and documents that Respondents need now to timely, fully and adequately  
15 | prepare and present its defenses at and participate in the evidentiary hearing, and thereby deprive  
16 | Respondents of due process, based on alleged confidentiality, when that confidentiality will  
17 | disappear as soon as the parties exchange exhibits and witness lists and at the evidentiary hearing.  
18 |

19 |         Finally, the Commission may authorize the disclosure of the names, information and  
20 | documents as not contrary to public interest. The Commission has basically done this (or otherwise  
21 | waived the confidentiality) by filing the NOH, which repeatedly referred to offerees and investors  
22 |

---

23 |  
24 | <sup>15</sup> *See* <http://edocket.azcc.gov/Default.aspx?SEARCH=S-20814A-11-0313>.

25 | <sup>16</sup> “The docket file is a public record and, as such, is available and open to inspection to all.” A.A.C.  
26 | R14-3-109(Z).

27 | <sup>17</sup> *See Slade*, 212 Ariz. at 182, 129 P.3d at 471 (“In filing its Complaint against Petitioners, the  
28 | Commission included the investigator’s affidavit. In doing so, the Commission made a matter of public  
record all of the *information* contained in his affidavit.”).

<sup>18</sup> “All hearings conducted pursuant to these rules shall be open to the public.” A.A.C. R14-3-  
109(V).

1 and their knowledge and frequently identified documents and the information and substance therein.  
2 Full and fair disclosure of documents and information that are the basis of the Commission's NOH  
3 and referred to in the NOH is in the public's best interest as well as in the interest of due process.  
4 Clearly the Commission agrees, as it surely would not have initiated its action against the  
5 Respondents and filed the NOH unless it felt such actions were not contrary to the public interest.  
6

7         Alternatively, should there still somehow be a concern that certain identities, information or  
8 documents may continue to be confidential under A.R.S. § 44-2042, instead of wholly disregarding  
9 Ariz. R. Civ. P. 26.1 disclosures, there could be an *in camera* inspection of the documents and if  
10 found confidential, an exchange of partial disclosures under Ariz. R. Civ. P. 26.1 (*i.e.*, everything  
11 that never was or is no longer confidential).<sup>19</sup> Respondents would also be willing to sign a  
12 confidentiality and/or protective order if desired or deemed necessary to protect any identities,  
13 information or documents. Such alternatives are better than completely disregarding Ariz. R. Civ.  
14 P. 26.1 (which is expressly incorporated into the Rules of Practice and Procedure), and depriving  
15 Respondents of their constitutional due process rights and right to a fair hearing under Arizona law.  
16

#### 17         IV.     CONCLUSION.

18         Based upon all of the foregoing, Respondents respectfully request that Judge Stern go with  
19 his inclination as expressed at the pre-hearing conference and order the parties to exchange  
20 disclosure statements pursuant to Ariz. R. Civ. P. 26.1 by no later than March 2, 2012. This action  
21 is a very serious and important matter to Respondents, who merely seek to have the opportunity to  
22 fully and fairly defend their actions and personal and professional reputations at the evidentiary  
23 hearing by obtaining documents and information that are not currently accessible to them but will  
24 likely be used against them to try to prove a serious charge of fraud and obtain significant penalties.  
25

26  
27         <sup>19</sup> See Slade, 212 Ariz. at 182, 129 P.3d at 471 ("If any information is privileged or protected by  
28 another statute, the Commission shall submit any names, information or documents it deems privileged and  
not waived to the trial court for an *in camera* inspection to determine whether they are to be disclosed.").

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  
28

RESPECTFULLY SUBMITTED this 3rd day of February, 2012.

MITCHELL & ASSOCIATES  
A Professional Corporation

By Sarah K. Deutsch (ys)

Robert D. Mitchell  
Sarah K. Deutsch  
MITCHELL & ASSOCIATES  
A Professional Corporation  
Viad Corporate Center, Suite 2030  
1850 North Central Avenue  
Phoenix, Arizona 85004

Michael D. Kimerer  
221 East Indianola Ave.  
Phoenix, Arizona 85012

Timothy J. Galligan  
5 Borealis Way  
Castle Rock, Colorado 80108

Counsel for the Respondents

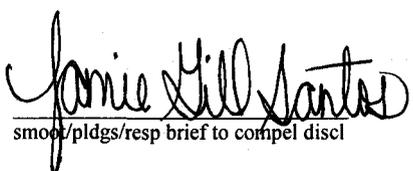
1 ORIGINAL plus nine copies of the foregoing filed  
2 on or about this 3rd day of February, 2012 with:

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

7 COPIES of the foregoing mailed  
8 on or about 3rd day of February, 2012 to:

9 Michael Dailey, Esq.  
10 Arizona Corporation Commission  
11 Securities Division  
12 1300 W. Washington Street, Third Floor  
13 Phoenix, Arizona 85007-2996

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

  
smoot/pldgs/resp brief to compel discl