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2013 APR -2 P 3:45 Arizona Corporation Commission

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ARIZONA CORPORATION COMMISSION
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and Promise Land Properties, LLC

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

BOB STUMP, Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

In the matter of:

PATRICK LEONARD SHUDAK, a single man,

PROMISE LAND PROPERTIES, LLC, an Arizona
limited liability company,

and

PARKER SKYLAR & ASSOCIATES, LLC, an
Arizona limited liability company,

Respondents.

DOCKET NO. S-20859A-12-0413

**RESPONDENTS' RESPONSE TO
THE SECURITIES DIVISION'S
OBJECTIONS TO RESPONDENTS'
FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS,
AND MOTION TO COMPEL**

Pursuant to the Rules of Practice and Procedure before the Arizona Corporation Commission, A.A.C. R14-3-101, *et seq.*, respondents Patrick Shudak and Promise Land Properties, LLC (the "Respondents") respond to the "response" (*i.e.*, objection) to their first request for documents by the Securities Division (the "Division") dated March 6, 2013, and move to compel compliance.

In its response, the Division refuses to provide any discovery to Respondents. The Division has made no effort to negotiate the scope of the discovery, or to engage in any dialogue to determine if this discovery dispute can be resolved. Moreover, instead of seeking a

1 protective order from the Administrative Law Judge (the "ALJ"), the Division unilaterally has
2 refused to comply with the discovery requests without any legal authority to do so. The
3 Division's response conflicts with well-recognized precedent that allows for discovery under
4 the Commission's procedural rules, and the Arizona Rules of Civil Procedure.

5 Given the schedule in this case, Respondents will be prejudiced greatly if there are
6 further delays in the production of discovery. They respectfully request a ruling on this
7 discovery dispute at the Hearing Division's earliest opportunity.

8 **ARGUMENT**

9 **I. THE DIVISION CONFUSES THE EXCHANGE OF WITNESS AND EXHIBIT**
10 **LISTS WITH DISCOVERY**

11 As a threshold matter, the Division inexplicitly contends that Respondents' need for
12 discovery will be satisfied in a month when the Division serves its list of witnesses and
13 exhibits. The premise defies logic.

14 First, Respondents seek discovery in order to obtain evidence supporting *their defense*.
15 The Division's list of witnesses and exhibit will identify only the deliberately selected evidence
16 the Division intends to use to support *its* case. The purpose of the former totally conflicts with
17 the purpose of the latter. While there might be some overlap, it is more likely that the evidence
18 Respondents are most interested in discovering is the evidence that the Division will omit from
19 its list of witnesses and exhibits.

20 Second, Respondents seek discovery *before* the exchange of the witness and exhibit
21 lists so that Respondents can identify documents they intend to use as exhibits. As a practical
22 matter, Respondents need the discovery before May 1, 2013.

23 Obviously, the exchange of witness and exhibit lists is not a substitute for discovery.
24 The fact that the Division even suggests such a thing evidences the extreme and prejudicial
25 nature of its position.

1 **II. THE COMMISSION'S PROCEDURAL RULES PERMIT BROAD**
2 **DISCOVERY RIGHTS TO ALL PARTIES.**

3 The Commission's Rules of Practice and Procedure (the "Procedural Rules") are found
4 at A.A.C. R14-3-101, *et seq.* The Procedural Rules apply to both Securities Division and
5 Utilities Division cases. A.A.C. R14-3-101.A. There is no distinction in that regard. *Id.* The
6 Procedural Rules expressly incorporate the Arizona Rules of Civil Procedure, including those
7 rules governing discovery. *Id.* Thus, discovery in the Division's cases is governed by the
8 Commission's own Procedure Rules and the Arizona Rules of Civil Procedure.

9 There is well-established precedent allowing broad discovery rights under the
10 Procedural Rules.¹ The Division ignores this precedent. As Assistant Chief ALJ Nodes noted
11 in a procedural order, "[t]he standard for conducting discovery is intentionally broad to allow
12 parties to a proceeding to prepare for hearing or trial and to mitigate the necessity for
13 unnecessary discovery-based cross-examination on the witness stand."² ALJ Nodes applied the
14 Rules of Civil Procedure, including the rule allowing all discovery requests "reasonably
15 calculated to lead to the discovery of admissible evidence."³ ALJ Rodda applied that same
16 standard in denying a motion to quash a subpoena.⁴ These procedural orders recognize that the
17 Commission's Procedural Rules incorporate the Rules of Civil Procedure and allow the same
18 broad discovery allowed in civil cases.

19 Based on these rulings, it is not surprising that the Division's stance against discovery
20 has been rejected in numerous cases. For example, the Division was required to provide
21 discovery in the *Hockensmith* case (Docket No. S-20631A-08-0503), the Yucatan case (Docket

22 ¹ See e.g. Decision No. 70355 (May 16, 2008) at Finding of Fact No. 9 (noting granting of
23 motion to compel) and Decision No. 66984 (May 11, 2004) at Finding of Fact No. 55 (same);
24 Decision No. 70011 (Nov. 27, 2007) at 48 (rejecting new argument raise by utility due to
25 "insufficient time to conduct discovery."); Decision No. 67454 (January 4, 2005) (discussing
26 "reasonably calculated to lead to the discovery of admissible evidence" discovery standard);
27 Decision No. 65121 (August 23, 2002) (at Finding of Fact No. 8) (noting that a hearing was
28 vacated and rescheduled in order to allow for further discovery).

² Procedural Order dated November 23, 2009 in Docket No. SW-01428A-09-0103 at p. 5.

³ *Id.*, citing Arizona R. Civ. Proc. 26(b)(1)(A).

⁴ Procedural Order dated November 13, 2009 in Docket No. RT-00000H-97-0137 at p. 2.

1 No. S-03539A-03-0000), and in the Reserve Oil case (Docket No. S-20437A-05-0925).
2 Despite this history, the Division continues to obstruct discovery.

3 The Division's many arguments all fail.

4 First, the Division argues that discovery is not constitutionally required in
5 administrative cases. Respondents have made no constitutional claims in this case. Rather, the
6 Respondents simply request the Division comply with discovery under the Commission's own
7 Procedural Rules and the Arizona Rules of Civil Procedure.

8 Second, the Division argues that the Administrative Procedure Act (the "APA") only
9 provides for limited discovery under A.R.S. § 41-1062. But Respondents' discovery is based
10 on the Procedural Rules, and not on the APA. Moreover, the APA expressly provides that
11 discovery is allowed "as provided by agency rule" A.R.S. § 41-1062(A). There is no
12 question that agencies may enact rules providing for additional discovery. Indeed, ALJ Nodes
13 rejected the notion that A.R.S. § 41-1062 bars discovery otherwise allowed by the Procedural
14 Rules.⁵

15 Third, the Division relies on A.R.S. § 44-2042 and argues that this confidentiality
16 statute bars discovery. The Division's argument is misplaced. The statute expressly excludes
17 disclosures "pursuant to any rule of the commission." *See* A.R.S. § 44-2042.A. However, even
18 if the statute did apply, the Division confuses the concepts of privilege and confidentiality. A
19 confidentiality statute does not create a privilege because "legislative bodies know how to
20 specify materials that will be privileged, and not subject to disclosure, as opposed to [materials
21 that are] confidential but nonetheless subject to disclosure." *Catrone v. Miles*, 215 Ariz. 446,
22 455, 160 P.3d 1204, 1213 (App. 2007). Statutory interests in confidentiality are typically
23 satisfied by measures such as protective orders, sealing of the record, closing the courtroom to
24 certain portions of the trial and the like. *Id.* That is precisely how confidential matters are
25 handled under the parallel confidentiality statute for utility matters. *See* A.R.S. § 40-204.C.

26
27 ⁵ Procedure Order dated November 23, 2009 in Docket No. SW-01428A-09-0103 at p. 5.

1 Often, these issues are addressed through a confidentiality agreement. That is also how
2 confidentiality issues were addressed in the Hockensmith case (Docket No. S-20631A-08-
3 0503). Respondents are willing to agree to a confidentiality agreement, a stipulated protective
4 order, or other reasonable measures to preserve the confidentiality of any documents the
5 Division believes are confidential.

6 In sum, the Division has failed to cite to any legal authority supporting its contention
7 that the Procedural Rules bar discovery. There is no such language in the Procedural Rules,
8 and the ALJs who interpret those rules routinely have rejected that contention.

9 **III. RESPONDENTS HAVE A NEED FOR THE DISCOVERY**

10 Despite the Division's blanket claim to the contrary, Respondents have a need for the
11 discovery. To be precise, the Division only argues that Respondents do not *need* to get the
12 discovery *from the Division*. The Division posits that if Respondents want the discovery, they
13 are entitled to it, but they *need* to get it from third parties – not the Division. That is not a legal
14 argument; it is obstructionist behavior.

15 Notably, the Division does not argue that the requests are beyond the scope of
16 discovery, or that the requests are overly broad or burdensome. Indeed, the Division implicitly
17 acknowledges that the discovery is relevant; it just does not want to be the source of the
18 discovery.

19 As the Division is well-aware, and has been discussed during at least one status hearing,
20 Mr. Shudak long-ago ceded any interest and control he had in the entity(ies) that have
21 continued to operate and control the underlying real estate investments. In fact, certain of the
22 investors (the alleged victims) are now in control. He figuratively handed over the keys to the
23 car to the investors. Thus, his discovery requests largely, if not exclusively, seek items that
24 were never his and that most certainly are not in his custody or control now.

25 Lastly, it is worth noting that, as is often the case, the Division had the opportunity to
26 serve its discovery on Respondents even before this case commenced when it served subpoenas
27 in June 2012. Respondents produced documents responsive to those subpoenas, and the

1 Division had the benefit of that discovery before it even filed the case. Respondents now seek
2 only some semblance of reciprocity so that they can *defend* against the case.

3 **CONCLUSION**

4 The days of ambush litigation tactics ended long ago. The Division does not deny that
5 it has documents responsive to the discovery requests, or that the discovery is relevant. The
6 Division just does not want to produce it. Respondents respectfully request that the ALR order
7 the Division to produce the requested discovery, and that this issue be set for expedited
8 consideration.

9 DATED this 2nd day of April, 2013.

10 GREENBERG TRAUIG, LLP

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12 

13 By: BRIAN J. SCHULMAN
14 Attorneys for Respondents

15 ORIGINAL and 13 copies of
16 the foregoing hand-delivered on this
17 2nd day of April, 2013 to:

18 Docket Control
19 Arizona Corporation Commission
20 1200 W. Washington Street
21 Phoenix, AZ 85007

22 COPY of the foregoing hand-delivered
23 on this 2nd day of April, 2013 to:

24 Mr. Marc Stern
25 Administrative Law Judge
26 Arizona Corporation Commission/Hearing Division
27 1200 W. Washington Street
28 Phoenix, AZ 85007

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COPY of the foregoing emailed/mailed
on this 2nd day of April, 2013 to:

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