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CORP COMMISSION
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Arizona Corporation Commission

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**IN THE MATTER OF THE FORMAL
COMPLAINT OF SWING FIRST GOLF
LLC AGAINST JOHNSON UTILITIES
LLC**

DOCKET NO. WS-02987A-13-0053

**MOTION TO DISMISS
AND MOTION TO STRIKE**

Brownstein Hyatt Farber Schreck, LLP
One East Washington, Suite 2400
Phoenix, AZ 85004

On March 11, 2013, Swing First Golf, LLC, (“SFG”) filed a formal complaint (the “2013 Formal Complaint”) against Johnson Utilities, L.L.C. (“Johnson Utilities” or the “Company”) asserting four allegedly “new” issues to be resolved by the Arizona Corporation Commission (“Commission”). However, of the four counts asserted by SFG in the 2013 Formal Complaint, Counts “A” and “B” are the same as counts “A” and “B” previously raised in SFG’s 2008 Amended Formal Complaint (the “2008 Amended Formal Complaint”) in Docket WS-02987A-08-0049, which claims were dismissed with prejudice pursuant to Decision 73137 (May 1, 2012). Thus, Johnson Utilities hereby moves to dismiss Counts “A” and “B” of the 2013 Formal Complaint pursuant to Decision 73137 and Rule 12(b)(6) of the Arizona Rules of Civil Procedure on the grounds that the claims are barred by the express language of Decision 73137 as well as the judicial doctrine of *res judicata* and, therefore, fail to state a claim upon which relief can be granted.

Likewise, Count “D” of the 2013 Formal Complaint fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6) of the Arizona Rules of Civil Procedure. Count “D” alleges a flooding of SFG’s golf course, albeit using language that is defectively vague and ambiguous and lacking in facts. A claim of flooding is a claim of trespass, and the Commission lacks the jurisdiction to address a trespass claim or to award damages caused by a trespass. While the Commission does have jurisdiction to address a billing

1 dispute between a public utility and a customer, SFG acknowledges in Count “D” that it already
2 received a billing credit for the alleged flooding. Thus, because there is no billing dispute
3 between the parties related to Count “D,” it must be dismissed.

4 Additionally, to the extent that Counts “A,” “B” and “D” fail to state a claim upon which
5 relief may be granted, Johnson Utilities moves the Commission to strike such counts pursuant to
6 Rule 12(f) of the Arizona Rules of Civil Procedure which allows the Commission to strike “any
7 redundant, immaterial, impertinent, or scandalous matter.” Counts “A,” “B” and “D” are
8 “immaterial and impertinent” to the resolution of any count properly before the Commission in
9 this docket.

10 Pursuant to Rule 12(b) of the Arizona Rules of Civil Procedure, a motion to dismiss
11 based upon a failure to state a claim upon which relief may be granted must be made before an
12 answer is filed. Thus, Johnson Utilities is filing this Motion to Dismiss and Motion to Strike in
13 compliance with Rule 12(b). With respect to Count “C” of the 2013 Formal Complaint, Johnson
14 Utilities will file an answer and counterclaim within ten (10) days following the date of a ruling
15 by the Commission on this motion in compliance with Rule 12(a)(3)(A).

16 **ARGUMENT**

17 Arizona Administrative Code R14-3-101(A) states, in relevant part, as follows:

18 In all cases in which procedure is set forth neither by law, nor by these rules, nor
19 by regulations or orders of the Commission, the Rules of Civil Procedure for the
20 Superior Court of Arizona as established by the Supreme Court of the state of
Arizona shall govern.

21 Thus, pursuant to the express language of Decision 73137 and Rule 12(b)(6) of the
22 Arizona Rules of Civil Procedure, Johnson Utilities moves to dismiss each of Counts “A”, “B”
23 and “D” of the 2013 Formal Complaint for failure to state a claim upon which relief may be
24 granted. Additionally, Johnson Utilities moves to strike Counts “A,” “B” and “D” pursuant to
25 Rule 12(f) of the Arizona Rules of Civil Procedure which allows the Commission to strike “any
26 redundant, immaterial, impertinent, or scandalous matter.”
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1 **1. Count A: “Utility Again Threatens to Withhold Effluent.”**

2 Count “A” of SFG’s 2013 Formal Complaint may be summarized as follows:

3 Since 2007, Utility has tried to maximize Effluent deliveries to the [Santan] HOA
4 by rationing deliveries to Swing First.

5 * * *

6 Swing First is aware the Utility does not presently have sufficient Effluent to
7 satisfy both its irrigation requirements and those of the Santan HOA. However,
8 this is a problem that Utility created by deliberately withholding Effluent in 2007
9 from Swing First and selling Effluent to the Santan HOA....

10 * * *

11 Swing First asks the Commission to order Utility to deliver Effluent to Swing
12 First in the quantities requested by Swing First. ... Only after satisfying Swing
13 First’s requirements should Utility be allowed to sell Effluent to any other
14 customers or to pump Effluent into the ground.¹ (emphasis added)

15 The crux of SFG’s Count “A” is a claimed right of first refusal or priority right to all
16 effluent requested by SFG from Johnson Utilities.² However, it is easy to see that these are the
17 very same claims and arguments raised by SFG in its 2008 Amended Formal Complaint³ which
18 were dismissed with prejudice in 2012 pursuant to Decision 73137. Count “A” of the 2008
19 Amended Formal Complaint states, in relevant part, as follows:

20 Utility has been generating and treating effluent within its certificated service area
21 since at least 2005. Utility’s tariffed rate for effluent is \$0.62 per thousand
22 gallons. However, despite Swing First’s right to the first effluent generated in the
23 certificated service area, Utility has rarely delivered effluent. Instead, it has
24 delivered CAP water to Swing First and charged it \$0.83 per thousand gallons.⁴
25 (emphasis added)

26 Mr. David Ashton, the manager of SFG, supported Count “A” of the 2008 Amended
27 Formal Complaint in his pre-filed direct testimony dated December 30, 2009. Section F of his

28 ¹ 2013 Formal Complaint at p. 9, lines 14-15 and 22-27, and p. 10, lines 1-2.

² Nothing contained in this motion should be construed as a waiver or an admission by Johnson Utilities
 that any of the claims of SFG in the 2013 Formal Complaint have merit. To the contrary, Johnson
 Utilities denies that SFG has a right to the first effluent or a priority to effluent over other customers such
 as the Santan Heights HOA. Johnson Utilities further denies that it has unlawfully withheld available
 effluent from SFG or that it has maximized deliveries of effluent to the Santan Heights HOA by
 rationing deliveries to SFG.

³ Docket No. WS-02987A-08-0049.

⁴ 2008 Amended Formal Complaint at p. 2, lines 18-23.

1 testimony is captioned “*Utility Withheld Effluent and Grossly Overcharged Swing First for*
2 *Substitute Deliveries,*” and included the following questions and answers:

3 Q. WHAT IS UTILITY DOING WITH THE TREATED EFFLUENT IT
4 PRODUCES THAT IT IS NOT DELIVERING TO SWING FIRST?

5 A. Based on Mr. Tompsett’s testimony in the rate case, it appears that Utility
6 has been selling some effluent to other irrigation customers..., but has
7 been pumping most of the effluent it produces into the ground to generate
8 recharge credits.

8 * * *

9 Q. DID UTILITY DELIBERATELY WITHHOLD EFFLUENT FROM
10 SWING FIRST?

11 A. It certainly appears that way. Utility has been able to directly deliver
12 effluent to Swing First since at least March 2006. Mr. Tompsett testified
13 that there are two customers connected to the Santan WWTP: Swing First
14 and the Santan HOA. Based on data requests in the rate case, I have
15 prepared Exhibit DA-2, which compares the amount of effluent available
16 from the Santan WWTP to what Utility actually delivered to Swing First
17 and the Santan HOA.

18 Q. HAS UTILITY SOLD ALL THE EFFLUENT THAT IT HAS
19 PRODUCED?

20 A. No. The table shows that since March 2006, Utility has produced far more
21 effluent than it has actually sold. In fact, Utility has sold only about 42%
22 of the effluent that it has produced since March 2006. Swing First could
23 have satisfied essentially all of its irrigation requirements with treated
24 effluent. Instead, Utility has withheld effluent, and delivered and billed us
25 for more expensive CAP water.⁵ (emphasis added)

26 Mr. Ashton further states in his pre-filed testimony as follows:

27 The Johnson Ranch Golf Course has been Utility’s customer for many years. We
28 should be receiving as much effluent as Utility can deliver, up to our
requirements. This is in accordance with our rights as a tariffed effluent
customer, and is wise public policy.⁶ (emphasis added)

The following table compares Count “A” of SFG’s 2008 Formal Amended Complaint to
Count “A” of SFG’s 2013 Formal Complaint:

⁵ Direct Testimony of David Ashton on Behalf of Swing First Golf LLC dated December 30, 2009
(Docket No. WS-02987A-08-0049) at pp. 10-11.

⁶ *Id.* at p. 5, lines 6-9.

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2008 Amended Formal Complaint Count "A"	2013 Formal Complaint Count "A"
SFG "should be receiving as much effluent as Utility can deliver, up to our requirements" ⁷	"Swing First asks the Commission to order Utility to deliver Effluent to Swing First in the quantities requested by Swing First" ⁸
"[D]espite Swing First's right to the first effluent generated in the certificated service area, Utility has rarely delivered effluent" ⁹	"Only after satisfying Swing First's requirements should Utility be allowed to sell Effluent to any other customers or to pump Effluent into the ground" ¹⁰
"Utility has withheld effluent" ¹¹	"[T]his is a problem Utility created by deliberately withholding Effluent in 2007 from Swing First and selling Effluent to the Santan HOA" ¹²
<p>"There are two customers connected to the Santan WWTP: Swing First and the Santan HOA."¹³</p> <p>"Utility has been selling some effluent to other irrigation customers..., but has been pumping most of the effluent it produces into the ground"¹⁴</p>	"Since 2007, Utility has tried to maximize Effluent deliveries to the [Santan] HOA by rationing deliveries to Swing First" ¹⁵

Clearly, Count "A" of the 2008 Amended Formal Complaint and Count "A" of the 2013 Formal Complaint are the same in all material respects. Having raised the claims in its 2008 Amended Formal Complaint that SFG "should be receiving as much effluent as Utility can deliver, up to our requirements"¹⁶ and that SFG has the "right to the first effluent generated in the certificated service area [of Johnson Utilities],"¹⁷ it was incumbent upon SFG to prosecute and prove up the claims. However, at the insistence of SFG, and over the strong opposition of Johnson Utilities, Count "A" and all of the other counts of the 2008 Amended Formal Complaint

⁷ *Id.* at p. 5, lines 6-9.
⁸ 2013 Formal Complaint at p. 9, lines 22-23.
⁹ 2008 Amended Formal Complaint at p. 2, lines 20-22.
¹⁰ 2013 Formal Complaint at p. 9, lines 24-25.
¹¹ Direct Testimony of David Ashton at p. 11, line 11.
¹² 2013 Formal Complaint at p. 9, line 9, through p. 10, line 2.
¹³ Direct Testimony of David Ashton at p. 11, lines 2-3.
¹⁴ *Id.* at p. 10, lines 9-11.
¹⁵ 2013 Formal Complaint at p. 9, lines 14-15.
¹⁶ Direct Testimony of David Ashton at p. 5, lines 6-9.
¹⁷ 2008 Amended Formal Complaint at p. 2, line 21.

1 were dismissed with prejudice pursuant to Decision 73137. Thus, SFG failed to establish any
2 right of first refusal or priority right to the effluent of Johnson Utilities, and SFG is now barred
3 from raising such claims again in this complaint docket.

4 Specifically, SFG is barred by the express language of Decision 73137 from raising
5 Count “A” of the 2013 Formal Complaint. Finding of Fact 114 states:

6 Swing First has stated it is aware that withdrawal of its Amended Complaint with
7 prejudice will **foreclose Swing First from raising those claims again** before the
8 Commission even if the Superior Court decides its claims are more appropriately
9 within the Commission’s jurisdiction. Therefore, Swing First has accepted the
10 risk that [the] Superior Court may or may not address the common claims raised
11 in the Amended Complaint and the Superior Court case.¹⁸ (emphasis added)

12 The Commission left no uncertainty as to the preclusive effect of Decision 73137
13 regarding the claims raised by SFG in the 2008 Amended Formal Complaint docket. The filing
14 by SFG of its Withdrawal of Complaint and the resulting Decision 73137 meant that SFG placed
15 its claims against Johnson Utilities in the hands of the Maricopa County Superior Court, and that
16 SFG lost the opportunity to have the Commission adjudicate those claims.

17 In addition to the express language of Decision 73137, the dismissal of a claim with
18 prejudice bars a party from raising the same claim in a subsequent action under the long-
19 established judicial doctrine known as *res judicata*. In *Roden v. Roden*, 29 Ariz. 549, 243 P. 413
20 (1926), the Arizona Supreme Court held that “[a] judgment of dismissal ‘with prejudice’ is the
21 same as a judgment for defendant upon the merits, and, of course, is *res judicata* as to every
22 matter litigated.”¹⁹ Similarly, in *Suttle v. Seely*, 94 Ariz. 161, 382 P.2d 570 (1963), the Arizona
23 Supreme Court ruled as follows:

24 A consent judgment entered by stipulation of the parties is just as valid as a
25 judgment resulting from a trial on the merits, **and a decree of dismissal with
26 prejudice made upon that stipulation is a final determination and is res
27 judicata as to all issues that were raised or could have been determined
28 under the pleadings.** *Cochise Hotels v. Douglas Hotel Operating Co.*, 83 Ariz.
40, 316 P.2d 290 (1957). Therefore since the first suit between the parties, which
was dismissed by stipulation, sought the same relief in regard to a partition of the

¹⁸ Decision 73137 at p. 23, FOF 114 (citation omitted).

¹⁹ *Roden v. Roden*, 29 Ariz. 549, 553, 243 P. 413, 415 (1926).

1 property as does the complaint in the present action the trial court properly treated
2 that issue as res judicata.²⁰ (emphasis added)

3 More recently, in *Torres v. Kennecott Copper Corp.*, 15, Ariz. App. 272, 488 P.2d 477
4 (1971), the Arizona Court of Appeals held that “a dismissal with prejudice is a judgment on the
5 merits, ... and is therefore Res judicata as to every issue reasonably framed by the pleadings.”²¹
6 Thus, barring SFG from re-litigating claims previously dismissed with prejudice pursuant to
7 Decision 73137 is fully consistent with the well-established judicial doctrine of *res judicata*.

8 For all of the reasons set forth herein, Count “A” of the 2013 Formal Complaint which
9 “asks the Commission to order Utility to deliver Effluent to Swing First in the quantities
10 requested by Swing First” should be dismissed pursuant to the express language of Decision
11 73137 (which is also *res judicata* as to the claims of SFG) and Rule 12(b)(6) of the Arizona
12 Rules of Civil Procedure for failure to state a claim upon which relief may be granted.

13 Additionally, because Count “A” fails to state a claim upon which relief can be granted,
14 the count should be stricken pursuant to Rule 12(f) of the Arizona Rules of Civil Procedure
15 which allows the Commission to strike “any redundant, immaterial, impertinent, or scandalous
16 matter.” Count “A” is barred by Decision 73137 and is, therefore, “immaterial and impertinent”
17 to the resolution of any claim properly before the Commission in this docket.

18 **2. Count B: “Utility Continues to Overcharge for Monthly Minimum Bills.”**

19 In Count “B” of the 2013 Formal Complaint, SFG “asks the Commission to order Utility
20 to resume basing its minimum bills on the three-inch meter that was originally installed.”²²
21 However, this very claim was previously raised by SFG in its 2008 Amended Formal Complaint
22 which was withdrawn with prejudice in 2012.²³ In fact, the very heading of Count “B” in the
23 2013 Formal Complaint alleges that Johnson Utilities “continues” to overcharge for monthly

24 ²⁰ *Suttle v. Seely*, 94 Ariz. 161, 163-164, 382 P.2d 570, 572 (1963).

25 ²¹ *Torres v. Kennecott Copper Corporation*, 15, Ariz. App. 272, 274, 488 P.2d 477, 479 (1971).

26 ²² 2013 Formal Complaint at p. 11, lines 9-10.

27 ²³ Again, nothing contained in this motion should be construed as a waiver or an admission by Johnson
28 Utilities that any of the claims of SFG in the 2013 Formal Complaint have merit. To the contrary,
Johnson Utilities denies that SFG is entitled to be billed a monthly minimum based upon a three-inch
water meter charge. Johnson Utilities further denies SFG’s claim that it arbitrarily replaced SFG’s three-
inch meter with an eight-inch meter.

1 minimum bills, an allegation that was obviously raised by SFG in the 2008 Amended Formal
 2 Complaint and thereafter dismissed with prejudice pursuant to Decision 73137. The following
 3 table compares Count “B” of SFG’s 2008 Formal Amended Complaint to Count “B” of SFG’s
 4 2013 Formal Complaint:

<p>5 2008 Amended Formal Complaint</p> <p>6 Count “B”</p> <p>7 “Overcharges for Minimum Bill”</p>	<p>5 2013 Formal Complaint</p> <p>6 Count “B”</p> <p>7 “Utility Continues to Overcharge for Monthly Minimum Bills”</p>
<p>8 “Swing First was served with a three-inch 9 meter until 2008. The minimum bill for this 10 sized meter is only \$270.”²⁴</p>	<p>8 “To meter Effluent service, after the effluent 9 line to the lake was completed, Utility 10 installed a three-inch water meter.”²⁵</p>
<p>11 “In January 2008, Utility replaced Swing 12 First’s three-inch meter with an eight-inch 13 meter.”²⁶</p> <p>14 “The purpose of the service was allegedly to 15 reduce back pressure on the line and to reduce 16 line breaks.”²⁷</p>	<p>11 “Then, in January 2008, Utility arbitrarily 12 replaced Swing First’s three-inch effluent 13 meter with an eight-inch meter, claiming that 14 the change was needed to correct previously 15 undisclosed delivery line problems.”²⁸</p>
<p>16 “Utility changed the meter size for its benefit, 17 not at Swing First’s request. It did not 18 otherwise affect the effluent system investment 19 dedicated to serve Swing First. Therefore, it is 20 inappropriate for Utility to charge more than 21 \$270 per month for its monthly effluent 22 minimum bill, even after January 2008.”²⁹</p>	<p>16 “[G]oing forward Swing First asks the 17 Commission to order Utility to resume 18 basing its minimum bills on the three-inch 19 meter that was originally installed. This 20 meter was selected and installed by Utility 21 and no one alleges that it did not accurately 22 read deliveries to Swing First. Utility should 23 be held to its initial meter choice.”³⁰</p>
<p>21 “Swing First asks ... [t]he Commission to 22 order Utility to render proper bills to Swing 23 First each month, based on actual meter reads, 24 one 3-inch meter, the effluent rate of \$0.62 per 25 thousand gallons, and the Transaction 26 Privilege tax of \$0.067 per thousand 27 gallons.”³¹</p>	<p>21 “Swing First asks the Commission to ... 22 [o]rder Utility to charge a minimum bill for 23 Swing First’s Effluent deliveries based on a 24 3-inch water meter.”³²</p>

25 ²⁴ Direct Testimony of David Ashton at p. 25, lines 2-3.

26 ²⁵ 2013 Formal Complaint at p. 10, lines 15-16.

27 ²⁶ Amended Formal Complaint at p. 4, lines 1-2.

28 ²⁷ Direct Testimony of David Ashton at p. 23, lines 20-21.

29 ²⁸ 2013 Formal Complaint at p. 10, lines 18-20.

30 ²⁹ Direct Testimony of David Ashton at p. 25, lines 4-7.

³⁰ 2013 Formal Complaint at p. 11, lines 9-12.

1 Clearly, Count “B” of the 2008 Amended Formal Complaint and Count “B” of the 2013
2 Formal Complaint are the same in all material respects. Having raised the claim in its 2008
3 Amended Formal Complaint that “it is inappropriate for Utility to charge more than \$270 per
4 month [based on a three-inch water meter] for its monthly effluent minimum bill,”³³ it was
5 incumbent upon SFG to prosecute and prove up that claim. However, at the insistence of SFG,
6 and over the strong opposition of Johnson Utilities, Count “B” and all of the other counts of the
7 2008 Amended Formal Complaint were dismissed with prejudice pursuant to Decision 73137.
8 Thus, SFG failed to establish that Johnson Utilities may charge no more than \$270 for the
9 monthly effluent minimum bill, based on a three-inch meter, and SFG is now barred from
10 raising such a claim again in this complaint docket.

11 As discussed above, SFG is barred by the express language of Decision 73137 from
12 raising Count “B” of the 2013 Formal Complaint. As further discussed above, the dismissal of a
13 claim with prejudice bars a party from raising the same claim in a subsequent action under the
14 long-established judicial doctrine of *res judicata*. Thus, for all of the reasons set forth herein,
15 Count “B” of the 2013 Formal Complaint which requests that the Commission “[o]rder Utility to
16 charge a minimum bill for Swing First’s Effluent deliveries based on a 3-inch water meter”³⁴
17 should be dismissed pursuant to the express language of Decision 73137 (which is also *res*
18 *judicata* as to the claims of SFG) and Rule 12(b)(6) of the Arizona Rules of Civil Procedure for
19 failure to state a claim upon which relief can be granted.

20 Additionally, because Count “B” fails to state a claim upon which relief can be granted,
21 the count should be stricken pursuant to Rule 12(f) of the Arizona Rules of Civil Procedure
22 which allows the Commission to strike “any redundant, immaterial, impertinent, or scandalous
23 matter.” Count “B” is barred by Decision 73137 and is, therefore, “immaterial and impertinent”
24 to the resolution of any claim properly before the Commission in this docket.

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27 ³¹ 2008 Amended Formal Complaint at p. 7, lines 24-26.

³² 2013 Formal Complaint at p. 13, lines 11-12.

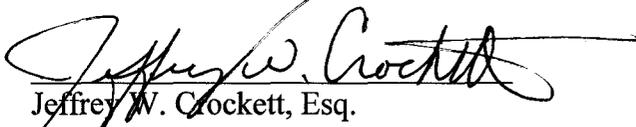
³³ Direct Testimony of David Ashton at p. 25, lines 6-7

³⁴ 2013 Formal Complaint at p. 13, lines 11-12.

1 counterclaim within ten (10) days following the date of a ruling by the Commission on this
2 motion in compliance with Rule 12(a)(3)(A).

3 RESPECTFULLY submitted this 2nd day of April, 2013.

4 BROWNSTEIN HYATT FARBER SCHRECK LLP

5 

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9 ORIGINAL and thirteen (13) copies of the
10 foregoing filed this 2nd day of April, 2013, with:

11 Docket Control
12 ARIZONA CORPORATION COMMISSION
13 1200 West Washington Street
14 Phoenix, Arizona 85007

15 Copy of the foregoing hand-delivered
16 this 20th day of March, 2013, to:

17 Yvette B. Kinsey, Administrative Law Judge
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