

ORIGINAL



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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

BOB STUMP, Chairman
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Arizona Corporation Commission
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2013 MAY 15 PM 12 25 MAY 15 2013

EMERGENCY [Signature]

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

DOCKET NO. WS-02987A-13-0053

**MOTION FOR ORDER TO SHOW
CAUSE AND FOR EMERGENCY
ORDER**

1 Swing First Golf LLC ("Swing First") hereby moves for an order to show cause and for
2 emergency relief against Johnson Utilities LLC, dba Johnson Utilities Company ("Utility").
3 Utility has even further reduced Effluent deliveries to Swing First. If sufficient Effluent
4 deliveries are not immediately resumed, fish and grass will die and Swing First will be forced to
5 shut down its golf course.

6 **I Latest Developments**

7 Utility delivered no water at all to Swing First for the 24-hour period from 8:30 Monday
8 morning to 8:30 Tuesday morning. Utility delivered just 350,000 gallons from 8:30 Tuesday
9 morning until 8:30 Wednesday morning. So, deliveries have averaged just 175,000 gallons per
10 day for the last two days, which is far below the 600-700,000 gallons per day required this time
11 of the year when temperatures are soaring and the Bermuda-grass turf is struggling to take hold.
12 The golf course is burning up.

13 However, perhaps it could have been even worse, in the short run. At least the water
14 delivered to Swing First could be used for irrigation. The San Tan Village Homeowners
15 Association is Utility's other customers that has been promised Effluent from the Santan
16 wastewater treatment plant ("Santan WWTP"). Based on newspaper and television reports, on
17 May 12 and 13, 2013, Utility delivered untreated effluent to the HOA, which may have

1 contained fecal matter.¹ Fish died in the HOA lakes and residents had to suffer the stench of the
2 untreated effluent. Utility was then forced to drain, disinfect, and refill the lakes.

3 **II Response to Utility**²

4 **A You Cannot Sell the Same Pig Twice**

5 By means of a straw-main argument, Utility once again misstates Swing First's position.
6 It claims that Swing First is trying to enforce the Utility Services Agreement, which both parties
7 believed gave Swing First the right to first refusal for effluent. Yes, Utility should be held to its
8 representations, but Swing First's claim is much simpler, and is based on 900 years of Anglo-
9 American Common Law: You cannot sell the same pig twice.

10 Utility sold the pig to Swing First in March 2006, when it began delivering large
11 quantities of Effluent to Swing First. Utility had promised the Effluent to Swing First in 2004,
12 and in reliance on that promise Swing First caused a pipeline to be built from the lake to Utility's
13 Effluent pipeline from the Santan WWTP. Then in 2007, Utility stole the pig back and resold it
14 to the San Tan Heights HOA – Utility stopped delivering Effluent to Swing First and started
15 delivering Effluent to the HOA. Utility's malfeasance is really this simple.

16 To make the purchasers whole, Utility has to give Swing First and the HOA the pigs they
17 originally purchased. If Utility does not have two pigs (enough effluent) then it has to make
18 Swing First and the HOA whole by providing other water at the price of Effluent. This is the
19 only equitable remedy.

20 Instead of trying to make Swing First and the HOA whole, Utility plays the victim and
21 asks that it be made whole. It offers only substantially more expensive water. Although not
22 stated in the original e-mail, Utility may have CAP water, contrary to its prior Commission
23 representations. And Utility does not deny that the CAP water would be one-third more
24 expensive, plus an additional \$550 per month. Utility also does not deny that its new alternative
25 non-potable water would cost Swing First four times the rate it has been paying for Effluent.

¹ http://www.azcentral.com/community/pinal/articles/20130514san-tan-heights-lake-filled-with-sewage.html?nclick_check=1#protected

² Utility's May 14, 2013, Response to Swing First Golf's Supplement to Complaint and Motion to Strike.

1 And to try to force Swing First to make it whole, Utility has turned off the Effluent tap again.
2 Finally, instead of trying to do the right thing, Utility is paying its attorney to file one pleading
3 after another—pleadings to which Swing First must respond at significant expense. This only
4 compounds Swing First’s injuries.

5 **B Utility Misstates the Court Rules**

6 Utility cites Rule 15(d), but ignores Rule 15(a), “A party may amend the party’s pleading
7 once as a matter of course at any time before a responsive pleading is served. ... Leave to amend
8 shall be freely given when justice requires.” Utility has not responded to Swing First’s claim
9 that Utility has failed to deliver Effluent, so Swing First is free to amend its pleading to set forth
10 additional facts that have developed since the original complaint. It is immaterial whether the
11 subsequent pleading is styled as a supplement or amendment.

12 Second, as the Bar Committee Notes state: “Rule 15(d) is intended to give the court broad
13 discretion in allowing a supplemental pleading.” McAuliffe states: “The function of the
14 supplemental pleading is to bring forward new facts or evidence arising after the filing of the
15 original pleading so that the entire controversy can be before the Court.”³ This is exactly what
16 Swing First has done. Certainly, the Commission will want to consider all the facts and evidence
17 concerning Utility’s malfeasance, including developments since the date of the original
18 complaint.

19 Utility is simply wasting the Commission’s time with its baseless Motion to Strike.

20 **C If It Looks Like a Duck, Quacks Like a Duck and Walks Like a Duck, It's a**
21 **Duck**

22 Utility is in high dudgeon concerning Swing First’s use of the word “extortion.”
23 Although Swing First has not charged Utility with a crime, criminal extortion is defined by
24 A.R.S. § 13-1804.

25 Theft by extortion; classification

26 A. A person commits theft by extortion by knowingly obtaining or seeking to
27 obtain property or services by means of a threat to do in the future any of the

³ Arizona Civil Rules Handbook, note 15 to Rule 15.

1 following: ...

2 3. Cause damage to property.

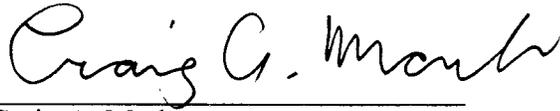
3 Utility is withholding Effluent and threatens to continue doing so, which will destroy
4 First's property, its Golf Course. With these threats, Utility is trying to force Swing First to pay
5 more for irrigation water. Utility certainly looks like, talks like, and walks like an extortionist.

6 **III Motion for Order to Show Cause and for Emergency Relief**

7 **Show Cause.** Utility created this current mess by withholding effluent from Swing First
8 in 2007 and taking on a new effluent customer. It sold the same pig to two customers, thereby
9 making both customers unhappy. It is Utility's responsibility to fix its mess, not its customers.
10 As a first step, Swing First asks the Commission to order Utility to show cause why it should not
11 deliver all quantities of Effluent requested by Swing First during the pendency of this Complaint,
12 or if Utility cannot deliver sufficient Effluent, then Utility should show cause why it should not
13 be required to supply alternative irrigation water at no additional cost. Utility should keep Swing
14 First whole until all the evidence has been heard. In the unlikely event that the Commission
15 ultimately finds that Swing First should have paid some higher rate, then Swing First will begin
16 paying the higher rate.

17 **Emergency Order.** Swing First's Golf Course is already burning up without water.
18 Swing First cannot wait until a formal hearing to consider its Motion For an Order to Show
19 Cause. Further, the Commission's Show Cause hearing may also want to consider how to
20 address Utility's most recent environmental transgression. By the time hearings are completed
21 and relief is ordered, the golf course damage may be irreversible. Therefore, Swing First asks
22 the Commission to immediately Order Utility to begin delivering all requested quantities of
23 Effluent to Swing First, or in the alternative to deliver substitute irrigation water to Swing First at
24 no additional cost.

1 RESPECTFULLY SUBMITTED on May 15, 2013.

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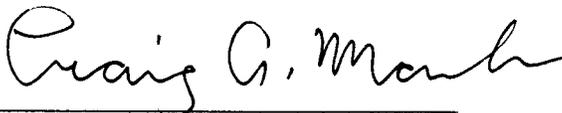
15 Original and 13 copies **filed**
16 on May 15, 2013, with:

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18 Docket Control
19 Arizona Corporation Commission
20 1200 West Washington
21 Phoenix, Arizona 85007
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23 Copy **e-mailed and mailed**
24 on May 15, 2013 to:

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