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BEFORE THE ARIZONA CORPORAT

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2013 MAY 30 P 4: 35

AZ CORP COMMISSION
DOCKET CONTROL

Arizona Corporation Commission

DOCKETED

MAY 30 2013

DOCKETED BY *JM*

DOCKET NO. WS-02987A-13-0053

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

MOTION TO REQUIRE SFG TO
COMPLY WITH RULES 15(A) AND
15(D) OF THE ARIZONA RULES OF
CIVIL PROCEDURE; RESPONSE AND
MOTION TO STRIKE SUPPLEMENTS
AND UPDATE TO FORMAL
COMPLAINT; AND NOTICE
REGARDING DISCOVERY

MOTION TO REQUIRE SFG TO COMPLY WITH RULES 15(A) AND 15(D) OF THE
ARIZONA RULES OF CIVIL PROCEDURE

Between May 8 and May 22, 2013, Swing First Golf, LLC (“SFG”) filed three supplements and one update to its formal complaint (“Formal Complaint”) in this docket, as well as a motion for an order to show cause and emergency order—a total of five pleadings in only 20 days.¹ Rule 15(d) regarding Supplemental Pleadings in the Arizona Rules of Civil Procedure states as follows:

Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the timer therefor. (Emphasis added).

To the extent that the three supplements and one update filed by SFG are “supplemental pleadings” within the meaning of Rule 15(d), then SFG violated Rule 15(d) by failing to obtain

¹ SFG filed a Supplement to Complaint on May 8, 2013, a Second Supplement to Complaint on May 13, 2013, a Third Supplement to Complaint on May 17, 2013 and an Update to Complaint on May 22, 2013. Johnson Utilities filed a response to SFG’s Supplement to Complaint on May 14, 2013, which is incorporated herein by this reference.

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1 permission from the Commission before filing the pleadings.² Arizona Administrative Code
2 R14-3-101(A) provides that “[i]n all cases in which procedure is set forth neither by law, nor by
3 these rules, nor by regulations or orders of the Commission, the Rules of Civil Procedure for the
4 Superior Court of Arizona as established by the Supreme Court of the state of Arizona shall
5 govern.” Thus, Johnson Utilities, L.L.C. (“Johnson Utilities” or the “Company”) hereby
6 requests an order from the Arizona Corporation Commission (“Commission”) requiring that
7 SFG comply with Rule 15(d) of the Arizona Rules of Civil Procedure by seeking leave of the
8 Commission before filing additional supplements and/or updates to its Formal Complaint.
9 Johnson Utilities has filed a Motion to Dismiss and Motion to Strike Counts A, B and D of the
10 Formal Complaint, and oral argument was held on the motions on May 20, 2013. The
11 Administrative Law Judge (“ALJ”) told the parties she would prepare a recommended opinion
12 and order (“ROO”) for consideration by the Commission at a future Open Meeting. SFG should
13 not be permitted to take bite after bite after bite at the apple.

14 While Johnson Utilities provided a response to SFG’s Supplement to Complaint filed
15 May 8, 2013, the Company has not previously provided a written response to SFG’s Second
16 Supplement to Complaint filed May 13, 2013, its Motion for Order to Show Cause and for
17 Emergency Order filed May 15, 2013, its Third Supplement to Complaint filed May 17, 2013, or
18 its Update to Complaint filed May 22, 2013. Johnson Utilities recognizes that the ALJ has taken
19 the Company’s Motion to Dismiss and Motion to Strike under advisement, pending issuance of
20 a ROO. However, the Company cannot allow certain of the erroneous assertions and arguments
21 contained in SFG’s recent pleadings to go un rebutted. Johnson Utilities will not attempt to
22 address each and every misstatement, inaccuracy, allegation or argument in SFG’s several
23 pleadings, and the Company’s decision not to address any allegation or argument of SFG in this
24 filing should not be construed as an admission or waiver with respect to such allegation or
25 argument.

26 ² Notwithstanding SFG’s caption on the three supplements and one update, they may actually be
27 amendments to the Formal Complaint under Rule 15(a) of the Arizona Rules of Civil Procedure. If they
28 are amendments to the Formal Complaint, then SFG violated Rule 15(a) by failing to obtain leave from
the Commission to amend the Complaint as required by the rule. Either way, the supplements and update
are improper under either Rule 15(a) or Rule 15(d).

1 Johnson Utilities notes that as of May 22, 2013, SFG requested Central Arizona Project
2 (“CAP”) water from Johnson Utilities and the Company began delivering CAP water to SFG to
3 supplement deliveries of effluent on or about May 23, 2013. As of the date of this filing, SFG’s
4 main golf course lake is close to full.

5 **RESPONSE AND MOTION TO STRIKE SECOND SUPPLEMENT TO COMPLAINT**

6 SFG alleges in its Second Supplement to Complaint that Johnson Utilities retaliated
7 against SFG for filing its May 8, 2013, Supplement to Complaint by cutting effluent deliveries
8 in half starting May 9, 2013, the day after the filing.³ In an attempt to support its allegation,
9 SFG lists effluent deliveries by date for the period May 6 through May 13 for the years 2011,
10 2012 and 2013, based upon SFG’s daily reading of its effluent meter.⁴ However, the reduction
11 in the delivery of effluent was not an act of retaliation, but the result of necessary maintenance at
12 the San Tan wastewater treatment plant (“San Tan WTP”) and a subsequent power interruption
13 at the plant which was well publicized in media reports.

14 On May 8, 2013, Johnson Utilities commenced repairs to the remote terminal unit at the
15 San Tan WTP. While these repairs were being made, the Company was unable to deliver
16 effluent to SFG or the San Tan Heights Homeowners Association (“San Tan HOA”), the
17 Company’s other current effluent customer. Then, On May 13, 2013, Johnson Utilities
18 experienced a power interruption at the San Tan WTP and the treatment process which reduces
19 turbidity in the effluent was interrupted, requiring that the Company temporarily suspend
20 effluent deliveries to both of its customers. Thus, normal deliveries of effluent were disrupted
21 during the May 6-13 time period discussed in SFG’s Second Supplement to Complaint. This
22 information was communicated to David Ashton and Tim West of SFG in a letter from Johnson
23 Utilities dated May 15, 2013.

24 Withholding available effluent from SFG is not in the economic interest of Johnson
25 Utilities. Effluent which is not delivered to the San Tan Heights HOA or SFG must be disposed

26 ³ Second Supplement to Complaint at p. 1, lines 4-5.

27 ⁴ *Id.* at p. 2, lines 2-3. Johnson Utilities has not verified the accuracy of these figures provided by SFG,
28 and in fact, they are somewhat different than the Company’s numbers, which may be the result of the
parties taking meter readings at different times of the day.

1 of by pumping it into the ground or by delivery to a farmer. The Company receives no revenue
2 from effluent that is pumped into the ground or delivered to the farmer. Thus, retaliating against
3 SFG by withholding available effluent would harm Johnson Utilities economically and the
4 Company would not act in such a way. The Company would certainly prefer to sell all of the
5 effluent that it can sell.

6 In the May 15, 2013 letter to SFG referenced above, Johnson Utilities reconfirmed its
7 ability to deliver water to SFG stating:

8 As Kenny Watkins communicated to you at the beginning of the month, Johnson
9 Utilities can deliver as much water as Swing First Golf requests using a
10 combination of effluent, Central Arizona Project (CAP) water, and if necessary,
11 non-potable groundwater. However, with the variability of the influent flow rates
12 at the San Tan wastewater treatment plant, capacity constraints on the delivery of
13 effluent through the existing pipeline to the golf course, periodic operational
14 interruptions due to required maintenance or unforeseen events (such as we have
15 experienced over the past week), and the competing demand for effluent from the
16 San Tan Heights Homeowners Association, we simply cannot commit to deliver a
17 specific quantity of effluent on a specific day. That being said, we understand
18 SFG's desire to receive effluent because it is cheaper water compared to the other
19 options, and we will continue to work to deliver as much effluent as we can on a
20 daily basis given the constraining factors mentioned above.

21 In the Second Supplement to Complaint, SFG attached a photo as Exhibit A which
22 purported to show the low level of water in its golf course lake. However, the low level of the
23 lake was solely the result of SFG's unilateral decision to refuse CAP water from Johnson
24 Utilities. Johnson Utilities has made clear to SFG that it can deliver as much water as SFG
25 requests using a combination of effluent, CAP water, and if necessary, non-potable groundwater.
26 Thus, SFG's reckless assertion that Johnson Utilities is "damaging the golf course and Swing
27 First's business" is patently false and unsupported by the facts.⁵ Moreover, as of May 22, 2013,
28 SFG requested CAP water from Johnson Utilities and the Company began delivering CAP water
to supplement effluent deliveries on or about May 23, 2013. As of the date of this filing, SFG's
main golf course lake is close to full.

Johnson Utilities requests that the Commission strike SFG's Second Supplement to
Complaint to the extent it is a "supplemental pleading" under Rule 15(d) of the Arizona Rules of

⁵ *Id.* at p. 2, lines 10-11.

1 Civil Procedure because SFG failed to obtain permission from the Commission before filing the
2 pleading as required by Rule 15(d). In the event the Second Supplement to Complaint is an
3 “amendment” to the Formal Complaint under Rule 15(a) of the Arizona Rules of Civil
4 Procedure, then the pleading should likewise be stricken because SFG failed to obtain
5 permission from the Commission to file an amendment as required under Rule 15(a), as more
6 fully discussed in the following section. Either way, the Second Supplement to Complaint is
7 improper under either Rule 15(a) or Rule 15(d) and should be stricken.

8 **RESPONSE TO SFG’S MOTION FOR ORDER TO SHOW CAUSE AND FOR**
9 **EMERGENCY ORDER**

10 In its Motion for Order to Show Cause and for Emergency Order (“Motion for
11 Emergency Order”) filed May 15, 2013, SFG argues that Johnson Utilities has sold the same
12 effluent to two customers—SFG and the San Tan Heights HOA. However, that argument
13 reflects a fundamental misunderstanding of the operation of utility tariffs and the operational
14 needs of a wastewater treatment plant operator to properly dispose of effluent. Johnson Utilities
15 has a tariff which permits the Company to sell effluent at the current rate of \$0.83 per thousand
16 gallons. During the winter months, Johnson Utilities has more effluent discharging from the San
17 Tan WTP than demand for that effluent from the Company’s existing customers. As a result,
18 the Company must pump some of the effluent into the ground or deliver it to a farmer who has
19 agreed to accept excess effluent.⁶ SFG has certainly been unwilling to accept excess effluent
20 from Johnson Utilities in the winter months.

21 During the summer months, by comparison, Johnson Utilities has greater demand for
22 effluent than effluent available and the Company must allocate the limited supply between its
23 customers. SFG would have the Commission believe that it has a priority right to all of the
24 effluent it wants in the summer months. Yet, SFG cites no Commission rule, no policy, no
25 decision, no statute, no case law, no Commission-approved agreement,⁷ or any other persuasive

26 ⁶ The farmer does not pay Johnson Utilities for the effluent received but has agreed to accept effluent to
27 help the Company dispose of the effluent.

28 ⁷ SFG continues to raise the 1999 Utility Services Agreement (Motion for Emergency Order at p. 2, line
6). However, it is well established that SFG was not a party to the 1999 agreement, the agreement was
never assigned to SFG, and the agreement was never submitted to nor approved by the Commission.

1 authority to support its claim.⁸ Instead, SFG cites “Anglo American Common Law” on the sale
2 of pigs. Effluent is not a pig and the sale of pigs is not regulated by the Commission. Effluent is
3 the byproduct of the collection and treatment of sewage, and it must be properly disposed of by
4 the Company day in and day out. Johnson Utilities must manage the disposal in the winter when
5 available effluent exceeds the demand, and it must manage the disposal in the summer when the
6 demand exceeds the supply.

7 Johnson Utilities acknowledges SFG’s desire to purchase effluent because it is cheaper
8 than the other alternatives. The San Tan Heights HOA has the same desire for the same reason.
9 However, SFG has no greater right to effluent than the San Tan Heights HOA. Thus, Johnson
10 Utilities must allocate effluent between its existing customers when the demand is greater than
11 the supply. To make up the difference, the Company can currently deliver CAP water, which is
12 only moderately more expensive than effluent. SFG’s assertion that Johnson Utilities must
13 supply all water requested by SFG and the San Tan Heights HOA at the price of effluent,
14 regardless of the source of the water, is simply ridiculous.⁹ There is no legal authority that
15 would support such a requirement, and all of the Company’s rate payers would ultimately be
16 harmed as they subsidized the cost of water for SFG and the San Tan Heights HOA.¹⁰

17 In responding to Johnson Utilities’ argument that SFG violated Rule 15(d) of the Arizona
18 Rules of Civil Procedure by filing supplements, amendments and updates to its Formal
19 Complaint without leave from the Commission, SFG misquotes Rule 15(a) in an attempt to
20 excuse its violation.¹¹ Johnson Utilities notes that by citing Rule 15(a), SFG apparently believes
21 that its three supplements and one update to the Formal Complaint are “amendments” under
22 Rule 15(a) and not “supplemental pleadings” under Rule 15(d).

23
24 Moreover, the 1999 Utility Services Agreement does not support SFG’s argument in any event. Simply
25 put, the 1999 Utility Services Agreement has no relevance or bearing on this case.

26 ⁸ It bears repeating that SFG’s claim to a priority to effluent is barred by the doctrine of *res judicata* and
Decision 73137, as discussed in Johnson Utilities’ Motion to Dismiss and Motion to Strike.

27 ⁹ Motion for Emergency Order at p. 4, lines 10-13.

28 ¹⁰ Johnson Utilities notes that the San Tan Heights HOA is not a party to this proceeding and has not
requested such relief.

¹¹ Johnson Utilities will give SFG the benefit of the doubt and assume that SFG inadvertently misquoted
Rule 15(a) and did not intend to intentionally misstate the rule or mislead the Commission.

1 Rule 15(a) states in its entirety, as follows:

- 2 1. A party may amend the party's pleading once as a matter of course:
- 3 A. within twenty-one days after serving it if the pleading is one to
- 4 which no responsive pleading is permitted; or
- 5 B. within twenty-one days after service of a responsive pleading if the
- 6 pleading is one to which a responsive pleading is required or, if a
- 7 motion under Rule 12(b), (e), or (f) is served, on or before the date
- 8 on which a response to the motion is due, whichever is earlier.

9 Otherwise a party may amend the party's pleading only by leave of court

10 or by written consent of the adverse party. Leave to amend shall be freely

11 given when justice requires. Amendment as a matter of course after

12 service of a motion under Rule 12(b), (e), or (f) does not, by itself, moot

13 the motion as to the adequacy of the allegations of the pleading as revised

14 in the amended pleading and does not relieve a party opposing the motion

15 from filing a timely response to the motion.

- 16 2. A party who moves for leave to amend a pleading must attach a copy of
- 17 the proposed amended pleading as an exhibit to the motion, which shall
- 18 indicate in what respect it differed from the pleading that it amends, by
- 19 bracketing or striking through the text to be deleted and underlining the
- 20 text to be added. If a motion for leave to amend is granted, the moving
- 21 party shall file and serve the amended pleading within ten days of the
- 22 order granting the motion, unless the court otherwise orders.
- 23 3. A party shall plead in response to an amended pleading within the time
- 24 remaining for response to the original pleading or within ten days after
- 25 service of the amended pleading, whichever period may be the longer,
- 26 unless the court otherwise orders. (emphasis added)

27 SFG asserts that “[a] party may amend the party’s pleading once as a matter of course at

28 any time before a responsive pleading is served.”¹² However, this is not what Rule 15(a) states.

Rule 15(a)(1)(A) states that “a party may amend the party’s pleading once as a matter of course

within twenty-one days after serving it if the pleading is one to which no responsive pleading is

permitted.” The pleading SFG is amending is the Formal Complaint, and Johnson Utilities is

permitted to file an answer to the Formal Complaint, so Rule 15(a)(1)(A) does not apply. Even

if this rule did somehow apply, the Formal Complaint was filed March 11, 2013 and served on

Johnson Utilities on March 13, 2013, while the Supplement to Complaint was filed May 8,

2013, which is more than 21 days after service of the Formal Complaint (56 days to be exact).

¹² Motion for Emergency Order at p. 3, lines 6-7.

1 Rule 15(a)(1)(B) states that “a party may amend the party’s pleading once as a matter of
2 course within twenty-one days after service of a responsive pleading if the pleading is one to
3 which a responsive pleading is required or, if a motion under Rule 12(b), (e), or (f) is served, on
4 or before the date on which a response to the motion is due, whichever is earlier.” Thus,
5 pursuant to this rule, SFG could amend its Formal Complaint one time without leave of the
6 Commission if it filed the amendment within 21 days of the date of service, or by April 3, 2013.
7 SFG missed this deadline by more than a month. In addition, SFG has now amended and/or
8 supplemented its Formal Complaint four times. Johnson Utilities has not consented to any of
9 these amendments.

10 Rule 15(a) states that in all cases other than those specifically identified above, the party
11 seeking to amend a pleading must first obtain leave of the court, or the Commission in this case.
12 SFG quotes the portion of the rule which states that “[l]eave to amend shall be freely given when
13 justice requires.” However, this statement applies to the court or the Commission as it considers
14 a request to amend a pleading. It does not give SFG the unilateral right to file supplement after
15 supplement after supplement to the Formal Complaint. Thus, Johnson Utilities requests that the
16 Commission require SFG to comply with Rules 15(a) and 15(d) by seeking permission from the
17 Commission before filing additional amendments and/or supplements to the Formal Complaint.

18 In Section III of its Motion for Emergency Order, SFG asserts that its golf course “is
19 already burning up without water.” However, SFG has now requested CAP water from Johnson
20 Utilities and the Company can supply all of the water that SFG may reasonably request using a
21 combination of effluent, CAP water, and if necessary, non-potable water upon approval of the
22 Commission. Thus, there is not now—nor has there ever been—an emergency.

23 **RESPONSE AND MOTION TO STRIKE THIRD SUPPLEMENT TO COMPLAINT**

24 In its Third Supplement to Complaint dated May 17, 2013, SFG alleges that “[b]eginning
25 on Sunday May 12 and continuing through the morning of Monday May 13, Utility delivered
26 untreated effluent to the HOA, which may have contained fecal matter.”¹³ SFG has no
27 independent knowledge to support this irresponsible allegation, but presumably relied upon

28 ¹³ Third Supplement to Complaint at p. 1, lines 7-8.

1 second hand information and/or an erroneous media report. Attached as Exhibit A to SFG's
2 Third Supplement to Complaint is a copy of a Johnson Utilities press release dated May 15,
3 2013, which states in relevant part, as follows:

4 Johnson Utilities continues its work to address a turbidity incident at its San Tan
5 wastewater facility this week. The incident was the source of an unpleasant, but
6 harmless, odor and considerable public interest. The incident began with a partial
7 power failure that has now been remedied. It was erroneously reported that
untreated sewage was discharged into the San Tan Homeowners Association
pond.

8 As reported to ADEQ, Johnson Utilities responded to the incident by halting
9 discharge of effluent to the lake and removing the water for reprocessing through
10 the WRP. Johnson is now completely emptying the ponds. They will then
11 remain empty until scheduled repairs by the San Tan Heights HOA are
12 completed. The HOA is making changes to the piping connecting their two
ponds. Because this work was planned before the turbidity event this week, it has
allowed the HOA to take advantage of the drained pond.

13 Johnson Utilities wants the record to be very clear on this point. At no time did the
14 Company discharge untreated effluent containing fecal matter to the San Tan Heights HOA
15 irrigation ponds. All effluent delivered to the San Tan Heights HOA had been treated, although
16 the effluent was high in turbidity as a result of a power interruption at the San Tan WTP and
17 subsequent failure of the aerators to immediately come back on line. The effluent with high
18 turbidity was pumped out of the HOA's lake and reprocessed in the Company's San Tan WTP.

19 In its Third Supplement to Complaint, SFG provides a table of purported effluent
20 deliveries to SFG for the period May 12-17, 2013, and asserts that "approximately 3,000,000
21 gallons of Effluent appear to have already gone missing."¹⁴ Johnson Utilities has several
22 responses to these erroneous assertions. First, SFG's assertion that Johnson Utilities had
23 "average production" of 800,000 gallons of effluent per day for the May 12-17 time period is not
24 accurate. Second, contrary to SFG's assertion, Johnson Utilities can account for all effluent
25 discharged from the San Tan WTP, and no effluent has "gone missing" as claimed by SFG.
26 Third, as discussed above, Johnson Utilities had a power interruption at the San Tan WTP
27 during the week of May 12, 2013, which disrupted normal operations at the plant and interrupted

28 ¹⁴ *Id.* at p. 2, lines 4-8.

1 the delivery of effluent. During this time, some effluent was delivered to SFG, some effluent
2 was delivered to a farmer, and some effluent was pumped into the ground. Thus, the purported
3 analysis of effluent deliveries during the week of May 12-17 as provided by SFG is erroneous.

4 There is another erroneous allegation in SFG's Third Supplement to Complaint. SFG
5 alleges that "Utility can make far more money pumping Effluent into the ground than it would
6 selling it to its customers."¹⁵ This is patently false. In reality, Johnson Utilities makes no
7 money on effluent that is pumped into the ground. The San Tan WTP is not permitted to accrue
8 underground storage credits for recharging effluent that could then be applied to offset the
9 Company's replenishment obligations as a member of the Central Arizona Groundwater
10 Replenishment District ("CAGRDR"). Thus, pumping effluent into the ground at the San Tan
11 WTP does not allow Johnson Utilities to avoid the CAGRDR charge on pumped groundwater
12 which is currently \$1.51 per thousand gallons in the Phoenix Active Management Area
13 ("Phoenix AMA"). SFG's assertion that "Utility will make \$1.51 per thousand gallons for
14 Effluent that it pumps into the ground" is simply wrong.¹⁶

15 Moreover, even if Johnson Utilities was permitted to accrue underground storage credits
16 (which it is not), the Company would not be "earning \$1.51 per thousand gallons just by
17 pumping the Effluent into the ground," as argued by SFG.¹⁷ The CAGRDR charge of \$1.51 per
18 thousand gallons pumped in the Phoenix AMA is a pass-through charge which is paid by the
19 Company's customers pursuant to a tariff approved by the Commission. Therefore, if Johnson
20 Utilities was to accrue underground storage credits for effluent pumped into the ground, there
21 would be a reduction in the amount that the Company owed the CAGRDR, which would reduce
22 the amount of the CAGRDR adjuster charge paid by the Company's customers. In other words,
23 the reduction in CAGRDR charges would accrue to the benefit of the customers of Johnson
24 Utilities and not to the Company.

25 In Section IV of the Third Supplement to Complaint, SFG asks whether Johnson Utilities
26 is billing the San Tan Heights HOA a phantom CAGRDR charge. This misguided premise is utter

27 ¹⁵ *Id.* at p. 2, lines 16-17.

28 ¹⁶ *Id.* at p. 3, lines 8-9.

¹⁷ *Id.* at p. 3, lines 12-13

1 nonsense and based upon the erroneous assumption that the San Tan Heights HOA is billed
2 under the Company's non-potable water service tariff. This is not the case. The San Tan
3 Heights HOA receives a combination of effluent and CAP water, and it does not receive water
4 under the non-potable water service tariff. Moreover, SFG does not represent the San Tan
5 Heights HOA, and the HOA is not a party to this action. Thus, SFG lacks standing to raise any
6 argument on behalf of the San Tan Heights HOA. Thus, Johnson Utilities requests that the
7 Commission strike those portions of SFG's Third Supplement to Complaint which purport to
8 raise issues on behalf of the San Tan Heights HOA, and order SFG to refrain from raising
9 additional issues on behalf of the HOA in future filings.

10 Finally, in the conclusion to the Third Supplement to Complaint, SFG asserts that
11 "Utility is clearly continuing to withhold Effluent deliveries from Swing First," and that "Swing
12 First just needs Effluent for irrigation and to maintain lake levels."¹⁸ SFG's premise that
13 Johnson Utilities is withholding effluent from SFG is based upon the fallacious argument that
14 SFG has a priority right to the effluent.¹⁹ SFG has never established such a right in any
15 proceeding before this Commission or in the Maricopa County Superior Court litigation (Docket
16 CV2008-000141). In addition, SFG is now accepting CAP water from Johnson Utilities, and
17 with the combination of effluent and CAP water, SFG's irrigation lake is close to full as of the
18 date of this filing.

19 For the reasons set forth above, Johnson Utilities requests that the Commission strike
20 SFG's Third Supplement to Complaint under Rule 15(a) and/or Rule 15(d) of the Arizona Rules
21

22 ¹⁸ *Id.* at p. 4, lines 5, 10 and 11.

23 ¹⁹ As set forth in Johnson Utilities' Motion to Dismiss and Motion to Strike, SFG simply does not have a
24 priority right to effluent over the San Tan Heights HOA. While SFG claimed in its 2008 Formal
25 Complaint (and then again in this docket) that it had a priority right over the San Tan Heights HOA to
the Company's effluent, SFG voluntarily withdrew the 2008 complaint without ever establishing the
legality or validity of such a priority right. Further, the Commission subsequently dismissed the 2008
Formal Complaint with prejudice in Decision 73137, Finding of Fact 114, which states:

26 Swing First has stated it is aware that withdrawal of its Amended Complaint with prejudice will
27 foreclose Swing First from raising those claims again before the Commission even if the Superior
28 Court decides its claims are more appropriately within the Commission's jurisdiction. Therefore,
Swing First has accepted the risk that [the] Superior Court may or may not address the common
claims raised in the Amended Complaint and the Superior Court case.

1 of Civil Procedure. Under either rule, the Third Supplement to Complaint is improper because
2 SFG failed to obtain the required permission from the Commission before filing the pleading.

3 **RESPONSE AND MOTION TO STRIKE UPDATE TO COMPLAINT**

4 In its Update to Complaint, SFG includes two e-mail communications between the
5 attorneys for SFG and Johnson Utilities regarding a settlement proposal by SFG. It is
6 disappointing and concerning that SFG would choose to file settlement communications
7 between attorneys in a public docket without the consent of the parties, and the filing of such
8 communications will likely have a chilling effect on future communications by Johnson
9 Utilities. Although SFG may have believed that it submitted a “very reasonable proposal,”²⁰
10 Johnson Utilities is bound to comply with its approved tariffs by charging the authorized rates
11 for the type of service provided. SFG’s assertion that the Company “would not allow the
12 Commission to determine what is in the customers’ best interests” is inaccurate and self-
13 serving.²¹ In setting rates and charges, the Commission has already determined that the
14 Company’s rates are just and reasonable for the various services provided. In fact, SFG fully
15 participated in the Company’s last rate case. Johnson Utilities believes that it is in the best
16 interests of all of its customers (and not just SFG and the San Tan Heights HOA) to adhere to
17 the tariffed rates and charges for the type of water actually delivered. There is no “arrogance” in
18 such a position as SFG asserts.

19 For the reasons set forth above, Johnson Utilities requests that the Commission strike
20 SFG’s Update to Complaint under Rule 15(a) and/or Rule 15(d) of the Arizona Rules of Civil
21 Procedure. Under either rule, the Update to Complaint is improper because SFG failed to obtain
22 the required permission from the Commission before filing the pleading.

23 **UPDATE REGARDING DISCOVERY**

24 On May 6, 2013, Johnson Utilities issued its First Set of Requests for Admission and
25 Data Requests (collectively, the “Discovery Requests”) to SFG in this docket. At the procedural
26 conference held May 20, 2013, Johnson Utilities advised the ALJ that SFG had failed to timely
27

28 ²⁰ Update to Complaint at p. 2, line 24.

²¹ *Id.* at p. 3, lines 8-9.

1 respond to the Discovery Requests. Since the procedural conference, the parties have had
2 further communications and SFG agreed to provide responses to the Discovery Requests within
3 40 days from the date they were sent, or by June 17, 2013. Because Johnson Utilities does not
4 wish to further trouble the Commission with a discovery matter, the Company agreed to the 40-
5 day response period, notwithstanding the fact that it is four times longer than the customary
6 response period of 10 days. Thus, Johnson Utilities will not ask for any action at this time by
7 the ALJ. However, in the event that SFG fails to timely provide the responses to the Discovery
8 Requests as promised, Johnson Utilities will so advise the Commission.

9 **CONCLUSION**

10 SFG has now requested CAP water to supplement the delivery of effluent and its main
11 golf course lake is close to full. Clearly, SFG has been exposed and there was never a
12 “catastrophe looming” as alleged in its Supplement to Complaint. Thus, the Commission should
13 deny SFG’s Motion for Order to Show Cause and for Emergency Order.

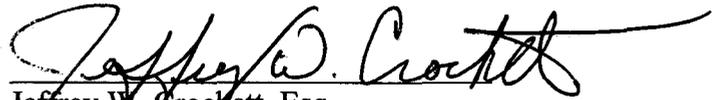
14 Further, SFG failed to comply with Rules 15(a) and/or 15(d) of the Arizona Rules of
15 Civil Procedure because it did not obtain prior permission from the Commission to file the
16 Supplement to Complaint, the Second Supplement to Complaint, the Third Supplement to
17 Complaint and the Update to Complaint as required by the rules. Thus, Johnson Utilities
18 requests that the Commission strike these pleadings for all of the reasons set forth herein.
19 Additionally, Johnson Utilities requests that the Commission strike those portions of SFG’s
20 Third Supplement to Complaint which purport to raise issues on behalf of the San Tan Heights
21 HOA, and order SFG to refrain from raising additional issues on behalf of the HOA in future
22 filings. SFG has no standing to raise arguments on behalf of the San Tan Heights HOA.

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1 Finally, Johnson Utilities requests that the Commission issue its order requiring SFG to
2 comply with Rule 15(a) and Rule 15(d) in the future by obtaining the Commission's prior
3 permission before filing supplements or amendments to the Formal Complaint.

4 RESPECTFULLY submitted this 30th day of May, 2013.

5 BROWNSTEIN HYATT FARBER SCHRECK LLP

6 

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10 ORIGINAL and thirteen (13) copies of the
11 foregoing filed this 30th day of May, 2013, with:

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

15 COPY of the foregoing hand-delivered
16 this 30th day of May, 2013, to:

17 Yvette B. Kinsey, Administrative Law Judge
Hearing Division
18 ARIZONA CORPORATION COMMISSION
19 1200 West Washington Street
Phoenix, Arizona 85007

20 Janice Alward, Chief Counsel
21 Legal Division
22 ARIZONA CORPORATION COMMISSION
23 1200 West Washington Street
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24 Steve Olea, Director
Utilities Division
25 ARIZONA CORPORATION COMMISSION
26 1200 West Washington Street
Phoenix, Arizona 85007

27
28

1 COPY of the foregoing sent via first class mail
2 and e-mail this 30th day of May, 2013, to:

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5 10645 N. Tatum Blvd., Suite 200-676
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