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**BEFORE THE ARIZONA CORPORATION COMMISSION**

COMMISSIONERS

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

2014 JAN 28 A 11:17

ARIZONA CORP COMMISSION  
DOCKET CONTROL

**ORIGINAL**

In the matter of:

THOMAS LAURENCE HAMPTON,  
CRD#2470192, and STEPHANIE YAGER,  
husband and wife,

TIMOTHY D. MORAN, CRD#2326078, and  
PATRICIA MORAN, husband and wife,

PATRICK MORAN, CRD#1496354, and  
KELLY MORAN, husband and wife,

HAMPTON CAPITAL MARKETS, LLC, an  
Arizona limited liability company,

Respondents.

DOCKET NO. S-20823A-11-0407

SECURITIES DIVISION'S RESPONSE TO  
PATRICK AND KELLY MORAN'S FIRST  
REQUEST FOR PRODUCTION OF  
DOCUMENTS TO THE ARIZONA  
CORPORATION COMMISSION

Arizona Corporation Commission

**DOCKETED**

JAN 28 2014

DOCKETED BY

The Securities Division of the Arizona Corporation Commission ("Division") hereby responds to Respondents Patrick and Kelly Moran's First Request for Production of Documents to the Arizona Corporation Commission ("Discovery Request"). Respondents' Discovery Request falls well outside of acceptable discovery limits as permitted for administrative proceedings under both the Arizona Revised Statutes and the Corporation Commission Rules of Practice and Procedure. Additionally, Respondents filed their Discovery Request before the March 28, 2014 due-date for exchanging exhibits and lists of witnesses, as ordered by the administrative law judge Marc E. Stern ("ALJ Stern") by procedural order. On or by March 28, 2014, the Division will comply with appropriate disclosure that comports with the rules applicable for administrative proceedings.



1 possession, custody, or control, or that of your attorneys, employees, agents, investigators, or other  
2 representatives, or is otherwise available to you.”<sup>1</sup> The Discovery Request is overbroad since  
3 Respondents are also requesting documents that may be “otherwise available” to the Division.  
4 Respondents are merely going on a fishing expedition and want an early review of the lists of  
5 witnesses and exhibits (“LWE”) that is in complete disregard of a procedural order in this case,  
6 administrative law, relevant confidentiality statutes and policies, and Commission rules.

7 A. Respondents have not demonstrated a reasonable need for their Discovery  
8 Request, a request that essentially asks for the Division’s file and all possible evidence,  
9 whether in its possession or not, in this matter.

9 Respondent’s Discovery Request fails to comply with applicable statutes or rules. The  
10 statutes and rules explicitly addressing discovery procedures in contested administrative  
11 adjudications before the Corporation Commission are found in Arizona Revised Statutes, A.R.S. §  
12 41-1001, *et seq.* and the Corporation Commission’s Rules of Practice and Procedure, R14-3-101, *et*  
13 *seq.* (“Rules of Practice and Procedure”). A.R.S. § 41-1062(A)(4) requires that the party  
14 demonstrate a reasonable need for the discovery requested. Tellingly, in their Discovery Request  
15 Respondents do not even assert, much less demonstrate, that they have a reasonable need for the  
16 discovery sought.

17 The most likely explanation for this omission is that Respondents do not have a reasonable  
18 need for the incredibly broad discovery they are seeking. Many of the documents requested are  
19 documents that were sent to or from Respondent Patrick Moran or payments made to or from  
20 Respondent Patrick Moran – information that is already available to them or in their possession.  
21 Further, the Respondents can bring their own evidence and conduct cross-examination<sup>2</sup> and they  
22 have their own duty of due diligence if they plan on refuting any or all allegations listed in the  
23 Notice. Respondents have had ample time to obtain any and all relevant documents to defend  
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25 <sup>1</sup> *Respt. Pl.* p.1.

26 <sup>2</sup> A.R.S. § 41-1062(A)(1); A.A.C. R14-3-104.

1 against the Division's allegations, which have been known to them since at least December 4,  
2 2012.

3 Nowhere in the Discovery Request have Respondents detailed any attempts to obtain the  
4 requested documents from available sources or from Patrick Moran. The fact that the Division  
5 may be in possession of certain documents and thus it would be more convenient for the  
6 Respondents to obtain them from the Division is not a sufficient basis in which to request and  
7 grant such discovery. Since the Discovery Request is devoid of any showing—or even assertion—  
8 of reasonable need, the request should be denied.

9 B. Arizona statute explicitly prohibits the Division's disclosure of certain  
10 information unless an applicable exception applies; Respondents have failed to assert  
or establish any applicable exemption.

11 Respondent's Discovery Request fails to address the confidentiality provision and its  
12 limitations on disclosure. The Division's disclosure of documents is limited by A.R.S. § 44-2042,  
13 which requires the Division to keep complaints and several other documents confidential:

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

26 The Division's compliance with the confidentiality statute is mandatory. The Respondents fail to  
cite any Arizona statute or rule that would require the Division to disclose any information or  
document obtained during the course of its investigation or that is otherwise confidential.  
Respondents have not cited any authorization by the Commission or Division director that would  
obviate the Division's required compliance with the confidentiality statute.

1           Additionally, when the Division discloses its LWE and the names of its witnesses as  
2 required by a procedural order, the confidentiality statute will still apply. The LWE is provided to  
3 Respondents and the ALJ; it will not be concurrently docketed or published. Consequently, all  
4 documents, information, and if applicable, complaints obtained in the course of investigation will  
5 not become a public record. Unless and until those documents and information are made public,  
6 the confidentiality provision will apply.

7           Respondents have offered no reason why they are entitled to protected and confidential  
8 materials in this case. Thus, their Discovery Request should be denied.

9           C. Respondents' Discovery Request should be denied because discovery for  
10 administrative proceedings within Arizona is available only within the limits defined  
by statute and agency rule in administrative proceedings.

11           Respondents' Discovery Request does not fall within the limits defined by statute or  
12 Commission rules for administrative proceedings. Courts have often decided on the limits of  
13 discovery in administrative proceedings. These decisions make two salient points.

14           The first of these is that, the rules of civil procedure for discovery **do not** apply in  
15 administrative proceedings.<sup>3</sup> This principle is particularly important from a policy standpoint since  
16 having civil discovery rules control the administrative arena would have many deleterious results  
17 including: 1) allowing Respondents to access confidential investigative information far removed  
18 from the witnesses and exhibits relevant to the active case against them; 2) allowing Respondents  
19 to protract the proceedings indefinitely; 3) allowing Respondents to excessively consume scarce  
20 but vital government resources better expended on other matters necessary for the protection of the  
21 public; and 4) allowing Respondents to force the agency into the position of a civil litigant rather  
22 than into its proper role as a governmental regulatory authority.

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24  
25 <sup>3</sup> See, e.g., *Pacific Gas and Electric Company*, 746 F.2d 1383, 1387 (9th Cir. 1984); *Silverman v. Commodity Futures*  
26 *Trading Commission*, 549 F.2d 28, 33 (7th Cir. 1977); *Banister v. U.S. Department of Treasury*, 2011 WL 7109220  
(N.D. Cal. 2011); *In re City of Anaheim, et al.*, 1999 WL 955896, 70 S.E.C. Docket 1848 (the federal rules of civil  
procedure do not properly play any role on the issue of discovery in an administrative proceeding).

1           The second point is that the authority to pursue discovery during the course of an  
2 administrative proceeding is not conferred as a matter of right. In fact, courts have repeatedly  
3 recognized that there simply is no basic constitutional right to pretrial discovery in administrative  
4 proceedings.<sup>4</sup> Accordingly, discovery in an administrative proceeding is only authorized to the  
5 extent that it is explicitly provided for in a separate statute or rule.<sup>5</sup>

6           A.R.S. § 41-1062 makes it clear that the only forms of pre-trial discovery permitted in  
7 administrative proceedings are 1) subpoenas, based on a showing of need and authorized by the  
8 administrative hearing officer; 2) depositions, based on a showing of need and authorized by the  
9 hearing officer; and 3) any other discovery provision specifically authorized under the individual  
10 agency's rules of practice and procedure. The statute reads:

11           A.     Unless otherwise provided by law, in contested cases the following shall apply:

12                     ....

13                     4.     The officer presiding at the hearing may cause to be issued  
14 subpoenas for the attendance of witnesses and for the production of  
15 books, records, documents and other evidence and shall have the  
16 power to administer oaths... Prehearing depositions and subpoenas  
17 for the production of documents may be ordered by the officer  
18 presiding at the hearing, provided that the party seeking such  
19 discovery demonstrates that the party has reasonable need of the  
20 deposition testimony or materials being sought... *Notwithstanding*  
21 *the provisions of section 12-2212, no subpoenas, depositions or*  
22 *other discovery shall be permitted in contested cases except as*  
23 *provided by agency rule or this paragraph. (Emphasis added).*

24           The relevant agency rules in this case are the Rules of Practice and Procedure. Under these  
25 rules, the presiding administrative law judge may direct a pre-hearing conference wherein an  
26 arrangement is made for the exchange of proposed exhibits, witness lists, or prepared expert

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<sup>4</sup> *Silverman*, 549 F.2d. at 33; *Pet v. Dep't of Health Services*, 542 A.2d 672 (Conn. 1988) ("The Constitution does not require that a respondent in an administrative proceeding be aware of all evidence, information and leads to which opposing counsel might have access.").

<sup>5</sup> *See, e.g., Pet*, 542 A.2d at 678; *Pacific Gas & Electric Co. v. F.E.R.C.*, 746 F.2d 1383, 1387 (9th Cir.1984); *See also* 73A C.J.S. *Public Administrative Law and Procedure*, § 124 (1983) ("Insofar as the proceedings of a state administrative body are concerned, only the methods of discovery set forth by the pertinent statute are available, and the methods not set forth therein are excluded").

1 testimony.<sup>6</sup> These rules also provide that a party may gain access to additional pre-hearing materials  
2 by way of a discretionary ALJ order requiring that the parties interchange copies of exhibits prior to  
3 hearing.<sup>7</sup> Corporation Commission administrative law judges often call upon these rules in ordering  
4 parties to file a list of witnesses and exhibits at a time and date in advance of the hearing, thereby  
5 facilitating the hearing preparation process.

6 In this case, on October 24, 2013, by the sixteenth procedural order, Administrative Law  
7 Judge Marc Stern (“ALJ Stern”) ordered the Division and Respondents to exchange their LWEs on  
8 March 28, 2014, and set the matter for final contested hearing on May 12, 2014, with the parties  
9 further ordered to set aside May 13 through 16 as additional hearing dates. Pursuant to this order, on  
10 or prior to March 28 the Division will provide Respondents with all documentation the Division will  
11 seek to introduce as evidence at the evidentiary hearing of this matter. This will consist of  
12 documents supporting the Division’s allegations listed in the Seconded Amended Notice of  
13 Opportunity for a Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution,  
14 Order for Administrative Penalties, Order for Revocation, and Order for Other Affirmative Action  
15 (“Notice”) against Respondents. The Division is fully aware that it is the Division’s responsibility to  
16 establish its allegations at the hearing. That is what the LWE and the hearing are for. In  
17 conformance with established law and procedure, Respondents will have the opportunity to review  
18 the LWE before the hearing and to examine witnesses called at the hearing.

## 19 II. CONCLUSION

20 The discovery rules for contested administrative proceedings in Arizona are expressly  
21 established by statute and agency rule. Only discovery within the limits defined by statutes or  
22 Commission rules for administrative proceedings are permitted. Discovery is restricted to matters  
23 that are relevant and to instances where there is a requisite showing of reasonable need.  
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26 <sup>6</sup> A.A.C. R14-3-108(A).

<sup>7</sup> A.A.C. R14-3-109(O) & (P).

1 Respondents have failed to prove or even assert that they have a reasonable need for any portion of  
2 their request.

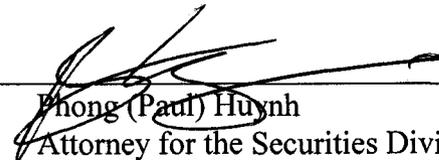
3 Discovery in administrative proceedings is limited further by the confidentiality provisions.  
4 Respondents have offered no reason why they are entitled to protected and confidential materials.

5 For contested administrative proceedings in Arizona, the applicable statutes and agency  
6 rules allow disclosure as ordered by the ALJ. In this case, that is an exchange of LWEs on March  
7 28, 2014.

8 Since Respondent's Discovery Request fails to comply with applicable statutes or rules and  
9 an LWE schedule has already been ordered in this matter, the Discovery Request should be denied.  
10

11 RESPECTFULLY SUBMITTED this 28 day of January, 2014.

12  
13 By \_\_\_\_\_

  
Phong (Paul) Huynh  
Attorney for the Securities Division of the  
Arizona Corporation Commission

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15  
16 ORIGINAL AND EIGHT (8) COPIES of the foregoing  
17 filed this 28 day of January, 2014, with

18 Docket Control  
19 Arizona Corporation Commission  
1200 West Washington  
Phoenix, AZ 85007

20 COPY of the foregoing hand-delivered this  
21 28 day of January, 2014, to:

22 Mr. Marc Stern  
23 Administrative Law Judge  
Arizona Corporation Commission/Hearing Division  
24 1200 West Washington  
Phoenix, AZ 85007  
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