

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of Interstate Gas)	
Supply, Inc. d/b/a IGS Energy,)	
)	
Complainant,)	
)	
v.)	Case No. 19-362-GE-CSS
)	
Santanna Natural Gas Corporation d/b/a)	
Santanna Energy Services,)	
)	
Respondent.)	

MEMORANDUM CONTRA MOTION TO COMPEL

I. INTRODUCTION

Ohio law allows for a supplier to file a good faith complaint against another supplier alleging a violation of Ohio law or the Public Utilities Commission of Ohio's (Commission) rules.¹ The Commission's rules allow that supplier to discover information related to its complaint and the specific allegations alleged therein.² Neither Ohio law nor the Commission's rules provide that a supplier may file a complaint making limited allegations of wrongdoing against a competitor and then use that complaint and the discovery process to launch an investigation into the business and marketing practices of a competitor in search of wrongdoing beyond that which it alleged in its Complaint.

Interstate Gas Supply, Inc. d/b/a IGS Energy (IGS) filed a complaint against Santanna Natural Gas Corporation d/b/a Santanna Energy Services (Santanna or Respondent) alleging that

¹ See R.C. 4905.26.

² See Ohio Adm. Code 4901-1-16, et seq.

Santanna deceptively solicited IGS customers telephonically (Complaint). IGS did not specifically mention or name any IGS customers to whom the alleged wrongdoing purportedly occurred. IGS did not specifically allege that any specific enrollment was unlawful or violated Commission rules. In fact, the only allegations in the Complaint are general assertions of Santanna's purported marketing and solicitation practices. General allegations are insufficient to substantiate a complaint as IGS has failed to assert factual allegations that sustain its claims. Ohio Adm. Code 4901-9-01(B). See also *See Jim's Steak House, Inc. v. City of Cleveland*, 81 Ohio St.3d 18, 19, 688 N.E.2d 506 (1998); *Ohio Utilities Co. v. Pub. Util. Comm'n*, 58 Ohio St.2d 153, 159 (1979); *In the Matter of the Complaint of Diana Williams v. Ohio Edison Co.*, Case No. 08-1230-EL-CSS, Finding and Order at ¶ 13 (October 28, 2009).

Nonetheless, IGS is attempting to use those general allegations to conduct an investigation into the operating and business practices of a competitor, Santanna, in hopes of finding some wrongdoing somewhere. This is an inappropriate use of the Commission's discovery process. Thus, this discovery dispute is now before the Commission because IGS incorrectly believes that its Complaint alleging that Santanna improperly solicited IGS customers telephonically somehow entitles IGS to obtain discovery related to Santanna's door-to-door solicitation practices despite the fact that IGS' Complaint does not allege that Santanna violated any laws or Commission rules with regard to its door-to-door solicitations or any specific enrollments.³

Santanna opposes IGS' attempt to extract discovery related to a different part of Santanna's business than that which was put at issue through the Complaint by IGS. In order to have a fair and reasonable discovery process, Ohio Adm. Code 4901-1-16(B) limits the scope of discovery in

³ See Complaint (February 1, 2019).

Commission proceedings to matters which are “relevant to the subject matter of the proceeding.” As discussed further below, IGS defined the subject matter of this proceeding through its Complaint, and did not place Santanna’s door-to-door solicitation practices or enrollments at issue, only asserting claims relating to telephonic solicitations and sales. Under the Commission’s rules, IGS may not use that limited Complaint to compel discovery on essentially all of Santanna’s solicitation operations and other business practices. Such an outcome would be unjust, unreasonable, and overly burdensome.

When Santanna did not acquiesce to IGS’ attempts to use the discovery process associated with this Complaint to seek information related to other aspects of Santanna’s business, IGS filed the Motion to Compel (Motion) that is the subject of this Memorandum Contra.⁴ Pursuant to Ohio Adm. Code 4901-1-12(B)(1), Santanna hereby files this memorandum contra IGS’ Motion to Compel discovery. For the reasons discussed below, the Commission should deny IGS’ Motion.

II. BACKGROUND AND APPLICABLE LAW

As IGS admits in its Motion, “IGS’ Complaint defines the scope and subject matter of the proceeding.”⁵ IGS determined the substance of the Complaint it filed, as well as the specific allegations asserted therein. It had the ability and the right to assert any facts or legal claims that it believed that it could prove at hearing before the Commission. The claims and allegations that IGS made speak for themselves. IGS believed it could prove at hearing that Santanna’s sales representatives contacted and solicited unnamed IGS customers and others via specific **telephone** numbers and claimed the following: 1) that Santanna was representing IDS Energy;⁶ 2) that IDS

⁴ See Motion to Compel (June 7, 2019) (Motion to Compel).

⁵ Id. at 11.

⁶ Id. at ¶¶ 8-9

Energy is not affiliated with Santanna or registered to conduct business with the Ohio Secretary of State;⁷ 3) that, during those calls, Santanna’s representatives made certain representations to the individuals that they had contacted;⁸ 4) that, on these calls, Santanna’s representatives acted with intent to mislead IGS customers;⁹ 5) that Santanna’s representatives solicited IGS customers with offers to enroll with Santanna’s services;¹⁰ and, 5) that these actions violated Ohio law and Commission rules.¹¹ That is the extent of the factual allegations underlying IGS’ legal claims.

As the Complaint defines the scope of the proceeding, it also defines the scope of discovery. Under Ohio Adm. Code 4901-1-16(B), parties “may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding” or which is “reasonably calculated to lead to the discovery of admissible evidence.” In other words, the Commission’s discovery rules do not provide parties an unfettered license to launch an investigation into all matters of its competitors and probe into any topic it desires at any given moment in the litigation. Rather, discovery is a vehicle by which parties reasonably may obtain information which is related to the claims and defenses asserted in the specific case. Thus, the relevant inquiry in determining Santanna’s obligations to respond to IGS’ discovery requests is whether the requests are relevant to the subject matter of the proceeding, as defined by IGS’ own Complaint, or otherwise reasonably calculated to lead to the discovery of admissible evidence. As outlined below, the subject requests meet neither of these criteria established by the Commission’s discovery rules.

⁷ Id. at ¶ 9.

⁸ Id. at ¶ 10.

⁹ Id. at ¶ 11.

¹⁰ Id. at ¶ 12.

¹¹ See id. at ¶¶ 13-26.

In responding to this Motion, Santanna references various allegations in the Complaint and their relation to the discovery requests at issue here. Santanna by no means accepts the truth of any of these allegations—as evidenced by its Answer to the Complaint¹²—and references them only insofar as they define the scope of the this Complaint proceeding and the discovery obligations of the parties given that scope.

III. ARGUMENT

A. Despite IGS’ Attempts to Recast the Allegations in Its Complaint, the Complaint Does Not Allege Wrongdoing by Santanna Related to Door-to-Door Solicitation.

IGS acknowledges that the contents of its Complaint are relevant to determining appropriate boundaries for discovery in this matter.¹³ Recognizing this, IGS advances the argument that the Complaint encompasses door-to-door solicitations. IGS’ argument is essentially that Paragraph 5 of the Complaint alleges that Santanna markets its products and services to Ohio customers through door-to-door sales and telemarketing and the various causes of action asserted by IGS all incorporate Paragraph 5 by reference.¹⁴ Therefore, IGS argues, door-to-door solicitations are relevant to the Complaint. This argument fails for two reasons. First, IGS blatantly misstates the substance of Paragraph 5 of its Complaint. Second, even if IGS did allege that Santanna conducted door-to-door solicitations, the Complaint still only asserts that Santanna acted wrongfully with regard to telephonic solicitations.

Paragraph 5, which IGS contends brings allegations of wrongdoing by Santanna in door-to-door solicitations, reads as follows:

Under Ohio’s consumer “choice” program, electric service companies and retail natural gas suppliers market their products and

¹² See Answer (February 21, 2019).

¹³ See Motion to Compel at 11.

¹⁴ Id.

services to Ohio consumers through direct mail solicitations, online marketing, door-to-door sales, and telemarketing.¹⁵

The paragraph does not even mention Santanna. This paragraph also does not allege any wrongdoing with regard to any supplier or method of marketing and solicitation practices. IGS states that electric service companies and retail natural gas suppliers market their products and services to Ohio consumers through various means, including telemarketing and door-to-door solicitations. This is a statement of background information on the Ohio choice program; it is a historic fact that speaks generally to the nature of marketing by all electric service companies and retail natural gas suppliers in the state. It is not an allegation or statement of fact regarding *Santanna* and Santanna's methods of marketing. In its Motion, IGS appears to admit that the statement is not specific to Santanna when it argues that "IGS' Complaint clearly states that **suppliers like Santanna** market products and services via door-to-door marketing and telephonic solicitation."¹⁶ It should go without saying that a general statement regarding "suppliers like Santanna" is not an allegation of wrongdoing about Santanna.

This point is reinforced by a separate allegation in the Complaint that is specific to Santanna and does in fact specify and limit the forms of marketing that IGS is complaining about. After providing background on the choice program and explaining how "suppliers like Santanna" conduct their business, IGS makes allegations related to how Santanna itself generally conducts its business. In Paragraph 7 of the Complaint, IGS alleges that "[u]pon information and belief, Respondent advertises its products and services to Ohio consumers via telemarketing."¹⁷ Here, in discussing Santanna and how it conducts solicitations, IGS does not attempt to allege that Santanna

¹⁵ Complaint at ¶ 5.

¹⁶ Motion to Compel at 12 (emphasis added).

¹⁷ Complaint at ¶ 7.

even engages in door-to-door solicitation, let alone that it does so improperly. In the following paragraph, IGS makes allegations of specific actions purportedly taken by Santanna's sales representatives while soliciting telephonically, and then continues describing those alleged actions until it begins the section of the Complaint where it asserts legal claims.¹⁸

Even if IGS had made an allegation that Santanna used door-to-door solicitation in Paragraph 5 of the Complaint as it claims in its Motion, that allegation would still be insufficient to sustain extensive and burdensome discovery related to door-to-door solicitations given that IGS did not allege wrongdoing with regard to door-to-door solicitations or any specific enrollment. IGS only alleged wrongdoing with regard to telephonic solicitations. The assertion that such an allegation would be sufficient to open the door to all types of discovery on any business practice or operation strains reason. By IGS' logic, any statement about a part of another party's business operation in a complaint—even if that statement is not related to the substance of the complaint—would enable the complainant to conduct discovery on that aspect of the respondent's business and operations.

This point is best illustrated through an example. Had IGS stated in its Complaint that “Santanna employs managers and executives that oversee its operations” and otherwise made the same allegations it makes here, it would not be permitted to conduct discovery on the salaries and benefits paid to those employees solely because they are mentioned in the Complaint. Doing so would plainly be an abuse of the discovery process, just as it is an abuse of the discovery process for one competitor in the market to use a statement that suggests that it is possible that a supplier like Santanna uses door-to-door solicitation to then conduct invasive, burdensome, unreasonable

¹⁸ See Complaint at ¶¶ 8-13.

discovery about an element of Santanna's solicitation business that IGS did not allege as being conducted wrongfully or improperly.

Perhaps recognizing that the Complaint it filed does not support the discovery it seeks to compel, IGS references information that it has "learned through discovery and its own internal investigation that Santanna's door-to-door agent(s) contacted IGS' customers and other Ohio consumers by phone and made certain representations that are in violation of Ohio law and the Commission's rules." Although Santanna believes that this statement is factually incorrect, it is not a proper basis to expand the scope of discovery. First, a statement in a motion to compel is not the equivalent to an allegation leveled in a complaint. As previously discussed, allegations in Complaints define the scope of the hearing, as they establish the facts and legal claims that the complainant is asking the Commission to resolve. A statement in a pleading such as the one IGS makes here does not have the same effect and cannot be used as a basis to compel discovery.

Second, to the extent the reference to an internal investigation is referring to the voluntary call to a vendor by IGS' executive on behalf of his wife's account, there was no solicitation by Santanna as the agent did not contact Ms. White, and, therefore, that enrollment cannot be alleged to be improper under the Complaint. Further, what IGS learned through discovery was that the phone numbers identified in the Complaint were not and are not used by Santanna or its third-party vendors authorized to conduct telephonic solicitations.

To be clear, Santanna has not objected to discovery about its telephonic solicitations (as IGS has actually alleged wrongdoing in that area of Santanna's operations) and would not object on relevance grounds to discovery that is tailored to that issue. The discovery in dispute, however, is by no means a "narrowly tailored series of inquiries intended to lead to relevant and admissible

information.”¹⁹ Rather, it is an expansive series of inquiries into elements of Santanna’s business that do not have anything to do with the Complaint that IGS filed. Such inquiries are unjust, unreasonable, and unduly burdensome.

Ultimately, IGS cannot use this Complaint as a fishing expedition to investigate a competitor’s business when it has not even alleged that the business it seeks to investigate is being conducted in violation of Ohio law or Commission rules. To do so would make a mockery of the discovery process and open the floodgates to meritless complaints filed by suppliers and entities for the sole purpose of gaining access to information about its competitors that it would not otherwise be able to learn.

B. Santanna’s Objections to the Disputed Discovery Were Well-Made, in Accordance with Ohio Law, and Should Be Sustained.

IGS identified 14 specific interrogatories and requests for production for which it asks the Commission to compel a response. These requests all concern information that is beyond the scope of the Complaint and is not reasonably calculated to lead to the discovery of evidence that is admissible and relevant to the Complaint, as Ohio Adm. Code 4901-1-16(B) requires. Below, Santanna explains why the objections asserted to the subject discovery requests were properly made and should be sustained.

Before proceeding to the discussion of specific requests, Santanna notes that for multiple requests, IGS drew attention to the fact that Santanna objected to requests on the grounds that they sought information that was confidential or competitively sensitive and argues that the objections are invalid because the parties have executed a protective agreement. Santanna notes that at the time initial responses were provided and the objects were made, the protective agreement was not

¹⁹ See Motion to Compel at 12.

in place, and, therefore, the objections were and are proper. Santanna further notes that the existence of a protective agreement does not necessarily address all objections on confidentiality grounds. For example, the protective agreement would not allow either party to access information or documents protected by the attorney-client privilege, which would be one form of confidentiality covered by Santanna's objection.

i. Interrogatory Nos. 3 and 4

These requests concern the identity and contact information of Santanna's door-to-door sales representatives between October 15, 2018 and April 30, 2018. The first statement IGS makes about these requests reveals that they lack relevance. In its Motion, IGS states: "Paragraph 8 of IGS' complaint alleges that Santanna's *sales representatives* improperly solicited customers **by telephone**. For that reason, IGS asked Santanna in Interrogatory 3 to identify all third-party agents or vendors it used to solicit electric and natural gas products **door-to-door** over a specific seven-month period."²⁰ IGS' position appears to be that an allegation of misconduct in soliciting customers telephonically allows IGS to also conduct discovery on door-to-door solicitations. This is not supported by a fair reading of the Complaint, which focuses its allegations exclusively on telephonic solicitations.

Nonetheless, IGS states that "IGS' reference to Santanna's 'sales representatives' should be read to include any individual Santanna retained to solicit products on its behalf."²¹ A full reading of IGS' Complaint, however, belies that interpretation. IGS alleged that misrepresentations occurred over the phone, even alleging specific telephone numbers that it claims were used to make the misrepresentations. Not once does it make an allegation that sales

²⁰ Motion to Compel at 12 (emphasis added).

²¹ Id. at 13.

representatives ever engaged in improper actions through door-to-door solicitations or that any enrollments were improper. IGS' statement in its Motion regarding how terms in the Complaint "should be read" carries little weight when the Complaint itself does not support such a reading. Similarly, assertions that it has a "substantial basis" to believe that door-to-door agents engaged in misconduct²² is not material when IGS did not allege that "substantial basis" when IGS had the opportunity to put its claims before the Commission through its Complaint and did not state any facts or produce documents to substantiate those claims.

As stated above, Santanna does not object on relevance grounds to interrogatories concerning telephonic solicitations, and IGS still seems to be asserting that the allegations at issue here took place over the phone. Yet, these discovery requests do not seek that information. Accordingly, Santanna maintains its objections to the relevance of Interrogatory Nos. 3 and 4 to the allegations in IGS' Complaint.

ii. Interrogatory Nos. 26 and 27

These requests seek information about the enrollment of Jennifer White, which was never alleged to be improper in the Complaint. As an initial matter, Santanna notes that Jennifer White is the spouse of IGS executive Matthew White. In its letter to IGS, attached as Exhibit 7 to IGS' Motion, Santanna described how it now has reason to believe that this entire Complaint arose when Mr. White personally called a third-party vendor to enroll his wife's account with Santanna. Although unsubstantiated, IGS implicitly claimed through discovery (not in the Complaint) that Ms. White was deceived and misled by the sales tactics of Santanna's sales representatives. However, first, even assuming what IGS is stating is true (which Santanna has no basis to support

²² Id. at 13.

IGS' assertion), if Mr. White (not Ms. White) voluntarily and proactively called the third-party vendor to inquire into enrolling in Santanna's products and services, no solicitation by Santanna's representative even occurred, and, thus, there could be no improper telephonic solicitation, which is the only allegation in the Complaint. Second, Santanna believes that the circumstances surrounding the voluntary call by Mr. White to enroll his wife's account with Santanna and Mr. White's statements to the third-party verifier are worthy of investigation by the Commission for impropriety. See IGS' Motion, Exhibit 7 at 2.

In any event, despite the suspect nature of Ms. White's enrollment by Mr. White and the fact that Ms. White's enrollment was not alleged as improper in the Complaint, Santanna answered these interrogatories in the spirit of resolving this matter amicably. Therefore, it is unclear what objection IGS is raising. When asked about contracts involving Ms. White, based upon information and belief, Santanna stated that it acted in accordance with the Commission's rules. That is a sufficient answer to the request.

IGS, however, strangely claims that "to the extent that Santanna has evidence that the enrollment is lawful IGS should be entitled to evaluate it." First, it is IGS, not Santanna that has the burden of proof in this matter. Santanna does not have an obligation to present affirmative evidence of the lawfulness of its conduct, IGS has the burden to prove that the conduct was not lawful. Second, it is not clear what evidence IGS is stating that these requests are even asking Santanna to produce; they are factual questions that Santanna answered.

Nonetheless, although not alleged in the Complaint, IGS appears to be stating that it does have evidence to suggest that the specific enrollment of Ms. White (or Mr. White as the case may be) was somehow improper. IGS, however, has failed to produce such "evidence" even though Santanna has repeatedly asked for it through discovery. In a letter dated May 16, 2019, Santanna

again inquired into the purported “evidence” to ascertain the validity of IGS’ claim and to determine how it may be related to the Complaint.²³

Contrary to IGS’ claims in its May 10, 2019 letter and even though Santanna requested the information through discovery, IGS has not produced any documentation to demonstrate that “Santanna’s door-to-door agent(s) contacted IGS’ customers by phone and made certain representations.” In fact, IGS admitted that Jennifer White (an IGS customer) was never contacted by any agent via phone or otherwise. Instead, IGS admitted that its “internal investigation” consisted of IGS’ general counsel (Mr. White) contacting a sales representative that has sold products for Santanna and misrepresenting and/or misleading that agent to enroll his wife’s accounts in what IGS apparently now alleges was in an improper manner. Santanna has no idea what Mr. White said to the agent, which IGS now claims may have violated Commission rules. Nonetheless, a third-party verifier would have had to follow up with Mr. White to verify such enrollment. Had the enrollment not occurred correctly or the agent somehow violated a Commission rule, the enrollment would have never occurred as it would have been deemed to be invalid through the third-party verifier’s process. The only way the enrollment would have been completed in the manner suggested by IGS would have required IGS’ general counsel to be untruthful to the third-party verifier by falsely answering the required questions.

If IGS has such “evidence,” IGS should be the party producing it, not Santanna.

Here again, IGS is reaching beyond the scope of the Complaint in an attempt to conduct its own investigation of Santanna’s routine business practices. In its Complaint, IGS did not allege that Santanna unlawfully solicited or enrolled customers via direct solicitation or that the enrollment of Jennifer White (or any other specific customer for that matter) was unlawful. IGS is not entitled to “evaluate” whether a specific enrollment (of the wife of IGS’ general counsel or the general counsel himself) by a method that is not the subject of the Complaint is lawful. Despite IGS’ attempts to insert Ms. White and her enrollment into this proceeding when it did not allege

²³ See IGS’ Motion, Exhibit 7 at 2.

any defect in her enrollment—or even mention her at all—in its Complaint, this information is still not relevant to the allegations made in the Complaint, which is the document controlling the scope of this proceeding. Specifically, Ms. White was not included in the Complaint as Ms. White was not solicited via telephone by Santanna or its third-party agents. Therefore, Ms. White’s enrollment is not the subject of the Complaint and is, thus, not relevant.

iii. Interrogatory No. 32

Interrogatory No. 32 is also about the central dispute in this discovery conflict: whether IGS is entitled to conduct discovery on elements of Santanna’s business that are not at issue in the case. Specifically, IGS is again contending that it is entitled to ask discovery regarding the enrollment of Ms. White. Even though Ms. White’s enrollment was not alleged as improper in the Complaint, in an attempt to clear up any confusion, Santanna stated in response to Interrogatory No. 25 that, upon knowledge and belief, Ms. White was enrolled by direct solicitation.²⁴ As Santanna has stated its belief that Ms. White’s enrollment was not performed by telephonic solicitation, it is beyond the scope of the Complaint. Accordingly, Santanna’s objection to relevance should be sustained.

iv. Interrogatory No. 33

Similar to Interrogatory No. 32, Interrogatory No. 33 seeks information concerning the enrollment of Ms. White, which, again, was not alleged to be improper in the Complaint. As stated previously, this enrollment was not performed by telephonic solicitation, and is therefore beyond the scope of the Complaint and the discovery process. This particular request is doubly problematic because it goes beyond a single enrollment and asks Santanna to produce records of

²⁴ See Motion to Compel, Exhibit 4 at INT-01-25.

every enrollment by the requested vendor when the enrollment that forms the basis for the request is not even one that is relevant to the Complaint. Such a request is beyond the scope of the Complaint, is unjust, unreasonable, and unduly burdensome.

v. Interrogatory Nos. 36-39

These requests mirror those disputed at Interrogatory Nos. 26 and 27 above. As Santanna stated in discussing those responses, Santanna is unclear why these requests were included in the Motion given that Santanna responded to these requests (despite their questionable relevance) in order to share information helpful in resolving this dispute. Santanna stated in response to these requests that it acts in accordance with Commission rules regarding such activities. These are responsive answers to the identified requests and provide IGS with the information it seeks.

vi. Request for Admission No. 8

Request for Admission No. 8 is symptomatic of the reality that this entire Complaint is nothing more than a fishing expedition undertaken by one supplier in search of wrongdoing by a competing supplier. The request concerns the matter of whether or not Santanna retained a natural gas acknowledgement form when it enrolled Ms. White (again, Ms. White's enrollment was not alleged to be improper in the Complaint). It concerns the existence of a signed acknowledgement form, as required by Ohio Adm. Code 4901:1-29-06(D)(6), for natural gas enrollments performed via direct solicitation. There is no such requirement for telephonic solicitations, which is the subject of this Complaint. IGS submits this request for no other basis than to test Santanna's compliance with Commission rules which it does not allege Santanna broke in the Complaint. IGS is not an investigative body, it is Santanna's competitor, and the invasive probing untethered from its Complaint that it seeks to conduct through this discovery process is inappropriate and beyond the scope of the fair, reasonable discovery process provided by the Commission's rules.

vii. Request for Production Nos. 4-6

These requests relate to many of the interrogatories discussed above. Accordingly, Santanna reaffirms that these requests are not relevant to the Complaint, as they concern door-to-door solicitations and Ms. White's enrollment, which were not alleged to be improper in IGS' Complaint. IGS alleged wrongdoing with regard to Santanna's telephonic solicitations, and these are not telephonic solicitations.

IV. CONCLUSION

For the reasons discussed herein, Santanna respectfully requests that the Commission deny IGS' Motion to Compel as the discovery requests for which it seeks an order compelling responses that are beyond the scope of its own Complaint and therefore beyond the scope of the discovery process as established by the Commission in Ohio Adm. Code 4901-1-16, et seq. The requests are also unjust, unreasonable, and unduly burdensome in violation of Ohio law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served via electronic mail on all parties of record on June 24, 2019.

/s/ Kimberly W. Bojko

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Case No(s). 19-0362-GE-CSS

Summary: Memorandum Contra Motion to Compel electronically filed by Mr. Brian W Dressel
on behalf of Santanna Natural Gas Corporation