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Via Federal Express

Docket Control  
Arizona Corporation Commission  
1200 W. Washington  
Phoenix, AZ 85007

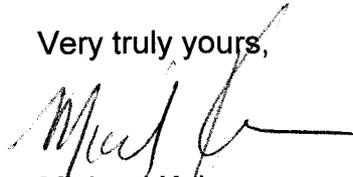
Re: Lonzo Archer  
Docket No. S-3557A-04-000

Dear Sir or Madam:

Enclosed please find an original and thirteen (13) copies of our Memorandum in Opposition to the Division's Motion to Recognize Securities Division Allegations as Admitted and a Docket Control Sheet in connection with the above captioned matter.

Thank you.

Very truly yours,



Michael Kalmus

Encl.

Arizona Corporation Commission  
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Arizona Corporation Commission

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10 Attorneys for Respondents

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11 **BEFORE THE ARIZONA CORPORATION COMMISSION**

12 In the Matter of )  
13 )  
14 LONZO ARCHER )  
15 1512 Plymouth Road )  
16 North Brunswick, NJ 08902 )  
17 )  
18 Respondent. )

Docket No. S-3557A-04-0000

MEMORANDUM IN OPPOSITION  
TO DIVISION'S MOTION TO  
RECOGNIZE SECURITIES DIVISION  
ALLEGATIONS AS ADMITTED

17 The effect of granting the Division's Motion to Recognize its Allegations as  
18 Admitted would be, in essence, to subject Respondent to a default judgment,  
19 despite the fact that Respondent has in fact submitted an Answer in response to  
20 the Division's allegations. Arizona law favors decisions on the merits of a case,  
21 and discourages drastic remedies such as default judgment and similar  
22 measures except in the case of prejudice or unnecessary delay. Thus, while the  
23 decision whether to grant relief from particular requirements of R14-4-305 is  
24 within the discretion of the Administrative Law Judge, "[t]he exercise of the  
25

1 discretion ought to tend, in a reasonable degree at least, to bring about a  
2 judgment on the very merits of the case.” Brown v. Beck, 64 Ariz. 299, 302 (Az.,  
3 1946); see also, General Elec. Capital Corp. v. Osterkamp, 172 Ariz. 185 (Az. Ct.  
4 App., Div. 2, 1992).

5         Aside from rote recitation of portions of A.A.C. R14-4-305, the Division’s  
6 only argument in favor of its motion consists of the statement that “such  
7 constructive admissions obviate the need for any formal hearing on the merits.”  
8 (p. 3) However, to accept this argument at its face value would result, most  
9 importantly, in depriving Respondent of his “day in court.” That the telephonic  
10 conference set for October 7 is proceeding as scheduled demonstrates that  
11 Respondent’s untimely Answer has created no delay for either the Division or the  
12 presiding Administrative Law Judge and that, therefore, granting the Division’s  
13 motion, and thereby subjecting Respondent to the effects of a default judgment,  
14 is not warranted.  
15

16         Furthermore, the Division has not alleged, and cannot demonstrate, that it  
17 has suffered any prejudice whatsoever by the late filing of Respondent’s Answer.  
18 That Respondent’s Answer was filed September 28 instead of September 9 did  
19 not prevent the Division from gathering information necessary for its hearing  
20 preparation, nor did it raise any obstacle to the Division’s ability to present its  
21 case at the hearing. Since both parties acknowledge that Respondent conducts  
22 no business in Arizona, it is axiomatic that there could be no bad acts  
23 complained of which continued to injure the Division’s interests between  
24 September 9 and September 28 as a result of the Respondent’s tardily-filed  
25

1 Answer. The Division can show neither delay nor prejudice which might warrant a  
2 decision by the Administrative Law Judge to ignore Respondent's meritorious,  
3 though tardy, Answer.

4 On the contrary, were the presiding Administrative Law Judge to ignore  
5 Respondent's Answer and deem the Division's allegations admitted, it is  
6 Respondent who would suffer prejudice. Respondent has submitted an Answer  
7 which relieves him, "if uncontroverted, from all liability" under the allegations put  
8 forth by the Division. Gutierrez v. Romero, 24 Ariz. 382, 385 (Az, 1922).  
9 Respondent's Answer, though admittedly filed after the purported due date of  
10 September 9, was yet in the hands of both the presiding Administrative Law  
11 Judge and the Division's counsel well before any motion was made to the  
12 Administrative Law Judge. While Gutierrez dealt with a motion to vacate a default  
13 judgment in civil court, the situation is wholly analogous to the case at hand:  
14

15 " [A]t the time the court entered judgment against the  
16 garnishees, there were on file their answers, in connection  
17 with the motion to vacate the so-called default, categorically  
18 answering the interrogatories of the garnishment writs,  
19 showing no liability. In other words, the court had before it,  
20 although filed somewhat tardily, a meritorious answer, and  
21 one relieving the garnishees, if uncontroverted, from all  
22 liability, at the very time the default judgment was entered."

23 Gutierrez, 24 Ariz. at 385 (emphasis added).

24 Beyond the fact that Respondent has in fact filed a meritorious Answer to  
25 the Division's allegations, Respondent would be further unnecessarily prejudiced  
by a decision to ignore his Answer because the tardiness of the filing was the  
result simply of the inadvertance of Respondent's counsel. Respondent is  
represented in this action by two active solo practitioners who each handle

1 multiple complex cases with limited staff and resources. Counsel's first obstacle  
2 in this case was a motion for pro hac vice admission which consumed significant  
3 time to obtain certificates of good standing from three jurisdictions. This pro hac  
4 vice procedure and its accompanying technicalities, along with the various  
5 adjournments in the case, combined with myriad demanding scheduling and  
6 technical requirements in other matters handled by counsel to create a situation  
7 in which both counsel simply miscommunicated the impending deadline for  
8 answering the allegations in the present matter. Regretfully, such oversights are  
9 the occasional results of a busy solo practice. It is unfortunate that the tardiness  
10 occurred in the present case; it would be even more unfortunate were  
11 Respondent to be the one to suffer from the unintentional oversight of his  
12 counsel. Such would be the result if the Answer is ignored and the Division's  
13 allegations deemed admitted.  
14

15 Indeed, even federal practice recognizes the hardships facing those with  
16 busy schedules and looming deadlines. "Under [Federal Rule of Civil Procedure]  
17 60(b), excusable neglect [which permits the vacation of a default judgment] is  
18 understood to encompass situations in which the failure to comply with a filing  
19 deadline is attributable to negligence." Pioneer Inv. Serv. Co. v. Brunswick  
20 Assocs. Ltd. Partnership, 507 U.S. 380, 394 (1993).  
21

22 In sum, Respondent has filed an Answer to the Division's allegations. The  
23 Answer was filed after the purported deadline of September 9 because  
24 Respondent's counsel, in the midst of other matters and the technicalities of this  
25 matter, simply miscommunicated regarding the closeness of the deadline.

1 Nonetheless, both the Division and the presiding Administrative Law Judge  
2 received Respondent's Answer well ahead of the scheduled telephonic  
3 conference and before any motion to penalize Respondent for tardiness was  
4 made. The need for a formal hearing has not been eliminated, Respondent's  
5 tardiness has caused no delay, and the Division has encountered no prejudice to  
6 its case. In such a situation, the rather drastic measure of ignoring Respondent's  
7 Answer and deeming the Division's allegations admitted, thereby denying  
8 Respondent his right to a hearing on the merits of the case, is a response that is  
9 simply unwarranted by the facts. Respondent therefore requests that the  
10 presiding Administrative Law Judge deny the Division's Motion to Recognize its  
11 Allegations as Admitted and permit the hearing to proceed.  
12

13 DATED, this 6<sup>th</sup> day of October, 2004,

14 

15 \_\_\_\_\_  
16 Michael Kalmus, P.C.  
17 Attorney for Respondent  
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