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BEFORE THE ARIZONA CORPORATION COMMISSION

2003 DEC - 8 12:49

COMMISSIONERS

AZ CORP COMMISSION
DOCUMENT CONTROL

MARC SPITZER, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON
KRISTIN K. MAYES

In the matter of:

ROBERT SHAKMAN
10249 E. Celtic Drive
Scottsdale, Arizona 85260

HEALTHCARE PURCHASING ALLIANCE,
INC.,
7150 E. Camelback Road, Suite 300
Scottsdale, Arizona 85251,

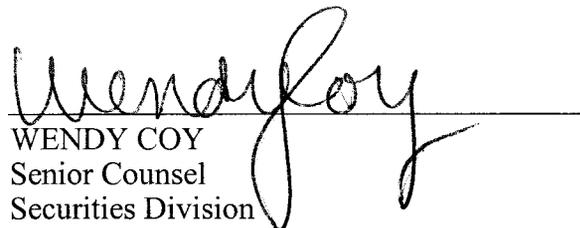
Respondents.

DOCKET NO. S-03184A-03-0000

RESPONSE TO RESPONDENT'S
MOTION TO DISMISS AND REQUEST
FOR ENTRY OF DEFAULT

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") requests that the Commission deny Respondents Motion to Dismiss and enter an Order of Default.

RESPECTFULLY SUBMITTED this ^{8th} of December, 2003


WENDY COY
Senior Counsel
Securities Division

Arizona Corporation Commission
DOCKETED

DEC - 8 2003

DOCKETED BY 

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MEMORANDUM OF POINTS AND AUTHORITIES

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2 On October 20, 2003, the Securities Division of the Arizona Corporation Commission filed
3 a *Notice Of Opportunity For Hearing Regarding A Proposed Order To Cease and Desist Order,*
4 *Order For Restitution and For Administrative Penalties and For Other Affirmative Relief*
5 (“Notice”). On October 20, 2003, the Notice was personally served on Respondents Robert
6 Shakman (“Shakman”) and Healthcare Purchasing Alliance, Inc. (“HPA”), by serving Shakman
7 individually and as officer and director of HPA. Shakman and HPA may be collectively referred to
8 as “Respondents.” In addition, on October 20, 2003, HPA was also served by serving its statutory
9 agent, Eric W. Kessler, Esq. *See* Affidavits of Service attached as Exhibit A.

10 Pursuant to A.R.S. § 44-1972(D) and A.A.C. R14-4-305 and R14-4-306, if any Respondent
11 wanted a hearing before the Commission, the Respondent was to file a request for a hearing no later
12 than November 3, 2003 (ten business days after service of the Notice). If a Respondent requested a
13 hearing, the Respondent was to file an answer to the Notice no later than thirty calendar days after
14 service of the Notice which would have been November 19, 2003. Respondents did not request a
15 hearing or file an answer within the timeframes proscribed by law.

16 After the timeframes had expired, on November 21, 2003, Shakman filed a *Response of*
17 *Robert Shakman* (“Response”) that contains brief admissions and denials of the Notice allegations.
18 In this Response, Shakman requests that the Notice be “denied and dismissed in its entirety.” *See*
19 *Shakman Response* page 2, lines 8-9. Shakman alleges that the Notice is barred and cites to three
20 legal theories as a basis of barring the action, the doctrine of estoppel, laches and statutes of
21 limitation. *See Shakman Response* page 2, lines 5-7. However, at no time and in no manner has
22 Shakman requested a hearing. Therefore, default orders should be entered.

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24 ...

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SHAKMAN HAS NOT REQUESTED A HEARING, AND SHOULD NOT BE AFFORDED AN ALTERNATIVE PROCEDURE

1
2 Respondents failed to request a hearing within the ten business days permitted by A.R.S. §
3 44-1972 and A.A.C. R14-4-306. By not requesting a hearing, the Respondents waived their right
4 to a hearing on this matter. “Waiver occurs when a party relinquishes a known right or exhibits
5 conduct that clearly warrants inference of an intentional relinquishment.” *Meineke v. Twin City*
6 *Fire Ins. Co.*, 181 Ariz. 576, 892 P.2d 1365 (App. 1994). Respondents are not entitled to an
7 alternative procedure under which they can request this matter be dismissed.

8 The Notice clearly states that “Respondents may request a hearing pursuant to A.R.S. § 44-
9 1972 and A.A.C. R14-4-306. **If any RESPONDENT requests a hearing, the RESPONDENT**
10 **must also answer this Notice.** A request for hearing must be in writing and received by the
11 Commission within 10 business days after service of this Notice of Opportunity for Hearing.”
12 (emphasis in original). A.R.S. § 44-1972(D) states that “the person to whom the notice is sent will
13 be afforded a hearing upon request to the commission **if the request is made in writing within**
14 **ten days after receipt of the notice.**” (emphasis added). Furthermore, A.A.C. R14-4-306(B)
15 clearly states that “. . . the respondent will be afforded a hearing upon request to docket control of
16 the Commission **if the request is made in writing within ten days after receipt of the notice by**
17 **the respondents.**” (emphasis added).

18 To date, the Respondents still have not requested a hearing. Twenty-four business days
19 after receiving personal service of the Notice, Shakman decided to file a Response to the Notice
20 requesting dismissal, but did not include a request for a hearing. Therefore, Shakman’s motion to
21 dismiss should not be considered and a default order should be entered. HPA has not filed a
22 request for hearing, an answer and was not included in Shakman’s Response. A default order
23 should be entered against HPA.

24 . . .

25 . . .

1 152 Ariz. 548, 733 P.2d 1131 (App. 1986). In fact, Shakman was notified in a previous matter¹
2 that “the state is immune from the statute of limitations defense.” *See Id.* at 555.

3 Shakman also raises the doctrine of estoppel and argues that the Notice should be barred. It
4 appears that Shakman really should have cited to *res judicata*. In any event, under either theory, the
5 State is not precluded from proceeding against Shakman. To be estopped from bringing this action,
6 the Division would have had to have an adjudication of the issues at hand. In *Brown v. Ticor Title*
7 *Insurance Co.*, 982 F.2d 386, 390 (9th Cir. 1992), the Court stated that a “lawsuit involving the
8 same parties and based upon the same cause of action as asserted in a previous case is barred under
9 the doctrine of *res judicata*. However, if . . . there was a denial of due process, then the prior
10 decision has no preclusive effect.”

11 The only action that would have fallen under the doctrine of estoppel (or *res judicata*) was
12 the action that ended in Decision No. 60250² dated June 12, 1997. If the prior Commission action
13 is the basis for Shakman’s argument regarding estoppel, the doctrine of estoppel cannot apply in
14 this situation. The prior decision issued by the Commission was ultimately found to be void due to
15 a violation of Shakman’s due process rights. *See State of Arizona Corporation Commission v.*
16 *Robert Shakman, et al.*, TJ 1999-003712, Order dated May 12, 2003 by Commissioner R. Jeffrey
17 Woodburn. Commissioner Woodburn’s ruling is attached as Exhibit B. A void order is as if it
18 never was – the Division cannot be estopped by Decision #60250. *See Hilgeman v. American*

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22 ¹ The Division filed a Notice of Opportunity against the same Respondents on April 10, 1997. The Division served
23 Respondents by certified mail. Respondents failed to request a hearing and an order was issued by the Commission on
24 June 12, 1997, Decision No. 60250. The matter was filed in Maricopa County Superior Court and a judgment was
25 issued. The Office of the Arizona Attorney General began a garnishment action against Shakman. Shakman, through
his attorney Eric W. Kessler, opposed the garnishment action. On May 12, 2003, Maricopa County Superior Court
Commissioner R. Jeffrey Woodburn issued an order dismissing the garnishment action and finding the judgment was
void due to failure to provide proper service. *See State of Arizona Corporation Commission v. Robert Shakman, et al.*,
TJ 1999-003712.

26 ² See footnote 1.

1 *Mortgage Securities, Inc.*, 196 Ariz. 215, 218, 994 P.2d 1030, 1033 (App. 2000) (“If a defendant is
2 not properly served with process, any resulting judgment is void . . .”).

3 WITHOUT GOOD CAUSE, RESPONDENTS HAVE FAILED TO EVEN MINIMALLY
4 COMPLY WITH PROCEDURAL REQUIREMENTS; DEFAULT ORDERS SHOULD BE
5 ENTERED.

6 Shakman chose to ignore clearly outlined procedures for requesting a hearing in response to
7 the Notice. Shakman can not use the excuse that he did not receive the Notice. As mentioned
8 above, the Notice clearly spells out the procedure for Respondents to follow to request a hearing.
9 The Notice even spells out, in simple English, what happens if a request for hearing is not timely
10 made. “If a request for a hearing is not timely made, the Commission may, without a hearing, enter
11 an order against each RESPONDENT granting the relief requested by the Division in this Notice
12 of Opportunity for Hearing.” See Notice page 6 lines 23 – 25.

13 The Respondents were clearly notified that there was a time limit to request a hearing and
14 the ramifications if they choose not to request a hearing. The Respondents ignored the law when
15 they offered and sold securities and they continue to ignore the law when given the opportunity to
16 be heard on the issues. Instead, Respondents file a Response that does not request a hearing, raises
17 defenses that are clearly not applicable to this proceeding and request that the Notice be dismissed.
18 Shakman did not meet his burden of proof and in fact cited to defenses that are not appropriate in
19 this matter and should be disregarded. HPA has failed to respond in any manner to the Notice filed
20 by the Division therefore, a default order should be entered. The Motion to Dismiss should be
21 denied. Default orders should be entered against both Shakman and HPA.

22 RESPONDENTS CANNOT DEMONSTRATE THAT DEFAULT ORDERS AGAINST THEM
23 SHOULD BE VACATED, THUS THEY CANNOT ARGUE THE ORDERS SHOULD NOT BE
24 ENTERED.

25 A review of the standard for vacating a default order highlights the appropriateness of entry
26 of default orders in these circumstances. According to the court in *Daou v. Harris*, 139 Ariz. 353,
678 P.2d 934, (1984), the Arizona Supreme Court has “consistently held that a motion to set aside a

1 default judgment may be granted only when the moving party has demonstrated each of the
2 following: that its failure to file a timely answer was excusable under one of the subdivisions of
3 rule 60(c); that it acted promptly in seeking relief from the default judgment; and that it had a
4 substantial and meritorious defense to the action.” (Emphasis added) *See Id.* at 358-359,

5 In this case Respondents have no excuse for Respondents’ lack of filing a request for
6 hearing. In fact the court in *Daou*, stated “mere carelessness is not sufficient reason to set aside a
7 default judgment.” *Id.* at 359. The test for what is excusable is “whether the neglect or
8 inadvertence is such as might be the act of a reasonably prudent person under similar
9 circumstances.” *Id.* at 359. The court in another matter also found that a “party’s mere neglect,
10 inadvertence or forgetfulness without any reasonable excuse” would not overturn a default
11 judgment. *See Sax v. Superior Court, Pima County*, 147 Ariz. 518, 520, 711 P.2d 657 (1985). In
12 this case, an ordinarily prudent person would not fail to comply with the timeframes and filing
13 requirements set forth by Arizona statutes and rules. Shakman not only filed late, he did not file a
14 hearing request at all.

15 One of the other requirements set forth in *Daou v. Harris*, at 359, is that moving parties
16 have a “substantial and meritorious defense to the action.” In this matter, Shakman sets forth
17 frivolous defenses that are not applicable to the present action. No substantial or meritorious
18 defenses were set forth in response to the allegations in the Notice. If the Commission granted a
19 default order in this matter, the Respondents do not meet the requirements to have the default order
20 overturned.

21 CONCLUSION

22 The Notice, the statutes and the regulations are quite clear as to the rights of Respondents to a
23 hearing. Shakman has failed to request a hearing. Instead, Shakman has filed a “Response”,
24 requesting that the Notice be dismissed and alleging, but offering no support for, frivolous defenses
25 to the allegations contained in the Notice.
26

1 A copy of the foregoing was mailed/hand delivered this

2 8th day of December, 2003 to:

3 Honorable Marc Stern, ALJ
4 Hearing Division
5 1200 W. Washington
6 Phoenix, Arizona 85007

7 Eric W. Kessler, Esq.
8 Kessler Law Offices
9 240 N. Center Street
10 Mesa, Arizona 85201

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EXHIBIT A

STATE OF ARIZONA)

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AFFIDAVIT OF SERVICE

County of Maricopa)

I, Alan C Walker, a Special Investigator for the Securities Division of the Arizona Corporation Commission, hereby certify that on the 20th day of October 2003 at 9:48 am, I served a copy of Docket No. S-03184A-03-0000 *Notice Of Opportunity For Hearing Regarding Proposed Order To Cease And Desist Order, For Restitution And For Administrative Penalties And For Other Affirmative Action* upon, Robert Edward Shakman at 10249 East Celtic Drive, Scottsdale Arizona 85260, by: service upon Robert Edward Shakman personally. Shakman was identified by Shakman acknowledging his identity and by my comparing his appearance with his Arizona Driver's License photograph on file.

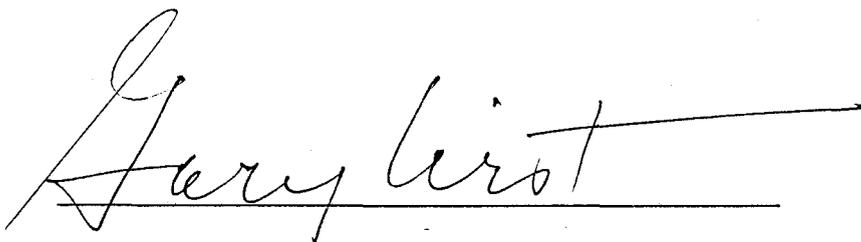


AFFIANT Alan C Walker

October 21, 2003

DATE

SUBSCRIBED AND SWORN TO BEFORE me this 21st day of October, 2003.



NOTARY PUBLIC

My Commission Expires:

Notary Public State of Arizona

Maricopa County

Gary J Kirst

Expires September 10, 2004



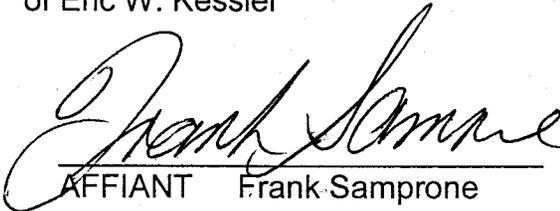
STATE OF ARIZONA)

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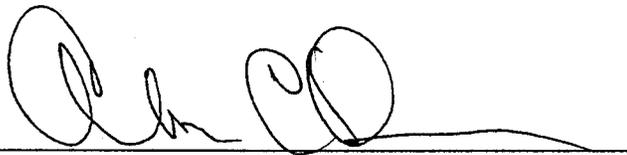
AFFIDAVIT OF SERVICE

County of Maricopa)

I, Frank Samprone, a Special Investigator for the Securities Division of the Arizona Corporation Commission, hereby certify that on the 20th day of October 2003 at 2:50 pm, I served a copy of Docket No. S-03184A-03-0000 *Notice Of Opportunity For Hearing Regarding Proposed Order To Cease And Desist Order, For Restitution And For Administrative Penalties And For Other Affirmative Action* upon, Eric W. Kessler, Attorney at Law, at 240 North Center, Mesa Arizona 85201, by: service upon Amanda an employee of Eric W. Kessler

 10/22/03
AFFIANT Frank Samprone DATE

SUBSCRIBED AND SWORN TO BEFORE me this 21st day of October, 2003.



NOTARY PUBLIC

My Commission Expires:



Notary Public State of Arizona
Maricopa County
Alan C Walker
Expires September 10, 2004

EXHIBIT B

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

Consumer Protection
Advocacy Section

TJ 1999-003712

05/09/2003

MAY 15 2003

RECEIVED

CLERK OF THE COURT
S. Carrillo
Deputy

COMMISSIONER R. JEFFREY WOODBURN

FILED: 05/12/2003

STATE OF ARIZONA CORPORATION
COMMISSION

ROBERT A ZUMOFF

v.

ROBERT SHAKMAN, et al.

ERIC W KESSLER

ORAL ARGUMENT RULING

In this garnishment action, defendant / judgment debtor Robert Shakman filed an objection on grounds that the underlying judgment was void due to improper service of process. The underlying judgment involved a 1997 administrative action filed by the Arizona Corporation Commission against Shakman for alleged securities violations. The Commission sent Shakman a Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist ("Notice") by certified mail, return receipt requested, to a generally delivery address in Truckee, California. As a result of a change of address order Shakman had signed, the Notice was forwarded to an apartment complex in Los Angeles. After Shakman failed to appear for the hearing, an Order to Cease and Desist ("Order") was entered against Shakman, which included an order for restitution in the amount of \$119,330.00. The Order was eventually transcribed into superior court, which led to the garnishment at issue.

As part of his garnishment objection, Shakman filed an affidavit acknowledging that he lived at the apartment complex in Los Angeles at the time the Notice was sent, but alleging that he never received the Notice. The affidavit alleges that Shakman would have filed a response and objected to the relief sought had he received the notice. It is undisputed that the return receipt was signed by someone other than Shakman.

In default situations involving service of process by certified mail under Rule 4.2(c), Arizona Rules of Civil Procedure, commissioners of the Maricopa County Superior Court historically have relied upon the case of Manley v. Nelson, 50 Haw. 484, 443 P.2d 155 (Haw.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TJ 1999-003712

05/09/2003

S.Ct. 1968), for the proposition that a nonresident defendant being served must personally sign the return receipt. This proposition has been followed even where a spouse signs a return receipt that was addressed to the other spouse: Unlike Rule 4.2(b) involving direct service upon a nonresident defendant, Rule 4.2(c) does not incorporate Rule 4.1(d), which permits substituted service at the usual place of abode.

Plaintiff argues that this case is controlled by rules promulgated by the executive branch under the Arizona Administrative Code, specifically A.A.C. R14-4-303(D)(5), R14-4-303(G), and R14-4-306(B), so the analogy to Rule 4.2(c) and rules promulgated by the judicial branch do not apply. However, "A notice is a fundamental requirement of due process." Benedict v. Andalman, 13 Ariz.App. 294, 296, 475 P.2d 954, 955 (App. 1970). Since we are dealing with an issue involving due process rights, the distinction between which branch of government promulgated the rule is irrelevant.

R14-4-303(D)(5) states that service can be made on an individual:

By mailing a copy to the last known dwelling, usual place of abode, business address or mailing address. Subpoenas, notices and temporary cease-and-desist orders served by mail shall be sent, return receipt requested, by certified mail.... The signed returned receipt shall constitute proof of service, but shall not be the exclusive method of proving service.

Plaintiff argues that: (1) the defendant's signature on the return receipt is not required under this rule since it only requires that notice be sent to the last known address, (2) a signed receipt is not the exclusive method of proving service, and (3) R4-14-303(G) states that service by mail is complete upon mailing. However, "Notice sought to be served by mail is not effective until it is received by the one sought to be served." Benedict, supra. Further, R4-14-306(B) states that a respondent has a right to request a hearing "within ten days after receipt of the notice by the respondent." (Emphasis added). A respondent cannot exercise the right to request a hearing if the respondent does not receive the notice in the first place.

Under plaintiff's theory, it would not matter who signed the return receipt or whether the defendant still lived at the last known address where the certified mail was sent. In this Court's view, adopting such a construction would violate due process. To assure that a defendant receives his or her due process rights to notice, it is necessary that the defendant, or an authorized agent for service of process, personally sign the return receipt if service is attempted by certified mail. If a defendant is not properly served, any resulting judgment is void. Hilgeman v. American Mortgage Securities, Inc., 196 Ariz. 215, 218, 994 P.2d 1030, 1033 (App. 2000).

For all of the above reasons,

IT IS ORDERED sustaining the objection and quashing the garnishment in this case.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TJ 1999-003712

05/09/2003

/S/ COMMISSIONER R. JEFFREY WOODBURN

JUDICIAL OFFICER OF THE SUPERIOR COURT