

ORIGINAL



0000075915

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Quarles & Brady, LLP
Firm State Bar No. 00443100
Renaissance One
Two North Central Avenue
Phoenix, AZ 85004-2391
TELEPHONE 602.229.5200

RECEIVED

2007 AUG 17 P 4: 23

Attorneys for Respondents AGRA-
Technologies, Inc.; William Jay
and Sandra Lee Pierson; William
H. and Patricia M. Baker

AZ CORP COMMISSION
DOCKET CONTROL

Lonnie J. Williams, Jr. (#005966)
Carrie M. Francis (#020453)

BEFORE THE ARIZONA CORPORATION COMMISSION

In the matter of:

AGRA-TECHNOLOGIES, INC. (a/k/a ATI),
a Nevada corporation,
5800 North Dodge Avenue, Bldg. A
Flagstaff, AZ 86004-2963;

WILLIAM JAY PIERSON (a/k/a BILL
PIERSON) and SANDRA LEE PIERSON
(a/k/a SANDY PIERSON), husband and wife,
6710 Lynx Lane
Flagstaff, AZ 86004-1404;

RICHARD ALLEN CAMPBELL (a/k/a
DICK CAMPBELL) and SONDR A JANE
CAMPBELL, husband and wife,
8686 West Morten Avenue
Glendale, AZ 85304-3940;

WILLIAM H. BAKER, JR. (a/k/a BILL
BAKER) and PATRICIA M. BAKER,
husband and wife,
3027 N. Alta Vista
Flagstaff AZ 86004

JERRY J. HODGES and JANE DOE
HODGES, husband and wife,
1858 Gunlock Court
St. George, UT 84790-6705;

LAWRENCE KEVIN PAILLE (a/k/a
LARRY PAILLE) and JANE DOE PAILLE,
husband and wife,
220 Pinon Woods Drive
Sedona, AZ 85351-6902;

Respondents.

DOCKET NO. S-20484A-06-0669

**RESPONDENTS' AGRA-
TECHNOLOGIES, INC., THE
PIERSONS' AND THE BAKERS'
OPPOSITION TO THE
SECURITIES DIVISION'S
MOTION FOR RULING
REGARDING ALLEGEDLY
UNREGISTERED SECURITIES**

(Administrative Law Judge Marc Stern)

Arizona Corporation Commission
DOCKETED

AUG 17 2007

DOCKETED BY nr

57

1 The Court should deny the Arizona Corporation Commission Securities Division's
2 ("ACC") Motion for Ruling that Respondents' "Ore Rights & Mining Agreement"
3 Investments Are Unregistered Securities (the "Motion")¹ because:

- 4 • The ACC's Motion is improper insofar as AGRA-
5 Technologies, Inc. ("AGRA"), Pierson and Baker (collectively
6 "Respondents") have not had an opportunity to conduct
7 discovery or exchange evidence with the ACC; and
- 8 • Genuine issues of material fact exist as to whether the Ore
9 Rights & Mining Agreements ("Mining Agreements") are
10 "securities" as that term is defined under Arizona law.

11 Accordingly, summary judgment is improper, and the ACC's Motion should be
12 denied. This Response is supported by the attached Memorandum of Points and
13 Authorities, the accompanying Controverting Statement of Facts ("CSOF"), and the entire
14 record herein.

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I. INTRODUCTION**

17 AGRA is a minerals resource company, which researches and develops new ways
18 to recover precious metals from the mineral resources it owns or controls. [CSOF ¶ 1].
19 From 2003 until 2006, AGRA sold to various buyers large volcanic cinders of ore body
20 and the right to extract precious metals from those cinders. [CSOF ¶ 2]. Buyers could
21 extract the precious metals from their cinders using their own desired means and sell them
22 on the open market for a significant profit. *Id.* In connection with the sale, AGRA
23 offered to process the buyers' cinders in exchange for a small fee. [CSOF ¶ 3]. The buyer
24 had the option to extract and process the metals by its own means or to hire AGRA to do
25 the same. *Id.* Because the buyers were free to extract and process the metals by their own
26 means, their ability to profit from the sale did not depend upon the efforts of AGRA. *Id.*
27 The terms of each sale were included in an Ore Rights & Mining Agreement, which the

28 ¹ Although the ACC labels its Motion a "Motion for Ruling," it is a motion for summary judgment filed pursuant to
Ariz. R. Civ. P. 56(a). Accordingly, Respondents submit their opposition to the ACC's Motion pursuant to Rule
56(c).

1 parties executed. [CSOF ¶ 5].

2 **II. LEGAL ARGUMENT**

3 **A. The Summary Judgment Standard**

4 Summary judgment should only be granted when no genuine issue of material fact
5 exists. *Orme School v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). When
6 determining whether any genuine issue of material fact exists, all facts must be examined
7 in the light most favorable to the non-moving party. *Huff v. Bekins Moving & Storage*
8 *Co.*, 145 Ariz. 496, 497, 702 P.2d 1341, 1342 (Ct. App. 1985). Moreover, the moving
9 party always bears the burden of proving the absence of a material factual dispute, and the
10 non-moving party is only required to show a dispute as to material facts relevant to the
11 legal issues which the moving party claims to be dispositive of the cause of action.
12 *Rhoads v. Harvey Publications, Inc.*, 131 Ariz. 267, 269, 640 P.2d 198, 200 (Ct. App.
13 1981). Here, there is a material fact issue as to whether the Mining Agreements were
14 contracts for the sale of securities. Accordingly, summary judgment is improper, and the
15 ACC's Motion should be denied.

16 **B. The ACC's Motion is Premature**

17 On September 19, 2007, the parties will exchange exhibits and witnesses in
18 anticipation of their evidentiary hearing set for October 15, 2007. With the exception of
19 this Motion and the accompanying Statement of Facts, that exchange will be Respondents'
20 first glimpse of the evidence that the ACC has compiled against them. The investigative
21 process does not permit Respondents the right or ability to conduct discovery. For the
22 duration of this lawsuit, the ACC has been compiling evidence against Respondents while
23 refusing to disclose any of that evidence to them. The ACC's strong-arm tactics have
24 made it impossible for Respondents to build a defense to the myriad of allegations raised.
25 As such, it would be patently unfair to allow the ACC to prosecute this Motion now,
26 before a full evidentiary hearing, when to date the ACC has refused to disclose any
27 evidence to Respondents and Respondents are precluded from conducting their own
28 discovery to build a defense.

1 By way of example, the ACC has subpoenaed presumably hundreds (perhaps
2 more) of documents from Paille, Campbell and Hodges, but has refused to disclose any of
3 those documents to Respondents.² The ACC deposed Paille, Campbell and Hodges, but
4 refused to allow Respondents to be present or to even review the transcripts. In fact, the
5 ACC even refused to allow the deponents themselves to review, make corrections, or
6 certify the transcripts of their own testimony. The ACC cites bits and pieces of testimony
7 in its Motion without disclosing the context of the testimony. As such, Respondents have
8 no way of knowing whether the ACC is mischaracterizing the testimony it offers in
9 support of its Motion against them. The ACC's Special Investigator Gary Clapper has
10 done an extensive investigation and has summarized many of his findings in an affidavit,
11 which is attached to the ACC's Motion. Yet, the ACC has refused to provide any
12 information about Clapper's investigation, thus preventing Respondents from identifying
13 what evidence Clapper's opinions are based upon.

14 Now the ACC is asking the Judge to "decrease the issues for the October 15, 2007
15 hearing" by deciding the critical issue of whether the Mining Agreements constituted
16 unlawful securities contracts before Respondents have a chance to examine the ACC's
17 evidence, and are precluded from conducting discovery of their own. To decide that issue
18 now would defeat the purpose of the October evidentiary hearing, which is to hear the
19 merits of this case after both sides have been provided at least a limited disclosure.
20 Consistent with reasonable notions of fairness, the Judge should deny the ACC's Motion
21 and permit a full evidentiary hearing of all issues.

22 C. AGRA's Mining Agreements Are Not Securities

23 Even if the Judge finds that the ACC's Motion is ripe to be decided (despite the
24 lack of discovery and disclosure that has hindered Respondents' ability to defend
25 themselves) the ACC's Motion should be denied because the Mining Agreements are not
26 securities.

27
28 ² The ACC refuses to even copy Respondents on the subpoenas that it issues in this matter. As such, the ACC may have subpoenaed documents from other sources without Respondents' knowledge.

1 1. The buyers' profits are not based solely on the efforts of others.

2 The Mining Agreements are not contracts for the sale of securities because the
3 buyers' profits are not based solely on the efforts of others. Under the *Howey* test, an
4 "investment contract" for the sale of securities exists if: (1) there is an investment of
5 money, (2) in a common enterprise, and (3) the profits are based solely on the efforts of
6 others. *S.E.C. v. Howey*, 328 U.S. 293, 300-01 (1946).

7 In *Howey*, the buyers ("investors") purchased small tracts of land located in a citrus
8 acreage. The buyers then hired a company under the same common control and
9 management as the seller to plant, grow, maintain, harvest and market citrus crops on the
10 land from which they expected to earn a profit. *Id.* at 295-96. The buyers had no right of
11 entry onto the land that they purchased, and no right to the specific fruit. *Id.* The court
12 found that these investors' profits were based solely on the efforts of others, and thus their
13 transactions had been sales of securities.

14 In sharp contrast to *Howey*, the buyers in this matter purchased large volcanic
15 cinders from AGRA, which they own outright, without restrictions. [CSOF ¶¶ 2-5]. They
16 are free to do as they please with the cinders. Because of the potential for significant
17 profit, most buyers wish to process their cinders and extract precious metals therefrom.
18 The buyers, however, are not obligated to do so. Buyers who decide to process their
19 cinders are free to process the cinders themselves, hire a third-party company to process
20 their cinders, or hire AGRA to process their cinders. *Id.* AGRA specifically conveyed
21 this fact to buyers in AGRA's informational summaries regarding the Platinum Recovery
22 Project, which stated: "After purchasing the rights to the material containing the
23 [platinum] the PRINCIPAL may remove and process the ore by means other than those
24 used by Agra Technologies, Inc." [CSOF ¶ 3].

25 Moreover, unlike the *Howey* case where the "investors" relied on a company under
26 the same common control and management as the seller company to market and sell their
27 crop, the buyers here are not relying on AGRA to market and sell the precious metals
28 once extracted. Rather, the buyers may sell the precious metals on the open market, or, if

1 the buyer retains AGRA to extract and process the metals, the buyer may sell them back
2 to AGRA. [CSOF ¶ 4]. It follows that any profits realized by the buyers in this matter
3 would not be solely from the efforts of others. As such, the Mining Agreements are not
4 contracts for the sale of securities and the ACC's Motion should be denied.

5 2. AGRA did not sell commodities.

6 The Mining Agreements are not "commodity investment contracts" under Ariz.
7 Rev. Stat. § 44-1801(6) because commodities are not conveyed through the agreements.
8 "Commodities" include "any metal or mineral including a precious metal." A.R.S. § 44-
9 1801(3). As the ACC admits in its Motion, AGRA sold *volcanic cinders* to its buyers.
10 Motion, p. 4:18-22. AGRA did not sell any precious metals. Rather, the buyers who
11 purchased the cinders did so with the hope that their cinders would yield marketable
12 quantities of precious metals after processing and extraction. AGRA, however, never
13 guaranteed its buyers that their volcanic cinders would contain any precious metals.
14 AGRA could not make such a representation with 100-percent certainty. Accordingly, the
15 buyers who purchased volcanic cinders did so only with the hope that their cinders would
16 contain precious metal, and assumed the risk that they would end up empty-handed. It
17 follows that, because AGRA did not sell commodities, the Mining Agreements are not
18 commodity investment contracts under Arizona law.

19 **D. Fact Issues Exist, which Prevent Summary Judgment**

20 In support of its Motion, the ACC relies largely on upon unexecuted Mining
21 Agreements as evidence that Respondents allegedly offered and sold unregistered
22 securities in Arizona. *See* ACC's SOF ¶ 1, citing to Tab 1, ACC015304-ACC015338.
23 Because these documents (which have not been properly authenticated) were never
24 executed, there is no evidence that they were ever provided to, or even seen by, any
25 alleged investors. This creates a significant fact issue as to whether Respondents sold any
26 alleged "securities" in Arizona.

27 The ACC also relies heavily upon testimony by Paille, Campbell and Hodges, in
28 which they invoke their Fifth Amendment rights in response to pointed questions by ACC

1 investigators, to establish certain facts. For example, the ACC cites the following
2 testimony in support of its position that the Mining Agreements were "securities" because
3 the buyers were passive investors whose profits depended solely on the efforts of others:

4 Q: BY MR. DAILEY: Would you agree that the ore
5 contracts are passive investments as to the ore contract
6 purchasers?

(Whereupon, the witness conferred with his counsel.)

7 A: THE WITNESS: Take the Fifth.

8 Q: BY MR. DAILEY: Isn't it true, Mr. Paille, that all ore
9 contract investors expected Agra to use its skill and expertise to
10 extract the precious metals from cinders so that they could
11 make a profit?

(Whereupon, the witness conferred with his counsel.)

12 A: THE WITNESS: Take the Fifth.

13 ACC's Statement of Facts, Tab 10, p. 112: 13-25.

14 The ACC asks the Judge to draw a negative inference from these parties'
15 invocations of their Fifth Amendment rights. *See* Statement of Facts, p. 4, fn. 2.
16 However, the negative inference drawn from a non-movant's invocation of his Fifth
17 Amendment rights is fundamentally incompatible with the notion of summary judgment,
18 where all reasonable inferences must be drawn in favor of the non-moving party.
19 Multiple courts have recognized Respondents' position on this issue. *Mulero-Rodriguez v.*
20 *Ponte, Inc.*, 98 F.3d 670, 678 (1st Cir. 1996) (invocation of the Fifth Amendment does not
21 alter the requirement that all inferences must be drawn in favor of the non-movant at
22 summary judgment); *United States v. Rylander*, 460 U.S. 752 (1983) (invocation of Fifth
23 Amendment does not alter evidentiary burdens); *Avirgan v. Hull*, 932 F.2d 1572, 1580
24 (11th Cir. 1991) ("[t]he negative inference, if any, to be drawn from the assertion of the
25 fifth amendment does not substitute for evidence needed to meet the burden of
26 production.")

27 In *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 389-94 (7th Cir. 1995), the
28 Court of Appeals held that the non-movant's invocation of the Fifth Amendment right

1 does not free the summary judgment movant from showing that the evidence in record
2 mandates judgment as a matter of law. Here, the ACC relies too heavily on the non-
3 movant's invocation of their Fifth Amendment right, and has failed to prove that the actual
4 evidence in the record mandates judgment as a matter of law. Accordingly, the ACC's
5 Motion should be denied.

6 **III. CONCLUSION**

7 For the reasons stated above, the Court should deny the ACC's Motion.

8 RESPECTFULLY SUBMITTED this 17th day of August, 2007.

9 QUARLES & BRADY, LLP

10 By _____

11 Lonnie J. Williams, Jr.
12 Carrie M. Francis
13 Attorneys for AGRA-Technologies, Inc.;
William Jay and Sandra Lee Pierson; and
William H. and Patricia M. Baker

14 ORIGINAL and THIRTEEN COPIES of
15 the foregoing hand-delivered this
16 17th day of August, 2007, to:

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

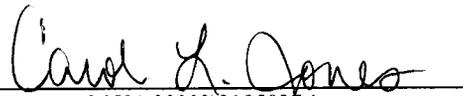
19 ONE COPY of the foregoing hand-delivered
20 this 17th day of August, 2007, to:

21 Securities Division
22 Arizona Corporation Commission
Attn: Mike Dailey and Mark Dinell
1300 West Washington
Third Floor
23 Phoenix, Arizona 85007

24 ONE COPY of the foregoing mailed
25 this 17th day of August, 2007, to:

26 Peter Strojnik
Peter Strojnik, P.C.
3030 N. Central Ave.
27 Suite 1401
Phoenix, AZ 85012
28 Attorneys for Respondents Campbells

1 Geoffrey S. Kerksmar
The Kerksmar Law Firm P.C.
2 3260 N. Hayden Road
Suite 204
3 Scottsdale, AZ 85251
Attorneys for Respondents Hodges and Paille
4

5 
6 QBPHX\126731.00002\2105027.1

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28