

NEW APPLICATION



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ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

2007 SEP 28 A 8:49

COMMISSIONERS

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AZ CORP COMMISSION
DOCKET CONTROL

Arizona Corporation Commission

DOCKETED

SEP 28 2007

DOCKETED BY [Signature]

In the matter of:
G'IEBER FINANCIAL, LLC, a Delaware limited liability company, CRD#128954
2500 South Power Road, Ste 222-Rm 213
Mesa, AZ 85208
DAVID A. GOTLIEB, CRD#2089760 and
STACEY SCIBELLI-GOTLIEB, husband and wife
Respondents.

DOCKET NO. S-20554A-07-0552
NOTICE OF OPPORTUNITY FOR HEARING REGARDING PROPOSED ORDER TO CEASE AND DESIST, ORDER FOR RESTITUTION, FOR ADMINISTRATIVE PENALTIES, OF DENIAL, AND FOR OTHER AFFIRMATIVE ACTION

NOTICE: EACH RESPONDENT HAS 10 DAYS TO REQUEST A HEARING

EACH RESPONDENT HAS 30 DAYS TO FILE AN ANSWER

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") alleges that G'IEBER FINANCIAL, LLC ("G'IEBER") and DAVID A. GOTLIEB ("GOTLIEB") have engaged in acts, practices and transactions that constitute violations of the Arizona Investment Management Act, A.R.S. § 44-3101 et seq. ("IM Act").

I. JURISDICTION

1. The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona Constitution and the IM Act.

II. RESPONDENTS

2. G'IEBER, CRD#128954, is a limited liability company organized on or about December 3, 2001 under the laws of the state of Delaware. G'IEBER's application for registration as a foreign limited liability company in Arizona was approved on June 30, 2003. G'IEBER

1 relocated from Massachusetts to Arizona in November of 2001 and is currently located at 2500 S.
2 Power Road, Mesa, Arizona. G'IEBER is licensed as an investment adviser in Massachusetts and
3 has been since December 6, 2000.

4 3. In or around April 2004, G'IEBER filed an application with the Arizona
5 Corporation Commission for licensure as an investment adviser. That application was deemed
6 abandoned on or about January 20, 2005, due to G'IEBER's failure to respond to the Division's
7 request for information. On May 18, 2006, G'IEBER filed another application for licensure as an
8 Arizona investment adviser, which is currently pending.

9 4. GOTLIEB, CRD#2089760, is and was at all pertinent times managing member of
10 G'IEBER. GOTLIEB was a securities salesman, registered in Arizona in affiliation with Hibbard
11 Brown & Co., Inc. from October 23, 1991 to April 25, 1992; and with Securities America, Inc. from
12 April 3, 1996 to December 1, 2000. GOTLIEB's registration as a securities salesman in Arizona was
13 automatically suspended, pursuant to A.R.S. § 44-1949, on December 1, 2000, when he ceased to be
14 associated with a registered dealer, and expired on December 31, 2000. GOTLIEB is and was at all
15 pertinent times licensed as an investment adviser representative in Massachusetts from December
16 6, 2000 to the present. GOTLIEB has been a resident of Arizona since November of 2001.
17 GOTLIEB is not and has never been licensed as an investment adviser representative in Arizona.
18 On or about August 16, 2006, GOTLIEB filed an application for licensure as an Arizona
19 investment adviser representative, which is currently pending.

20 5. STACEY SCIBELLI-GOTLIEB was at all relevant times the spouse of GOTLIEB
21 and is joined in this action under A.R.S. § 44-3291(C) solely for purposes of determining the liability
22 of the marital community. At all relevant times, GOTLIEB and STACEY SCIBELLI-GOTLIEB
23 were acting for their own benefit and for the benefit or in furtherance of the marital community.

24 6. G'IEBER AND GOTLIEB may be collectively referred to as "RESPONDENTS."
25 STACEY SCIBELLI-GOTLIEB may be referred to as "RESPONDENT SPOUSE."
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**III.
FACTS**

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2 7. GOTLIEB was a registered securities salesman from approximately 1991.
3 According to GOTLIEB, in approximately 2000, he decided to leave the brokerage firm where he
4 was employed and offer his clients an opportunity to “move forward” with him through G’ieber
5 Value Fund L.P. (“G’ieber Fund”).

6 8. G’ieber Fund is a limited partnership organized under the laws of Delaware in or
7 around April of 2000. G’ieber Fund was registered with the Arizona Secretary of State’s Office as a
8 foreign limited partnership on or about December 12, 2002 and is currently located at 2500 S.
9 Power Road, Mesa, Arizona. G’ieber Fund is a pooled investment partnership. G’ieber Fund has
10 approximately 33 limited partners who invested at least \$4,000,000. G’ieber Fund is the sole client
11 of G’IEBER.

12 9. GOTLIEB is the managing and sole member of G’IEBER. G’IEBER is the general
13 partner of G’ieber Fund. GOTLIEB has custody of the client’s, G’ieber Fund, assets.

14 10. According to GOTLIEB, RESPONDENTS have been operating as an unlicensed
15 investment adviser and investment adviser representative in Arizona since 2001.

OFFERING MEMORANDUM AND ADVISORY AGREEMENT

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17 11. GOTLIEB provided an offering memorandum dated October 19, 2000 to the clients
18 that followed him to G’ieber Fund. The offering memorandum not only explained the sale of the
19 limited partnership interests, it also explained, in detail, the terms of the investment advisory
20 services that would be provided by G’IEBER.

21 12. Pursuant to the offering memorandum, RESPONDENTS make all investment
22 decisions and have full custody and discretion over the funds in G’ieber Fund.

23 13. The offering memorandum outlines G’ieber Fund’s investment strategies. G’ieber
24 Fund’s objective is to generate substantial capital appreciation during periods of market strength,
25 while preserving capital and profiting selectively during periods of stock market weakness. G’ieber
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1 Fund seeks substantial capital appreciation by investing in, and trading equities, options and other
2 investments.

3 14. According to the offering memorandum, G'IEBER was to receive compensation for
4 providing investment advice and managing the investments of G'ieber Fund in the form of
5 management fees, as well as receiving a share of the profits of the G'ieber Fund. The General
6 Partner would be paid by G'ieber Fund a monthly management fee equal to 1/12th of 1%
7 (approximately 1.0% annually) of the net asset value of each limited partner's book capital account.
8 The offering memorandum states that G'IEBER would be allotted an incentive equal to 20% of the
9 new appreciation of G'ieber Fund during each calendar quarter. The incentive allocations accrue
10 monthly.

11 15. From about 2001 to about May of 2006, G'IEBER collected fees from G'ieber Fund
12 for providing investment advisory services. Beginning in about May of 2006, after being notified
13 that G'IEBER could not to receive compensation for investment advisory services provided to
14 G'ieber Fund unless licensed or exempt from licensure, G'IEBER continued to accrue fees from
15 G'ieber Fund by deducting the fees from the limited partners' capital accounts. G'IEBER has not
16 collected the fees.

17 16. The offering memorandum further outlines that all investment decisions will be
18 made exclusively by GOTLIEB through G'IEBER. The offering memorandum states that G'IEBER
19 has unlimited authority to administer the financial activities of G'ieber Fund. Further, the offering
20 memorandum states that GOTLIEB will supervise all of G'ieber Fund's investment and
21 administrative functions.

22 17. The offering memorandum states that the success of G'ieber Fund will depend on
23 the ability of GOTLIEB to develop and implement investment strategies to achieve G'ieber Fund's
24 investment objectives.

1 18. The offering memorandum discloses that G'IEBER is to provide office space and
2 certain support services at no cost to G'ieber Fund. GOTLIEB through G'IEBER, however,
3 invested G'ieber Fund money in an office building in Mesa, Arizona, which housed not only
4 G'ieber Fund but also G'IEBER and GOTLIEB's mortgage broker¹ businesses.

5 19. Pursuant to the offering memorandum, G'ieber Fund was to provide GOTLIEB a 20
6 year life insurance policy with death benefits of one million dollars. The beneficiary was to be
7 G'ieber Fund. According to GOTLIEB, G'ieber Fund is paying for an insurance policy on
8 GOTLIEB in the amount of two million dollars. G'ieber Fund is the beneficiary for one million
9 dollars; GOTLIEB's family is the beneficiary of the remaining one million dollars. G'ieber Fund is
10 not reimbursed for the expense of the extra coverage.

11 20. Although the offering memorandum generally discloses conflicts of interest it does
12 not disclose specific conflicts that may be present involving the general partner and its affiliates.
13 The offering memorandum is silent regarding material conflicts of interest.

14 21. The offering memorandum provides for payment of management fees and profit
15 incentive fees to G'IEBER. The offering memorandum does not provide for "salary" payments
16 directly to GOTLIEB. According to bank records, payments were made from the G'ieber Fund bank
17 accounts to GOTLIEB's personal bank account documented as "salary advance".

18 22. In addition to the offering memorandum, RESPONDENTS gave the limited partners
19 in G'ieber Fund a limited partnership agreement. The limited partnership agreement states that
20 G'IEBER, the general partner, may withdraw or receive a distribution of any portion of its own
21 interests upon notice to the limited partners. According to GOTLIEB, G'IEBER has been
22 liquidating its shares without the required notice to the investors.

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¹ Great Southwest Mortgage and Western Horizon Mortgage

1 28. G'ieber Fund made a series of investments in CCC. The decision to have G'ieber
2 Fund invest in CCC was made by GOTLIEB as managing member of G'IEBER, the general partner
3 of G'ieber Fund.

4 29. As CFO of CCC and a member of the board of directors, GOTLIEB had knowledge
5 of CCC's financial condition. G'ieber Fund, through G'IEBER, under the control of GOTLIEB,
6 invested in CCC through a series of notes. The promissory notes between G'ieber Fund and CCC
7 were signed by GOTLIEB as principal of the general partner and Daniel Gotlieb¹, Chief Operating
8 Officer of CCC. According to GOTLIEB, CCC required an investment of funds to cover
9 operational expenses, including salary.

10 30. On or about September 27, 2001, G'ieber Fund lent CCC \$50,000 evidenced by a
11 promissory note. The note was for a term of 30 days at 12% annualized rate. CCC was to pay the
12 principal and the interest back to G'ieber Fund on or before October 29, 2001.

13 31. CCC did not pay the note due on October 29, 2001.

14 32. Even though the first note was in default, on November 28, 2001, G'ieber Fund lent
15 an additional \$90,000 to CCC. A promissory note was executed between G'ieber Fund and CCC.
16 The principal was due on December 31, 2001. According to GOTLIEB, CCC was in significant
17 trouble at this point.

18 33. On or about December 1, 2001, CCC held a Board of Directors meeting at which
19 GOTLIEB was present. At the meeting, all board members agreed that CCC was in financial crisis.

20 34. At this time, GOTLIEB proposed converting the G'ieber Fund notes totaling
21 \$140,000 to CCC stock or alternatively, to close down CCC and pay G'ieber Fund the funds owed.

22 35. With the prior two notes in default, on December 14, 2001, G'ieber Fund lent an
23 additional \$13,000 to CCC through another promissory note. According to GOTLIEB, CCC
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26 ¹ David Gotlieb's brother.

1 needed to pay rent. The note was due on December 31, 2001. On December 14, 2001, the
2 September 27, 2001 note had not been paid.

3 36. At the time of the December 29, 2001 CCC special shareholders meeting, G'ieber
4 Fund held \$153,000 in due or delinquent notes from CCC. GOTLIEB's company American
5 Impound Tax Services ("AITS") held an outstanding note from CCC in the amount of \$7,000.

6 37. On January 2, 2002, G'ieber Fund sent a notice of delinquency to CCC.

7 38. With the prior notes in default, on January 14, 2002, G'ieber Fund lent an additional
8 \$50,000 to CCC evidenced by a promissory note. The term of the note was fifteen days. CCC was
9 to fund operations with the \$50,000.

10 39. Even though the prior notes were in default, on January 14, 2002, G'ieber Fund
11 issued a line of credit to CCC in the amount of \$1,000,000. At the time the line of credit was
12 opened, CCC was delinquent on the previous promissory notes issued by G'ieber Fund.

13 40. On or about January 17, 2002, CCC held a special shareholder's meeting. At this
14 meeting, GOTLIEB disclosed to the board that CCC would have a negative net worth as of
15 December 31, 2001 if the current notes payable were not converted to stock or paid off. The current
16 notes payable amounted to \$153,000 to G'ieber Fund and \$7,000 to AITS.

17 41. On or about January 11, 2002 G'ieber Fund obtained a loan from Wells Fargo in the
18 amount of \$42,000. The loan was guaranteed by G'IEBER. On or about December 21, 2001,
19 G'ieber Fund had placed \$42,000 into a certificate of deposit with restricted access to secure the
20 loan subsequently obtained by G'ieber Fund.

21 42. At the January 17, 2002 special shareholder's meeting, a proposal by G'IEBER
22 through GOTLIEB was made to the CCC board. The proposal included that G'IEBER would
23 purchase and lease to CCC an information system including WAN and email. The lease was for 36
24 months at 18% interest with a \$1.00 buy out option at the end of the lease. A leasing contract was to
25 be signed by CCC and G'IEBER.

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1 Southwest Mortgage. According to GOTLIEB, the reason G'ieber Fund paid for the expenses of
2 Great Southwest Mortgage was to recoup some of the money lost in the CCC investment. However,
3 there is no documentation to support GOTLIEB's representations.

4 48. GOTLIEB left Great Southwest Mortgage to become branch manager of Western
5 Horizon Mortgage. Western Horizon Mortgage took over the offices of Great Southwest Mortgage.
6 Western Horizon Mortgage went out of business in about April of 2007.

7 **LICENSING STATUS**

8 49. G'IEBER's application for licensure as an investment adviser in Arizona remains
9 incomplete. G'IEBER has failed to provide the Division with information required to complete the
10 application.

11 50. GOTLIEB's application for licensure as an investment adviser representative in
12 Arizona is incomplete. GOTLIEB has failed to provide the Division with information required to
13 complete the application.

14 51. RESPONDENTS' applications raised issues of concern for the Securities Division.
15 The Securities Division requested additional information be provided to address those issues.
16 RESPONDENTS failed to provide responses to the Securities Division's request.

17 **IV.**
18 **VIOLATION OF A.R.S. § 44-3151**
19 **(Transactions by Unlicensed Investment Advisers**
20 **or Investment Adviser Representatives)**

21 52. RESPONDENTS G'IEBER and GOTLIEB transacted business in Arizona as an
22 investment adviser or investment adviser representative while not licensed or in compliance with
23 Article 4 of the IM Act.

24 53. This conduct violates A.R.S. § 44-3151.
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V.

**REMEDIES PURSUANT TO A.R.S. § 44-3201
(Denial, Revocation or Suspension of Investment Adviser or Investment Adviser
Representative License; Restitution, Penalties, or other Affirmative Action)**

54. RESPONDENTS G'IEBER's and GOTLIEB's conduct is grounds to deny
RESPONDENTS G'IEBER's and GOTLIEB's applications as an investment adviser and investment
adviser representative with the Commission pursuant to A.R.S. § 44-3201. Specifically, denial of
RESPONDENTS G'IEBER's and GOTLIEB's applications would be in the public interest and:

a) RESPONDENTS G'IEBER's and GOTLIEB's applications for licensure are
incomplete, inaccurate or misleading within the meaning of A.R.S. §44-3201(A)(1).
RESPONDENTS have failed to provide documents that were requested.

b) RESPONDENT G'IEBER is insolvent or is in an unsound financial condition within
the meaning of A.R.S. §44-3201(A)(2). The only source of income for G'IEBER is G'ieber Fund. In
fact, according to the offering memorandum, G'IEBER and G'ieber Fund were newly formed entities
created solely for the purposes outlined in the offering memorandum. Neither G'IEBER nor G'ieber
Fund had been capitalized beyond certain minimum, immaterial levels. Further, GOTLIEB admitted
that G'IEBER's sole source of income was from the G'ieber Fund fees.

c) RESPONDENTS G'IEBER and GOTLIEB have violated the Investment
Management Act and Rules by continuing to provide financial advice for compensation without
being licensed within the meaning of A.R.S. §44-3201(A)(3).

d) RESPONDENTS further violated the Investment Management Act and Rules within
the meaning of A.R.S. §44-3201(A)(3) by:

- (1) RESPONDENTS failed to provide account statements to the limited partners that
identified the amount of funds, amount of each security in custody and setting
forth all transactions in the account during the statement period as required by
A.A.C. R14-6-206(A)(4)(b)(i); and

1 (2) RESPONDENTS failed to comply with auditing requirements for funds in
2 custody and control of RESPONDENTS within the meaning of A.A.C. R14-6-
3 206(A)(4)(b)(ii).

4 e) RESPONDENTS G'IEBER and GOTLIEB failed to file with the Commission all
5 information required under the IM Act and Rules and refused to permit an examination within the
6 meaning of A.R.S. §44-3201(A)(4) by failing to provide requested documentation or provide
7 responses to subpoenas specifically related to the use of limited partners' funds pursuant to A.R.S.
8 §44-3132(2).

9 f) RESPONDENT G'IEBER knowingly retained an unlicensed investment adviser
10 representative within the meaning of A.R.S. §44-3201(A)(5). GOTLIEB has not been licensed as an
11 investment adviser representative in the state of Arizona.

12 g) RESPONDENT G'IEBER permitted RESPONDENT GOTLIEB to render
13 investment advice in violation of the Investment Management Act and Rules within the meaning of
14 A.R.S. §44-3201(A)(6). GOTLIEB admits to making all investment decisions on behalf of
15 G'IEBER, the general partner of G'ieber Fund. The offering memorandum sets forth that GOTLIEB
16 is to make all investment decisions on behalf of G'ieber Fund.

17 h) RESPONDENTS G'IEBER and GOTLIEB engaged in dishonest or unethical
18 practices in the securities industry within the meaning of A.R.S. §44-3201(A)(13) including but not
19 limited to:

20 i) Refusing to allow or otherwise impeding the Commission from conducting an
21 investigation or examination under the IM Act or any rule adopted thereunder
22 within the meaning of R14-6-203(1) by failing to provide, as requested and
23 subpoenaed, detailed financial information related to use of limited partners'
24 funds including but not limited to cash receipts journals, cash disbursement
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1 journals, general ledgers, bank statements; and documents showing the
2 calculations for management and incentive fees.

3 ii) Failing to disclose conflicts of interest that impaired the rendering of unbiased
4 and objective advice to the detriment of the partners within the meaning of R14-
5 6-203(11).

6 iii) RESPONDENTS violated their fiduciary duty as adviser to the fund and general
7 partner to the limited partners by failing to make full and fair disclosure of all
8 material facts including but not limited to GOTLIEB's relationship with CCC.

9 iv) RESPONDENTS further violated their fiduciary duty to the G'ieber Fund by
10 using the assets of G'ieber Fund to further benefit their own interests including
11 but not limited to using G'ieber Fund assets to purchase equipment for CCC and
12 having assets of G'ieber Fund placed in GOTLIEB's name.

13 55. RESPONDENTS G'IEBER's and GOTLIEB's conduct is grounds to assess
14 restitution and penalties pursuant to A.R.S. § 44-3201(B). Specifically, RESPONDENTS G'IEBER
15 and GOTLIEB have:

16 a) Rendered investment advice in Arizona without being licensed within the meaning of
17 under A.R.S. §44-3201(A)(6).

18 b) Engaged in dishonest or unethical practices in the securities industry within the
19 meaning of A.R.S. §44-3201(A)(13), specifically,

20 i) Refusing to allow or otherwise impeding the Commission from conducting an
21 investigation or examination under the IM Act or any rule adopted thereunder
22 pursuant to A.R.S. §44-3132(2) by failing to provide, as requested, detailed
23 financial information related to use of limited partners' funds including but not
24 limited to cash receipts journals, cash disbursements journals, general ledgers,
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1 bank statements, and documents showing the calculations for management and
2 incentive fees.

3 ii) Failing to disclose a conflict of interest that impaired the rendering of unbiased
4 and objective advice to the detriment of the partners within the meaning of R14-
5 6-203(11).

6 **VI.**
7 **VIOLATION OF A.R.S. § 44-3241**
8 **(Fraud in the Provision of Investment Advisory Services)**

9 56. RESPONDENTS G'IEBER and GOTLIEB engaged in a transaction or transactions
10 within or from Arizona involving the provision of investment advisory services in which
11 RESPONDENTS G'IEBER and GOTLIEB, directly or indirectly: (i) employed a device, scheme or
12 artifice to defraud; (ii) made untrue statements of material fact or omitted to state material facts
13 which were necessary in order to make the statements made not misleading in light of the
14 circumstances under which they were made; (iii) misrepresented professional qualifications with the
15 intent that the client rely on the misrepresentation; and (iv) engaged in transactions, practices or
16 courses of business which operated or would operate as a fraud or deceit. RESPONDENTS
17 G'IEBER and GOTLIEB conduct includes, but is not limited to, the following:

18 a) Failing to have an independent certified public accountant verify all client funds and
19 securities by actual examination at least once during each calendar year without notice as defined by
20 A.A.C. R14-6-206(A)(4)(b)(i);

21 b) Failing to have an independent certified public accountant file a copy of the auditor's
22 report and financial statements with the Commission within 30 days after the completion of the
23 examination along with a letter stating that they examined the funds and securities and describing the
24 nature and extend of the examination as defined by A.A.C. R14-6-206(A)(4)(b)(ii);

25 c) Failing to disclose all material conflicts of interest of GOTLIEB including but not
26 limited to:

1 Executive Assistant to the Executive Director, voice phone number 602/542-3931, e-mail
2 lhogan@azcc.gov. Requests should be made as early as possible to allow time to arrange the
3 accommodation.

4 **IX.**
ANSWER REQUIREMENT

5 Pursuant to A.A.C. R14-4-305, if any RESPONDENTS request a hearing, requesting
6 RESPONDENTS must deliver or mail an Answer to this Notice of Opportunity for Hearing to
7 Docket Control, Arizona Corporation Commission, 1200 W. Washington, Phoenix, Arizona 85007,
8 within 30 calendar days after the date of service of this Notice of Opportunity for Hearing. Filing
9 instructions may be obtained from Docket Control by calling (602) 542-3477 or on the
10 Commission's Internet web site at <http://www.azcc.gov/Divisions/Hearings/Docket.asp>

11 Additionally, the RESPONDENTS must serve the Answer upon the Division. Pursuant to
12 A.A.C. R14-4-303, service upon the Division may be made by mailing or by hand-delivering a
13 copy of the Answer to the Division at 1300 West Washington, 3rd Floor, Phoenix, Arizona, 85007,
14 addressed to Wendy Coy.

15 The Answer shall contain an admission or denial of each allegation in this Notice and the
16 original signature of the answering RESPONDENT or RESPONDENT'S attorney. A statement of
17 a lack of sufficient knowledge or information shall be considered a denial of an allegation. An
18 allegation not denied shall be considered admitted.

19 When a RESPONDENT intends in good faith to deny only a part or a qualification of an
20 allegation, the RESPONDENT shall specify that part or qualification of the allegation and shall
21 admit the remainder. The RESPONDENT waives any affirmative defense not raised in the answer.

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