



0000099298

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

2009 JUN 12 P 2:08

Arizona Corporation Commission

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In the matter of:)
)
 KYLE SCHMIERER, individually and doing)
 business as AMADIN, and JANE DOE)
 SCHMIERER, husband and wife,)
)
 Respondents.)

DOCKET NO. S-20651A-09-0029

**RESPONSE TO MOTION
FOR MEDIATION**

I. Procedural History

On January 29, 2009, the Securities Division of the Arizona Corporation Commission ("Commission") filed a Temporary Order to Cease and Desist and Notice of Opportunity for Hearing, ("TC&D") with respect to Respondent Kyle Schmierer.

On February 19, 2009, Respondent Kyle Schmierer filed a Request for Hearing.

On February 24, 2009, by Procedural Order, a pre-hearing conference was scheduled for March 23, 2009.

On February 26, 2009, Respondent Kyle Schmierer filed an Answer.

On March 23, 2009, the pre-hearing conference was held. Administrative Law Judge Stern recommended that the parties meet and discuss a resolution to this matter. Further, Judge Stern suggested that the matter be arbitrated or mediated. The parties were to file a motion to either set a hearing date or to set an arbitration/mediation date after meeting to discuss the issues.

On March 31, 2009, the Securities Division filed a Motion to Set Hearing. On April 2, 2009, Respondent filed a Motion to Set Mediation. A procedural conference was held on April 30, 2009. On May 19, 2009, the Third Procedural Order was issued. The Third Procedural Order scheduled a hearing to be held on August 31, 2009 and the exchange of witness and exhibit lists

1 on June 19, 2009. In addition, the Third Procedural Order also ordered that, within 14 days of the
2 Third Procedural Order, the Respondent review the terms of the proposed consent and make a
3 filing with the Commission which either indicates to the Securities Division whether he agrees
4 with the terms of the Consent Order or that Respondent requests mediation or wishes to proceed
5 with an evidentiary hearing as ordered.

6 On June 10, 2009, Respondent filed a Motion for Mediation.

7 **II. Response**

8 **a. Mediation/Arbitration**

9 Respondent's Motion for Mediation requests a mediation (at times Respondent refers to
10 arbitration). The Arizona Securities Act and Rules ("Act") does not contain a provision that allows
11 matters brought under the Act to be mediated or arbitrated. Further, the Arizona Administrative
12 Code does not contain a provision that allows matters to be mediated or arbitrated. Therefore, the
13 Securities Division requests this matter proceed to hearing that has been scheduled to begin on
14 August 31, 2009.

15 The Commission does not have the resources to conduct two hearings in a single case. In
16 essence, that is what the Respondent is requesting by seeking mediation/arbitration. During the
17 mediation, the Securities Division would have to present its case, to an Administrative Law Judge,
18 just as it would at a hearing. The result of mediation is not binding against either party and
19 therefore either party would still be entitled to request a hearing. It would save time and resources
20 for both parties to just conduct the hearing that has already been scheduled.

21 This case is not conducive to mediation/arbitration. The Securities Division has attempted
22 to discuss the allegations in the Temporary Cease and Desist Order and the proposed consent on
23 numerous times with Respondent. However the Respondent continues to assert that his
24 interpretation of the Act is correct. The Respondent asserts he has a First Amendment right to seek
25 investors over the Internet. This matter needs to proceed to hearing where the Administrative Law
26 Judge is able to rule on the interpretation of the Act and its applicability to the facts of this case.

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b. Settlement

The Respondent asserts his right to settle this matter in his Motion for Mediation. The option to negotiate a settlement on this matter has been available since this matter was filed. In fact, on February 27, 2009, the Securities Division provided a draft proposed consent to Respondent. Respondent has provided no response to the proposed consent except to request that the administrative penalty be reduced or eliminated. No substantive comments have been received from the Respondent related to the various terms of the proposed consent.

The Securities Division continues to be willing to discuss the proposed consent with the Respondent any time prior to hearing.

c. Jury Trial

Respondent's Motion for Mediation requests that he be afforded a jury trial. This is an administrative case. Jury trials are not permitted in administrative cases.

The United States Supreme Court has held that jury trials are not available in an administrative proceeding. *See Tull v. United States*, 481 U.S. 412, 418, n.4 (1987)(citing *Atlas Roofing Co. v. Occupational Safety and Health Review Com'n*, 430 U.S. 442 (1977) (the Seventh Amendment of the United States Constitution is not applicable to administrative proceedings). The Arizona legislature enacted the Act, charged the Commission with its enforcement, and provided for adjudication procedures under the Act. It did not provide for a jury trial in this forum.

d. Investigation into the Securities Division

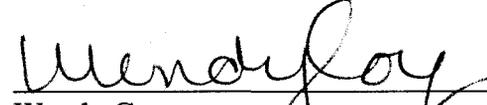
Respondent's Motion for Mediation requests that an investigation be conducted into the Securities Division. Respondent asserts that he was told he would have an opportunity to review the proposed consent order and note which parts he did not agree with and wanted to change. Respondent complains that a hearing request was filed the next day. The Respondent has been told on many occasions to review the proposed consent and provide the comments to the Securities Division. The specific instance Respondent refers to is an email that was sent to him by Ms. Coleman that stated the Respondent was to provide his written comments to Securities Division

1 attorney Wendy Coy. Ms. Coleman's email also states that a request for hearing would be filed
2 however; the Securities Division was willing to negotiate a settlement prior to the hearing. See
3 attached Exhibit A. There is no misconduct on the part of any Securities Division staff member.

4 **III. Conclusion**

5 The Respondent's Motion for Mediation should be denied. There is no provision under the
6 Arizona Securities Act or the Arizona Administrative Code that authorizes a mediation or
7 arbitration. This matter is not conducive to mediation/arbitration. The Respondent does not have a
8 right to a jury trial in an administrative matter. No investigation of the Securities Division is
9 warranted. Therefore, the Securities Division requests that this matter proceed to the hearing that is
10 set for August 31, 2009.

11 Respectfully submitted this 12th day of June, 2009.

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13 By: 
14 Wendy Coy
15 Senior Counsel for the Securities Division of
16 the Arizona Corporation Commission
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1 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
2 filed this 12th day of June, 2009 with:

3 Docket Control
4 Arizona Corporation Commission
5 1200 W. Washington St.
6 Phoenix, AZ 85007

7 COPY of the foregoing hand-delivered
8 filed this 12th day of June, 2009 to:

9 Mr. Marc E. Stern
10 Administrative Law Judge
11 Arizona Corporation Commission/Hearing Division
12 1200 W. Washington St.
13 Phoenix, AZ 85007

14 COPY of the foregoing mailed
15 this 12th day of June, 2009 to:

16 Kyle Schmierer
17 220 West Behrend Dr.
18 Phoenix, AZ 85027
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EXHIBIT A

Wendy Coy

From: Julie Coleman
Sent: Monday, March 30, 2009 10:46 AM
To: 'Amadin7@aol.com'
Cc: Wendy Coy
Subject: FW:

Attachments: WhatEveryInvestorShouldKnow.pdf; Raising_Capital.pdf

Mr. Schmierer:

Per our telephone conversation, I have attached two informational pamphlets which are available on our website. Again, if you do not understand what is required of you in order to raise capital, you must seek legal advice. Unfortunately, Division staff cannot provide any legal advice to you.



WhatEveryInvest Raising_Capital.
rShouldKnow.pdf (226 KB)

Please contact Wendy today with your written proposed changes. The Division will be requesting that a hearing date be set in this matter; however, we are certainly willing to continue to negotiate a settlement (i.e., consent) in the interim.

Julie A. Coleman
Chief Counsel of Enforcement
Arizona Corporation Commission, Securities Division
1300 W. Washington St., Third Floor
Phoenix, AZ 85007
Direct Phone: (602) 542-0639
Fax: (602) 594-7427
Email: jcoleman@azcc.gov

From: Wendy Coy
Sent: Thursday, March 26, 2009 9:34 AM
To: 'Amadin7@aol.com'
Subject:

Mr. Schmierer -

Please contact my supervisor, Julie Coleman, Chief Counsel of Enforcement, to discuss the pending matter. Ms. Coleman may be reached at 602-542-0639.

Wendy L. Coy
Senior Counsel
Arizona Corporation Commission
Securities Division
1300 W. Washington, 3rd Floor
Phoenix, AZ 85007
602-542-0633