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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

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

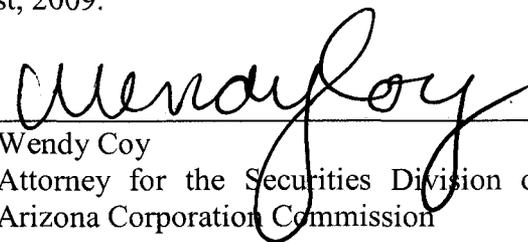
RESPONSE TO:

**1) MOTION TO DISMISS AND
SANCTIONS FOR MALICIOUS
PROSECUTION; 2) MOTION FOR
JURY TRIAL; AND 3) MOTION FOR
SANCTIONS FOR FAILURE TO
COMPLY WITH DISCOVERY**

On August 24, 2009, Respondent filed a Motion for a Jury Trial and a Motion to Dismiss.
Both Motions should be denied for the reasons outlined in the attached Memorandum of Points
and Authorities.

Respectfully submitted this 27th day of August, 2009.

By:


Wendy Coy
Attorney for the Securities Division of the
Arizona Corporation Commission

Arizona Corporation Commission
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **Motion to Dismiss and Sanctions for Malicious Prosecution**

3 Respondent filed a Motion to Dismiss this matter on the basis of malicious prosecution
4 solely on his assertion that his offering complies with a “statutory private offering exemption.”
5 However, Respondent fails to provide any evidence that supports his assertion. Pursuant to A.R.S.
6 §44-2033, the burden of proving that an exemption from registration exists is on the Respondent.

7 Respondent asserts that he qualifies for a “statutory private offering exemption” under the
8 both federal and state law. Both federal and Arizona law include a “statutory private offering
9 exemption.” Respondent does not meet the federal or state requirements of a “statutory private
10 offering exemption.” To satisfy the “statutory private offering exemption” the sales of securities
11 must be done privately and cannot be made through general solicitation. Respondent conducted a
12 general solicitation by soliciting investors over the Internet as outlined in the Temporary Cease and
13 Desist Order (“TC&D”) filed on January 29, 2009.

14 Respondent references Regulation D of the Securities and Exchange Act of 1933.
15 Regulation D outlines the “safe harbor provisions” under federal law. The Commission has adopted
16 A.A.C. R14-4-126 (“Rule 126”) as the counterpart to federal Regulation D. Both Regulation D and
17 Rule 126 set forth specific requirements to qualify for the safe harbor exemptions. Based upon the
18 facts of the case, the Respondent does not qualify for either the federal or state “statutory private
19 offering exemption” or any of the “safe harbors” that may be available. Respondent has produced
20 no evidence, as is his burden, to establish his right to an exemption.

21 There is no basis to dismiss this action or for sanctions. The Securities Division properly
22 filed this matter and has complied with all rulings, statutes and rules.

23 **Motion for Jury Trial**

24 Respondent filed another motion requesting a jury trial. The Securities Division responded
25 to the first request on June 12, 2009. Respondent cites to the Arizona Constitution as authority for
26

1 his demand for a jury trial in a civil matter. This matter is an administrative matter in an
2 administrative forum. There is no option for a jury trial.

3 The United States Supreme Court has held that jury trials are not available in an
4 administrative proceeding. See *Tull v. United States*, 481 U.S. 412, 418, n.4, 107 S.Ct. 1831
5 (1987)(citing *Atlas Roofing Co. v. Occupational Safety and Health Review Com'n*, 430 U.S. 442
6 (1977) (the Seventh Amendment of the United States Constitution is not applicable to
7 administrative proceedings)). The Arizona legislature enacted the Act, gave the Arizona
8 Corporation Commission (“Commission”) authority to enforce the Act and provided for procedures
9 under the Act to further the duties of the Commission. The legislature did not provide for a jury
10 trial in administrative proceedings. This is an administrative proceeding. There is no basis for a
11 jury trial in an administrative matter. The motion must be denied.

12 **Motion for Sanctions for Failure to Comply with Discovery**

13 As outlined in the *Response To: 1) Motion For Continuance; and 2) Motion To Compel*
14 *Discovery* filed August 25, 2009, the Securities Division has complied with all the Procedural
15 Orders of Administrative Law Judge Stern, the Act, the Arizona Administrative Code and case
16 law when responding to discovery requests. Respondent had the location and identity of the sole
17 witness the Securities Division will call to testify as to the facts of this case. The exhibits were
18 provided to the Respondent on June 19, 2009 as outlined in the Third Procedural Order. There
19 are no grounds to order sanctions against the Securities Division.

20 **Conclusion**

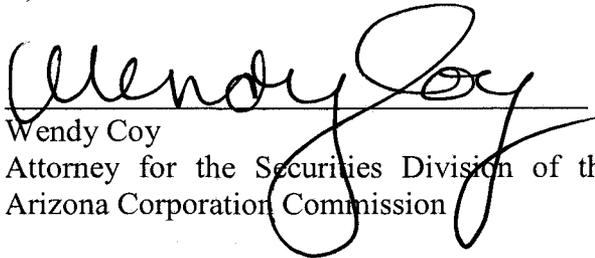
21 Respondent has failed to establish grounds for granting a motion to dismiss or assessing
22 sanctions. There is no ability to conduct jury trials in an administrative proceeding. All discovery
23 requirements have been met therefore; there is no basis to grant sanctions against the Securities
24 Division.

25 ...

26 ...

1 A hearing on the facts of this case has been set for August 31, 2009. Respondent has the
2 opportunity to question the witness and challenge the evidence presented by the Securities Division
3 related to the allegations set forth in the TC&D that was filed on January 29, 2009.

4 Respectfully submitted this 27th day of August, 2009.

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6 By: 
7 Wendy Coy
8 Attorney for the Securities Division of the
9 Arizona Corporation Commission
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1 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
2 filed this 27th day of August, 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 27th day of August, 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 27th day of August, 2009 to:

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

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