

ORIGINAL



BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS 2009 SEP -3 P 3: 35

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

SECURITIES DIVISION
DOCKET CONTROL

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 IMMEDIATE
DISMISSAL & SEVERE SANCTIONS

On August 12, 2009 and August 24, 2009, Respondent filed what appears to be Motions to Dismiss. The Securities Division previously responded to these motions.

On August 31, 2009, Respondent again filed what appears to be a Motion to Dismiss.

All the Motions to Dismiss should be denied for the reasons outlined in the attached Memorandum of Points and Authorities.

Respectfully submitted this 3rd day of September, 2009.

By: Wendy Coy
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 **I. Motion to Dismiss**

3 On August 12, 2009, Respondent filed his initial Motion to: Dismiss Hearing/Jury Trial
4 For My Case.

5 On August 24, 2009, Respondent filed another Motion to Dismiss This Case and
6 Sanctions for Malicious Prosecution.

7 On August 27, 2009, the Securities Division responded to Respondent's motions
8 addressing the same allegations raised by Respondent as those raised in Respondent's August 31,
9 2009 motion.

10 On August 31, 2009, Respondent filed a Motion for Immediate Dismissal and Severe
11 Sanctions. The basis of Respondent's motions to dismiss is twofold, one, in Respondent's
12 opinion, he qualifies for an exemption therefore the case should be dismissed and two, the
13 Securities Division has abused its power.

14 **II. The Respondent Does Not Meet The Requirements Of A Statutory Private Offering
15 Exemption.**

16 The Respondent's motion stated that this matter should be dismissed because he followed
17 the "SEC Regulation D and therefore is exempt from registration from both the Federal
18 Government and the state of Arizona." Further, Respondent asserts that he qualifies for a
19 "statutory private offering exemption." The facts do not support Respondent's assertion.

20 First, the burden is on the Respondent to prove that an exemption is available to him.
21 A.R.S. §44-2033. Respondent has not done so. Second, Respondent asserts that his offering meets
22 the requirements of both federal and state statutory private offering exemptions. The Respondent
23 does not meet the requirements of a statutory private offering exemption or the respective safe
24 harbor provisions for the reasons outlined below.

25 ...

26 ...

1 **A. The Burden Is On The Person Raising Exemption To Prove It Is Applicable.**

2 Pursuant to A.R.S. §44-2033, in any action, when a defense is based upon any exemption
3 under the Arizona Securities Act (“Act”), the burden of proving the existence of the exemption
4 shall be upon the party raising the defense. “The general rule governing the burden of proof in
5 Arizona is that a party who asserts the affirmative of an issue has the burden of proving it.” *Black,*
6 *Robertshaw, Frederick, Copple & Wright, P.C. v. U.S.*, 130 Ariz. 110, 634 P.2d 398 (Ct.App.
7 1981) quoting *Harvey v. Aubrey*, 53 Ariz. 210, 213, 87 P.2d 482, 483 (1939). Respondent stated
8 that his offering qualifies for an exemption under the Act however he has provided no evidence to
9 support this statement. The Respondent has not met his burden. The motion should be denied on
10 this basis alone.

11 **B. Respondent Does Not Meet The Requirements Of A Statutory Private**
12 **Offering Exemption Under Either Federal Or State Law.**

13 Respondent asserts that he meets the requirements of a “statutory private offering
14 exemption” under both federal and state law and that he followed “Regulation D.” Even if
15 Respondent had introduced evidence in his motion, he could not overcome the public nature of
16 his offering. Although in his motions, Respondent references a “statutory private offering
17 exemption” and “Regulation D,” Respondent fails to specify the specific statutory sections or
18 rules that he asserts applies to the subject offering. Even if Respondent had specified which
19 statutory sections or rules apply, his offering does not meet the specific requirements under either
20 federal or state law for the reasons outlined below. Since the Respondent has cited to both federal
21 and state law, the Securities Division will respond to both. The TC&D filed by the Securities
22 Division only addresses violations of the Act.

23 Section 4(2) of the federal Securities Act of 1933 provides an exemption from registration
24 for “transactions by an issuer not involving any public offering.” Section 44-1844(A)(1) of the
25 Arizona Securities Act is the state equivalent to Section 4(2). In order to satisfy the statutory
26 private offering exemption, the securities cannot be sold through advertising and the sales must be

1 made to only a limited number of sophisticated people who have access to the information that
2 would be included in a registration statement. *See SEC v. Murphy*, 626 F.2d 633 (9th Cir. 1980).

3 Respondent states that since he followed "Regulation D" he is therefore "exempt from
4 registration from both the Federal Government and the state of Arizona." Respondent does not
5 provide any detail as to which section of Regulation D is applicable to his offering. Regulation D
6 of the Securities Act of 1933 outlines two exemptions¹ and a "safe harbor" with respect to Section
7 4(2) of the Securities Act of 1933. Since the Respondent references only the terms "statutory
8 private offering exemption" and "Regulation D" in his motions, the Securities Division assumes
9 that Respondent is referencing Rule 506 (17 C.F.R. §230.506(a)) which is the safe harbor to the
10 4(2) exemption of the Securities Act of 1933.

11 Rule 506 provides a "safe harbor" to the private offering exemption under the Securities
12 Act of 1933. A "safe harbor" is a rule that explicitly states the requirements an issuer must meet.
13 If an issuer complies with all of the requirements of the rule, it will be deemed to have complied
14 with the statute. In this case, if Respondent complied with Rule 506 of Regulation D, the issuer
15 will be deemed to have met the requirements for the section 4(2) private placement exemption.
16 Offerings of any amount by any issuer to an unlimited number of accredited investors plus 35
17 "sophisticated" persons are exempt from federal registration under Rule 506. However,
18 Regulation D prohibits the use of general solicitation or general advertising under Rule 506².
19 Respondent does not meet the requirement of Rule 506. As alleged in the Securities Division
20 TC&D and as will be shown at hearing. Respondent sought investors over the Internet on
21 numerous different sites. Respondent advertised the details of his offering including a 100%
22 return on investment "guaranteed." The offering would be deemed a "public offering" and not
23 eligible for the "statutory private offering exemption."

24 ¹ Rule 504 and Rule 505 are exemptions from registration for limited offerings on the federal level. A.A.C. 14-4-
25 126(E) is similar to Rule 505, and also outlines exemptions to registration. Although there is no equivalent to Rule 504
under the Arizona Securities Act, a transaction exempt under Rule 504 may be exempt under other provisions of the
Arizona Securities Act.

26 ² 17 C.F.R. 230.502(c), Limitation on manner of offering. "neither the issuer . . . shall offer to sell the securities by any
form of general solicitation or general advertising . . ."

1 A.A.C. R14-4-126³ contains similar provisions as federal Regulation D. Rule 126(F)
2 provides a safe harbor for the A.R.S. §44-1844(A)(1) exemption from registration for private
3 placements. Although Rule 126(F) does not contain limits on the amount of securities offered,
4 general solicitation or general advertising is prohibited⁴. Respondent does not meet the
5 requirement of Rule 126(F). As mentioned above, Respondent sought investors over the Internet
6 on numerous different sites. Respondent advertised the details of his offering including a 100%
7 return on investment “guaranteed.”

8 Respondent simply does not meet the requirements under Section 4(2) of the Securities
9 Act of 1933 or A.R.S. §44-1844(a)(1). Therefore the Securities Division took appropriate action
10 by filing its TC&D. There are no grounds to dismiss this action.

11 **C. The Securities Division Has Not Abused Its Powers.**

12 Respondent accuses the Securities Division of abusing its powers by filing the TC&D
13 against him for violations of the Act. The Securities Division has complied with all statutes, rules,
14 and procedural orders on this matter. Obviously, the Securities Division had more than adequate
15 reasons to stop Respondent’s violations of the Act. Respondent has provided no evidence to
16 support an order of dismissal on this matter.

17 Respondent also asserts that this matter must be dismissed due to some failure of the
18 Securities Division to provide “essential information” related to this matter. The Securities
19 Division has provided to the Respondent all evidence pursuant to the Third Procedural Order.
20 Moreover, the Respondent raised the issue of pre-hearing discovery in his motion dated June 10,
21 2009. On June 19, 2009, ALJ Stern denied the Motion in the Fourth Procedural Order stating that
22 witness and exhibit list and the exhibits “should provide the Respondent with the “essential
23 information” needed to prepare his defense.” Therefore this new motion should also be denied.

24 . . .

25 _____
26 ³ Id.

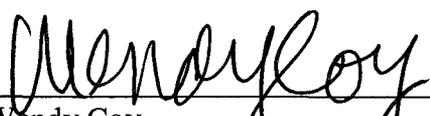
⁴ A.A.C.14-4-R126(C)(3), Limitation on manner of offering. “[n]either the issuer . . . shall offer or sell the securities by any for of general solicitation or general advertising . . .”

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III. Conclusion

There is no basis to dismiss the TC&D. Respondent's Motion for Dismissal should be denied.

Respectfully submitted this 3rd day of September, 2009.

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

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ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
filed this 3rd day of September, 2009 with:

Docket Control
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

COPY of the foregoing hand-delivered
filed this 3rd day of September, 2009 to:

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

COPY of the foregoing mailed
this 3rd day of September, 2009 to:

Kyle Schmierer
220 West Behrend Dr.
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