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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

2009 SEP -3 P 3: 36

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:

1) MOTION: MY CONSTITUTIONAL
RIGHTS TO A JURY TRIAL REMAIN
INVIOATE; AND 2) MOTION FOR
CONTINUANCE - FUTURE JURY
TRIAL DATE OR CASE MUST BE
DISMISSED IMMEDIATELY

On August 31, 2009, Respondent filed a series of Motions including a Motion For Jury Trial and Motion for Continuance. The August 31, 2009 motions all have been addressed in previous responses by the Securities Division as outlined below. All motions 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
DOCKETED
SEP - 2 2009
DOCKETED BY [Signature]

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Issues:**

3 Respondent has filed numerous motions in this matter. The Securities Division has
4 responded to the motions. In some instances, Procedural Orders have been issued ruling on the
5 motions. Respondent's Motions can be categorized in the following groups:

- 6 1. Mediation – Respondent requests that this matter be mediated.
- 7 2. Discovery – Respondent asserts that he is entitled to additional discovery.
- 8 3. Jury Trial – Respondent asserts that he has a right to a jury trial in an
9 administrative proceeding.
- 10 4. Formal Investigation – Respondent asserts that the Securities Division has
11 acted in a manner that is inappropriate.
- 12 5. Dismissal – Respondent asserts that the action filed against him should be
13 dismissed for malicious prosecution and failure to provide discovery. The
14 motions for dismissal filed by Respondent will be addressed in a separate
15 pleading.
- 16 6. Sanctions – Respondent requests that the Securities be sanctioned for
17 violations of discovery rules and malicious prosecution.
- 18 7. Continuance – Respondent requested a continuance of the administrative
19 hearing.

20 **II. Procedural History**

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

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

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

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On February 26, 2009, Respondent filed an Answer.

On March 23, 2009, the pre-hearing conference was held. Administrative Law Judge Stern (“ALJ Stern”) recommended that the parties meet and discuss a resolution to this matter. Further, ALJ 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 on June 19, 2009.

On June 10, 2009, Respondent filed a Motion For Release of Essential Information Before Mediation and a Motion for Mediation.

On June 12, 2009, the Securities filed Responses to the motions filed on June 10, 2009 by Respondent. On June 19, 2009, a Fourth Procedural Order was issued addressing Respondent’s motions. The Fourth Procedural Order denied Respondent’s Motion For Release of Essential Information and held in abeyance the Motion for Mediation.

On June 19, 2009, the Securities Division made its witness and exhibits available to Respondent.

Also on June 19, 2009, ALJ Stern issued the Fourth Procedural Order denying Respondent’s Motion for Release and holding in abeyance Respondent’s Motion for Mediation. Further, ALJ Stern granted Respondent’s request for additional time to produce his witness and exhibit list. The Fourth Procedural Order affirmed August 31, 2009 as the hearing date.

On June 24, 2009, Respondent filed three motions essentially requesting a rehearing on the issues of disclosure of investigative materials, mediation and the demand for an investigation of the Securities Division.

1 On July 2, 2009, the Securities Division filed a Response to Respondent's motions filed
2 on June 24, 2009. In the Response, the Securities Division stated that the issues raised in the June
3 24, 2009 motions had all been addressed in the Response the Securities Division filed on June 12,
4 2009.

5 On July 9, 2009, Respondent filed a Preliminary Witness and Exhibit List. In addition, on
6 July 9, 2009, Respondent also filed a Motion to Delay Deadline for Witness and Exhibits and the
7 Trial and a Motion To Begin A Formal Investigation Into The Abuse Of Power And Extortion By
8 The Securities Division Immediately. The issue of an investigation against the Securities Division
9 was addressed in the Responses filed by the Securities Division on June 12, 2009 and July 2,
10 2009.

11 On August 12, 2009, Respondent filed a Motion: Oral Contract of Mediation Option Must
12 Be Upheld. In addition, Respondent filed a Motion to Dismiss Hearing/Jury Trial for my Case and
13 re-filed the Motion to Delay Deadline for Witness and Exhibits and The Trial and Motion to
14 being a formal investigation into the abuse of power and extortion by the Securities Division
15 Immediately and Motion: Demand that Promise of Mediation Option be Upheld. The Securities
16 Division responded to the Motion for Mediation on June 12, 2009. In addition, the Securities
17 Division addressed Respondent's motion for jury trial and an investigation into the Securities
18 Division in the June 12, 2009 Response. Furthermore, the Securities Division again addressed
19 these same issues with its July 2, 2009 Response.

20 On August 21, 2009, Respondent filed a Motion for Continuance for New Trial Date and
21 Motion to Compel Discovery. The Securities Division responded on August 25, 2009.

22 On August 24, 2009, Respondent filed a Motion to Dismiss This Case and Sanctions for
23 Malicious Prosecution, Motion for Sanctions for Failure to Comply with Discovery and Motion to
24 Assert My Constitutional Rights and Demand for a Jury Trial. The Securities Division filed its
25 Response to the Motions on August 27, 2009.

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1 On August 31, 2009, 8:51 a.m., (the day of the scheduled hearing schedule do to begin at
2 10:00 a.m.) Respondent filed the following: Motions: Motion for Immediate Dismissal and
3 Severe Sanctions, Motion My Constitutional Rights to a Jury Trial Remain Inviolate and Motion
4 for Continuance – Future Jury Trial Date or Case Must be Dismissed Immediately.

5 On August 31, 2009, after Respondent failed to appear at the scheduled hearing, ALJ
6 Stern granted the Motion to Continue over the objections of the Securities Division.

7 **III. Respondent Requests Mediation –**

8 On March 31, 2009, the Securities Division requested a hearing date be set. On April 2,
9 2009, Respondent filed a request for mediation and to delay the setting of a hearing date. On
10 April 10, 2009, ALJ Stern issued a Procedural Order setting a procedural conference to determine
11 whether mediation or a hearing should be set. The procedural conference was held on April 30,
12 2009. Pursuant to the Third Procedural Order, a hearing date of August 31, 2009 was scheduled
13 to begin at 10:00 a.m. The Third Procedural Order allowed time for Respondent to request
14 mediation or proceed with an evidentiary hearing.

15 On June 10, 2009, Respondent filed a Motion: Request For Mediation. On June 12, 2009,
16 the Securities Division responded to the request for mediation. As the Securities Division stated in
17 its Response, the Arizona Securities Act (“Act”) does not contain a provision that allows matters
18 brought under the Act to be mediated or arbitrated. Further, the Arizona Administrative Code
19 does not contain a provision that allows matters to be mediated or arbitrated. Respondent failed to
20 provide any authority to support his request for mediation.

21 On June 19, 2009, the Fourth Procedural Order was issued. ALJ Stern ordered that the
22 Motion for Mediation shall be held in abeyance. The Fourth Procedural Order affirmed the
23 hearing date scheduled for August 31, 2009.

24 On June 24, 2009, Respondent filed a Motion: Demand That Promise Of Mediation
25 Option Be Upheld. On July 2, 2009, the Securities Division filed a Response referencing its June
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1 12, 2009 response. On August 12, 2009, Respondent then filed a Motion: Oral Contract of
2 Mediation Option Must Be Upheld.

3 Respondent's August 12, 2009 motion is yet another attempt by Respondent to have the
4 matter mediated when not permitted by law.

5 Neither the Act nor the Administrative Code allows for mediation on this type of matter.
6 Therefore Respondent's motion should be denied.

7 **IV. Motion for Sanctions for Failure to Comply with Discovery**

8 Pursuant to the Third Procedural Order, the Securities Division and Respondent were to
9 exchange witness and exhibit lists by June 19, 2009. On June 10, 2009, Respondent filed a
10 Motion For Release of Essential Information Before Mediation. On June 12, 2009, the Securities
11 Division responded to Respondent's motion outlining Respondent's due process rights.

12 On June 19, 2009, a Fourth Procedural Order was issued. Pursuant to the Fourth
13 Procedural Order, Respondent's Motion for Release was denied. The Fourth Procedural Order
14 further stated that the witness and exhibit list should provide Respondent with the "essential
15 information" needed to prepare his defense. Respondent received about three additional weeks to
16 review the Securities Division's exhibits and to seek information from the witness listed before
17 providing his witness and exhibit list.

18 On June 24, 2009, Respondent filed another Motion for Release of Essential Information
19 Immediately. The Securities Division responded to this motion on July 2, 2009, referring back to
20 its Response on June 12, 2009. Further, in the Fourth Procedural Order dated June 19, 2009, ALJ
21 Stern denied Respondent's motion stating that the requested "essential information" would be
22 provided to Respondent when the Securities Division produced its witness and exhibit list along
23 with copies of the exhibits.

24 On August 21, 2009, Respondent filed a Motion to Compel Discovery specifically
25 requesting the home addresses and phone numbers of Securities Division employees. The
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1 Securities Division responded on August 25, 2009. In its response, the Securities Division cites to
2 statutes and rules that govern the discovery process in an administrative proceeding.

3 On August 24, 2009, Respondent filed a Motion for Sanctions for Failure to Comply with
4 Discovery. The Securities Division responded on August 27, 2009.

5 Ignoring the fact that ALJ Stern already ruled on the issue, on August 31, 2009,
6 Respondent again filed a motion seeking release of what he termed “essential information.”

7 Respondent’s repeated requests are essentially requests for pre-hearing discovery. The
8 Securities Division provided all evidence it plans to present at hearing to Respondent. Respondent
9 was also provided the name of the Securities Division’s witness. Respondent is not allowed free
10 access to the Securities Division’s investigative file. “At a hearing a party shall be entitled to enter
11 an appearance, to introduce evidence, examine and cross-examine witnesses, make arguments, and
12 generally participate in the conduct of the proceeding.” A.A.C. R14-3-104(A).

13 The legislature has mandated that contested cases before the Commission are governed by
14 Arizona Revised Statutes. *See* A.R.S. §§ 41-1067 and 41-1092.02(A)(4). Specifically, A.R.S. §
15 41-1061(A)(1) states: “Every person who is a party to such proceedings shall have the right to be
16 represented by counsel, to submit evidence in open hearing and shall have the right of cross-
17 examination.” Also, A.R.S. § 41-1062(A)(4) states: “Prehearing depositions and subpoenas for the
18 production of documents may be ordered by the officer presiding at the hearing, provided that the
19 party seeking such discovery *demonstrates* that the party has *reasonable need* of the deposition
20 testimony or materials being sought. . . . Notwithstanding the provisions of section 12-2212, no
21 subpoenas, depositions or other discovery shall be permitted in contested cases *except as provided*
22 *by agency rule or this paragraph.*” Emphasis added. The Commission has specific rules related to
23 discovery, A.A.C. Rule R14-3-101 et seq.

24 Respondent is entitled to due process in this matter. “The fundamental requirement of due
25 process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”
26 *Mathews v. Eldridge*, 96 S. Ct. 893 (1976) quoting *Armstrong v. Manzo*, 380 U.S. 545 (1965).

1 There is no basic constitutional right to pretrial discovery in administrative proceedings. *Silverman*
2 *v. Commodity Futures Trading Commission*, 549 F.2d. 28, 33 (7th Cir. 1977); *See also Starr v.*
3 *Commissioner of Internal Revenue*, 226 F.2d. 721,722 (7th Cir. 1955), cert. denied, 350 U.S. 993,
4 76 S.Ct. 542 (1955); *National Labor Relations Board v. Interboro Contractors, Inc.*, 432 F.2d 854,
5 857 (2nd Cir. 1970); *Miller v. Schwartz*; 528 N.E.2d 507 (N.Y. 1988). “[T]he evidence used to
6 prove the Government’s case must be disclosed to the individual so that he has an opportunity to
7 show that it is untrue. ... We have formalized these protections in the requirements of confrontation
8 and cross-examination.” *Green v. McElroy*, 79 S. Ct. 1400 (1959). “The Constitution does not
9 require that a respondent in an administrative proceeding be aware of all evidence, information and
10 leads to which opposing counsel might have access.” *Pet v. Dept. of Health Services*, 207 Conn.
11 346, 542 A.2d 672 (1988) quoting *Federal Trade Commission v. Anderson*, 631 F.2d 741, 748
12 (D.C. Cir. 1979). “This does not mean that a party can be denied due notice of the hearing, the
13 right to produce relevant evidence, the right to cross-examine witnesses produced by his adversary,
14 and the right to be fairly apprised of the facts upon which the agency will act.” *Id.*

15 Respondent has the right to cross-examine the witnesses against him. Further, Respondent
16 has the ability, pursuant to A.A.C. Rule R14-3-109(O), to subpoena for hearing those witnesses that
17 he believes have testimony relevant to the allegations in the TC&D.

18 The Securities Division has complied with all Procedural Orders issued by ALJ Stern.
19 Respondent had the location and identity of the sole witness the Securities Division will call to
20 testify as to the facts of this case. Respondent is not entitled to personal identifying information
21 on Commission employees. The exhibits were provided to Respondent on June 19, 2009 as
22 outlined in the Third Procedural Order. The Fourth Procedural Order specifically denied
23 Respondent’s motion for further discovery. There are no grounds to order sanctions against the
24 Securities Division.

25 Respondent’s Motions to Compel Discovery should be denied.

26 ...

1 **V. Motion for Jury Trial**

2 On June 10, 2009, Respondent filed a Motion: A Request for Mediation. Contained within
3 the Motion filed by Respondent, he requests "trial of his peers." The Securities Division responded
4 to the Motion on June 12, 2009 and addressed the issue of a jury trial in an administrative setting.
5 The Securities Division's response cited to case law from the U. S. Supreme Court finding that
6 there is no right to a jury trial in administrative proceedings.

7 On June 24, 2009, Respondent filed a Motion: Demand That Promise of Mediation Option
8 Be Upheld. In this motion, Respondent again asserts that he is entitled to a jury trial. The
9 Securities Division responded on July 2, 2009 and referenced its June 12, 2009 response.

10 On August 12, 2009, Respondent filed a Motion: Oral Contract of Mediation Option Must
11 Be Upheld. Within this motion, Respondent requests a jury trial. On August 24, 2009, Respondent
12 filed a Motion to Assert My Constitutional Rights & Demand a Jury Trial. The Securities Division
13 responded on August 27, 2009. On August 31, 2009, Respondent filed another motion seeking a
14 jury trial.

15 In the August 24, 2009 and the August 31, 2009 motions, Respondent cites to the Arizona
16 Constitution as authority for his demand for a jury trial in a civil matter. This matter is an
17 administrative matter in an administrative forum. There is no right to a jury trial.

18 Respondent states in his August 31, 2009 motion that "[n]o cited case law or any law can
19 supersede the US constitution and deny anyone of their constitutional rights!"

20 The United States Supreme Court has held that jury trials are not available in an
21 administrative proceeding. *See Tull v. United States*, 481 U.S. 412, 418, n.4, 107 S.Ct. 1831
22 (1987)(citing *Atlas Roofing Co. v. Occupational Safety and Health Review Com'n*, 430 U.S. 442
23 (1977) (the Seventh Amendment of the United States Constitution is not applicable to
24 administrative proceedings)). The Arizona legislature enacted the Act, gave the Commission
25 authority to enforce the Act and provided for procedures under the Act to further the duties of the
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1 Commission. The legislature did not provide for a jury trial in administrative proceedings. This is
2 an administrative proceeding. There is no basis for a jury trial in an administrative matter.

3 Respondent's motion must be denied.

4 **VI. Motions for Formal Investigations**

5 On June 10, 2009, Respondent filed a Motion: A Request for Mediation. Included in this
6 motion was the request that an investigation be opened into the actions of the Securities Division.

7 On June 12, 2009, the Securities Division filed a response addressing the issues raised by
8 Respondent.

9 On June 24, 2009, Respondent filed a Motion: Request A Formal Investigation Into The
10 Abusive Behavior Of The Securities Division. On July 2, 2009, the Securities Division filed a
11 response to the June 24, 2009 motion filed by Respondent referencing its June 12, 2009 response.

12 On July 9, 2009, Respondent filed a Motion To Begin A Formal Investigation Into The
13 Abuse Of Power And Extortion By The Securities Division Immediately. On August 12, 2009,
14 Respondent re-filed the Motion To Begin A Formal Investigation Into The Abuse Of Power And
15 Extortion By The Securities Division Immediately. Respondent alleges, without any
16 documentation or any support, that the Securities Division is "applying the law according to the
17 whims of the employees." The facts of the case speak for themselves.

18 Respondent chose to attack the investigation instead of responding to the allegations
19 contained in the TC&D. The Securities Division appropriately brought this action for alleged
20 violations of the Act. Respondent had the opportunity to address the allegations at the requested
21 hearing, but failed to even appear at the scheduled hearing.

22 Respondent's requests for an investigation to be conducted into the Securities Division's
23 actions are without basis. Respondent has cited no authority or specific actions by the Securities
24 Division that warrant an investigation. Respondent's motions should be denied.

25 ...

26 ...

1 **VII. Motions for Sanctions**

2 On August 24, 2009, Respondent filed a Motion to Dismiss This Case & Sanctions for
3 Malicious Prosecution. In addition, Respondent filed a Motion for Sanctions for Failure to
4 Comply with Discovery. On August 27, 2009, the Securities filed a Response. On August 31,
5 2009, Respondent filed a Motion for Immediate Dismissal & Severe Sanctions.

6 Respondent stated in his motions for sanctions that the Securities Division “prevented
7 Respondent from raising money for his business.” The Securities Division filed a TC&D against
8 Respondent **because** he was raising money for his business in violation of the Act. This is the
9 very reason the Securities Division filed its action.

10 Respondent cites no legal basis or authority to impose sanctions. Respondent’s motions to
11 impose sanctions should be denied.

12 **VIII. Motion for Continuances**

13 On February 19 2009, Respondent requested a hearing be set on the TC&D filed on
14 January 29, 2009. On May 19, 2009, the ALJ Stern issued the Third Procedural Order setting this
15 matter for hearing on August 31, 2009. The hearing date of August 31, 2009 was reaffirmed in the
16 Fourth Procedural Order issued on June 19, 2009. On July 9, 2009, Respondent filed a Motion to
17 Delay Deadline For: Witnesses and Exhibits & the Trial.

18 On June 19, 2009, the Securities Division provided its witness and exhibit list to
19 Respondent. Respondent filed a witness and exhibit list on July 9, 2009. On August 12, 2009,
20 Respondent re-filed his Motion to Delay Deadline for: Witnesses and Exhibits & the Trial. On
21 August 21, 2009, Respondent filed a Motion for Continuance for New Trial Date. The Securities
22 Division responded on August 25, 2009. On August 31, 2009, Respondent filed Motion For
23 Continuance – Future Jury Trial Date Or Case Must Be Dismissed Immediately.

24 Respondent requested a hearing. The hearing date was set by the Third Procedural Order
25 dated May 19, 2009. Respondent now states that he “must attend classes at College.” Respondent
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1 did not disclose the college he was attending, the starting time of the class or the length of the
2 class without evidence, there was no good cause to continue this matter.

3 Respondent also states that he has been denied "essential information [he] requested in
4 discovery motions" therefore the hearing must be continued. On June 19, 2009 the Fourth
5 Procedural Order was issued wherein ALJ Stern denied Respondent's motions for release of
6 additional information. There was no basis to continue this matter.

7 Respondent's August 31, 2009 motion to continue states that he has been denied Peggy
8 Scozzari's contact information. On June 19, 2009, the Securities Division disclosed that Special
9 Investigator Peggy Scozzari was to be called as a witness. The Witness and Exhibit List
10 disclosed that she could be contacted at the Securities Division, through the undersigned attorney.
11 Respondent was provided the business card of Investigator Scozzari that contained her contact
12 information on February 26, 2009. Respondent did not attempt to contact Investigator Scozzari.

13 Respondent was present at the offices of the Arizona Corporation Commission an hour
14 before the hearing was to start. Respondent left prior to his requested hearing. Respondent had
15 an opportunity to confront the evidence against him and he chose to not appear. There was no
16 good cause to continue this matter.

17 **IX. Conclusion**

18 Respondent's motions should be denied. ALJ Stern has ruled on some of the issues contained
19 within the motions. The other issues were addressed and are awaiting rulings.

20 Respondent has the opportunity to question the witness and challenge the evidence presented
21 by the Securities Division related to the allegations set forth in the TC&D that was filed on January
22 29, 2009.

23 Respectfully submitted this 3rd day of September, 2009.

24
25 By:


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

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

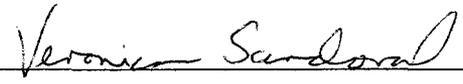
3 Docket Control
4 Arizona Corporation Commission
5 1200 W. Washington St.
6 Phoenix, AZ 85007

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

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

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20 _____

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