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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

2009 SEP 14 A 9:42

Arizona Corporation Commission

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CORP COMMISSION
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SEP 14 2009

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In the matter of:
STEVE JOHN ROGAN, a married man,
CAROL ANN RICHEY, a married woman,
DEM BONZ BARBECUE
RESTAURANTS, L.L.C., an Arizona limited
liability company,
PIZAZZ, L.L.C., an Arizona limited liability
company,
Respondents.)

DOCKET NO. S-20654A-09-0068

SECURITIES DIVISION'S SUPPLEMENTAL
POST HEARING MEMORANDUM

On September 2, 2009, the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") filed its post hearing memorandum. In order to more clearly set forth the appropriate legal standard to be used in determining whether a promissory note is a security, the Division hereby submits its supplemental post hearing memorandum.

The Division's post hearing memorandum sets forth the analysis to be used to determine whether a promissory note constitutes a security. The post hearing memorandum contains a discussion of the standard articulated in *Reves*. See *Reves v. Ernst & Young*, 494 U.S. 56, 65 (1990). However, the Arizona Court of Appeals has instructed that the analysis in *Reves* should be applied only in the context of an alleged violation of the antifraud statute, A.R.S. § 44-1991(A). *MacCollum v. Perkinson*, 185 Ariz. 179, 186 (Ariz. Ct. App. 1996). A distinct analysis is applied to alleged registration violations. See *State v. Tober*, 173 Ariz. 211 (1992). In this case, since the Division has alleged violations of both the registration and antifraud provisions of the Arizona Securities Act, both *Reves* and *Tober* are applicable and must be applied.

1 **Antifraud provision of the Arizona Securities Act - A.R.S. § 44-1991(A)**

2 Pursuant to *Reves*, any note is presumed to be a security unless the note “bears a strong
3 resemblance” to an item on a list of exceptions or a court is convinced to add a new exception to
4 the list. *Reves*, 494 U.S. at 67. The type of notes that are not securities include notes delivered in
5 consumer financing, notes secured by a mortgage on a home, notes secured by a lien on a small
6 business or some of its assets, notes evidencing a “character” loan to a bank customer, notes which
7 formalize an open account indebtedness incurred in the ordinary course of business, short-term
8 notes secured by an assignment of accounts receivable or notes given in connection with loans by a
9 commercial bank to a business for current operations. *Id.* at 65 (citing *Exch. Nat’l Bank of Chicago*
10 *v. Touche Ross & Co.*, 544 F. 2d 1126, 1138 (2d. Cir. 1976). The promissory note in this case was
11 unsecured, did not involve a commercial bank, bank customer or accounts receivable and requires
12 repayment over a term of forty eight (48) months. (Hr’g Ex. S-4) As a result, the promissory note
13 does not fall within in any of the categories set forth above.

14 In *Reves*, the Supreme Court did allow for the possibility that a new exception could be
15 added to the list. *Id.* at 67. Before adding to the list, one must examine four factors:

- 16 1. The motivation of the parties to the note. A note is more likely to be
17 a security if the “seller’s purpose is to raise money for the general
18 use of a business enterprise or to finance substantial investments and
19 the buyer is interested primarily in the profit the note is expected to
20 generate. . . .” *Id.* at 66 If the note is to facilitate the exchange of a
21 minor asset or consumer good, correct the seller’s cash flow, or
22 advance some other commercial or consumer purpose, then the note
23 is less likely to be a security. *Id.*
- 24 2. The plan of distribution. This element looks at whether the note is
25 an instrument for which there is “common trading for speculation or
26 investment.” *Id.* (quoting *SEC v. C.M. Joiner Leasing Corp.*, 320
U.S. 344, 351 (1943)).
3. The reasonable expectations of the investing public. Notes will be
considered securities in circumstances where the investing public
expects the instruments to be a security, even though the
“circumstances of the particular transaction might suggest that the
instruments are not securities . . . *Id.* at 66-67.

1 ORIGINAL AND THIRTEEN (13) COPIES
2 of the foregoing filed this 14th day of
3 September, 2009, with:

4 Docket Control
5 Arizona Corporation Commission
6 1200 West Washington
7 Phoenix, AZ 85007

8 COPY of the foregoing hand-delivered this
9 14th day of September, 2009 to:

10 Administrative Law Judge Marc Stern
11 Arizona Corporation Commission/Hearing Division
12 1200 West Washington
13 Phoenix, AZ 85007

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

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