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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

2009 OCT -7 A 9: 28

AZ CORP COMMISSION
DOCKET CONTROL

Arizona Corporation Commission
DOCKETED

OCT - 7 2009

DOCKETED BY [Signature]

In the matter of:
SPORTS DIMENSIONS, INC., a North Carolina corporation,
and
MARC HUBBARD and JANE DOE HUBBARD, husband and wife,
Respondents.

DOCKET NO. S-20665A-09-0154
SECURITIES DIVISION'S POST-HEARING MEMORANDUM

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") submits its post-hearing brief as follows:

I. PRELIMINARY ISSUES

A. Procedural History

On March 27, 2009, the Division filed a Temporary Order to Cease and Desist and Notice of Opportunity for Hearing ("TC&D"). The TC&D alleged that Respondents Sports Dimensions, Inc. ("SDI") and Marc Hubbard ("Hubbard") engaged in acts, practices and transactions that constituted violations of the Securities Act of Arizona, A.R.S. §§44-1841, 44-1842, and 44-1991. SDI and Hubbard may be referred to collectively as "Respondents."

The Division served Respondents SDI and Hubbard on April 8, 2009. On April 24, 2009, Respondents filed a joint Answer ("Answer").

An administrative hearing was held on August 27, 2009. Respondents failed to appear for the administrative hearing. (Hearing Transcript "H.T." p. 5:11 - 12). All Division exhibits were admitted into evidence. (H.T. p. 11:11 -12)(Exhibits S-1 - S-10).

1 **B. Jurisdiction**

2 Pursuant to A.A.C. R14-4-303(D)(5), Respondents were served with the TC&D by
3 certified mail. **(Affidavits of Service filed on 4/28/2009)**. At all relevant times, Respondent SDI
4 was a North Carolina corporation. During the relevant time, Respondent Hubbard resided in South
5 Carolina. **(H.T. p. 7:15 – 17)(Hubbard’s Answer)**.

6 The Commission has jurisdiction to enforce the provisions of the Securities Act of
7 Arizona (the “Act”), A.R.S. §44-1801 *et. seq.* (See Article XV of the Arizona Constitution and
8 §44-1971 of the Act). The Act prohibits the offer or sale for sale of unregistered securities within
9 or from Arizona, A.R.S. §44-1841; transactions involving the sale, purchase or offer to sell or buy
10 any securities by unregistered dealers or salesmen within or from Arizona, A.R.S. §44-1842; and
11 the use of fraud in the offer to sell or buy securities, within or from Arizona, A.R.S. §44-1991.

12 **C. Facts**

13 1. SDI was, at all relevant times, a North Carolina corporation that was incorporated in
14 January of 2002 and is located in South Carolina. **(H.T. p. 13:17 - 22)(Exhibits S-2 and S-9)**. SDI
15 did not seek authorization to transact business in Arizona as a foreign corporation. **(H.T. p. 14:1 -**
16 **3)**.

17 2. Hubbard was, at all relevant times, the president and CEO of SDI and resided outside
18 of Arizona. **(H.T. p. 13:23 through p. 14:5; p. 22: 1 - 6)(Exhibits S-2, S-6 and S-9)**. Hubbard
19 was never married.

20 3. The investments offered by SDI and Hubbard were not registered with the Division.
21 **(H.T. p. 38:10 - 16)(Exhibit S-1)**.

22 4. Hubbard was not registered with the Division as dealer or salesman. **(H.T. p. 38:1 -**
23 **9)(Exhibit S-1)**.

24 5. Hubbard claims that SDI is a “regional company specializing in the Concert
25 Business” which has been in business for over “twelve successful” years. **(Exhibits S-6 and S-8,**
26 **Bates No. ACC000006)**. Hubbard through SDI is seeking funds from investors to provide working

1 capital for concert promotions. (H.T. p. 33:24 – 25 through p. 34:1)(Exhibit S-8 Bates No.
2 ACC000013; ACC000029; ACC000042; ACC000045; ACC000048; ACC000050; and
3 ACC000057).

4 6. In or about February of 2009, SDI and Hubbard sent unsolicited information to an
5 Arizona resident offering an investment in SDI. (H.T. p. 21:12 through p. 24:1)(Exhibit S-6).
6 According to the unsolicited information, if investors purchased the Series 2009-A Convertible
7 Corporate Notes (“Note or Notes”), the investment would yield 30% annually guaranteed. (H.T. p.
8 22:10 – 22; p. 23: 9 - 12)(Exhibit S-6). Further, the letter also stated that investors could triple
9 their investments within 18 months. (H.T. p. 22: 23 - 25)(Exhibit S-6). SDI and Hubbard
10 represented that this investment was “virtually recession proof.” (H.T. p. 23:7 - 8)(Exhibit S-6).

11 7. SDI and Hubbard operated a website, www.sdiconcerts.com, which allows access
12 to the offering documents to only “accredited” investors who register for a password. (H.T. p. 25:1
13 – 18; p. 26:12 - 25)(Exhibits S-7 and S-8). Before an offeree can access the complete website,
14 the offeree must complete a form on which the offeree provides contact information and represents
15 they are accredited. (H.T. p. 26:4 - 7)(Exhibit S-8 Bates No. ACC000001). Once the online form
16 is completed, the offerees then receive a password to enter the website. (H.T. p. 24:2 - 9) (Exhibit
17 S-7). With the password, the offerees are able to view the Private Placement Memorandum
18 (“PPM”) for the Notes. (H.T. p. 25:1 – 18; p. 26:4 - 11)(Exhibits S-7 and S-8).

19 8. The website does allow access to a summary that is available to anyone who
20 accesses the website. (H.T. p. 26:16 – 25; p. 27: 1 - 17)(Exhibit S-8). The summary is similar to
21 one of the documents mailed to an Arizona offeree and includes details of the offering. (H.T. p.
22 27:5 6)(Exhibit S-8).

23 9. The PPM is dated January 15, 2009 and has an expiration date of January 15, 2010.
24 (H.T. p. 29:10 – 13)(Exhibit S-8 Bates No. ACC000009). According to the “Summary of Private
25 Placement,” SDI and Hubbard are seeking to raise \$10,000,000. (H.T. p. 28:15 - 16)(Exhibit S-8
26 Bates No. ACC000009). The minimum purchase amount for an investor is one Note for the

1 purchase price of \$10,000. (H.T. p. 23:13 – 17; p. 29:1 – 5)(Exhibits S-6 and S-8 Bates No.
2 ACC000009). The maturity date of the Note is twelve months with a return of \$13,000. (Exhibit
3 S-8 Bates No. ACC000009). The Note is convertible into Series A Common Shares at \$2.00 a
4 share. (H.T. p. 29:11 - 13)(Exhibit S-8 Bates No. ACC000009).

5 10. According to the PPM, the funds raised through the sale of the Notes will be used
6 for working capital. (H.T. p. 32:23 - 25)(Exhibit S-8 Bates No. ACC000013). The materials sent
7 to the Arizona offeree and on the website further indicate that the funds raised from the sale of the
8 Notes will be used to “book up to three major North American tours in each of the next three
9 years.” (Exhibit S-8 Bates No. ACC000007 and ACC000029).

10 11. Although the general solicitation that was mailed to an Arizona resident and the
11 information on SDI’s website represents that the investment “Yields 30% Annually Guaranteed,”
12 the PPM contradicts this statement. (Exhibits S-6 and S-8 Bates No. ACC000006). The PPM
13 specifically states that “there can be no guarantee that the business will be profitable to the extent
14 anticipated.” (H.T. p. 35:13 – 25; p. 36:1)(Exhibit S-8 Bates No. ACC000057). Further, the PPM
15 states “there can be no guarantee that the results shown in the enclosed projections will be realized
16 in whole or in part.” (H.T. p. 36:8 - 12)(Exhibit S-8 Bates No. ACC000057). Moreover, the
17 PPM states that SDI does not “guarantee or warrant the projected results.” (H.T. p. 36:13 -
18 18)(Exhibit S-8 Bates No. ACC000058).

19 12. The PPM states that SDI is a “development stage company formed in 2006” and “is
20 relatively new and as such has no substantial long-term operating history.” (Exhibit S-8 Bates No.
21 ACC000053). Yet, elsewhere in the PPM, SDI is represented as having eleven years of event
22 promotion achieving an average return on investment exceeding 30%. (H.T. p. 34:19 – 25; p.
23 35:1)(Exhibit S-8 Bates No. ACC000028). Also in the PPM, there is a representation that SDI
24 was incorporated in 2002 and has an “11-year operating history.” (H.T. p. 31:4 - 15)(Exhibit S-8
25 Bates No. ACC000028). In materials sent to an Arizona offeree and also listed on the SDI
26

1 website, Respondents represent that SDI sponsored its first musical concert in 1986 and has posted
2 a profit in each year of operation. **(H.T. p. 30:7 - 9)(Exhibit S-8 Bates No. ACC000007).**

3 13. The PPM states that there has been no other prior execution of a securities offering
4 by SDI. **(Exhibit S-8 Bates No. ACC000051).** However, on September 26, 2006, the California
5 Department of Corporations issued a Desist and Refrain Order against Sports Dimensions, Inc.,
6 Sports Dimensions, Inc. dba SDI and Marc Hubbard. **(H.T. p. 16:23 - 25; p. 17:1 - 4)(Exhibit S-
7 4).** The basis of the Desist and Refrain Order was that SDI and Hubbard offered to sell promissory
8 notes and investment contracts through general solicitation utilizing postings on its website and
9 through other means. **(H.T. p. 18:1 - 14)(Exhibit S-4).** As described in the Desist and Refrain
10 Order, SDI and Hubbard promised investors a 20% quarterly rate of return on their investments.
11 **(Exhibit S-4).** SDI and Hubbard represented that the investments were secured by box office
12 receipts and a surety bond issued by Tri-Point Holdings. **(H.T. p. 37:2 - 6)(Exhibit S-4).**

13 14. In the present action, the subscription agreement states that the Notes are secured by
14 a surety bond issued by "Liberty Reinsurance" [sic] as well as concert tickets sales. **(H.T. p. 37:2 -
15 13)(Exhibit S-8 Bates No. ACC000080).**

16 15. The California Desist and Refrain Order issued against SDI and Hubbard was not
17 disclosed in the PPM or the subscription agreement. **(H.T. p. 38:20 - 25)(Exhibits S-4 and S-8).**

18 16. In addition to the offer underlying the California Desist and Refrain Order, in July
19 of 2002, Respondents filed a Form D with the Securities and Exchange Commission indicating
20 Respondents had sold securities, under the offering, within the past fifteen days¹. **(H.T. p. 15:1 -
21 25; p. 16:1 -9)(Exhibit S-3).**

22 17. On March 5, 2007, Department of the Secretary of State of North Carolina,
23 Securities Division, issued a Final Order to Cease & Desist against SDI and Hubbard. **(H.T. p.
24 20:15 - 25; p. 21:1 - 10)(Exhibit S-10).**

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26

¹ A Notice must be filed no later than 15 days after the first sale of securities in the offering. **(Exhibit S-3 page 3).**

1 18. SDI and Hubbard did not prominently and conspicuously indicate on its website or on
2 the cover page of any offering document or on the subscription agreement (a) that the securities are
3 not being offered to persons in Arizona, (H.T. p. 39:7 - 10) or (b) in which specific states, other than
4 Arizona, the securities are being offered. (H.T. p. 39:11 - 13)(Exhibit S-8). Further, SDI and
5 Hubbard did not state that the offer for sale is not specifically directed to any person in Arizona by, or
6 on behalf of, the issuer; and no sales of the issuer's securities are made in Arizona as a direct or
7 indirect result of the Internet offer for sale. (H.T. p. 39:14 - 19)(Exhibit S-8).

8 19. On February 23, 2009, Nevada Secretary of State issued a Cease and Desist Order
9 against SDI and Hubbard for violations of the Nevada Securities Act. This recent action was not
10 disclosed to potential investors; nor is the information available on the SDI website. (H.T. p. 19:1
11 - 25; p. 20:1 - 14)(Exhibit S-5).

12 **II. THE INVESTMENTS OFFERED AND SOLD BY CERTAIN DEFENDANTS ARE**
13 **SECURITIES.**

14 **A. The Registration Requirement.**

15 "By legislative design, the Securities Act of Arizona (the "Securities Act") protects the
16 public by preventing dishonest promoters from selling financial schemes to unwary investors who
17 have little or no knowledge of the realistic likelihood of the success of their investments." *Siporin*
18 *v. Carrington*, 200 Ariz. 97, 98, 23 P.3d 92 (App. 2001). The facts above indicate that SDI and
19 Hubbard offered securities in the form of notes. The notes were neither registered nor exempt from
20 registration. In any action, civil or criminal, the burden of proving the existence of an exemption
21 from registration under the Securities Act falls upon the party raising such a defense. A.R.S. §44-
22 2033. *See also, State v. Barber*, 133 Ariz. 572, 578, 653 P.2d 29 (App. 1982). Under the
23 circumstances of this case, there are no applicable exemptions. Furthermore, Hubbard was not
24 registered as a dealer or salesman (or exempt from registration) as required under the Securities
25 Act. A.R.S. §44-1842. (H.T. p. 38:1 - 19)(Exhibit S-1).

26 ...
...

1 **B. The Promissory Notes Are "Securities."**

2 The Respondents were offering "Corporate Notes in the form of 'Series 2009-A
3 Convertible Corporate Notes.'" (H.T. p. 23:9 - 12; p. 28:19 - 21)(Exhibits 6 and 8 Bates No.
4 ACC000013). The offering document specifically states that the investments they are offering are
5 securities. (Exhibit 8 Bates No. ACC000013 and Bates No. ACC000017).

6 The Securities Act defines what financial instruments are considered securities.
7 Specifically, the Act states that security means "any note." See A.R.S. §44-1801(26). The Act also
8 clearly defines the types of notes that exempt from the registration provisions of the Act. See
9 A.R.S. §§44-1843, 44-1843.01 and 44-1844. The Supreme Court in *State v. Tober*, 173 Ariz. 211,
10 841 P.2d 206 (1992) instructed that unless the notes fit within an exemption under A.R.S. §44-
11 1843 (exempt securities), A.R.S. §44-1843.01 (exempt government securities) and A.R.S. §44-
12 1844 (exempt transactions), they are securities that must be registered. It is Defendants' burden to
13 prove that one of the exemptions applies. A.R.S. §44-2033; *State v. Goodman*, 110 Ariz. 524, 526,
14 521 P.2d 611 (1974). There is no evidence that any exemption applies to the Notes. They are
15 securities that must be registered. The Defendants violated A.R.S. §44-1841 by offering the Notes.

16 **C. SDI And Hubbard Violated The Anti-Fraud Provisions Of The Arizona Securities Act.**

17 The promissory notes offered by SDI and Hubbard were securities. Under a securities
18 fraud theory, a promissory note is presumed to be a security. however, the U.S. Supreme Court has
19 identified certain categories of notes that are excluded from the definition of security. See *Reves v.*
20 *Ernst & Young*, 494 U.S. 56, 65 (1990); *MacCollum v. Perkinson*, 185 Ariz. 179, 913 P.2d 1097
21 (App. 1996)(adopting the *Reves*' test in Arizona for the purpose of the antifraud provisions). In
22 *Reves*, the Supreme Court held that every promissory note is a security unless it bears a strong
23 "family resemblance" to a judicially crafted list of non-securities.² *Reves*, 494 U.S. at 65. *Id.* at
24 66-67. Instruments that do not have a familial resemblance to one of the excluded categories are
25

26 ² In *Reves*, the Supreme Court held that the *Howey* test for investment contracts does not apply to promissory notes.
494 U.S. at 64.

1 then considered to be securities if (1) the seller's motivation is to raise money or finance
2 investments and the buyer's purpose is to make a profit; (2) there is common trading of the
3 instrument for speculation or investment; (3) the public expects that the instrument is a security;
4 and (4) there is no other regulatory scheme to significantly reduce the risk of the instrument,
5 thereby rendering the application of the securities laws unnecessary. *Id.* The parties may rebut the
6 presumption by examining a note transaction in light of four factors.

7 If a note does not resemble one of the families of notes that are not securities, then, using
8 the same four factors described above, a determination may be made whether the note represents a
9 category that should be added as a nonsecurity. *Id.* Respondents did not provide any support to
10 establish that the Notes they offered were not securities. In fact, Respondents confirmed that the
11 Notes were securities. **(Exhibit 8 Bates No. ACC000013 and Bates No. ACC000017).**

12 In this case, SDI and Hubbard were seeking to raise \$10,000,000 for working capital and
13 promised investors that the investment "Yields 30% Annually Guaranteed." **(H.T. p. 28:15 -**
14 **16)(Exhibits S-6 and S-8 Bates No. ACC000006 and Bates No. ACC000013).** Further, the PPM
15 specifically refers to the Notes as securities. **(Exhibit S-8 Bates No. ACC000013 and Bates No.**
16 **ACC000017).** Based upon the representations in the offering documents, the public would expect
17 that the Notes would be a security. **(Exhibits S-6 and S-8 Bates No. ACC000013 and Bates No.**
18 **ACC000017).** The only regulatory scheme applicable to the Notes offered by SDI and Hubbard
19 would be the protections offered under the federal and state securities regulations. Applying the
20 facts to the test set forth in *Reves* clearly establish that the Notes offered by SDI and Hubbard are
21 securities. *Id.*

22 Under A.R.S. §44-1991, it is a fraudulent practice and unlawful for a person, in connection
23 with a transaction or transactions within or from this state involving an offer to sell or buy
24 securities, or a sale or purchase of securities, to directly or indirectly do any of the following: (1)
25 employ any device, scheme or artifice to defraud; (2) make untrue statements of material fact, or
26 omit to state any material fact necessary in order to make the statements made, in the light of the

1 circumstances in which they were made, not misleading; or (3) engage in any transaction, practice
2 or course of business which operates or would operate as a fraud or deceit. A.R.S. §44-1991(A).
3 Securities fraud may be proven by any one of these acts. *Hernandez v. Superior Court*, 179 Ariz.
4 515, 880 P.2d 735 (App. 1994).

5 In the context of these provisions, “materiality” requires a showing of substantial likelihood
6 that, under all the circumstances, the misstated or omitted fact would have assumed actual
7 significance in the deliberations of a reasonable buyer. *Trimble v. American Sav. Life Ins. Co.*, 152
8 Ariz. 548, 553, 733 P.2d 1131 (1986). Under this objective test, there is no need to investigate
9 whether a misleading statement or misrepresentation was actually significant to a particular buyer.
10 Additionally, the affirmative duty not to mislead potential investors in any way places a heavy burden
11 on the offeror and removes the burden of investigation from the investor. *Trimble*, 152 Ariz. at 553.
12 A misleading statement or misrepresentation of a material fact in the offer and sale of a security is
13 actionable even though it may be unintended or the falsity or misleading character of the statement
14 may be unknown. In other words, scienter or guilty knowledge is not an element of a violation of
15 A.R.S. §44-1991(2). *See e.g., State v. Gunnison*, 127 Ariz. 110, 113, 618 P.2d 604 (1980). Stated
16 differently, a seller of securities is strictly liable for any misleading statement or misrepresentation.
17 *Rose v. Dobras*, 128 Ariz. at 214. Additionally, there is no requirement to show that investors relied
18 on the misleading statements or misrepresentations, *Rose*, 128 Ariz. at 214, or that the misleading
19 statement or misrepresentation caused injury to the investors. *Trimble*, 152 Ariz. at 553. “Plaintiffs’
20 burden of proof requires only that they demonstrate that the statements were material and
21 misleading.” *Aaron v. Fromkin*, 196 Ariz. 224, 227, 314 P.2d 1039, 1042 (App. 2000).

22 A primary violation of A.R.S. §44-1991 can be either direct or indirect. It is now well-settled
23 in Arizona that *indirectly* violating A.R.S. §44-1991 is not to be narrowly interpreted. *Barnes v.*
24 *Vozack*, 113 Ariz. 269, 550 P.2d 1070 (1976)(Officers of company could be liable under A.R.S. §44-
25 1991 for the fraudulent statements of a salesman of the security.)

26 SDI and Hubbard have violated A.R.S. §44-1991 by:

1 a) Failing to disclose to offerees the Desist and Refrain Order issued by the
2 California Department of Corporations for a previous securities offering;

3 b) Misrepresenting to offerees that there had been “no other execution of a
4 securities offering” by SDI when, in fact, Respondents conducted a securities offering in 2006
5 resulting in a Desist and Refrain Order issued by California and Respondents filed a Form D with
6 the Securities and Exchange Commission in 2002 related to a securities offering;

7 c) Misrepresenting to offerees that the investment was guaranteed; and

8 d) Misrepresenting to offerees the nature of the business experience and history.

9 Any *one* of these actions would violate the Securities Act. A cease and desist order is
10 necessary to prevent further harm to the investing public.

11 **III. CONCLUSION**

12 The evidence presented at the hearing establishes that SDI and Hubbard, while not being
13 registered as securities salespersons, offered unregistered securities, within or from Arizona, to
14 prospective Arizona investors beginning from in about February of 2009. Pursuant to A.R.S. §44-
15 2036(A), Respondents can be ordered to pay an administrative penalty of up to five thousand dollars
16 (\$5,000) for each violation of the Act. An award of ten thousand dollars for violations of A.R.S. §44-
17 1841 and A.R.S. §44-1842 include the offer of unregistered securities by an unregistered securities
18 salesperson. Based upon the nature of Respondents’ material misrepresentations and misleading
19 representations, the maximum administrative penalty amount of twenty thousand dollars (\$20,000) for
20 violations of A.R.S. §44-1991 is justified.

21 Based upon the evidence presented, the Division respectfully requests this tribunal to:

22 A. Order Respondents to cease and desist from further violations of the Act pursuant to A.R.S.
23 §44-2032;

24 ...

25 ...

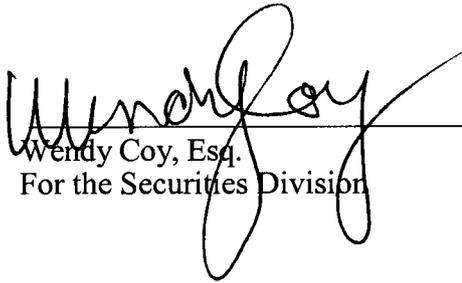
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B. Order Respondents, pursuant to A.R.S. §44-2036(A), to pay an administrative penalty of not less than \$30,000; and

C. Order any other relief this tribunal deems appropriate or just.

Dated this 7th day of October, 2009.


Wendy Coy, Esq.
For the Securities Division

1 ORIGINAL AND THIRTEEN (13) COPIES
2 of the foregoing filed this 7th day of
3 October, 2009, with:

4 Docket Control
5 Arizona Corporation Commission
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8 COPY of the foregoing hand-delivered this
9 7th day of October, 2009 to:

10 Administrative Law Judge Marc Stern
11 Arizona Corporation Commission/Hearing Division
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14 COPY of the foregoing mailed this
15 7th day of October, 2009 to:

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