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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

2009 NOV 12 P 4:41

Arizona Corporation Commission

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| <p>In the matter of:</p> <p>SIR MORTGAGE &amp; FINANCE OF ARIZONA, INC., an Arizona corporation,</p> <p>GREGORY M. SIR (a/k/a "GREG SIR"), and ERIN M. SIR, husband and wife,</p> <p style="text-align: center;">Respondents.</p> | <p>)</p> | <p>DOCKET NO. S-20703A-09-0461</p> <p><b>SECURITIES DIVISION RESPONSE TO RESPONDENTS' SUPPLEMENT TO MOTION TO VACATE &amp; REQUEST TO ALTER SCHEDULE IN SECOND PROCEDURAL ORDER</b></p> <p><b>AND</b></p> <p><b>MOTION FOR MOTION PRACTICE SCHEDULING ORDER</b></p> |
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The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") responds to RESPONDENTS': (1) November 3, 2009 "Supplement to Motion to Vacate" (the "Supplement"); and (2) November 4, 2009 "Request to Alter Schedule in Second Procedural Order" (the "Request"), and request that they be denied.

**A. Response to Supplement**

RESPONDENTS argue that the TC&D must be vacated because the pending hearing schedule does not comply with R14-4-307(D). (Supplement, p.2:6-10).

In support of their Supplement, RESPONDENTS argue that the TC&D is subjecting their "small" mortgage business to "financial devastation." (Supplement, p.2:8-11) As discussed in the Division's November 12, 2009 Supplemental Response to Respondents' Motion to Vacate (the "Supplemental Response"), the TC&D: (a) merely orders RESPONDENTS to comply with the Arizona Securities Act ("Act"); and (b) does not prohibit RESPONDENTS from either raising capital or operating their mortgage business, as long as they can do so without violating the law.

1 Specifically, the TC&D orders RESPONDENTS to “CEASE AND DESIST from any  
2 violations of the Securities Act.” (TC&D, p.16:18-21). Thus, RESPONDENTS’ de-facto  
3 request for the ALJ to vacate the TC&D so that they can violate the Act lacks merit and should  
4 be denied.

5 RESPONDENTS are now asking the ALJ to vacate the TC&D because: (1) the ALJ has  
6 not conducted a hearing within thirty days as required by R14-4-307(D); and (2) the pre-hearing  
7 conference that occurred on October 28, 2009 (the “Pre-Hearing Conference”) does not satisfy  
8 the rule. RESPONDENTS’ timing argument lacks merit for several reasons, and their reliance  
9 on R14-4-307(D) is inapposite.

10 First, the Supplement must be denied as untimely. R-14-3-106(H) of the applicable Rules  
11 of Practice and Procedure Before the Commission states that an, “Answer **shall** include a motion  
12 to dismiss if a party desires to challenge the sufficiency of the complaint.” RESPONDENTS’  
13 October 24, 2009, Answer includes every conceivable affirmative defense to the TC&D **but** the  
14 specific purported defense of the timing of the hearing under R14-4-307(D). (*See*, Answer at pp.  
15 8:13 to 11:10, and purported defenses numbered “A” through to “NN”).<sup>1</sup> RESPONDENTS’  
16 September 28, 2009 Request for Hearing also glaringly fails to ask that a final hearing be held  
17 within any specific time frame-let alone within thirty days.

18 Moreover, RESPONDENTS’ counsel did not raise the instant timing of the hearing  
19 argument at the October 28, 2009 Pre-Hearing Conference. Indeed, RESPONDENTS’ counsel  
20 agreed to the presently scheduled February 1, 2010 hearing date and, in fact, requested that the date  
21 for the exchange of witnesses and exhibits be pushed to January 4, 2010 so that such work would  
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23 <sup>1</sup> By making an extraordinarily specified list of forty affirmative defenses in their Answer, RESPONDENTS  
24 also objectively documented their intent to specifically exclude the purported defenses of the timing of the  
25 hearing under R14-4-307(D). *United California Bank v. Prudential Ins. Co. of America*, 140 Ariz. 238,  
26 273, 335, 681 P.2d 390, 425 (App. 1983)(“The rule of “ejusdem generis” is a rule of interpretation which  
applies where general words in a contract are followed by enumerated specific terms involving the same  
subject matter. Under this rule of interpretation the meaning of the general terms is presumed to be limited  
to the enumerated specific terms and to include only those things of the same nature as those specifically  
enumerated...”). Because the Supplement violates the plain language of R-14-3-106, it should be denied.

1 not interfere with his pre-existing schedule. Because RESPONDENTS' timing of the hearing  
2 argument is untimely and has been waived, the Supplement must be denied.

3 Second, RESPONDENTS reliance on R14-4-307(D) is also misplaced. RESPONDENTS  
4 have ignored subsections (A) and (E) of R14-4-307. Subsection (A) states that the existing TC&D  
5 will stay in effect for 180 days, and Subsection (E) states that the 180 day time period is "tolled"  
6 from the date Respondents filed their Answer (in this case on October 24, 2009), "until a decision is  
7 entered, unless otherwise ordered by the Commission." Further, R14-4-307(C) does not require  
8 that the final hearing be set at any time. Analogous to Subsections (A) and (E) of R14-4-307,  
9 Subsection (D) merely states that the final hearing shall be set as otherwise provided by law, or  
10 ordered by the Commission. Also, contrary to RESPONDENTS' suggestion, R14-4-307(D) does  
11 not actually state that a final contested, evidentiary hearing be held within thirty days. It clearly  
12 only references the fact that a hearing be held and, in fact, a hearing was held on October 28, 2009.  
13 The Division agrees that RESPONDENTS are entitled to a hearing. The timing of the hearing is  
14 within the sound discretion of the ALJ. The hearing dates set by the ALJ comply with the rules.

15 In addition to the rules, one can consider the following in determining an acceptable  
16 hearing date: (a) at the October 28, 2009 pre-hearing conference, RESPONDENTS' counsel  
17 agreed to, and/or did not object to the present dates for the contested evidentiary hearing to begin  
18 on February 1, 2010; (b) the Division's on-going investigation may reveal additional Securities  
19 Act violations not addressed by the allegations of the existing TC&D; and (c) RESPONDENTS  
20 admit that any alleged damage to their mortgage business has been caused "by the decline in real  
21 estate values," (Answer, p.11, ¶MM), that there are "very few viable lending opportunities these  
22 days" (Supplemental Response, p.4:5-7), and that their mortgage business has been negatively  
23 "impacted by current market conditions." (Motion, p.1:21-22). Simply put, the TC&D **does not**  
24 prohibit them from running their business, if it is run in compliance with the law. Further, any  
25 delay in a final hearing is due to the fact that RESPONDENTS desire to engage in extensive  
26 discovery as evidenced, in part, by their November 6, 2009 Request for Production of all of the

1 Division's documents, and their November 10, 2009 request for the issuance of four subpoenas.  
2 Based on the foregoing, the Division requests the ALJ to deny the Supplement.

3 **B. Response to the Request**

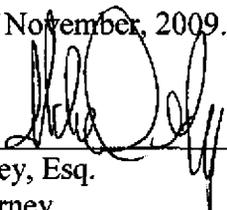
4 The Division desires a resolution to its objections to RESPONDENTS' requests for  
5 production of documents<sup>2</sup> and issuance of subpoenas for testimony and documents prior to the  
6 parties' exchange of their list of witnesses and exhibits.

7 Alternatively, the Division suggests that the ALJ set the date for both RESPONDENTS and  
8 the Division to simultaneously exchange their list of witnesses and exhibits to December 17, 2009.

9 **C. Motion to Set Motion Practice Scheduling Order**

10 Finally, the Division moves the ALJ to set a motion deadline of January 7, 2010, with all  
11 responses to such motions due on or before January 20, 2010 due to the large number of motions  
12 that RESPONDENTS have and likely will file prior to the final hearing.

13 **RESPECTFULLY SUBMITTED** this 12<sup>th</sup> day of November, 2009.

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15 \_\_\_\_\_  
16 Mike Dailey, Esq.  
17 Staff Attorney  
18 Securities Division  
19 1300 West Washington, Third Floor  
20 Phoenix, Arizona 85007

19 **ORIGINAL AND THIRTEEN (13) COPIES**  
20 **of the foregoing filed this 12<sup>th</sup> day of**  
21 **November, 2009 with:**

21 Docket Control  
22 Arizona Corporation Commission  
23 1200 West Washington  
24 Phoenix, Arizona 85007  
25

26 <sup>2</sup> The Division intends to file an objection to RESPONDENTS' November 6, 2009 "First Request for Production of Documents." Its objection to RESPONDENTS' November 10, 2009 request for the issuance of four subpoenas for testimony and documents is being filed contemporaneously herewith.

1 **Copy of the foregoing hand-delivered this 12<sup>th</sup> day of**  
2 **November, 2009 to:**

3 Marc E. Stern, Administrative Law Judge  
4 Arizona Corporation Commission  
5 Hearing Division  
6 1200 West Washington  
7 Phoenix, Arizona 85007

8 **Copy of the foregoing mailed this 12<sup>th</sup> day of**  
9 **November, 2009 to:**

10 Paul Roshka, Esq.  
11 Tim Sabo, Esq.  
12 Roshka DeWulf & Patten  
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