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**BEFORE THE ARIZONA CORPORATION COMMISSION**

COMMISSIONERS

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

ARIZONA CORPORATION COMMISSION  
DOCKET CONTROL

In re:	)	DOCKET NO. S-20677A-09-0256
In the matter of:	)	SECURITIES DIVISION'S RESPONSE TO
SECURE RESOLUTIONS, INC., an Arizona	)	RESPONDENTS' PETITION TO ENFORCE
Corporation;	)	AUTOMATIC STAY AND VACATE ALL
DOUGLAS COTTLE and KYLA COTTLE,	)	ADMINISTRATIVE CLAIMS
husband and wife,	)	
Respondents.	)	

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") hereby request this Commission to deny Respondents' (also may be referred to as "Debtors") Petition To Enforce Automatic Stay ("Petition"), to deny Debtors' request for an order enjoining the Commission from taking further action against them and to determine that the Commission's actions have not violated 11 U.S.C. § 362(A). This Response is supported by the following Memorandum of Points and Authorities.

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Arizona Corporation Commission  
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2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. BACKGROUND**

4 On May 21, 2009, the Division filed a Notice of Opportunity Regarding a Proposed Order to  
5 Cease and Desist, Order for Restitution, For Administrative Penalties, and For Other Affirmative Action  
6 (“Notice”) against Secure Resolutions, Inc. (“SRI”) and Douglas and Kyla Cottle, husband and wife.

7 A copy of the Notice was personally served on Respondents Douglas Cottle and Kyla Cottle on  
8 May 28, 2009. On June 8, 2009, a request for hearing was filed by Douglas Cottle and Kyla Cottle,  
9 respectively. A final contested hearing is currently scheduled for February 8, 9, 10, 11, 16, 17, and 18,  
10 2010.

11 On November 4, 2009, SRI, Douglas and Kyla Cottle filed a Chapter 7 bankruptcy case in U.S.  
12 Bankruptcy Court, District of Arizona. James Portman Webster of James Portman Webster, P.L.L.C. (“Mr.  
13 Webster”) represented SRI, Douglas and Kyla Cottle in the bankruptcy proceedings in Case Nos. 2:09-bk-  
14 28331-CGC and 2:09-bk-28307-GBN, respectively.

15 On November 17, 2009, Julie Beauregard, of Mitchell & Associates<sup>1</sup>, counsel of Douglas and Kyla  
16 Cottle, filed an Application to Withdraw as counsel for Douglas and Kyla Cottle.

17 On November 18, 2009, Mr. Webster, Attorney for debtors Douglas and Kyla Cottle, and SRI, filed  
18 a notice of automatic stay for all debtors.

19 A status conference was scheduled for November 19, 2009, by the September 29, 2009  
20 Procedural Order. At the November 19, 2009 status conference, Julie Beauregard, of Mitchell &  
21 Associates, counsel of Douglas and Kyla Cottle, made an appearance. Mr. Webster did not appear. The  
22 Division was represented by counsel. Administrative Law Judge Stern (“ALJ Stern”) granted the  
23 withdrawal of Mitchell & Associates based on the articulated facts stated in their Application to  
24 Withdraw.

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<sup>1</sup> Mitchell & Associates entered a Notice of Appearance on behalf of Douglas and Kyla Cottle on September 22, 2009. Secure Resolutions, Inc. was not represented by counsel.

1 **II. LEGAL ARGUMENT**

2 A. Jurisdiction and Authority of the Arizona Corporation Commission.

3 The intent and purpose of the Securities Act of Arizona is to protect the public, to preserve fair  
4 and equitable business practices, to suppress fraudulent or deceptive practices in the sale or purchase of  
5 securities and to prosecute persons engaged in fraudulent or deceptive practices in the sale or purchase  
6 of securities. See Laws 1951, Ch. 18, § 20.

7  
8 B. Administrative Proceedings Against Debtors Are Exempt From The Automatic Stay.

9 The filing of a bankruptcy petition operates as a stay, applicable to all entities, of “the  
10 commencement or continuation . . . of a judicial, administrative, or other action or proceeding against a  
11 debtor . . . .” 11 U.S.C. § 362(a)(1). The general policy behind the automatic stay is to grant complete  
12 and immediate, albeit temporary relief to the debtor from creditors, and to prevent dissipation of the  
13 debtor’s assets before orderly distribution to all creditors can be affected. S.E.C. v. Brennan, 230 F.3d  
14 65, 70 (C.A.2 (N.Y.) 2000)(quoting Penn Terra Ltd. v. Department of Envntl. Resources, 733 F.2d 267,  
15 271 (3d Cir.1984)). A main purpose of the stay is to protect the priority of payment to creditors. 3  
16 Collier on Bankruptcy § 362.05[5][b] at 362-61 (15<sup>th</sup> Ed. 2000).

17 Section 362(b) establishes several exceptions to the automatic stay. Section 362(b)(4) provides  
18 the automatic stay does not apply to:

19 . . . the commencement or continuation of an action or proceeding by a  
20 governmental unit . . . to enforce such governmental unit’s . . . police and regulatory  
21 power, including the enforcement of a judgment other than a money judgment, obtained  
22 in an action or proceeding by the governmental unit to enforce such governmental unit’s .  
23 . . police or regulatory power.

24 Section 362(b)(4) permits the government to initiate or continue an action under its police or  
25 regulatory powers without the restrictions of the automatic stay. In Re Universal Life Church, Inc., 128  
26 F.3d 1294, 1297 (C.A.9 (Cal.) 1997); 3 Collier on Bankruptcy § 362.05[5][b], at 362-58 (15th ed.

1 1996). The purpose of this exception is to prevent a debtor from “frustrating necessary governmental  
2 functions by seeking refuge in bankruptcy court.” S.E.C. v. Brennan, 230 F.2d at 71 quoting City of  
3 New York v. Exxon Corp., 932 F.2d 1020, 1024 (2d Cir. 1991). To prevent bankruptcy from becoming  
4 “a haven for wrongdoers,” the automatic stay should not prevent governmental regulatory, police and  
5 criminal actions from proceeding. In Re Universal Life Church, Inc., 128 F.3d at 1297; 3 Collier on  
6 Bankruptcy § 362.05[5][a], at 362-54 (15th ed. 1996).

7 The legislative history of § 362(b)(4) indicates that when a governmental unit brings a legal  
8 action against a debtor in order “to prevent or stop violation of fraud, environmental protection,  
9 consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for  
10 violation of such a law, the action or proceeding is not stayed under the automatic stay.” S.Rep. No. 95-  
11 989 at 52 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 5838; H.R.Rep. No. 95-595 at 343 (1977),  
12 reprinted in 1978 U.S.C.C.A.N. 5963, 6299; In Re Universal Life Church, Inc., 128 F.3d at 1298.

13 The United States District Court for the District of Arizona has specifically held that the  
14 automatic stay does not preclude an investigation by the Commission regarding possible violations of  
15 the Securities Act of Arizona because actions of the Commission are pursuant to the Commission’s  
16 police and regulatory power. In re Knoell, 160 Bankr. Rep. 825, 826 (D. Ariz. 1993). The exception in  
17 § 362(b)(4) applies whenever a governmental unit is exercising a valid and traditional police or  
18 regulatory power. In re PMI-DVM Real Estate Holdings, L.L.P., 240 B.R. 24, 30 (Bkrtcy.D.Ariz.  
19 1999). The Commission has exercised valid and traditional police and regulatory powers in its actions  
20 against Debtors.

21  
22 C. The Commission Can Enter An Order To Cease And Desist, An Order For Penalties and  
an Order For Restitution Against Debtors.

23 In the Notice of Opportunity For Hearing, the Commission seeks a permanent Order to Cease  
24 and Desist, i.e., an injunction, against Debtors to prevent Debtors from future violations of The  
25 Securities Act of Arizona. The Commission also seeks penalties and restitution from Debtors for their  
26 violations of The Securities Act of Arizona.

1 In the bankruptcy case of In re Charter First Mortgage, Inc., the Washington State Attorney  
2 General sought injunctive relief against the debtor, civil penalties and restitution of money on behalf of  
3 the victims for alleged violations of the Washington Consumer Act. In re Charter First Mortgage, Inc.,  
4 42 B.R. 380 (Bankr.D.Or. 1984). The bankruptcy court concluded that it was appropriate for  
5 Washington to attempt to obtain an injunction and civil penalties for alleged violations of the  
6 Washington Consumer Act, but the state could not enter a restitution order. In re Charter First  
7 Mortgage, Inc., 42 B.R. at 384. In the case of In re Poule, a registered contractor argued that revocation  
8 of his license and the civil fines imposed on him by the Registrar of Contractors of the State California  
9 violated the automatic stay in § 362(a)(1). In re Poule, 91 B.R. 83, 85 (9th Cir. BAP 1988). The court  
10 held that when a state agency imposes civil penalties on a debtor for fraudulent conduct or when the  
11 state agency is attempting to prevent future fraudulent conduct through injunctive relief, the action  
12 comes within the scope of § 362(b)(4). In re Poule, 91 B.R. at 87 (emphasis added).

13 Once a court determines that a proceeding is excepted from the automatic stay by § 362(b)(4),  
14 the court can allow the governmental unit to fix the amount of penalties, up to and including entry of a  
15 money judgment. S.E.C. v. Brennan, 230 F.3d 65, 71-2 (C.A.2 (N.Y.) 2000). These cases and other  
16 cases hold that “anything beyond the mere entry of a money judgment against a debtor is prohibited by  
17 the automatic stay.” Brennan, 230 F.3d at 71. This is consistent with language in § 362(b)(4), “. . .  
18 including the enforcement of a judgment other than a money judgment . . . .” Of course, the proceeding  
19 in which the money judgment is entered must be one to enforce the governmental unit’s police or  
20 regulatory power. Brennan, 230 F.3d at 71.

21 Likewise, the Commission can enter an order to cease and desist, an order for restitution, and an  
22 order for penalties against Debtors for their violations of the Securities Act of Arizona. The  
23 Commission acknowledges it cannot attempt to collect on an order for restitution or on an order for  
24 penalties unless it submits the claims to the bankruptcy court like any creditor of the Debtors must do.  
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1           D. The Commission need not obtain a release, grant of authorization or file a motion for  
2           relief from the stay from the Bankruptcy Court to proceed in this administrative action.

3           The Bankruptcy Court need not issue a release, grant of authorization or motion for relief from  
4 the stay in a proceeding before the Commission, that is exempted by the automatic stay pursuant of 11  
5 U.S.C. § 362(b)(4). At the November 19, 2009 status conference, ALJ Stern inquired if the Division  
6 would seek a release or grant of authorization from the Bankruptcy Court. The court in which litigation  
7 is pending has jurisdiction to determine whether the proceeding before it is subject to the automatic  
8 stay. S.E.C. v. Bilzerian, 131 F.Supp.2d 10, 14 (D.D.C. 2001); NLRB v. Sawulksi, 158 B.R. 971, 975  
9 (E.D.Mich.1993). The court in Bilzerian, as many other courts must do, had to first address whether the  
10 proceeding before it was affected by the automatic stay provision found in § 362(a). Bankruptcy courts  
11 do not have exclusive jurisdiction in determining the applicability of the automatic stay. S.E.C. v.  
12 Bilzerian, 131 F.Supp.2d at 14; In re Montana, 185 B.R. 650, 652 (Bankr. S.D.Fla. 1995); NLRB v.  
13 Sawulksi, 158 B.R. at 975. Therefore, the Commission has jurisdiction to determine whether the  
14 automatic stay applies to this administrative case.

15           As articulated above, the automatic stay does not apply to an administrative case when the  
16 governmental unit is exercising its police and regulatory powers. The Bankruptcy Court of Arizona has  
17 confirmed this position on multiple occasions. For example, the Division brought an administrative  
18 action against Arthur B. Cooper (“Cooper”) and Linda A. Cooper (“L. Cooper”) (also collectively  
19 called the “Coopers”), in Docket No. S-03550A-04, alleging violations of the Securities Act. The  
20 Coppers filed a bankruptcy petition in the Bankruptcy Court of Arizona, Case No. 2-05-26746 RJH. By  
21 request of ALJ Stern and pursuant to a procedural order dated November 2, 2005, the Division on  
22 behalf of the Commission filed a motion for relief from the automatic stay on November 4, 2005. On  
23 January 26, 2006, Judge Haines granted the Division’s relief from the automatic stay and found as  
24 follows:

- 25           1)           The Arizona Corporation Commission is a governmental agency enforcing its police  
26                       and regulatory power;

1           2)       Pursuant to 11 U.S.C. § 362(b)(4), police and regulatory actions commenced by the  
2                   Arizona Corporation Commission are not stayed by these bankruptcy proceedings;  
3                   and,

4           3)       The Arizona Corporation Commission may proceed with their investigation, and also  
5                   proceed to exercise their regulatory powers as provided by law.

6           Specifically, the [Bankruptcy] Court recognizes the authority of the Arizona Corporation  
7                   Commission to enter Orders in administrative and civil proceedings, including but not limited to,  
8                   those that provide for injunctive relief, for penalties, for restitution and for the revocation of  
9                   licenses as provided by law; however, the Arizona Corporation Commission may not attempt to  
10                  execute upon the monetary judgment so long as the Bankruptcy Court has jurisdiction over the  
11                  debtor. (*See* EXHIBIT A)

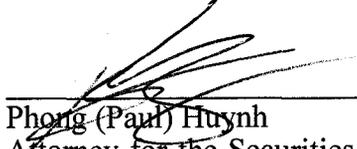
12       As the Cooper matter demonstrates, the Bankruptcy Court has acknowledged that the Commission's  
13       actions and proceedings to enforce the Securities Act and Investment Management Act fit squarely  
14       within 11 U.S.C. § 362(b)(4). The Division and/or Commission need not file a release, grant of  
15       authorization or motion for relief from the automatic stay because its proceeding is statutorily exempted  
16       from the stay, unless the ALJ determines otherwise. Since the Commission has jurisdiction to determine  
17       whether the automatic stay applies to this administrative case and since the actions are a valid exercise  
18       of the police and regulatory powers specifically exempted from the automatic stay, the ALJ could and  
19       should rule that the automatic stay does not apply to the administrative case and the proceeding against  
20       SRI, Douglas and Kyla Cottle shall proceed accordingly.

21       **III.    CONCLUSION**

22               Based upon the foregoing facts and legal arguments, the Commission asserts that the  
23       administrative proceedings before it should not be stayed because 11 U.S.C. § 362(b)(4) and applicable  
24       case law excepts the proceedings from the automatic stay. The Commission can order Debtors to cease  
25       and desist from violating Arizona securities laws and enter an order for restitution and penalties. The  
26       Commission request that you deny Debtors' petition for an order enjoining the Commission from taking

1 further action against Debtors before the Commission, and to determine that the Commission has not  
2 violated 11 U.S.C. § 362(a)(1).

3  
4 Respectfully submitted this 20th day of November, 2009.

5  
6 By: 

7 Phong (Paul) Huynh  
8 Attorney for the Securities Division of the Arizona  
9 Corporation Commission

10 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing  
11 filed this 20th day of November, 2009 with:

12 Docket Control  
13 Arizona Corporation Commission  
14 1200 W. Washington St.  
15 Phoenix, AZ 85007

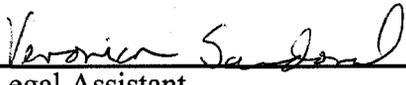
16 COPY of the foregoing hand-delivered this  
17 20th day of November, 2009 to:

18 Mr. Marc E. Stern  
19 Administrative Law Judge  
20 Arizona Corporation Commission/Hearing Division  
21 1200 W. Washington St.  
22 Phoenix, AZ 85007

23 COPY of the foregoing mailed this  
24 20th day of November, 2009 to:

25 Secure Resolutions, Inc.  
26 1921 S Alma School Road STE 201  
Mesa, AZ 85210

James Portman Webster  
James Portman Webster, P.L.L.C.  
935 E. Main St., Ste. 204  
Mesa, AZ 85203

By:   
Legal Assistant

# **EXHIBIT A**

**IT IS HEREBY ADJUDGED  
and DECREED this is SO  
ORDERED.**

The party obtaining this order is responsible for  
noticing it pursuant to Local Rule 9022-1.

**Dated: January 26, 2006**



1 **ARIZONA CORPORATION COMMISSION**

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3 1300 West Washington, 3<sup>rd</sup> Floor  
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**RANDOLPH J. HAINES**  
U.S. Bankruptcy Judge

9 Attorney for Movant

10 UNITED STATES BANKRUPTCY COURT  
11 DISTRICT OF ARIZONA

12 In re:

13 ARTHUR BRYAN COOPER and LINDA A.  
14 COOPER,

15 Debtor.

In Proceedings Under  
Chapter 13

(Case No: 2-05-26746 RJH)

16 ARIZONA CORPORATION COMMISSION,

17 Movant,

**ORDER APPROVING MOTION FOR  
RELIEF FROM THE AUTOMATIC STAY**

18 vs.

19 ARTHUR BRYAN COOPER and LINDA A.  
20 COOPER,

21 Respondents.

22 This matter having come on to be heard upon the Arizona Corporation  
23 Commission's Motion for Relief from the Automatic Stay filed on November 4, 2005, the  
24 Respondents having submitted their response and a reply having been filed as well, and the  
25 Court having heard the Oral Arguments of the parties, the Court hereby finds as follows:  
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- 1) The Arizona Corporation Commission is a governmental agency enforcing its police and regulatory power;
- 2) Pursuant to 11 U.S.C. §362(b)(4), police and regulatory actions commenced by the Arizona Corporation Commission are not stayed by these bankruptcy proceedings; and,
- 3) The Arizona Corporation Commission may proceed with their investigation, and also proceed to exercise their regulatory powers as provided by law.

Specifically, the Court recognizes the authority of the Arizona Corporation Commission to enter Orders in administrative and civil proceedings, including but not limited to, those that provide for injunctive relief, for penalties, for restitution and for the revocation of licenses as provided by law; however, the Arizona Corporation Commission may not attempt to execute upon any monetary judgment so long as the Bankruptcy Court has jurisdiction over the debtor.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2006.

The Honorable Randolph J. Haines  
United States Bankruptcy Court

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