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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission
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IN THE MATTER OF

INTERSECURITIES, INC.
570 Carillon Parkway
St. Petersburg, FL 33716-1202
CRD #16164

GREGORY RUSSELL BROWN and JANE DOE RUSSELL, husband and wife
16417 South 15th Drive
Phoenix, AZ 85045
CRD #2233684

Respondents.

DOCKET NO. S-03482A-03-0000

INTERSECURITIES, INC.'S REPLY TO SECURITIES DIVISION'S RESPONSE TO THE MOTION FOR JURY TRIAL

Respondent InterSecurities, Inc. ("ISI") has asked the Arizona Corporation Commission ("the Commission") to grant its request for a jury trial. The Securities Division's ("the Division") Response offers no persuasive authority in opposition to the Motion. The Commission must dismiss the Division's claims for damages and penalties because it cannot presently conduct a jury trial. If the Division wishes to proceed with the damages and penalties claims the Commission should direct the Division to bring those claims in a forum where ISI can have its constitutionally guaranteed jury trial.

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RESPECTFULLY SUBMITTED this 7th day of October, 2003.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

The Division argues that this matter purely involves "public rights," which in this case is the enforcement of securities laws, and that ISI is thus not entitled to a jury trial. The Division is wrong. The public rights doctrine is inapplicable in Arizona. ISI is entitled to a jury trial.

The Division concedes that this proceeding has been initiated to recover funds on behalf of "49 Arizona citizens [who] have lost up to $2.7 million . . ." (Response at 7.) The Division also acknowledges that ISI received no benefit, direct or indirect, as a result of Brown's telephone sales. The Division's concessions regarding these two issues compel the conclusion that ISI is entitled to a jury trial.

Further, courts have specifically held that proceedings initiated before or by administrative agencies may trigger parties' constitutional rights to a jury trial. SCI Management Corp. v. Sims,

71 P.3d 389, 101 Hawai'i 438 (2003); FUD's Inc. v. State, 727 A.2d 692 (R.I. 1999). This is such a case.

The Division's remaining arguments consist of the repeated and circular assertion that the mere existence of statutes and an administrative procedure for resolving regulatory proceedings initiated by the Commission renders these provisions constitutional without further inquiry. This overly simplistic view implies that all laws are constitutional because they are passed by the legislature. Once again, the Division is wrong.

The Division misses the point: laws and rules are not constitutional just because the legislature adopted them; they must be consistent with their constitutional mandate. To resolve this dispute without a jury trial would violate ISI's right to a jury trial pursuant to Article II, Section 23 of the Arizona Constitution. The Division's attempt to recover money from ISI triggers ISI's right to a jury trial because: (1) the Division has brought an action for damages, which is analogous to an action at common law; and/or (2) the Division seeks to punish ISI by requiring it to pay investors although ISI never received any of the investors' money. Tull v. United States, 481 U.S. 412, 417, 107 S.Ct. 1831, 1835 (1987); SEC v. First Pacific Bancorp, 142 F.3d 1186 (9th Cir. 1998).

II. ISI IS ENTITLED TO A JURY TRIAL.

A. The Public Rights Doctrine Does Not Abrogate ISI's Right to a Jury Trial.

1. The Public Rights Doctrine Has Not Been Adopted in Arizona, and is Inapplicable.

The Securities Division urges the Commission to apply the "public rights" doctrine, which was developed by federal courts in cases interpreting parties' rights to a jury trial pursuant to the Seventh Amendment of the United States Constitution. See, e.g., Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 51, 109 S.Ct. 2782 (1989) (United States Constitution requires a jury trial

in fraudulent conveyance action brought by trustee in bankruptcy proceeding). No case in Arizona, however, has adopted the public rights doctrine.

Further, the "Seventh Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same." Minneapolis & St. Louis Railroad Co. v. Bombolis, 241 U.S. 211, 217, 36 S.Ct. 595, 596 (1916) (citations omitted). "Arizona has long provided its citizens with greater access to jury trials than is required by the federal constitution." State ex rel. McDougall v. Strohson, 190 Ariz. 120, 121-22, 945 P.2d 1251, 1252-53 (1997).

As discussed in detail in ISI's Motion, Arizona law provides three distinct circumstances where a defendant will be found to have a right to jury trial: (1) when the defendant is exposed to a severe penalty; (2) when the act involves moral turpitude; and (3) when the offense has traditionally merited a jury trial under common law. Rothweiler v. Superior Court, 100 Ariz. 37, 42, 410 P.2d 479, 483 (1966).

The Division fails to cite any authority to distinguish Rothweiler, nor can it. The Arizona Supreme Court has already rejected an argument that Arizona should discard the Rothweiler test and be guided entirely by principles of federal constitutional law, so that Arizonans would have no right to a jury trial unless it was commanded by the federal constitution. State ex rel. McDougall v. Strohson, 190 Ariz. at 121-22, 945 P.2d at 1252-53.

The Division's argument that the public rights doctrine applies also ignores the long-established principle that the Commission is unlike any other administrative body in Arizona or any other jurisdiction:

> The Corporation Commission must be distinguished from the general type of administrative agency. Usually the agency is created and derives its powers solely from the Legislature, but the Corporation Commission was created by people of Arizona through the

> Constitution just as was the Legislature. Throughout the years the courts of this state have been faced with the problem of defining the relationship of powers of those two concurrent constitutional bodies.

Sulger v. Arizona Corp. Comm'n., 5 Ariz. App. 69, 72, 423 P.2d 145, 148 (1967).

Article 15 of the Arizona Constitution created the Commission as a separate branch of government. Qwest Corp. v. Kelly, 204 Ariz. 25, 29, 59 P.3d 789, 793 (Ct. App. 2002) (citing Arizona Corp. Comm'n. v. State ex rel. Woods, 171 Ariz. 286, 290, 830 P.2d 807, 811 (1992)). The Commission is unique from other administrative agencies in that it has executive, legislative and judicial powers. Qwest Corp., 204 Ariz. at 29, 59 P.3d at 793 (citing Woods, 171 Ariz. at 291, 830 P.2d at 812).

The Commission is not an agency to which the legislature could simply assign and create certain powers. When the Framers of the Arizona Constitution drafted Article II, Section 23, they removed the power of the Legislature to limit a party's right to jury trial by specifically providing in the Constitution that the right to jury trial shall remain inviolate. Similarly, the Framers also limited the Legislature's ability restrict the scope of the Commission's authority in Article 15, Section 6 of the Constitution. Article 15, Section 6 empowers the legislature to enlarge the powers and extend the duties of the Commission. A.R.S. Const. Art. 15, § 6. Conversely, this constitutional provision prohibits the legislature from decreasing the powers or duties of the Commission. Selective Life Ins. Co. v. Equitable Life Assur. Soc. of U.S., 101 Ariz. 594, 422 P.2d 710 (1967). Thus, the Legislature lacks the authority to not only limit the constitutionally preserved right to jury trial, but also to restrict the Commission from ordering a jury trial.

The Division mischaracterizes the holding in Rothweiler v. Superior Court, 1 Ariz. App. 334, 402 P.2d 1010 (1965), aff'd, 100 Ariz. 37, 410 P.2d 479 (1966) ("Rothweiler I") to support its contention that the Legislature has the authority to determine whether or not a jury trial will be

afforded. Rothweiler I, however, simply held that the Legislature has considerable discretion to determine whether a jury trial will be afforded when a party has no constitutional right to a jury trial. Id. To hold that the Legislature has the power to determine whether a party has a jury trial right in the first instance, however, would make Article II, Section 23 of the Arizona Constitution superfluous.

Further, the Arizona Supreme Court has held that it will not defer to a legislative preference in determining jury entitlement because "the simple fact is that questions of jury entitlement involve constitutional considerations; so judicial abandonment to a legislative preference (again, assuming a legislative preference had been expressed) is not permissible since, clearly the court is the final arbiter of whether a legislative act passes constitutional muster." McDougall, 190 Ariz. at 126-27, 945 P.2d at 1257-58 (citation omitted).

The Arizona Constitution did not abrogate a party's right to a jury trial in Commission proceedings, and the Legislature is without authority to limit that right. This proceeding is analogous to a common law cause of action for damages and specifically implicates ISI's jury trial rights. The public rights doctrine is inapplicable.

2. If the Public Rights Doctrine Applies, this Case Does Not Implicate a Public Right.

Even if the public rights doctrine is the appropriate analysis, this matter does not implicate a public right.

The public rights doctrine permits Congress to assign adjudication of new statutory public rights to a tribunal that does not employ juries as finders of fact without violating the Seventh Amendment right to jury trial. Granfinanciera, S.A. v. Nordberg, 492 U.S. at 51, 109 S.Ct. 2782 (United States Constitution requires a jury trial in fraudulent conveyance action brought by trustee

in bankruptcy proceeding) (quoting Atlas Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 455, 97 S.Ct. 1261 (1977)).

Public rights are statutory causes of action that: (1) inhere in, or lie against the Federal Government in its sovereign capacity; or (2) that are so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article II judiciary. Granfinanciera, 492 U.S. at 53-54, 109 S.Ct. at 2796-97. Conversely, an action involves "private rights" where it concerns "the liability of one individual to another under the law as defined." Granfinanciera, at 51, n.8, 109 S.Ct. at 2795, n.8.

The United States Supreme Court holds that Congress:

> Lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury. As we recognized in Atlas Roofing, to hold otherwise would be to permit Congress to eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common law forebears.
>
> The Constitution nowhere grants Congress such puissant authority. Legal claims are not magically converted into equitable issues by their presentation to a court of equity...nor can Congress conjure away the Seventh Amendment by mandating that traditional legal clams be brought there or taken to an administrative tribunal.

Granfinanciera, 492 U.S. at 51-52, 109 S.Ct. at 2795-96 (footnote, citations and quotations omitted).

Although the Division seeks to suspend or revoke ISI's securities license, this is not a case where this is likely to occur and ISI believes the Division recognizes as such. Moreover, the Division is seeking $2,752,850 from ISI to compensate the 49 investors in addition to civil penalties. Money damages is the primary claim. The Commission's role, if any, in enforcing the public right is incidental to its role in seeking damages on behalf of individual persons, causing this action to be one outside of the public rights doctrine.

3. Although the Division Labels its Damages Claim as "Restitution," it does not seek Equitable Relief and This Action Does Not Implicate a Public Right.

The Division contends that by seeking "restitution," but not "disgorgement," this action does not implicate ISI's right to a jury trial. The Division forgets that in addition to restitution, it seeks to impose up to $490,000 in civil penalties pursuant to A.R.S. § 44-2036. Further, the $2,752,850 sought by the Division as "restitution" amounts to a severe penalty and is, therefore, analogous to the penalty sought in Tull.

The Division makes the novel and unprecedented argument that by calling its damages remedy "restitution," it is immune from any claim that it seeks anything but an equitable remedy. The Division states that Tull is distinguishable in part because the Division seeks restitution, whereas in Tull the government sought to impose civil penalties provided for under federal law. [Response, at 13.]

The Division, however, cannot recast or "magically convert[]" its common law damages claim into an equitable action by simply labeling it "restitution." Granfinanciera, 492 U.S. at 52, 109 S.Ct. at 2796. If anything, the Division must be forced to recognize the inevitable: by seeking to recover money from ISI that ISI never received, the Division cannot characterize this action as restitutionary or equitable.

Moreover, Tull held that there is no meaningful distinction between disgorgement and restitution: "an action for disgorgement . . . is a remedy only for restitution – a more limited form of penalty than a civil fine. Restitution is limited to 'restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant.'" Tull, 481 U.S. at 424.

Further, a closer look at the definition of restitution also establishes that this action is more closely analogous to an action at law for damages. "Restitution measures the remedy by the

defendant's gain and seeks to force disgorgement of that gain. It differs in its goal or principle from damages, which measures the remedy by the plaintiff's loss and seeks to provide compensation for that loss." Dobbs, Dan B., Handbook on the Law of Remedies, §4.1(1), Ch. 4, p.369 (2d 1993). "Restitution is the return or restoration of what the defendant has gained in a transaction." Id. at 356. In other words, the distinction between disgorgement and restitution lies simply with who receives the ill-gotten gains wrested away from the wrongdoer.

The Ninth Circuit Court of Appeals provides further support for ISI's arguments:

> We need not engage in a ***rather scholastic argument*** about whether restitution and disgorgement are really just about the same thing. *Compare Tull v. United States,* 481 U.S. 412, 424, 107 S.Ct. 1831, 1839, 95 L.Ed.2d 365 (1987) (***they are to be equated***), *and SEC v. Blatt,* 583 F.2d 1325, 1335 (5th Cir. 1978) (same), *with Texas American Oil Corp. v. United States Dep't of Energy,* 44 F.3d 1557, 1569-70 (Fed. Cir. 1995) (they are distinct concepts), *and* [*SEC v.*] *Huffman,* 996 F.2d [800,] 802 (same). The distinction drawn between the two remedies plays no role in this case because the district court determined that Sands and Bancorp were unjustly enriched by the amount that they fraudulently retained from the Bancorp offering and fraudulently diverted from the PacVen offering. The fact that the district court also ordered restitution does not affect the nature of the disgorgement remedy; nor does it render the disgorgement order improper. *See* [*SEC v.*] *Fishbach* [*Corp*]., 133 F.3d [170,] 176 [(2d Cir. 1997)] ("[I]t is normally within the district court's discretion to order that disgorged funds be used to compensate securities fraud victims..."); *SEC v. World Gambling Corp.*, 555 F.Supp. 930, 934 (S.D.N.Y.), *aff'd*, 742 F.2d 1440 (2d Cir. 1983) ("[W]hile disgorgement has been said to serve more important interests than the compensation of investors, that principle is a far cry from the proposition that restitution is an improper end.") (internal citation omitted.)

First Pacific Bancorp, 142 F.3d at 1192-93 (some emphasis added and some in original).

The two cases cited by the Division also support ISI's position. In Krull v. SEC, 248 F.3d 907 (9th Cir. 2001), the Ninth Circuit referred generally to the "disgorgement/restitution issue," implying that the two are essentially the same. Krull, 248 F.3d at 914. The difference is who

receives the money: "restitution was substituted for disgorgement, as the NBCC apparently considered it more appropriate to reimburse the customers than to disgorge commissions..." Id. Further, in SEC v. Huffman, 996 F.2d 800 (5th Cir. 1993), the other case cited by the Division, the Fifth Circuit stated, "disgorgement is ***not precisely*** restitution." Huffman, at 802 (emphasis added). Discussing the difference between the two remedies, the Fifth Circuit stated, "Disgorgement does not aim to compensate the victims, as restitution does." Id.

Finally, the Division states that ISI's claim that it received no financial benefit does not negate its ability to seek redress before the Commission for harm allegedly suffered by the investors [Response, at 9.] Thus, the Division concedes that this action is not really an action for restitution, but rather for damages. Claims for money damages are usually claims "at law." Dobbs, Dan B., Handbook on Remedies, §4.1(2), Ch. 4, p.370 (2d ed. 1993). Accordingly, the Division's claims parallel common law claims that historically were actions at law, thus implicating ISI's jury trial rights.

The overwhelming weight of authority as set forth above leads to the following compelling conclusions: (1) the Division's damages claim cannot fairly be characterized as restitution because ISI never obtained any funds that it can be ordered to return to investors; (2) because ISI has nothing to return, the Division's damages claims must be characterized as either common law damages claims or an attempt to punish ISI; and (3) accordingly, ISI is entitled to a jury trial.

4. Even if a Public Right is Implicated, the Cause of Action Involves a Hybrid of Public and Private Rights; Thus the Public Rights Doctrine Does Not Apply.

When a party acts to enforce public rights and seeks to recover substantial money damages as compensation, the party's role in enforcement of the public rights is minor and the narrow exception to the requirement of a jury trial does not apply. Bishop Coal Co. v. Salyers, 380 S.E.2d

238, 245, 181 W.Va. 71 (1989). The Division concedes that the primary focus of this action is to recover substantial money damages from ISI in order to compensate the investors for the alleged harm they suffered. As set forth repeatedly herein, because money damages is the Division's primary claim, the Commission's role, if any, in enforcing public rights is minor and this action is outside of the public rights doctrine.

B. The Right to Jury Trial Exists in Matters Initiated By or Before Administrative Agencies.

At least two state courts have held that the right to a jury trial may be implicated in administrative proceedings. The Rhode Island Supreme Court has held that a complaint filed by an employee before an administrative agency pursuant to Rhode Island's Fair Employment Practices Act ("FEPA"), is outside the public rights doctrine, and within a party's constitutionally preserved right to jury trial. FUD's Inc. v. State, 727 A.2d 692 (R.I. 1999).

FUD's involved a complaint filed pursuant to FEPA, which allows employees and other aggrieved parties to file unlawful employment practice charges against employers with the Rhode Island Commission for Human Rights ("RICHR"). The court held that FEPA's procedure implicated the employer's jury trial rights and stated as follows::

> the availability of an open-ended award of compensatory and punitive damages in response to a FEPA charge, coupled with the potentially significant financial impact of such an award upon any given respondent employer, indicates that this type of employment-discrimination claim bears more similarity to an action at law than to an equitable cause of action.

Id. at 697.

The Court ruled that because an important and potentially substantial component of the statutory relief available under FEPA is legal in nature and that the cause of action itself is more

analogous to a common law action, a FEPA action triggers employers' rights to a jury trial. Id. at 697. The Court concluded that FEPA's deprivation of that right was unconstitutional. Id.

The court then held that the FEPA action in that case did not exclusively involve public rights. Id., 727 A.2d at 697. Although the court found the right of employees to be free from employment discrimination was "statutory" and was assigned to an administrative agency for adjudication, the Court found the employee's right to obtain compensatory or punitive damages for any violation of their rights to be free from employment discrimination fell more on the side of a traditional private remedy for legal wrongdoing than on the side of constituting an integral component of the public regulatory scheme. Id. The Court held that the case was a hybrid cause of action, "that is, one involving not only the adjudication of public rights, but also of a private party's right to obtain compensatory and/or punitive damages from another private party for a statutory violation," and thus outside the public rights doctrine, but within a litigant's inviolable constitutional right to obtain a jury trial. Id.

Similarly, the Hawaii Supreme Court ruled that an employer was entitled to a jury trial on an employee's claims of sexual harassment and retaliation before the Hawaii Civil Rights Commission. SCI Management Corp. v. Sims, 71 P.3d 389, 101 Hawai'i 438 (2003).

As in FUD's and SCI, the United States Supreme Court has similarly found a jury trial right to exist in a forum where no procedure was in place to hold such a trial. In Granfinanciera, the Supreme Court held that the public rights doctrine did not strip a party that had not submitted a claim against a bankruptcy estate of its right to jury trial in a bankruptcy proceeding to recover allegedly fraudulent transfers, notwithstanding Congress' designation of fraudulent conveyance actions as triable by bankruptcy judges without a jury. Id. 492 U.S. at 36, 109 S.Ct. at 2787.

The Supreme Court concluded that the nature of the relief sought in a fraudulent conveyance action was traditionally provided by law courts or on the law side of courts having both legal and equitable dockets. Id. at 49, 109 S.Ct. at 2794. The Supreme Court stated that its decisions "establish beyond peradventure that in cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received." Id. at 48, 109 S.Ct. at 2793 (citations omitted).

Next, the Supreme Court analyzed whether under the public rights doctrine Congress permissibly withdrew jurisdiction over that action by courts of law and assigned it exclusively to non-Article III tribunals sitting without juries. Id. at 49, 109 S.Ct. at 2794. It held that it had not. Id. at 60, 109 S.Ct. at 2800. First, the Supreme Court held that fraudulent transfer actions were "quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate." Id. at 56, 109 S.Ct. at 2798.

Second, it held that such actions were not an integral part of the public regulatory scheme upon which the bankruptcy trustee sought to justify the adjudication of the action without a jury. Id. at 34, 55, n.10, 109 S.Ct. at 2786, 2797, n.10. The Supreme Court stated "Congress cannot eliminate a party's Seventh Amendment right merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity." Id. at 60-61, 109 S.Ct at 2800.

The Division seeks to recover money from ISI that it never received. As such this matter cannot be characterized as an equitable action best left to the Commission to resolve.[1] Rather, the Division's damages claim is a common law damages claim.

A.R.S. § 44-2037 authorizes the Commission to bring matters such as this in superior court, which is where a jury trial would be available. Hence, it has the power to choose whether ISI or similarly situated defendants will have the right to a jury trial. All ISI asks for is the same access to superior court.

III. CONCLUSION.

For the foregoing reasons ISI respectfully requests that the Commission grant ISI's Motion for a Jury Trial and dismiss the Division's claims for damages and penalties because it cannot presently conduct a jury trial. If the Division wishes to proceed with the damages and penalties claims the Commission should direct the Division to bring those claims in a forum where ISI can have its constitutionally guaranteed jury trial.

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[1] The Division cites Cactus Wren Partners v. Arizona Dept. of Building and Fire Safety, 177 Ariz. 559, 869 P.2d 1212 (Ct. App. 1993), as support for its contention that no jury trial right is available here. Cactus Wren, however, involved another agency, not a Commission proceeding. Further, Cactus Wren involved the classic remedial use of restitution, which is not the case here where the Division seeks to recover funds from a company that never received any money in the first instance.

RESPECTFULLY SUBMITTED this 7th day of October, 2003.

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