

ORIGINAL



0000135241

RECEIVED

BEFORE THE ARIZONA CORPORATION COMMISSION

2012 MAR 16 P 3:40

Arizona Corporation Commission

COMMISSIONERS

DOCKETED

GARY PIERCE, Chairman  
BOB STUMP  
SANDRA D. KENNEDY  
PAUL NEWMAN  
BRENDA BURNS

AZ CORP COMMISSION  
DOCKET CONTROL

MAR 16 2012

DOCKETED BY

In the matter of:  
DAVID SHOREY AND MARY JANE SHOREY, husband and wife,  
WESTCAP ENERGY INC., an Arizona corporation, d/b/a Westcap Solar,  
Respondents.

DOCKET NO. S-20790A-11-0104  
SECURITIES DIVISION'S POST HEARING BRIEF  
Hearing Dates: January 23 and 24, 2012  
Assigned to Administrative Law Judge Marc E. Stern

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

**A. SUMMARY OF THE ISSUES.**

The main questions presented in this case are (1) whether an unregistered dealer and salesman, who are both principally based out of Tucson, Arizona, have violated the registration provisions of the Securities Act when they offered and sold securities to investors overseas; (2) whether Arizona's Securities Act must be complied with, unless a "covered security" is established; and (3) whether payments of commissions to unregistered salesmen, which totaled 72.5% of all investor money raised, is so material that failing to disclose this simple fact is a material omission. The answer to each question is yes.

The Securities Act applies to all offers or sales within or from Arizona. Westcap Energy, Inc. and David Shorey are unregistered dealers and salesmen with the state of Arizona and this fact is not debated. On multiple occasions, Mr. Shorey, from Arizona, directly offered or sold company stock to overseas investors. Respondents present a fallacy when they argue that they are exempt

1 from registration because they complied with Regulation S, an exemption for offerings involving  
2 only offshore transactions. The fallacy exists because preemption is only applicable to covered  
3 securities, which their stock offering is not. The term covered security, for the purposes of this  
4 case, is only applicable to transactions not involving a public offering. Here, Respondents solicited  
5 numerous investors through a general solicitation. Further, a Regulation S offering is not a covered  
6 security, as defined by statute. Without a covered security present, preemption is not an issue and  
7 state registration must be complied with. Even if a covered security exists, Arizona's ability to  
8 enforce its anti-fraud provisions is still preserved.

9 More glaring than the registration violations is the lack of full disclosure to investors on  
10 how their money was actually used. The picture painted to the investors was a local solar company  
11 seeking to grow into an emerging market of renewable energy. Investors could get in on the  
12 ground floor of this emerging company and buy company stock, which would appreciate in value  
13 once the company went public. The company was seeking a gross amount of \$1,000,000 to take it  
14 to a projected level of profitability and growth; \$100,000 would be used for offering expenses and  
15 the remaining for various development and capital expenses. Yet, when the Division's forensic  
16 accountant analyzed what actually happened to the investors' money, she discovered that 72.5% of  
17 every dollar invested went to pay commission or finders fees. An additional 8% of the investors'  
18 money was used to pay dividend payments. By applying over 80% of every dollar raised to  
19 commission payments and dividend payments, the prospect of growing and developing a capital-  
20 intensive solar company are bleak. But the most important aspect of these large payments is that  
21 not a single investor was told that their money would be used in such a manner. A vague  
22 disclaimer that commission payments may be paid cannot cure the fact that this important  
23 information was never disclosed nor does it dismiss the Respondents' obligations of full disclosure.  
24 The use of investor money to pay such huge commissions is material as a matter of law and by  
25 failing to disclose this fact violates the anti-fraud provisions of the Securities Act.

26

1 Under Arizona law, the violations of the Securities Act are strict liability offenses and good  
2 faith reliance on advice of counsel is not an affirmative defense. Good faith reliance on advice of  
3 counsel is only applicable to actions brought under federal securities law where scienter is an  
4 element to be proven.

5 **B. JURISDICTION.**

6 The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona  
7 Constitution and the Securities Act of Arizona, A.R.S. § 44-1801 *et seq.* (“Securities Act”).

8 **C. FACTS.**

9 David Shorey (“Mr. Shorey”) is an individual who resided in Pima County, Arizona for all  
10 times relevant and was a certified public accountant under license number 6724-R. Resp’t Answer  
11 p.2. Mary Jane Shorey (“M. Shorey”) was at all relevant times the spouse of Mr. Shorey. Resp’t  
12 Answer p.2. Mr. Shorey has resided in Arizona since 1983. Hr’g Tr. Vol. II, p.189. Westcap  
13 Energy, Inc. d/b/a Westcap Solar, (“WEI”) is an Arizona corporation with its principal place of  
14 business in Pima County, Arizona and Mr. Shorey is the director and chief executive officer.  
15 Resp’t Answer p.2; Ex. S-11(G). Mr. Shorey and WEI may be collectively referred to as  
16 “Respondents.” Between the timeframe of March 2, 2010, to January 23, 2012, Mr. Shorey was  
17 not a registered dealer or salesman with the Commission. Ex. S-55A; Hr’g Tr. Vol. I, pp. 33 & 34.  
18 Between the timeframe of March 2, 2010, to January 23, 2012, WEI was not a registered dealer or  
19 salesman with the Commission. Ex. S-55B; Hr’g Tr. Vol. I, pp. 34 & 35. From 2009 to the  
20 present, Litchfield Enterprises, Inc. (“LEI”) was not a registered securities dealer or salesman with  
21 the state of Arizona. Hr’g Tr. Vol. I, pp. 35. From 2009 to the present, Daniel Thomas Kerrigan  
22 (“Mr. Kerrigan”) was not a registered securities dealer or salesman with the state of Arizona. *Id.* at  
23 36. Mr. Kerrigan is the president of Intuition Capital Corporation (“Intuition Capital”). *Id.* at  
24 pp.74-75. Intuition Capital maintained a bank account that is owned or controlled by Mr. Kerrigan  
25 and hereafter they may be collectively referred to as “Intuition Capital.” No state securities filings  
26 have been made to date by Respondents. Hr’g Tr. Vol. II, p. 224.

1           Between the period of March 2010, to August 31, 2010, Respondents offered and sold at  
2 least \$388,570 of 8% Series A Convertible Preferred Stock of WEI. Ex. S-6 and Ex. S-7,  
3 ACC000457. Mr. Shorey corresponded with all investors by email, mail, and federal express. Ex.  
4 S-54, pp.32; S-16 to S-51. Some of the documents provided to investors were titled subscription  
5 agreement (“Subscription Agreement”) and private placement (“Private Placement”), which  
6 required the investors to sign and return the documents to WEI’s Arizona address or to fax them to  
7 an Arizona-based number. Ex. S-8. Pursuant to the Subscription Agreement, each share of  
8 preferred stock was convertible into ten shares of common stock for a period of twelve months  
9 from the purchase price, was to be paid a quarterly dividend of 8%, was priced at five dollars per  
10 share, and classified the investors as shareholders of WEI. Ex. S-8, ACC000520-524.  
11 Furthermore, Respondents’ Private Placement stated that WEI would attempt to become a publicly  
12 traded company through a merger, acquisition, or file a registration statement on the common  
13 stock, whereby each preferred stock holder would receive, based on their percentage of ownership,  
14 a proportionate share of the common stock in the publicly traded company (hereafter collectively  
15 referred to as “WEI Stock”). *Id.* at ACC000527-528.

16           Respondents engaged Intuition Capital to introduce investors to WEI. Hr’g Tr. Vol. II, p.  
17 250. Respondents never received from Intuition Capital any written documentation detailing the  
18 investors’ background or financial information. In fact, no document was ever received from  
19 Intuition Capital that would substantiate that any investor was “accredited” because all Mr. Shorey  
20 received was the investor’s address and name. *Id.* at 253. Respondents paid 72.5% in commissions  
21 to LEI and/or Intuition Capital, which was never disclosed to any of the investors. Hr’g Tr. Vol. II,  
22 p.275-276. Mr. Shorey himself testified that the commission fees were “indeterminable” at the  
23 time the private placement document was created. *Id.* at 278. In fact, Respondents failed to even  
24 disclose that a fee of 10% was to be paid to LEI pursuant to a written agreement entered into on  
25 October 2009, nearly six months before the first WEI solicitation in March 2010. Mr. Shorey  
26 testified that when LEI informed him that Intuition Capital requested a 65% payment to aid

1 Respondents in raising money from foreign investors, Mr. Shorey stated it was more than he could  
2 afford. *Id.* at 249. Mr. Shorey also testified that due to Intuition Capital's high fee, he requested  
3 that LEI lower their fee to 7.5%. *Id.* at 246. The Division's evidence shows that beginning March  
4 2010, 72.5% commission payments were made to LEI and/or Intuition Capital. Ex. S-56. Even  
5 though the commission fees became a determinable amount sometime between October 2009 and  
6 March 2010, Respondents never amended or revised the subscription agreement or private  
7 placement document to disclose that 72.5% of each investor payment would be used to pay fees or  
8 commissions to LEI and/or Intuition Capital. Ex. S-8; RS-1 to RS-4.

9 Roy Connell ("Mr. Connell") purchased 2,000 shares of WEI Stock around August 17,  
10 2010. Ex. S-6. Based on documents obtained from Respondents, Mr. Shorey communicated with  
11 Mr. Connell prior to receiving any written confirmation of Mr. Connell's accreditation or  
12 sophistication. On August 6, 2010, Mr. Shorey sent a letter that stated, by purchasing WEI Stock,  
13 Mr. Connell was "getting in on the ground floor," would own newly issued stock, and that the  
14 "investment will grow as we accelerate our business expansion." Ex. S-7, ACC000475. Mr.  
15 Shorey's letter also indicated that he was attaching a WEI subscription agreement for Mr.  
16 Connell's review. Thereafter, it appears that Mr. Connell submitted a partially executed  
17 subscription agreement on or about August 13, 2010. *Id.* Respondents did not put forth any  
18 evidence that Mr. Shorey, prior to offering the investment opportunity, established or obtained  
19 information to determine what Mr. Connell's prior investment experience was, what Mr. Connell's  
20 financial income or net worth was, or whether Mr. Connell met the requirements of an accredited  
21 investor. In fact, Mr. Connell was cold called by Intuition Capital. Hr'g Tr., p.48. The evidence  
22 also established that Ravinder Randhawa ("Mr. Randhawa") was also cold called by Intuition  
23 Capital and offered investments in WEI Stocks. Ex. S-1; Hr'g Tr., p.48.

24 At the hearing, the Division called Michael Brokaw (Mr. Brokaw) and Denise Fritz (Mrs.  
25 Fritz) as testifying witnesses.<sup>1</sup> Mr. Brokaw is a senior special investigator and certified peace

26 <sup>1</sup> See *Begay v. Ariz. Dept. of Econ. Sec.*, 128 Ariz. 407, 409, 626 P.2d 137, 139 (Ct. App. 1981), which states "It is clear in Arizona that hearsay is admissible in administrative proceedings, and that it may, in proper circumstances,

1 officer with the state of Arizona. Mrs. Fritz is a forensic accountant who was recognized as an  
2 expert witness at the hearing by ALJ Stern. Hr'g Tr. Vol. I, p.170.

3 Mrs. Fritz testified that she analyzed WEI's Wells Fargo Bank account for the periods of  
4 January 25, 2010, to August 31, 2010 and created a report titled "summary of receipts and  
5 disbursements." Hr'g Tr. Vol. I, p. 153. Mrs. Fritz's review discovered that certain investor wire  
6 transfers, "said things like Westcap Energy investment, or it might have said 8 percent  
7 investment." *Id.* at 155. Mrs. Fritz also compared the names listed on the wire transfers with the  
8 list of investors provided to the Division by Respondents and she matched them up. *Id.* For the  
9 entire timeframe she analyzed, the bank account was principally held and based in Tucson, Arizona  
10 and Mr. Shorey was the only authorized signatory. *Id.* at 156. As part of her analysis, she  
11 determined that the account had an opening balance of \$100. *Id.* at 161. Mrs. Fritz's report noted  
12 that \$388,495 was deposited into the account from investors, that that over \$214,000 of the  
13 investors' money was disbursed to LEI, that over \$48,000 was disbursed to Intuition Capital and/or  
14 Mr. Kerrigan, that \$2,229 of the investors' money was used to make the 8% dividend payment, and  
15 that she discerned that 72.5% of every investor payment was paid to LEI and/or Intuition Capital.  
16 Ex. S-56. Mr. Shorey also made dividend payments directly, by mail or wire transfer, to each  
17 investor from Westcap's Arizona-based bank account. S-54, pp. 51-52.

18 On January 23 and 24, 2011, a hearing was conducted before Administrative Law Judge  
19 Marc E. Stern ("ALJ Stern"). The Division was represented by counsel. Mr. Shorey, WEI, and  
20 Respondent Spouse were represented by Bruce Heurlin of the law firm of Heurlin, Sherlock,  
21 Panahi. By stipulation of the parties, ALJ Stern admitted the following exhibits into evidence: S-1  
22 through S-56 and R-1 through R-5 and R-9.

23  
24  
25  
26  

---

be given probative weight. [citations omitted]. It also appears that in some circumstances hearsay may properly be  
the sole support of an administrative decision."; *See also Wieseler v. Prins*, 167 Ariz. 223, 227, 805 P.2d 1044, 1048  
(Ct. App. 1991), which discussed double hearsay and stated, "Reliable hearsay is admissible in administrative  
proceedings and may be the only support for an administrative proceeding."

1       **D. LEGAL ARGUMENTS.**

2               **I. RESPONDENTS OFFERED AND SOLD UNREGISTERED WEI**  
3               **SECURITIES FROM ARIZONA.**

4               The Respondents offered and sold unregistered WEI Stock from the state of Arizona due to  
5               Mr. Shorey's direct solicitation of investors, while residing and operating in Arizona. The  
6               evidence shows that Mr. Shorey directly solicited numerous investors through his personal and  
7               company email, described the WEI business, and was the principal person who handled, sent, and  
8               received the WEI investment offering documents and investor payments. For example, in a  
9               correspondence from Mr. Shorey to Mr. Connell, it stated:

10              "We would like to take this opportunity to thank you for your interest in Westcap Energy,  
11              Inc. As Chairman and CEO (sic)... As an investor in our Private Placement 8% Series "A"  
12              Convertible Preferred Stock, you will be getting in on the ground floor of the Westcap  
13              business expansion..... Your investment will grow as we accelerate our business  
14              expansion."

15              Ex. S-7, ACC000475. Mr. Shorey then noted in the correspondence that a subscription agreement  
16              was attached for review and execution. Many other investors received this same correspondence.  
17              *See Id.* at ACC000477, ACC000479, ACC000483. In each of these instances, it is clear that Mr.  
18              Shorey is enticing each individual to purchase WEI Stock. Mr. Shorey's actions were an offer to  
19              sell or an offer for sale, within the meaning of A.R.S. § 44-1801(15).

20              In addition to direct communications with investors, Mr. Shorey also testified that he  
21              entered into a written agreement with LEI and an oral agreement with Intuition Capital to solicit  
22              overseas investors to purchase WEI Stock. Between March 2010, and August 2010, the  
23              Respondents also received direct payments from 24 investors into an Arizona-based bank account.  
24              After receiving investor payments in the Arizona-based bank account, Mr. Shorey then paid  
25              commissions to LEI and Intuition Capital from the same Arizona-based bank account. WEI also  
26              maintained its principal place of business in Arizona and pursuant to the Subscription Agreement, a  
                certificate representing the number of shares purchased by the investor would be sent from WEI.  
                Ex. S-8, ACC000521. Respondents' activities and actions prove that they offered and sold WEI  
                Stock from the state of Arizona.



1 pertinent case law supports the determination that the WEI Stocks fit the definition of “stock” and  
2 was required to be registered prior to Respondents’ offers and sales.

3         Alternatively, the WEI Stocks can be construed as investment contracts that also require  
4 registration pursuant to A.R.S. § 44-1841. Investment contracts are included in the definition of a  
5 security under the Securities Act. *See* A.R.S. § 44-1801(26). The term “investment contract” has  
6 been extensively construed through case law. Arizona has adopted the generally accepted federal  
7 test for an investment contract. *See Rose v. Dobras*, 128 Ariz. 209, 211, 624 P.2d 887, 889 (Ct.  
8 App. 1981); *Daggett v. Jackie Fine Arts, Inc.* 152 Ariz. 559, 566, 733 P.2d 1142, 1149 (Ct. App.  
9 1986). An investment contract is a program where (1) individuals invest money, (2) in a common  
10 enterprise, (3) with the expectation of profits from the undeniably significant efforts of others. *Rose*  
11 *v. Dobras*, 128 Ariz. at 211, 624 P.2d at 889. This test is based on the formulation of the United  
12 States Supreme Court in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244  
13 (1946), and the test is commonly referred to as the *Howey* test.

14         The Ninth Circuit has stated that the investment of money prong of the *Howey* test “means  
15 only that the investor must commit his assets to the enterprise in such a manner as to subject  
16 himself to financial loss.” *Hector v. Wiens*, 533 F.2d 429, 433 (9th Cir. 1976). In addition, “[t]wo  
17 tests have been developed to determine the existence of a common enterprise in order to satisfy this  
18 second prong of the *Howey* test: (1) the horizontal commonality test and (2) the vertical  
19 commonality test.” *Daggert*, 152 Ariz. at 565, 733 P.2d at 1148. Horizontal commonality requires  
20 a pooling of investor funds collectively managed by a promoter or third party. *Id.* To establish  
21 vertical commonality, only a positive correlation between the potential profits of the investor and  
22 the potential profits of the promoter needs to be demonstrated. *Id.* at 566, 733 P.2d at 1148.  
23 Arizona courts have held that commonality will be satisfied if either horizontal or vertical  
24 commonality is shown. *Id.*

25         Finally, according to Arizona case law, one must only establish that the efforts made by  
26 persons other than the investors were undeniably significant, essential managerial efforts that

1 affected the failure or success of the enterprise. *See Nutek Information Systems, Inc. v. Arizona*  
2 *Corp. Comm'n.*, 194 Ariz. 104, 108, 977 P.2d 826, 830 (Ct. App. 1998).

3         The WEI Stock satisfies all three prongs of the *Howey* test. First, investors committed  
4 money with WEI, as evidenced by the wire transfers and deposits into WEI's bank account.  
5 Second, the investor monies were pooled and collectively controlled by Mr. Shorey to use as he  
6 determined which included making dividend payments to other investors, transfers to a WEI  
7 Compass Bank account, commission payments to LEI, and other miscellaneous disbursements. Ex.  
8 S-56. Respondents' pooling and collective control of the monies constitutes horizontal  
9 commonality, which satisfies the common enterprise prong. Finally, the efforts of the Respondents  
10 were undeniably significant. Mr. Shorey actively managed, controlled, and had a significant  
11 impact on the success or failure of WEI's business, as its director and CEO. Mr. Shorey also  
12 presented to investors his experience with solar and wind generation companies and also presented  
13 the experience and background of additional WEI employees because such experience was  
14 important to the success of WEI, a startup solar company. Ex. S-8. In addition, the investors were  
15 passive, since none of the investors had any control or voting power in WEI. Investors could not  
16 make decisions on how or by whom the monies would be utilized because they did not participate  
17 in the day-to-day operations of WEI nor had any legal authority to control WEI. Not to mention,  
18 all the investors resided in a completely different country approximately five thousand miles away  
19 from Tucson, Arizona. Under these circumstances, investors were forced to rely on Respondents  
20 to operate WEI successfully in order to make it marketable for a merger or its stock shares enticing  
21 to the public because the company was profitable and growing. With all the *Howey* elements met,  
22 the WEI Stocks constitute investment contracts within the meaning of A.R.S. § 44-1801(26).

23         Whether defined as stocks or an investment contracts, the WEI Stocks are securities and are  
24 required to be registered unless an exemption from registration applies. As more fully discussed  
25 below, Respondents failed to meet their burden of proof that the WEI Stocks were exempt from  
26 registration or that the transactions were exempt.

1                   **III. THE ARIZONA SECURITIES ACT MUST BE COMPLIED WITH SINCE**  
2                   **FEDERAL PREEMPTION IS ONLY APPLICABLE WHEN A “COVERED**  
3                   **SECURITY” EXISTS, WHICH THE WEI STOCKS ARE NOT.**

4                   Respondents argue that their failure to comply with the Securities Act is excused because  
5 they complied with a federal regulation, whereby the application to state statutes or rules is  
6 preempted. This argument is misplaced because Congress preempted the states' registration  
7 requirements only when a “covered security” exists. Where a non-covered security is present, such  
8 as the WEI Stocks, compliance with the states' registration provisions still applies.

9                   When reviewing whether a state statute is preempted by federal law, the “sole task is to  
10 ascertain the intent of Congress.” *California. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280  
11 (1987). The defendant bears the burden of demonstrating that federal law preempts Arizona law.  
12 *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). The Respondents' claim of preemption  
13 must “overcome the assumption that a federal law does not supersede the historic police powers of  
14 the state.” *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978).

15                   When Congress passed the National Securities Markets Improvement Act of 1996  
16 (“NSMIA”), it did not preempt the entire securities field from state regulation. Pub. L. 104-290,  
17 110 Stat. 3416 (1996) (codified, as amended, in various sections of 15 U.S.C.). Congress limited  
18 the preemptive impact of NSMIA to any offering that “is a **covered security**.” 15 U.S.C. §  
19 77r(a)(1)(A) (emphasis added). This limitation is significant because Congress declined to use the  
20 blanket term of “securities” when defining the scope of the exemption. Rather, Congress created a  
21 term of art – “covered security” – and provided a detailed definition for that phrase. *See* 15 U.S.C.  
22 § 77r(b). Section 18 of the Securities Act of 1933 provides that state securities registration  
23 requirements are preempted if the securities fall within one of the identified classes of “covered  
24 securities.” *See* 15 U.S.C. § 77r(a)(1)(A). Included in the definition of “covered security” is “a  
25 transaction that is exempt from registration under this chapter pursuant to ... Commission rules or  
26 regulations issued under section 4(2) of this title....” 15 U.S.C. § 77r(b)(4)(D). Section 4(2) of the  
Securities Act of 1933 is limited to “transactions by an issuer not involving any public offering.”

1 The reference to “rules and regulations issued under section 4(2)” encompasses Rule 506 of  
2 Regulation D (“Regulation D”) – the safe harbor for nonpublic offerings (“Rule 506”).<sup>2</sup> See 17  
3 C.F.R. § 230.506(a).

4 Respondents do not dispute that the WEI Stock offering was not registered with the  
5 Commission. However, based on Respondents’ continued attempts to define each investor as an  
6 “accredited investor,” it appears that the Respondents will argue that with respect to the WEI  
7 Stocks, Arizona securities laws are preempted by federal law on the *mere assertion* that the WEI  
8 Stocks constituted a federal “covered security” sold by Respondents pursuant to Rule 506. The  
9 Respondents are mistaken. The applicability of the securities registration provisions of the Arizona  
10 Securities Act is not preempted by Section 18 of the Securities Act of 1933 because under Rule  
11 506, an issuer can seek an exemption from the registration obligations only if they strictly satisfy  
12 and actually comply with all provisions of the safe harbor.<sup>3</sup> The Respondents did not.

13 A.R.S. § 2033 states that, “[i]n any action, civil or criminal, when a defense is based upon  
14 **any exemption** provided for in this chapter, the **burden of proving the existence of the**  
15 **exemption shall be upon the party raising the defense [...]**” (emphasis added). Our Supreme  
16 Court has held, concerning the “burden of proof” section of the Securities Act (A.R.S. § 44-2033),  
17 that “[b]ecause of the vital public policy underlying the registration requirement, there must be  
18 **strict compliance with all the requirements** of the exemption statute.” *State v. Baumann*, 125  
19 Ariz. 404, 411, 610 P.2d 38, 45 (1980) (*en banc*) (emphasis added); See also A.A.C. R14-4-126(F)  
20 (“Issuers may make private offerings without compliance with this subsection (F) provided such  
21 offerings completely satisfy the criteria set forth in Arizona court decisions interpreting A.R.S. §  
22 44-1844(A)(1) and in federal court decisions interpreting Section 4(2) of the Securities Act of  
23

24 \_\_\_\_\_  
25 <sup>2</sup> That is, if an issuer complies with the requirements of Rule 506, then the issuer will be deemed to have complied  
with the requirements for an exemption under Section 4(2) of the Securities Act of 1933.

26 <sup>3</sup> Likewise, Respondents did not comply with all of the requirements to qualify for a private offering exemption under  
the Arizona Securities Act, A.R.S. 44-1844(A)(1) since a public solicitation occurred.

1 1933. [...], the claimant has the burden of proving the exemption claimed is available to  
2 claimant"). The Respondents will not be able to meet this burden.

3 First, Respondents engaged in a general solicitation of the WEI Stock. If an issuer has  
4 conducted a general solicitation or advertising in connection with an offering, the issuer has not  
5 complied with Rule 506.<sup>4</sup> See 17 C.F.R. 230.508(2). In determining whether a general solicitation  
6 has occurred, the SEC has focused on whether the issuer, or a dealer acting on behalf of the issuer,  
7 had a relationship with the offeree that was both "substantive" and "preexisting." See e.g., *E.F.*  
8 *Hutton Co.*, SEC No-Action Letter, 18 Sec. Reg. & L. Rep. (BNA) 171 (December 3, 1985)  
9 (providing that no general solicitation exists when an offer is made to customers of a broker-dealer  
10 because of the broker's preexisting, substantive relationship with its customers; further, providing  
11 that the requisite relationship could be established through a questionnaire *unrelated* to a specific  
12 offering providing the broker-dealer with sufficient information to evaluate the offeree's  
13 sophistication and financial condition.). Here, the Respondents had no substantive or preexisting  
14 relationship with the investors to whom WEI Stocks were sold. As noted at the hearing, WEI  
15 engaged Intuition Capital to sell WEI Stock by general solicitations since Mr. Randhawa and Mr.  
16 Connell were "cold called" and offered the WEI Stocks. A fortuitous and random phone call to  
17 investors from the Respondents or Intuition Capital does not create a substantive preexisting  
18 relationship. This general solicitation disqualifies the Respondents from invoking a Rule 506  
19 exemption. *Baumann*, 125 Ariz. at 411, 610 P.2d at 45. (See also A.A.C. R14-4-126(C)(3), which  
20 states that neither "the issuer nor any person acting on its behalf shall offer or sell the securities by  
21 any form of general solicitation or general advertising...."). As such, the WEI Stock does not fall  
22 within the classification of a covered security.

23 Second, though Rule 506 does not limit the number of accredited investors who can be sold  
24 securities during an offering, it does require that the investor be accredited or the issuer must

25 \_\_\_\_\_  
26 <sup>4</sup> When an issuer makes an offering pursuant to the registration exemptions provided by A.R.S. § 44-1841(A)(1) or  
A.A.C. R1-4-126, the issuer can conduct no "general solicitation" or "general advertising" connected with the sale of  
these securities See A.A.C. R14-4-126(C)(3).

1 reasonably believe the investor is accredited at the time of the sale of the securities. *See* 17 C.F.R.  
2 230.501(a); 17 C.F.R. 230.506. However, there is no evidence in the administrative record that  
3 Respondents, or their agents, had any knowledge of either the financial condition or net worth of  
4 these investors prior to selling them stock in WEI. In an attempt to establish accreditation, the  
5 Respondents argued that each investor, by executing the Subscription Agreement, acknowledged  
6 their sophistication and knowledge. Hr’g Tr. Vol. II, p. 286-287. Respondents’ counsel then went  
7 on to argue that all investors were therefore accredited. This argument is erroneous and misplaced  
8 for multiple reasons.

9 Principally, nowhere in the Subscription Agreement or the Private Placement is the term  
10 “accredited investor” stated or defined. To insert a legal definition or meaning that does not even  
11 appear in the documents themselves is inappropriate. Mr. Shorey himself testified that no financial  
12 information exists for any of the investors and therefore he cannot prove through documentation  
13 the net worth or salary of any investor, in order to establish accreditation. Without documentation,  
14 Mr. Shorey can not even establish that he had a reasonable basis to believe the investors were  
15 accredited.

16 Further, the Respondents improperly assume that the term “sophisticated investor” is  
17 synonymous with the term “accredited investor,” when in fact they are not. The term accredited  
18 investor is specifically defined by statute, whereas a “sophisticated investor” is a term of art. *See* 17  
19 CFR § 230.501.<sup>5</sup> Rule 506 limits the number of non-accredited investors to 35. *See* 17 CFR  
20 230.506(b)(2). All non-accredited investors must be sophisticated or the issuer must believe the  
21 investors were sophisticated prior to the time the investors purchased the securities. 17 CFR  
22 230.506 (b)(2)(ii). A sophisticated investor either alone or with a qualified purchaser  
23 representative “has such knowledge and experience in financial and business matters that he is  
24 capable of evaluating the merits and risks of the prospective investment.” *Id.* An offer to even one  
25 unsophisticated person can result in the loss of the exemption. *Mark v. FSC Sec. Corp.*, 870 F.2d  
26

---

<sup>5</sup> See also A.A.C. R14-4-126(B)(1).

1 331, 334 (6th Cir. 1989); *See also* *McDaniel v. Compania Minera Mar de Cortes, Sociedad*  
2 *Anonimo, Inc.* 528 F. Supp. 152, 164 (Dist. Ct. Ariz. 1981) (“It is incumbent upon the defendant to  
3 establish that all offerees had access to or disclosure of the same type of information a registration  
4 statement would provide.”); *See also* A.A.C. R14-4-126(F)(2)(b). As exhibit S-6 reflects, there  
5 were over eighty offerees and investors, but there are less than two dozen executed subscription  
6 agreements presented by Respondents in exhibit RS-10. Without such evidence, Respondents can  
7 not establish how an offeree has the knowledge and experience in financial and business matters  
8 that makes the investor capable of evaluating the merits and risks of the WEI Stock investment.  
9 Instead, the evidence supports that the WEI Stock was offered to unsophisticated investors, since  
10 sophistication cannot be established, which resulted in the loss of a Rule 506 exemption. Since a  
11 Rule 506 exemption is not applicable, the WEI Stock does not qualify as a “covered security” and  
12 therefore Respondents must comply with the registration provisions of the Securities Act.

13 Third, the Respondents also fail to meet the standards of A.R.S. § 44-1844(A)(1),  
14 “transactions by an issuer not involving any public offering,” in order to qualify as a covered  
15 security within the meaning of Section 4(2) of the Securities Act of 1933. The statute is clear that  
16 the securities must not be sold publicly. As discussed above, a general solicitation was conducted  
17 by the Respondents and therefore eliminates A.R.S. § 44-1844(A)(1) as a viable exemption.<sup>6</sup>

18 Furthermore, the case law also supports the Division’s position that the Respondents cannot  
19 invoke A.R.S. § 44-1844(A)(1) as a basis to claim a covered security exists. In *SEC v. Murphy*, the  
20 Court went on to discuss the development of “flexible tests for the private offering exemption,  
21 focusing upon: (1) the number of offerees; (2) the sophistication of the offerees; (3) the size and  
22 manner of the offering; and (4) the relationship of the offerees to the issuer.... The party claiming  
23

24 <sup>6</sup> Arizona Rule 140 states that “offers and sales of securities by an issuer in compliance with Rule 504 shall be exempt  
25 from the registration requirements of A.R.S. §§ 44-1841 and 44-1842, subject to the satisfaction of the provisions of  
26 this Section.” A.A.C. R14-4-140(B) (emphasis added). The exemption from registration is only available if, with  
respect to the securities transaction (i.e., the WEI Stocks offering), the issuer (i.e., WEI) has both complied with all  
of the provisions of federal Rule 504 of Regulation D (“Rule 504”) and with all of the provisions of Arizona Rule  
140. See 17 C.F.R. §230.504; A.A.C. R14-4-140(B). To qualify for a Rule 504 exemption, it must be limited to  
accredited investors, which the Respondents did not do nor will they be able to establish.

1 the exemption must show that it is met not only with respect to each purchaser, but also with  
2 respect to each offeree.” *SEC v. Murphy*, 626 F.2d 633, 644-645 (9th Cir. 1980) (citations  
3 omitted). A brief analysis of the factors discussed in *Murphy* reveals that the WEI offering was a  
4 public offering.

5 First, the Respondents offered the investment to over eighty individuals, of which twenty-  
6 four became investors. Such a large number of offerees, in a short span of seven months, reflects  
7 the view in *Murphy* that, “the more offerees, the more likelihood that the offering is public.” *SEC*  
8 *v. Murphy*, 626 F.2d at 645. As in *Murphy*, Respondents never presented any evidence to “suggest  
9 that the number of offerees was small or that there was even any attempt to monitor the offerees at  
10 all.” *Id.* Since no actual contract between Respondents and Intuition Capital even exists, there is  
11 no evidence that Respondents placed any control over how many people would be offered the  
12 investment. It was clear that Mr. Shorey did not care how many people were offered the WEI  
13 investment, as long as they resided overseas.

14 Second, as *Murphy* noted, a defendant must also establish the sophistication of each offeree,  
15 not just investors, and the Respondents failed to do so here. Respondents only attempted to  
16 establish the sophistication of actual investors and generally ignored the importance of qualifying  
17 every offeree. Therefore they fail to satisfy this prong.

18 Lastly, the relationship between the issuer and the offerees must be so great that a “court  
19 may only conclude that the investors do not need the protection of the Act if all the offerees have  
20 relationships with the issuer affording them access to or disclosure of the sort of information about  
21 the issuer that registration reveals” which is quite extensive. *Id.* at 647; *See also* A.A.C. R14-4-  
22 126(C)(2)(a), (which lists the information an issuer must disclose to a non-accredited purchaser  
23 prior to sale). This relationship is lacking since all offerees and investors were never told that  
24 commissions of 72.5% would be paid or that investor money would be used to pay other investors  
25 their 8% dividend payment. As *Murphy* noted, sophisticated investors must receive or have access  
26 to “the use of investor funds, the amount of direct and indirect commissions, accurate financial

1 statements. [...]. [...] or the continued viability of [the company] depended upon a consistent  
2 influx of new capital.” *Id.* None of these concerns discussed in *Murphy* were disclosed to offerees  
3 or investors.

4 The WEI Stock does not qualify as a covered security because the facts established that a  
5 Rule 506 exemption and a A.R.S. § 44-1844(A)(1) exemption was not met. Therefore, federal  
6 preemption is not applicable to this case. Respondents, having failed to qualify as a covered  
7 security, violated the registration requirements of the Securities Act.

8  
9 **IV. FEDERAL REGULATION S DOES NOT DISMISS RESPONDENTS’  
OBLIGATIONS TO COMPLY WITH THE SECURITIES ACT.**

10 Respondents also posit that A.R.S. § 44-1841 is inapplicable to the WEI Stock offering  
11 because the offers to sell and the sales were not made within Arizona, relying on Regulation S  
12 under the Securities Act of 1933 – the federal safe harbor from the federal registration  
13 requirements for offshore sales of securities (“Regulation S”). *See* 17 C.F.R. §§ 230.901-230.905  
14 and 55 FR 18306-01. Respondents’ reliance on Regulation S is misplaced because nothing in  
15 Regulation S “obviates the need to comply with **any** applicable state law relating to the offer and  
16 sale of securities.” *Id.* at Preliminary Notes 1- 4 to Regulation S (emphasis added). Simply put, it  
17 is irrelevant whether or not a Regulation S exemption from the registration requirements of the  
18 Securities Act of 1933 is available to the Respondents for the WEI Stock offering because an  
19 offering made pursuant to Regulation S is *not* identified as one of the classes of “covered  
20 securities” under Section 18 of the Securities Act of 1933. *Id.*; *see also* 15 U.S.C. § 77r(a)(1)(A).  
21 Therefore, state securities registration requirements are not preempted and still must be complied  
22 with. *Id.*

23 Furthermore, Respondents cannot establish compliance with A.R.S. § 44-1844(A)(19)—the  
24 state exemption from the registration requirements of A.R.S. §§ 44-1841 and 44-1842 for  
25 transactions involving the sale of securities to persons who are not residents or present in the state  
26 of Arizona. *See* A.R.S. § 44-1841(A)(19). To qualify for the A.R.S. § 44-1844(A)(19) exemption,

1 **all** of its conditions must be met. *Id.* (emphasis added). Many of the conditions of A.R.S. § 44-  
2 1844(A)(19) were not met, such as subsection (b)(ii), which requires that the “issuer files as a  
3 notice filing one copy of any offering materials which may be required by the SEC...”; subsection  
4 (b)(iii) which requires a filing fee; and subsection (c) which requires “Within ten working days of  
5 completion of the offering the issuer files a description of the actions taken as to compliance with  
6 the securities act of 1933...” As noted in at the hearing, no notice filings have been made with the  
7 state of Arizona. Further, no filing fees have been paid and there is no filing in evidence describing  
8 the actions taken as to comply with the Securities Act of 1933. If anything, the evidence reveals all  
9 the actions taken that failed to comply with the Securities Act of 1933.

10 Most importantly, Regulation S does not absolve violations of the antifraud provisions. *See*  
11 17 C.F.R. §§ 230.901-230.905 and 55 FR 18306-01 Preliminary Note 1 to Regulation S. The State  
12 of Arizona retains fraud jurisdiction in all instances because Section 18 of the Securities Act of  
13 1933 expressly preserves state antifraud regulatory authority. *See* 15 USCA § 77r(c)(1) Securities  
14 Act of 1933, Sec. 18(c)(1) (Consistent with this section, the securities commission (or any agency  
15 or office performing like functions) of any State shall retain jurisdiction under the laws of such  
16 State to investigate and bring enforcement actions with respect to fraud or deceit, or unlawful  
17 conduct by a broker or dealer, in connection with securities or securities transactions). Though the  
18 Division denies a registration or transaction exemption is applicable in this case, for the purposes  
19 of determining the violations of A.R.S. § 44-1991, exemptions are not material to an alleged  
20 omission of a material fact or an untrue statement of material fact.

21 **V. MR. SHOREY AND WESTCAP ARE NOT REGISTERED AS SECURITIES**  
22 **SALESMEN, DEALERS, OR BROKERS AND THEREFORE ANY OFFER**  
23 **OR SALE OF A SECURITY BY THEM WAS IN VIOLATION OF A.R.S. §**  
24 **44-1842.**

24 The preemption provisions of Section 18 of the Securities Act of 1933 also do not apply to  
25 the Arizona Securities Act’s dealer or salesman registration requirements. *See*, 15 U.S.C. §  
26 77r(a)(1); Pursuant to A.R.S. 1843.02(D), “Section 44-1842 applies to federal covered securities

1 transactions unless an exemption is available under another provision of this chapter.” Neither  
2 Respondent was registered as a dealer or salesman with the Commission with respect to the sale of  
3 WEI Stocks. Ex. S-55(A) and (B). Furthermore, Respondents presented no evidence at the  
4 administrative hearing regarding the applicability of any exemption from the dealer and salesman  
5 registration requirements of A.R.S. § 44-1842.

6 **VI. THE FAILURE TO DISCLOSE HIGH COMMISSION PAYMENTS OF**  
7 **SEVENTY-TWO POINT FIVE PERCENT IS A MATERIAL OMISSION AS**  
8 **A MATTER OF LAW AND A VIOLATION OF THE ANTI-FRAUD**  
9 **PROVISIONS OF THE SECURITIES ACT.**

9 The Respondents’ failure to disclose commission payments of 72.5% is a material omission  
10 as a matter of law and in violation of the Securities Act’s anti-fraud provisions. Under A.R.S. §  
11 44-1991(A)(2), it is a fraudulent practice and unlawful for a person, in connection with a  
12 transaction or transactions within or from this state involving an offer to sell or buy securities, or a  
13 sale or purchase of securities, to directly or indirectly, **make untrue statements of material fact,**  
14 **or omit to state any material fact necessary** in order to make the statements made, in the light of  
15 the circumstances in which they were made, not misleading. In the context of these provisions, the  
16 term “materiality” requires a showing of substantial likelihood that, under all the circumstances,  
17 the misstated or omitted fact would have assumed actual significance in the deliberations of a  
18 reasonable buyer. *Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 553, 733 P.2d 1131, 1136  
19 (1986), citing *Rose v. Dobras*, 128 Ariz. 209, 214, 624 P.2d 887, 892 (App. 1981), quoting *TSC*  
20 *Industries v. Northway, Inc.*, 426 U.S. 438, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976). Under this  
21 objective test, there is no need to investigate whether an omission or misstatement was actually  
22 significant to a particular buyer. *Trimble*, 152 Ariz. at 553, 733 P.2d at 1136.

23 In reviewing the case law, it was repeatedly determined that the existence of an excessive  
24 commission would be material, as a matter of law, to investors. For example, in a securities fraud  
25 action brought against an offerer and promoter of investments, the Ninth Circuit upheld a district  
26 court decision that held “failure to disclose the 30% commission was material as a matter of law to

1 the investor's assessment of the strength of the potential investment. [...] the 30% commissions  
2 were 'so obviously important to an investor, that reasonable minds cannot differ on the question of  
3 materiality.'" *SEC v. Alliance Leasing Corp.*, 28 Fed. Appx. 648, 652 (9th Cir. 2002)(Summary  
4 Order). Similarly, in *Stone v. Kirk*, the Sixth Circuit held that the fact that a salesman would earn  
5 18% or more in commission payments was a material fact that should have been disclosed. *Stone v.*  
6 *Kirk*, 8 F.3d 1079 (6th Cir. 1993). In *Santoro* the court held "a broker has an affirmative duty to  
7 disclose all relevant information, including the receipt of excessive commissions," which were  
8 15% in that case. *U.S. v. Santoro*, 302 F.3d 76, 80 (2nd Cir. 2002); *See also U.S. v. Szur*, 289 F.3d  
9 200, 212 (2nd Cir. 2002), (A criminal case alleging securities fraud and other offenses and held  
10 that 45-50% in commissions to brokers was "clearly significant and must be disclosed accurately").  
11 Finally, in *Levine*, the S.E.C. brought an action regarding violations of section 17(a) of the  
12 Securities Act of 1933, section 10(b) of the Securities Exchange Act of 1934, and related statutes,  
13 against defendants who failed to disclose commission payments of 75% to their "Seller Agents."  
14 *U.S. S.E.C. v. Levine*, 671 F.Supp.2d 14, 21 n.3 (Dist. D.C. 2009). The Seller Agents were  
15 individuals or entities that sold the securities to investors, primarily in Europe. The *Levine* court  
16 held that "there should be no doubt that the [defendant's] failure to disclose the agents'  
17 commissions of over 75% was also a material misrepresentation." The *Levine* court cited *SEC v.*  
18 *Alliance Leasing Corp.*, 2000 WL 35612001, at 8-9 (S.D.Cal. Mar. 20, 2000), which reviewed the  
19 impact of commission payments of 30% and noted that "the disclosures of commissions and other  
20 compensation is fundamental to securities laws." *Id.* at 29-30. In light of these cases, the  
21 Respondents failure to disclose commission payments of 72.5% was a material omission.

22 A misrepresentation or omission of a material fact in the offer and sale of a security is  
23 actionable even though it may be unintended or the falsity or misleading character of the statement  
24 may be unknown. In other words, scienter or guilty knowledge is not an element of a civil  
25 violation of A.R.S. § 44-1991(A)(2). *See State v. Gunnison*, 127 Ariz. 110, 113, 618 P.2d 604, 607  
26 (1980) (En Banc). Moreover, a seller of securities is strictly liable for any of the

1 misrepresentations or omissions he makes. *Rose v. Dobras*, 128 Ariz. at 214, 624 P.2d at 892.  
2 Thus, by establishing that Respondents never specifically disclosed the 72.5% commission  
3 payments, the elements of A.R.S. § 44-1991(A)(2) have been met.

4 Respondents will argue that the Private Placement obviates their need to disclose the fact  
5 that 72.5% in commissions were paid, and paid to unregistered salesmen no less, because it  
6 contains the statements that “The Company ... reserves the right to pay commissions to registered  
7 brokers or dealers registered with the . NASD .... The Company may also pay finders’ fees [...].  
8 The amount of any commission or finders’ fee will be within the range of amounts normally paid  
9 in similar situations.” Respondents’ reliance on this disclaimer is misplaced because the evidence  
10 in the record shows that only a few investors actually received the Private Placement. For the  
11 majority who did not receive it, any disclaimer contained in the Private Placement is irrelevant.  
12 For the few individuals who did receive a Private Placement, they received a document that  
13 contained a detailed “Use of Proceeds” that delineated “Offering expenses” of \$100,000 for a  
14 \$1,000,000 offering. The remaining \$900,000 is allocated to various business development  
15 expenses or costs. Ex. S-8, ACC000528. Based on this representation, it is reasonable for an  
16 investor to assume that 10% of his/her money may be applied to offering expenses, such as  
17 salesmen commissions or finders’ fees, and the remainder to grow the business. Yet, far more than  
18 10% in offering expenses were paid and none of the salesmen were registered with the NASD or  
19 with the state of Arizona. Ex. S-56; Hr’g Tr. pp.34 & 35. Though Respondents paid 72.5% in  
20 commissions beginning with the first investment, they never revised their Private Placement to  
21 reflect this important fact.

22 In addition, the use of proceeds fails to disclose that 8% of investor funds would be used to  
23 pay other investors in the form of dividend payments. As noted in *TLC*, the court discussed the  
24 materiality of misrepresentation and omission and stated that, “[t]here is no dispute that reasonable  
25 investors would have considered it important in making an investment decision that: [...], their  
26 money was being used in various improper schemes, including racehorses and paying returns of

1 other investors.” *S.E.C. v. TLC Investments and Trade Co.*, 179 F.Supp.2d 1149 (C.D. Cal. 2001).  
2 Respondents’ payments were contrary to the information disclosed in the Private Placement and  
3 their failure to disclose the use of investor money to pay other investors is a material omission,  
4 within the meaning of A.R.S. § 44-1991(A)(2).

5  
6 **VII. GOOD FAITH RELIANCE ON ADVICE OF COUNSEL IS NOT A  
VALID DEFENSE AGAINST VIOLATIONS OF THE SECURITIES ACT.**

7 The Respondents’ argument that good faith reliance on advice of counsel is a defense  
8 against violations of the Arizona Securities Act is without merit. Mr. Shorey testified that he and  
9 WEI relied on the subscription agreement and private placement document that was allegedly  
10 created by Kenneth Bart (“Mr. Bart”), counsel for LEI. Hr’g Tr. pp. 196 - 197. Our Appellate  
11 Court has held that violations of A.R.S. §§ 44-1841 and 44-1842 are strict liability offenses  
12 because of A.R.S. § 13-202(B) provides:

13 If a statute defining an offense does not expressly prescribe a culpable mental  
14 state that is sufficient for commission of the offense, no culpable mental state is  
15 required for the commission of such offense, and the offense is one of strict  
16 liability unless the proscribed conduct necessarily involves a culpable mental  
state. If the offense is one of strict liability, proof of a culpable mental state will  
also suffice to establish criminal responsibility.

17 *State v. Tober*, 170 Ariz. 573, 826 P.2d 1199 (App. 1991), *reversed*, 173 Ariz. 211, 841 P.2d 206  
18 (1992). The Court of Appeals held that these were strict liability statutes. *Id.* (“[A] lack of intent  
19 to violate the law or good faith belief that the note in question was not a security is not a defense in  
20 Arizona, in marked contrast to federal law.”) The Arizona Supreme Court reviewed *Tober* and  
21 implicitly accepted the conclusion that A.R.S. §§ 44-1841 and 1842 were strict liability statutes.  
22 *Tober* at 213, 841 P.2d at 208. As a strict liability offense, the analysis hinges on whether the  
23 omission or misstatement is material to a reasonable investor, not whether the Respondent had the  
24 intent or “scienter” to misrepresent. This is a contrast to federal law where claims under Rule 10b-  
25 5 do “require a plaintiff to allege and prove conduct which, at the very least, is either knowing or  
26

1 intentional.” *Stewart v. Bennett*, 359 F.Supp. 878, 885 (1973); *See also* 17 C.F.R. § 240.10b-5.  
2 Because scienter is a factor under federal law, the defense of good faith reliance of counsel is  
3 applicable in federal actions as a “factor to be considered in determining the propriety of injunctive  
4 relief.” *See SEC v. Goldfield Deep Mines Co. of Nev.*, 758 F.2d 459, 467 (9th Cir. 1985).  
5 Therefore, following the advice of counsel is not a valid defense to violations of the Arizona  
6 Securities Act.

7 **VIII. THE MARITAL COMMUNITY OF MR. SHOREY AND MRS.**  
8 **SHOREY IS LIABLE FOR ANY RESTITUTION AND ADMINISTRATIVE**  
9 **PENALTY ORDERED.**

10 The marital community of Mr. Shorey and M. Shorey is liable for any restitution or  
11 administrative penalties ordered by the Commission since the marital community existed during  
12 the relevant timeframe and still exists to this day. Mr. Shorey and M. Shorey have been Arizona  
13 residents and married for over twenty years. During marriage, “the spouses have equal  
14 management, control and disposition rights over their community property and have equal power to  
15 bind the community.” A.R.S. § 25-214(B). *See, e.g., Schlaefel v. Financial Management Service*,  
16 196 Ariz. 336, 339, 996 P.2d 745, 748 (Ct. App. 2000). In addition, “[...], either spouse may  
17 contract debts and otherwise act for the benefit of the community. [...]” A.R.S. § 25-215(D). The  
18 debt arises at the time it is incurred. The Arizona Court of Appeals has stated, “[a] debt incurred  
19 by a spouse during marriage is presumed to be a community obligation; a party contesting the  
20 community nature of a debt bears the burden of overcoming that presumption by clear and  
21 convincing evidence.” *Hrudka v. Hrudka*, 186 Ariz. 84, 91, 919 P.2d 179, 186 (Ct. App. 1995).  
22 Furthermore, “[...] a debt is incurred at the time of the actions that give rise to the debt. [Citations  
23 omitted].” *Arab Monetary Fund v. Hashim*, 219 Ariz. 108, 111, 193 P.3d 802, 806 (Ct. App. 2008).  
24 Respondents put forth no evidence to refute or attempt to rebut the community property  
25 presumption that Mr. Shorey’s debts would be obligations of his and Respondent Spouse’s marital  
26 community. As such, the marital community should be jointly and severally liable for any order of  
restitution or administrative penalty.



1 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing  
2 filed this 16<sup>th</sup> day of March, 2012 with:

3 Docket Control  
4 Arizona Corporation Commission  
5 1200 W. Washington St.  
6 Phoenix, AZ 85007

7 COPY of the foregoing hand-delivered this  
8 16<sup>th</sup> day of March, 2012 to:

9 Mr. Marc E. Stern  
10 Administrative Law Judge  
11 Arizona Corporation Commission/Hearing Division  
12 1200 W. Washington St.  
13 Phoenix, AZ 85007

14 COPY of the foregoing mailed this  
15 16<sup>th</sup> day of March, 2012 to:

16 Bruce R. Heurlin  
17 HEURLIN SHERLOCK PANAH  
18 1636 North Swan Road, Suite 200  
19 Tucson, Arizona 85712-4096  
20 Attorneys for all Respondents

21 By: Paul Huynh  
22  
23  
24  
25  
26