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MAR 19 2012

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and Westcap Energy, Inc. dba Westcap Solar

DOCKETED BY

BEFORE THE ARIZONA CORPORATION COMMISSION

In the matter of:

DOCKET NO. S-20790-A-11-0104

DAVID SHOREY and MARY JANE
SHOREY, husband and wife,

WESTCAP ENERGY INC., an Arizona
corporation, d/b/a Westcap Solar,

Respondents.

RESPONDENTS' BRIEF

Respondents David Shorey, Mary Jane Shorey, and Westcap Energy, Inc, an
Arizona corporation, d/b/a Westcap Solar, submit their brief.

References to the transcript are to the hearing transcript for January 23 and 24,
2012 and are Page ____, Line ____.

The Securities Division's exhibits are S-____.

Shorey's exhibits are RS-____.

1. Introduction

***Because the Securities Division has no jurisdiction as to any allegation, this
matter must be dismissed as a matter of law.***

Westcap Energy, Inc. (Westcap) is a defunct and dissolved Arizona corporation
with no assets and no shareholders. Page 108, Lines 6-9, Page 218, Lines 23-24, Page
219, Lines 20-25 to Page 220, Lines 1-2. All investors in this matter own shares of Abco
Energy, Inc., a Nevada corporation. Page 220, Lines 3-10.

David Shorey (Shorey) was the founder of Westcap.

1 The Securities Division seeks to destroy a successful small startup business and
2 destroy the 24 European shareholders, who have never complained about anything. Page
3 210, Lines 23-25. The shareholders, all foreign citizens, look forward to receiving profit
4 from their investments. The shareholders have not been harmed in any way. No United
5 States or Arizona government entity has ever received any complaint from these foreign
6 citizens regarding their desire and decision to invest money in Westcap.

7 **2. Charges, Burdens of Proof, and Requested Penalties**

8 The Amended Notice of Opportunity for Hearing Regarding Proposed Order to
9 Cease and Desist, for Restitution, and for Administrative Penalties accuses Respondents
10 of (1) offering or selling unregistered securities, A.R.S. 44-1841, (2) making transactions
11 by unregistered dealers or salesmen, A.R.S. 44-1842, and (3) committing fraud in
12 connection with the offer or sale of securities, A.R.S. 44-1991.

13 Respondents have the burden of proof as to the unregistered allegations.

14 The Securities Division has the burden of proof as to the fraud allegations. Good
15 faith and immateriality are both defenses and issues of fact.

16 The Securities Division requests restitution, although there was no evidence that
17 any investor wants restitution. The Securities Division wants a \$5,000 penalty per
18 violation, that will destroy a successful, small, startup business and destroy the
19 shareholders' investments.

20 **3. Unconstitutional Application of Arizona Law**

21 In pertinent part, A.R.S. 44-1841 (sale of unregistered securities) states:

22 A. It is unlawful to sell or offer for sale within or from this state any
23 securities unless the securities have been registered pursuant to article 6
24 or 7 of this chapter or are federal covered securities if the securities
25 comply with section 44-1843.02 or chapter 13, article 12 of this title.

26 In pertinent part, A.R.S. 44-1842 (transactions by unregistered salesmen) states:

27 A. It is unlawful for any dealer to sell or purchase or offer to sell or buy
28 any securities, or for any salesman to sell or offer for sale any securities

1 within or from this state unless the dealer or salesman is registered as
2 such pursuant to the provisions of article 9 of this chapter.

3 In pertinent part, A.R.S. 44-1991 (fraud in the offer or sale of securities)
4 states:

5 A. It is a fraudulent practice and unlawful for a person, in connection
6 with a transaction or transactions within or from this state involving an
7 offer to sell or buy securities, or a sale or purchase of securities,
8 including securities exempted under section 44-1843 or 44-1843.01 and
9 including transactions exempted under section 44-1844, 44-1845 or 44-
10 1850, directly or indirectly to do any of the following:

- 11 1. Employ any device, scheme or artifice to defraud.
- 12 2. Make any untrue statement of material fact, or omit to state any
13 material fact necessary in order to make the statements made, in the
14 light of the circumstances under which they were made, not misleading.
- 15 3. Engage in any transaction, practice or course of business which
16 operates or would operate as a fraud or deceit.

17 In this matter, the offering was made by a European company to European
18 investors, who purchased their securities entirely in Europe.

19 Application of A.R.S. 44-1841, A.R.S. 44-1842, or A.R.S. 44-1991 to sales and
20 offerings made outside of Arizona would be unconstitutional. *Arizona Corp. Com'n v.*
21 *Media Products, Inc.*, 158 Ariz. 463, 469, 763 P.2d 527, 533 (Ariz. App. 1988) (copy
22 attached). It is well-established under Arizona law that the Arizona Corporation
23 Commission (ACC) is barred from bringing an action against a company on the basis of
24 securities sales that were made entirely to investors outside of Arizona. *Id.* "While
25 protecting local investors is plainly a legitimate state objective, the State has no
26 legitimate interest in protecting nonresident shareholders." *Id.*, at 467, 531, quoting
27 *Edgar v. Mite Corp.*, 457 U.S. 624 at 640 (1982). Unlike *Media Products*, all of the
28 investors in this matter were non-U.S. citizens in Europe. Arizona has no legitimate
interest in protecting foreign shareholders.

1 In *Media Products, Inc.* the Arizona Court of Appeals held that an action by the
2 ACC to enjoin the sales of securities was in violation of the Commerce Clause, U.S.
3 Const., Art. I, § 8, cl. 3, because the securities were sold entirely to buyers outside of
4 Arizona. *Id.*, at 467, 531. Moreover, *Media Products* involved sales and offerings in other
5 states within the United States. In this matter, there were only sales and offerings in
6 foreign countries, and none in the United States.

7 Under well-established Commerce Clause jurisprudence the extraterritoriality
8 principle “precludes the application of a state statute to commerce that takes place wholly
9 outside of the State's borders, whether or not the commerce has effects within the State.”
10 *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982); *see also In re Nat'l Century Fin.*
11 *Enterprises, Inc., Inv. Litig.*, 755 F. Supp. 2d 857, 875-79 (S.D. Ohio 2010) (discussing
12 the ongoing viability of the extraterritoriality principle in light of recent decisions by
13 various Circuit Courts, including the 6th Circuit’s recent holding that “a state regulation
14 that controls extraterritorial conduct is per se invalid.”)

15 The *Media Products* case was decided in 1988, adopting the extraterritoriality
16 principle into Arizona law. Since that time, the *Media Products* holding has not been
17 overturned by any court, nor has the legislature passed any statute altering the Court of
18 Appeals’ ruling.

19 Because the ACC’s action in this case is in direct violation of the Commerce
20 Clause and barred by the holding in *Media Products*, this case should be dismissed with
21 prejudice as a matter of law.

22 4. SEC Regulation S Offering

23 Westcap’s offering was pursuant to SEC Regulation S to foreign investors in
24 Europe, with no offerings in the United States or to United States citizens. Westcap’s
25 offering complied with SEC Regulation S and was exempt from registration. *In re Royal*
26 *Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 404 (D. Md. 2004) (“common
27 shares sold overseas were offered pursuant to Regulation S, the SEC regulation which
28

1 exempts ‘offers and sales that occur outside the United States’ from the registration
2 requirements of § 5 of the Securities Act of 1933. 17 C.F.R. § 230.901”).

3 ***SEC Regulation S does NOT require:***

- 4 1. ***accredited investors;***
- 5 2. ***sophisticated investors; or***
- 6 3. ***specific disclosures.***

7 Regulation S, Rule 901, *et seq.*

8 Also, SEC Regulation S does not prohibit “cold calls.” *Id.*

9 Regulation S is codified in Rules 901 to 905 of the General Rules and Regulations
10 Promulgated Under the Securities Act of 1933. Under Rule 901, “offers and sales that
11 occur outside the United States” are deemed ***not to be included*** in the definition of “offer,
12 offer to sell, sell, sale, and offer to buy” as defined by the Securities Act. In other words,
13 under SEC regulations, where securities are sold only to foreign investors, with no
14 possibility that they will be re-sold to United State citizens, they are simply regarded as
15 not being securities sales for regulatory purposes. Rules 903 provides specific provisions
16 guiding exclusively foreign securities sales, the substance of which is that the securities
17 must be sold only to foreign investors and that the securities must remain off-shore.
18 Regulation S, Rule 903; *see also*, Hazen, *Federal Securities Law*, 3rd Ed., pp.58-59.

19 The policy behind Regulation S is that U.S. securities regulations are for purposes
20 of protecting citizens of the United States. Protection of non-U.S. citizen investors who
21 reside outside of the United States and wish to inject capital into the United States’
22 system should be left to their own sovereign governments: “Adopting a territorial
23 approach, Regulation S presents domestic issuers with the choice to sell securities freely
24 offshore while avoiding the registration requirements of the Securities Act.” *The*
25 *Unfounded Fear of Regulation S*, Stephen J. Choi, Duke Law Journal, December
26 2000 Vol. 5, No. 3 (citing SEC Offshore Offers & Sales, Exchange Act Release No. 33-
27 6779, 53 Fed. Reg. 22,661, at 22,665 (June 17, 1988)).

28

1 ***SEC Regulation S is not intended to protect foreign investors in foreign***
2 ***countries. Moreover, the Arizona Securities Division has no authority to overrule or***
3 ***interfere with SEC Regulation S or try to control foreign commerce.***

4 In all SEC Regulation S offerings, offering documents are prepared in the United
5 States and delivered to prospective foreign investors. The offering is made overseas, as
6 was the case here. In all SEC Regulation S offerings, investors' money is sent to the
7 United States.

8 The Securities Division has no authority to nullify Westcap's offering, which
9 complied with SEC Regulation S requirements.

10 **5. A.R.S. 44-1844 (19) Does Not Apply**

11 Although not even mentioned at the hearing, the Securities Division may try to
12 argue that the notice requirements of A.R.S. 44-1844 (19) apply to a foreign offering.
13 That statute does not apply.

14 A.R.S. 44-1844 (19) states:

15 19. Transactions involving the sale of securities to persons who are not
16 residents of this state and are not present in this state if all of the
17 following conditions are met:

18 (a) The securities being offered are not blind pool offerings.

19 (b) At least ten days before the offering date:

20 (i) The issuer certifies that the securities being offered will be offered
21 and sold in compliance with the securities act of 1933 and the laws and
22 regulations ***of those states in which the offers and sales will be made.***

23 (ii) The issuer files as a notice filing one copy of any offering materials
24 which may be required by the SEC or the laws and rules ***of those states***
in which the offers and sales will be made.

25 (iii) The issuer submits a filing fee of two hundred dollars.

26 (c) Within ten working days of completion of the offering the issuer
27 files a description of the actions taken as to compliance with the
28 securities act of 1933 and the laws and rules ***of those states in which the***
offers and sales were made.

1 (d) The transaction complies with any rule adopted by the commission
2 further restricting the exemption created by this paragraph to prevent
any fraudulent practices.

3 Emphasis added.

4 A.R.S. 44-1844 (19) applies to offers and sales in other *states, not in foreign*
5 *countries*. The word “states” cannot be misconstrued by the Securities Division to read
6 “foreign countries.” The statute as written does not apply here. Moreover, noncompliance
7 with a notification statute should not result in penalties, especially where the Securities
8 Division has no authority to regulate foreign commerce or interfere with federal law.

9
10 **6. Formation of Westcap**

11 Shorey, a certified public account (CPA), formed Westcap to provide various
12 solar-powered services to homes, commercial buildings, and governmental buildings.

13 During recent economic hard times, Westcap unsuccessfully attempted to borrow
14 or raise money from the SBA, banks, hard money lenders, venture capitalists, and other
15 sources. Page 193, Lines 6-25 to Page 194, Lines 1-21. One potential fundraiser proposed
16 to charge 50% of all money raised, plus \$40,000/month. Page 194, Lines 8-11.

17 **7. Litchfield**

18 Unable to raise capital from investors in the United States, Westcap entered into a
19 contract with Litchfield Enterprises, Inc., a Colorado corporation (Litchfield) for
20 Litchfield to raise \$1,000,000 and charge 10% of money raised (S-9, Bates ACC00540).
21 Litchfield and Litchfield’s attorney prepared the Private Placement Memorandum (PPM)
22 (S-8) (Page 196, Lines 18-24) and the Subscription Agreement (S-19). Page 82, Lines 17-
23 19. At all times, Respondents relied on Litchfield and its attorney regarding all matters as
24 to raising money. Litchfield agreed to use a European entity to raise funds in Europe.
25 Page 283, Lines 23-25 to Page 284, Lines 1-2.

26 **8. Litchfield and Intuition**

27 For many years, Litchfield had worked with Intuition Capital Corp. (Intuition)
28 located in Barcelona, Spain. Page 254, Lines 4-16.

1 Litchfield had "vetted" Intuition and confirmed that Intuition only dealt with
2 sophisticated and accredited investors. Shorey was so informed by Litchfield. Page 202,
3 Lines 22-25 to Page 203, Lines 1-4, Page 285, Lines 4-13, Page 286, Lines 19-21. As
4 previously stated, sophistication and accreditation are not required for an SEC Regulation
5 S offering.

6 Respondents never had any contract with Intuition. Page 82, Lines 20-25, Page
7 197, Lines 23-25.

8 Intuition charged a 65% commission. Westcap successfully negotiated with
9 Litchfield for Litchfield to lower its charge from 10% to 7.5%, resulting in total
10 commissions of 72.5%. Page 195, Line 14-16.

11 9. Private Placement Memorandum

12 *No specific disclosures are required for an SEC Regulation S offering.*

13 Litchfield's PPM did not state the exact commission to be paid for Westcap to
14 raise money, because that amount was unknown at the time that the PPM was prepared,
15 and could not be stated. Page 200, Lines 10-15.

16 However, the PPM *did state that commissions or finders' fees would be paid.*
17 Accordingly, every potential and actual investor knew that commissions or finders' fees
18 would be paid.

19 The PPM states:

20 (1) The Shares will be offered on a "best efforts" basis by the
21 officers and directors of the Company. These individuals will
22 receive no commissions or other remuneration in connection with
23 such sales. The Company, however, reserves the right to pay
24 commissions to registered brokers or dealers registered with the
25 National Association of Securities Dealers ("NASD") in connection
26 with the sale of the Shares in which case the proceeds to the
27 Company will be reduced. The Company may also pay finders' fees
28 for introduction to persons or entities that purchase Preferred Stock
in this Offering. *The amount of any commissions or finders' fees
will be within the range of amounts normally paid in similar
situations, in which case, the proceeds to the Company will be
reduced.*

1 S-8, Bates ACC000527. Emphasis added.

2 As previously stated, Litchfield had entered into a contract with Westcap and
3 Litchfield would be paid 10%.

4 Litchfield's 10% was stated in the PPM under Use of Proceeds, as \$100,000 (10%
5 of the \$1,000,000 to be raised.) S-8, Bates ACC000528.

6 The PPM stated that preferred shareholders would be paid 8% interest for 12
7 months and each preferred share would be converted to 10 shares of common stock. S-8,
8 Bates ACC000527.

9 The 8% was paid and the shares were converted. Page 222, Lines 1-13.

10 **10. Subscription Agreement**

11 ***SEC Regulation S does not require accreditation.***

12 Litchfield prepared the Subscription Agreement. Page 197, Line 11-17.

13 Article II of the Subscription Agreement has, as stated by Investigator Brokaw, the
14 "buyer beware" warnings.

15 Q. Would you call this language warning language, or what kind of
16 language would you refer to this as?

17 A. I would say so. Buyer beware, I guess. I don't know.

18 Q. Well, buyer beware, but would you say this places the buyer on
19 notice that anybody who wanted to invest, that they should
20 investigate?

21 A. Correct

22 Page 116, Lines 24-25 to Page 117, Lines 1-6.

23 The Subscription Agreement clearly informs potential investors that the shares
24 were not registered and will be restricted.

25 Article II, S-19, Bates ACC000722, follows this page, with emphasis added.
26
27
28

Closing and Closing Agreements: The Buyer has caused the Purchase Price denominated in dollars to be transferred to the Escrow Agent by wire transfer together with this Agreement, properly executed. The offer to purchase contained in this Agreement once submitted will become irrevocable and binding subject only to acceptance by the Seller. A certificate representing the Shares will be issued by the Company within 30 days of the closing of this registration and will be sent to the Buyer upon transfer of the Total Consideration to the Company.

ARTICLE II REPRESENTATIONS BY THE BUYER

In order to induce the Seller to enter into this Agreement and sell the Shares to the Buyer, the Buyer makes the following representations and warranties as of the date hereof which statements shall be true and correct as of the Closing Date hereon:

Access to Information: The Investor, in making the decision to purchase the Shares, has relied upon the representation and warranties contained in this Agreement as well as independent investigations made by it and/or its representatives, if any. The Investor and/or its representatives during the course of this transaction, and prior to the purchase of any Shares, has had the opportunity to ask questions of and receive answers from the management of the Company concerning the business of the Company and to receive to the business, assets, financial condition, results of operation and liabilities [contingent or otherwise] of the Company.

Sophistication and Knowledge: The Investor and/or its representatives has knowledge and experience in financial and business matters sufficient that it can represent it self and is capable of evaluating the merits and risks of the purchase of the Shares. The Investor has relied on the advice of, or has consulted with, only the Investor's own Advisors. The Investor represents that it is not an entity organized only for the purpose of acquiring the Shares.

Lack of Liquidity: The Investor acknowledges that the purchase of the shares involves a high degree of risk and further acknowledges that it can bear the economic risk of the purchase of the Shares, including the total loss of its investment.

No Public Solicitation. The Investor is not subscribing for the Shares as a result of or subsequent to any newspaper, magazine or similar media or broadcast over television or radio, or presented at any seminar or meeting, or any solicitation of a subscription by a person not previously known to the Investor in connection with investments in securities generally. Neither the Company nor the Investor has engaged in any 'Directed Selling Efforts in the U.S.' promulgated by the Securities and Exchange Commission ("SEC") pursuant to The Securities Act of 1933 (the "Securities Act").

Authority: The Investor has full right and power to enter into, perform and hold the Shares pursuant to this Agreement and make an investment in the Company, and its Agreement and make an investment in the Company, and Agreement constitutes the Investor's valid and legally binding obligation, enforceable in accordance with this terms.

The Shares have not been registered under the Securities Act:

THE SHARES REPRESENTED BY THIS CERTIFICATE HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933

The Buyer consents to the Company making a notation on its records or giving instructions to any transfer agent of the Company in order to implement the restrictions on transfer of the Shares set forth in this Section 2.1.

ARTICLE III REPRESENTATIONS AND WARRANTIES OF THE COMPANY

11. Accredited

SEC Regulation S does not require accreditation.

Westcap was informed that all investors were accredited. Page 202, Lines 6-9, Page 202, Lines 22-25 to Page 203, Lines 1-4.

Significantly, the Securities Division offered *no evidence that any investor was not accredited*. For example, Investigator Brokaw testified about his hearsay telephone call with repeat investor Roy Connell. Brokaw failed to even ask Connell if Connell was accredited.

Q. Did he specify or state whether or not he was accredited, to your recollection?

A. No, he didn't.

Page 47, Lines 22-23.

Q. Now, there is nothing in this memorandum that says that you asked Mr. Connel whether he was an accredited investor. I assume you didn't ask that; is that right?

A. That's correct. I did not.

Q. Why did you not ask him that?

A. I don't know. It wasn't one of the questions that I just thought of, I guess.

Page 121, Lines 10-17.

a. Commissions / Finders' Fees

SEC Regulation S does not require specific disclosures.

As previously stated, commissions and finders' fees were disclosed in the PPM, although not in an exact amount because that exact amount was unknown when Litchfield prepared the PPM. And, of course, a commission is charged in every investment. Page 83, Lines 6-11.

Thus, the Securities Division's complaint is that the exact amount of commissions and finders' fees was not disclosed in the PPM, although that was literally impossible to do.

1 The Administrative Law Judge asked Brokaw:

2 Q. Okay. But even ones that aren't under investigation, have you read
3 any private placement memorandums that – where the commission
4 or the finder fee is specified?

5 A. I have not.

6 Page 128, Lines 16-20.

7 Q. Okay. But in your experience in the investigation field for the
8 Division, have you seen legitimate private placement memorandums
9 which don't specify the amount that will be paid to the finders of
10 investors for the company seeking investors?

11 A. Yes, you are right.

12 Page 128, Lines 23-25 to Page 129, Lines 1-3.

13 Litchfield's 10% was disclosed in "Use of Proceeds." S-8, Bates ACC000528.

14 The issue is whether the total 72.5% commissions and finders' fees complies with
15 the PPM's disclosure:

16 *The amount of any commissions or finders' fees will be within the
17 range of amounts normally paid in similar situations, in which case,
18 the proceeds to the Company will be reduced.*

19 "Normally paid in similar situations" means that the "similar situation" involves:

- 20 1. a small, startup solar business in Arizona;
- 21 2. that is risky, with many such businesses failing;
- 22 3. during a bad worldwide economy; and
- 23 4. for funds solely raised in Europe.

24 The Securities Division fails on this issue for four reasons.

25 **First**, raising funds in "similar situations" would cost more than other situations.

26 **Second**, again, the Securities Division presented no evidence regarding the
27 commissions and finders' fees normally paid in similar situations. Investigator Brokaw
28 testified:

Q. Okay. Now, what did you do, if anything, to find out the range of
amounts normally paid in situations similar to Westcap Energy?

A. I didn't do anything.

1 Page 112, Lines 24-25 to Page 113, Lines 1-2.

2 Q. And you didn't look around to find out what other small start-up
3 companies who raise money in Europe, what the range of amounts
4 normally paid in those situations were?

5 A. No, I did not.

6 Q. So at least from you, we don't have any evidence whatsoever of a
7 survey, an inquiry, research, investigation, into the range of amounts
8 normally paid in the situation similar to Westcap Energy; correct?

9 A. That would be correct.

10 Page 113, Lines 18-25 to Page 114, Lines 1-2.

11 Brokaw did no survey or investigation, nothing, as to whether 72.5% was the
12 amount of commissions and finders' fees "normally paid in similar situations."

13 Finally, Brokaw had no testimony to offer regarding this issue.

14 Q. And so your testimony – you don't have any testimony about what is
15 the range of amounts normally paid in situations similar to Westcap
16 Energy; correct?

17 A. Correct.

18 Page 148, Lines 19-22.

19 The Securities Division offered no evidence regarding this, and on that basis alone
20 the Securities Division's complaint about the amount of commissions fails.

21 *Third*, the total commission and finders' fees paid (the 72.5%) was \$281,756.99.
22 S-56 (page 3). Litchfield's 10% (\$100,000) was stated in the PPM under "Use of
23 Proceeds." Therefore, the difference is \$181,756.99.

24 Shorey's contributions to Westcap, in exchange for which he received nothing,
25 more than made up for that difference.

26 Without receiving any stock back (Page 226, Lines 6-7), Shorey contributed
27 \$50,000 of his own money to Westcap (Page 226, Lines 4-5). Shorey was to earn
28 \$10,000/month for the last 36 months, but was paid nothing, contributing \$360,000 of his
services to Westcap. Shorey personally guaranteed loans (Page 226, Lines 8-19) and used
his personal credit card to keep the business running (Page 226, Lines 20-25 to Page 227,
Lines 1-18), and the business was successful. Page 192, Lines 9-20.

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Fourth, the Securities Division failed to prove materiality.

At the hearing, no investor testified that the 72.5% commissions and finders' fees was objectionable, material, or, if the exact amount could have been known before the PPM, the investors would not have invested.

The Administrative Law Judge asked Shorey:

“The amount of any commissions or finder fees will be within the range of amounts normally paid in similar situations, in which case the proceeds to the company will be reduced.”

Now, this is a statement in the private placement memorandum, and what is your basis for determining what is “amounts normally paid in similar situations”?

Shorey explained:

A. I would say that my basis for making a statement that way is that the exact amounts may be indeterminable and they maybe change from time to time; however, my previous experience and Litchfield's experience, who advised and wrote this, who advised me and Westcap, wrote this private placement memorandum through their attorney, advised that that wording was stated because their experience in the marketplace in Europe, which, of course, agrees with mine, was that these fees were undeterminable and that they would be normally the amounts paid to get those markets to work.

Q. Okay. Well, so the idea of a 65 percent commission to a finder of funding for your company, from what you learned from Litchfield and from your own experience, was that what was a normal range?

A. Yes, sir, that certainly was.

Page 278, Lines 9-25 to Page 279, Lines 1-20.

The standard of materiality is an objective one. Materiality is proof of “a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable buyer.” *Rose v. Dobras*, 128 Ariz. 209, 214, 624 P2d 887, 892 (App. 1981).

However, this hypothetical analysis is defeated by the actual facts that the investors who paid the commission/finder's fees never complained, and rather reinvested,

1 and will profit from their investments. Whatever the materiality, there was no damage.
2 And in any event, the only evidence in the record is that the information was not material.

3 **12. Foreign Offer**

4 The purpose of an SEC Regulation S foreign offering is to encourage United
5 States entities to raise money outside of the United States and bring that money into the
6 United States. That purpose promotes investments in the United States economy.

7 Every Regulation S offering involves two things:

- 8 1. Offering documents prepared in the United States (e.g. PPM and
9 Subscription Agreement) given to prospective investors outside the
10 United States; and
- 11 2. Investors' money transferred from a foreign country to the United
12 States.

13 The Westcap offering was pursuant to Regulation S.

14 The Subscription Agreement states:

15 **ARTICLE I**
16 **PURCHASE, SALE AND TERMS OF SHARES**

17 The Subscription: In consideration of and in express reliance upon the
18 representations, warranties, covenants, terms and conditions of this
19 agreement, the Seller agrees to sell Shares in the Company to the Buyer
20 in an offshore transaction negotiated outside the United States (U.S.)
and to be consummated and closed outside the U.S., and the Buyer
agrees to purchase from the Seller the number of Shares at a per share
purchase price set forth in the above Confirmation.

21 S-19, ACC000721.

22 Intuition offered the Westcap investment in Europe, solely to European citizens.
23 No one in the United States or any U.S. citizen was offered the Westcap investment.
24 (Page 82, Lines 12-16.) Shorey never contacted any potential investor to offer the
25 Westcap investment, anytime or anywhere. No stock was ever sold or transferred to
26 anyone in the United States or to any U.S. citizen living abroad.

27 Shorey's only involvement started after *Intuition in Europe* informed Shorey of a
28 person who wanted to invest.

1 Although Shorey sent documents to the investor and received invested funds, as
2 with all Regulation S offerings, *the offering was made by Intuition in Europe*. A
3 previously stated, every foreign offering involves documents prepared in the United
4 States and sent to prospective foreign investors outside of the United States.

5 Intuition offered the Westcap investment solely to those outside the United States,
6 in Europe.

7 THE WITNESS: This offer was never offered in the United States. It
8 was targeted only for foreign investors. It is referred to as a Regulation
9 S offering, which means it's not offered, advertised, solicited, or
delivered to anyone in the United States, and it never was.

10 ALJ STERN: Okay. Go ahead, Mr. Heurlin.

11 BY MR. HEURLIN:

12 Q. Now, of the investors, we heard yesterday that all the investors were
in Europe; correct?

13 A. That's correct.

14 Page 201, Lines 3-13.

15 Shorey never talked to any offeree. Page 201, Lines 14-19.

16 Intuition, in Europe, talked to offerees, in Europe. Page 201, Lines 20-23.

17 **13. Transformation From Westcap to ABCO Energy, Inc.**

18 Respondent Arizona corporation Westcap Energy, Inc.'s name was changed to
19 Westcap Solar, Inc. Westcap Energy, a Nevada corporation, was formed and it bought
20 Energy Conservation Technologies, Inc., a Nevada corporation. Page 282, Lines 19-21.
21 All assets and shareholders of Respondent Arizona corporation Westcap Energy, Inc.
22 were transferred to Nevada corporation Westcap Energy. Westcap Energy merged with
23 Energy Conservation. Energy Conservation changed its name to Abco Energy, Inc., a
24 Nevada corporation. Abco Energy owns subsidiary Abco Solar Arizona. Page 217, Lines
18-25 to Page 218, Lines 1-24.

25 The 24 investors own shares in Abco Energy and have no interest in Westcap.

26 **14. Success**

27 The Consolidated Financial Statements Years Ended 12-31-2011 and 2010 prove
28 the success of this small, startup, solar business (RS-8).

1 The Securities Division's CPA only inspected Westcap financial records for a time
2 period of January through August 31, 2010. Page 153, Lines 10-14. Of course, that look
3 at a 9-month time period for the small, startup Westcap was only a brief glance at the
4 business. The Securities Division's CPA did not analyze Westcap's operating account.
5 Page 175, Lines 11-19.

6 That success would not have happened without the money raised by Litchfield and
7 Intuition or the contributions and efforts by Shorey.

8 There are 24 investors and none of them have complained about anything. Even
9 after the Securities Division contacted investors, none complained.

10 Brokaw testified:

11 Q. And, as a matter of fact, you, on October 6, 2011, sent what is titled
12 a complaint form to every investor; correct?

13 A. That's correct.

14 Q. And no investor returned a complaint form, did they?

15 A. One did.

16 Q. And that, obviously, is not an exhibit here, is it?

17 A. I don't believe it is.

18 Page 81, Lines 17-25 to Page 82, Line 1.

19 21 of 24 investors reinvested. Page 211, Lines 1-3. All were paid 8% interest
20 (Page 214, Lines 17-21) and all preferred stock was converted to common stock. Page
21 215, Lines 12-21. Stock certificates were not issued to save on expenses and no investor
22 requested a certificate. Page 215, Lines 22-25 to Page 216, Lines 1-25 to Page 217, Lines
23 1-8, Page 221, Lines 1-4, Page 257, Lines 19-25, Page 258, Lines 1-25, to Page 259,
24 Lines 1-20. Businesses commonly issue stock in the "book entry format" to reduce
25 expenses. The investors await a public offering and expect to double their original
26 investments. Page 222, Lines 16-25 to Page 224, Lines 14-25, to Page 225, Line 1.

27 **15. Conclusion**

28 **a. "Reverse Time"**

In its closing argument, the Securities Division lawyer stated:

1 Again, there is testimony that – and we have been in this situation
2 before, Your Honor, where now all of a sudden the corporate, big, bad
3 government and the Corporation Commission is trying to regulate its
4 Securities Act and is going to put a legitimate company out of business.

5 I guess I’m not going to really comment whether or not I believe it’s
6 legitimate or not, or whether the figures are accurate, but I can’t reverse
7 time. The violations or the actions and the activity undertaken by Mr.
8 Shorey occurred; we are just addressing them.

9 Page 297, Lines 10-20.

10 First, Respondents do not criticize the Securities Division as a “big, bad
11 government” entity or object to its duty to regulate securities.

12 Respondents’ criticism is that the Securities Division position *in this case* is that,
13 if the Securities Division had understood Respondents’ success before the hearing, the
14 Securities Division would not have proceeded against Respondents. And the Securities
15 Division offers no explanation why its investigators and attorneys could not discover that
16 Westcap was and is successful prior to the hearing.

17 Second, of course the Securities Division “can’t reverse time.” However, the
18 Securities Division could have exercised good judgment and dismissed this matter to
19 protect the investors. That is why the Securities Division exists. The Securities Division
20 should have dismissed this matter immediately following the hearing.

21 **b. The Securities Division Seeks to Harm Investors Who Never Complained**

22 Westcap is a defunct Arizona corporation with no assets or shareholders. Shorey’s
23 years of efforts built ABCO Energy into a success. ABCO Energy’s 24 *European*
24 investors have no complaint and look forward to making money on their investments.
25 Any sanction imposed will harm the investors. If a sanction is significant, ABCO Energy
26 will go out of business, destroying the investors’ investments. Page 239, Lines 22-25.

27 **c. The ACC No Jurisdiction**

28 Finally, and, of course, most significant, is that the Securities Division proceeded
in this matter *without jurisdiction*.

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1 How the Securities Division can justify this matter, the filing, the hearing, the
2 brief, that is contrary to the 1988 decision in *Media Products* is unknown. This matter is
3 due to the Securities Division's not being aware of *Media Products* or was taken in bad
4 faith.

5 Respondents request that this case be dismissed.

6 Pursuant to A.R.S. 41-1001.01 and A.R.S. 348, Respondents request an award of
7 costs and attorneys fees.

8 DATED March 16, 2012.

9 HEURLIN SHERLOCK LAIRD

10 By: Bruce Heurlin
11 Bruce R. Heurlin
12 Kevin M. Sherlock
13 Attorneys for Respondents

14 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
15 mailed on March 16, 2012, to:

16 Docket Control
17 Arizona Corporation Commission
18 1200 West Washington
19 Phoenix, Arizona 85007

20 Copy mailed March 16, 2012, to:

21 Marc E. Stern
22 Administrative Law Judge
23 1200 West Washington
24 Phoenix, Arizona 85007

25 Arizona Reporting Service, Inc.
26 2200 North Central Avenue, Suite 502
27 Phoenix, Arizona 85004

28 Phong (Paul) Huynh
Arizona Corporation Commission
Securities Division
1300 West Washington, Third Floor
Phoenix, Arizona 85007

expired. There is no mistake in the caption, but rather an effort by the real party in interest to add a new legal theory. Under the circumstances, petitioner would be prejudiced by the relation back. The order of the respondent court is vacated and the trial court is directed to enter an order granting petitioner's motion to dismiss.

LACAGNINA, C.J., and
HATHAWAY, J., concur.



158 Ariz. 463

**The ARIZONA CORPORATION COM-
MISSION, Plaintiff-Appellee,**

v.

**MEDIA PRODUCTS, INC., a Delaware
corporation, Defendant-Appellant.**

No. 1 CA-CIV 9655.

Court of Appeals of Arizona,
Division 1, Department C.

June 16, 1988.

Review Denied Nov. 22, 1988.

State corporation commission brought action under Securities Act to enjoin initial public stock offering and for other related relief. The Superior Court, Maricopa County, No. CV-87-00708, I. Sylvan Brown, J., determined that corporation had violated securities laws of state and corporation appealed. The Court of Appeals, Shelley, J., held that: (1) state statute which prohibited unregistered sales of securities from state applied to sales which were negotiated out of state by out-of-state agent underwriter with out-of-state purchasers, and (2) application of statute violated commerce clause.

Reversed and remanded.

Corcoran, J., filed dissenting opinion.

1. Appeal and Error ¶842(8)

In reviewing trial court's conclusions of law, appellate court is not bound by those conclusions, and will determine questions of law independently.

2. Securities Regulation ¶262

For purposes of Arizona statute which prohibited sale of unregistered securities from within or from state, sales were "from" state, though they were negotiated out of state solely by out-of-state agent underwriter and its selling out-of-state broker-dealers with purchasers who were residents of states where offerings were registered; principal place of business and base of operations for corporation was within state, officers and directors operated and resided in state, stock certificates were prepared and issued by transfer agent in state, and agreement designated Arizona bank as escrow agent. A.R.S. §§ 44-1841, 44-1841, subd. A.

3. Commerce ¶12, 13.5

Commerce Clause invalidates any state statute which directly burdens interstate commerce; moreover, any state statute which incidentally affects commerce will be struck down under Commerce Clause if burden imposed upon commerce is clearly excessive in relation to putative local benefits. U.S.C.A. Const. Art. 1, § 8, cl. 3.

4. Commerce ¶62.4

Securities Regulation ¶244

Arizona statute which prohibited sale of unregistered securities violated Commerce Clause in situation where corporation, which had principal place of business in Arizona was not incorporated there, and all stock purchasers were nonresidents; Arizona had no duty to purchasers whose home states had already determined that offerings met their own state's standards and had registered offerings in those states and with the SEC, and further, business reputation of Arizona was not at stake. A.R.S. §§ 44-1841, 44-1841, subd. A; U.S. C.A. Const. Art. 1, § 8, cl. 3.

5. Securities Regulation ¶310

Court had no discretion to deny attorney fees to corporation which requested such fees upon its successful appeal from

injunction prohibiting sales of securities; state failed to respond to request. 17A A.R.S. Civil Appellate Proc.Rules, Rule 21(c).

Robert K. Corbin, Atty. Gen. by Patrick M. Murphy, Chief Counsel, Financial Fraud Div., and W. Mark Sendrow, Sharon A. Fox, Asst. Attys. Gen., and Bradley S. Carroll, Sp. Asst. Atty. Gen., Phoenix, for plaintiff-appellee.

Brown & Bain, P.A. by C. Randall Bain and Jennifer B. Beaver, Phoenix, for defendant-appellant.

Carson, Messinger, Elliott, Laughlin & Ragan, Evans, Kitchel & Jenckes, P.C., Fannin, Terry, Hay & Lemberg, P.A., Fennimore Craig, P.C., Phoenix, Furth, Fahrner, Bluemle & Mason, Scottsdale, Gaston, Snow, Moya, Bailey, Bowers & Jones, Phoenix, Hecker, Phillips & Hooker, Tucson, Jennings, Strouss & Salmon, O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, Storey & Ross, P.C., Streich, Lang, Weeks & Cardon, P.A., Phoenix, for amici curiae.

OPINION

SHELLEY, Judge.

The Arizona Corporation Commission (Commission) brought this action under the Securities Act (Act) to enjoin the initial public stock offering of Media Products, Inc. (Media), for civil penalties under A.R.S. § 44-2037, restoration to investors of amounts paid for Media stock, and other related relief. The offering was not registered in the State of Arizona. The parties stipulated to consolidate the preliminary injunction request with the trial of all other matters raised in the complaint. Prior to trial, the court bifurcated the liability and remedies portion of the case and proceeded to try only the liability issues. We summarize the trial court's conclusions as follows:

1. That A.R.S. § 44-1841 required the registration of securities sold entirely to persons residing outside of the state by an underwriter located outside of the state on behalf of a foreign corporation

having a base of operations in Arizona; and

2. That Arizona has a sufficient state interest in the issuance of securities by a company with a base of operations in the state, even though it was incorporated in the State of Delaware so that Arizona's prohibition of the sale of Media Products stock in other states is not an impermissible burden on interstate commerce in contravention of the United States Constitution.

The trial court entered a final appealable order pursuant to rule 54(b), Arizona Rules of Civil Procedure, adjudging that Media had violated the securities laws of Arizona by failing to register the sale of its initial public offering with the Commission. The court reserved determination of any applicable remedies following appeal. Media timely appealed.

Media is a Delaware corporation with its principal offices in Arizona. It entered into a "Selling Agency Agreement" with First Devonshire Securities, Inc. of Spokane, Washington, wherein the "agent" agreed, on a "best efforts, all-or-none" basis, to sell its initial public stock offering of 1,300,000 shares of common stock. Media's offering was properly registered with the federal Securities and Exchange Commission (SEC). Media's offering was also duly registered under applicable Blue Sky laws in California, Colorado, Connecticut, Georgia, Idaho, Illinois, Minnesota, Montana, New Jersey, New York, Oregon, Pennsylvania and Washington. It made application to the Securities Division of the Commission to register the offering in Arizona but subsequently withdrew its application. The agent as underwriter then informed the Securities Division that it would proceed with the offering in the states where registration had been accomplished. The Securities Division informed Media that such an offering would constitute a violation of the Act. Media then informed the Securities Division that it would proceed, as it did not agree with the Division's interpretation of the Act.

Sales of the entire issue were negotiated out-of-state solely by the out-of-state agent

underwriter and its selling out-of-state broker-dealers with purchasers who were residents of states where the offerings were duly registered. No sales or offers of sale were made in Arizona or to Arizona residents. There is no contention that the offerings were fraudulent.

[1] In reviewing the trial court's conclusions of law, this court is not bound by those conclusions, and we will determine questions of law independently of the trial court. *Gary Outdoor Advertising v. Sun Lodge, Inc.*, 133 Ariz. 240, 242, 650 P.2d 1222, 1224 (1982).

I.

The first issue on appeal is:

Did the court err as a matter of law in interpreting A.R.S. § 44-1841 to prohibit the sale of securities by a foreign corporation having a base of operations in Arizona where (i) all of the sales activities were conducted by out-of-state broker-dealers in states other than Arizona, (ii) the offers to purchase were made and accepted out-of-state, and (iii) no sale or offer of sale was made to any resident of Arizona?

Arizona Revised Statutes § 44-1841(A) reads:

Sale of unregistered securities prohibited; classification

It is unlawful to sell or offer for sale within or from this state any securities unless such securities have been registered by description under §§ 44-1871 through 44-1875 or registered by qualification under §§ 44-1891 through 44-1900, except securities exempt under §§ 44-1843 or 44-1843.01 or securities sold in exempt transactions under § 44-1844.

Media posits that A.R.S. § 44-1841 is inapplicable to the Media offering because the offers to sell and the sales were not made within or from the State of Arizona. Media and *Amici Curiae* assert that in interpreting A.R.S. § 44-1841, the court should look to the interpretation of the California Blue Sky Statutes by the Califor-

nia Department of Corporations. They cite A.R.S. § 44-1815, which reads:

The director shall cooperate with the administrators of the securities laws of other states and of the United States with a view to achieving maximum uniformity in the interpretation and enforcement of *like* provisions of the laws administered by them. (Emphasis added)

The pertinent California statute states in detail under what circumstances an offer to sell or sale of securities is considered to be made within or to originate from that state. Arizona Revised Statutes § 44-1841 only states that "It is unlawful to sell or offer to sell within or from this state any securities unless such securities have been registered . . ." The pertinent California statute does not contain provisions "like" A.R.S. § 44-1841. As a result, the California Department of Corporations' interpretation of its statute is irrelevant.

[2] The key words in our statute are "sell or offer for sale within *or from* this state any securities unless such securities have been registered . . ." A.R.S. § 44-1841. Media posits that the Commission created a legal fiction in holding that the sale took place *from* Arizona because the issuer only performed ministerial actions from its base of operations in Arizona. We disagree. The following actions by Media took place within the State of Arizona:

1. The principal place of business and base of operations for Media is in Arizona.
2. The officers and directors operated from and reside in Arizona.
3. The stock certificates were prepared and issued by the transfer agent in Arizona.
4. The Board of Directors' meetings took place in Arizona.
5. The Selling Agency Agreement stated: "[N]otice given pursuant to any of the provisions of this Agreement shall be in writing and shall be delivered (a) to the Company at the office of the Company, 3230 East Roeser Road, Phoenix, Arizona 85040, Attention: David J. Riddle . . ."

6. The agreement designated an Arizona bank as the escrow agent.
7. The agreement states:

VI. PAYMENT AND DELIVERY

A. Payment for the one million three hundred thousand (1,300,000) Shares shall be made to the Company at the offices of Lukins & Annis, P.S., by the Escrow Agent by certified or bank cashier's check in United States currency, same day funds, upon satisfying the conditions of escrow and upon delivery to the Escrow Agent of certificates for such Shares, registered in such name or names and in such denominations as the Agent shall have requested, in all cases against the signed receipt of the Escrow Agent. The Company shall pay to the Agent from funds paid to it by the Escrow Agent the agreed commission provided for hereinabove. *The date on which the sale of securities described in this Section A of Article VI occurs is herein referred to as the "Closing Date."*

B. *The Company agrees to cause certificates for Shares, which the Company agrees to sell, to be made available to the Agent at the Company's address at least one full business day prior to the relevant Closing Date for checking and packaging.*

C. A Closing Date, as referred to in this Agreement, shall be the date or dates mutually agreed upon within three (3) regular full business days after written notice by the Agent to the Company, on which the Agent or the Escrow Agent, in the case of the Closing Date, shall make payment for and the Company shall deliver certificates for the Shares, in accordance with this Article VI. (Emphasis added)

Media's actions were more than ministerial. Pursuant to the contract, the agent had the duty not only to notify the company's escrow agent of the names under which shares were to be registered and in what denominations, but the certificates for these shares were to be made available to the agent at the company's Arizona ad-

dress at least one full business day prior to the closing date for checking and packaging. Pursuant to the agreement, the date on which the sale of the securities occurred is the closing date of the escrow. The closing occurred in Arizona.

Media and *Amici Curiae* assert that their position is supported by analogous provisions of the Uniform Securities Act of 1956. We disagree. Section 414 of the Uniform Act, which specifies its scope, is not analogous to A.R.S. § 44-1841, which covers the scope of the Arizona Act. Arizona Revised Statutes § 44-1841(A) states only: "It is unlawful to sell or offer for sale within or from this state unless such securities have been registered ..." In contrast, § 414, which sets forth the Uniform Act's scope, consists of 6 paragraphs, four of which read as follows:

(c) For the purpose of this section, an offer to sell or to buy is made in this state, whether or not either party is then present in this state, when the offer (1) originated from this state or (2) is directed by the offeror to this state and received at the place to which it is directed (or at any post office in this state in the case of a mailed offer).

(d) For the purpose of this section, an offer to buy or to sell is accepted in this state when acceptance (1) is communicated to the offeror in this state and (2) has not previously been communicated to the offeror, orally or in writing, outside this state; and acceptance is communicated to the offeror in this state, whether or not either party is then present in this state, when the offeree directs it to the offeror in this state reasonably believing the offeror to be in this state and it is received at the place to which it is directed (or at any post office in this state in the case of a mailed acceptance).

(e) An offer to sell or to buy is not made in this state when (1) the publisher circulates or there is circulated on his behalf in this state any bona fide newspaper or other publication of general, regular, and paid circulation which is not published in this state, or which is published in this state but has had more than

two-thirds of its circulation outside this state during the past twelve months, or (2) a radio or television program originating outside this state is received in this state.

(f) Sections 102 and 210(c), as well as section 405 so far as investment advisers are concerned, apply when any act instrumental in effecting prohibited conduct is done in this state, whether or not either party is then present in this state.

Arizona Revised Statutes § 44-1841(A) leaves the interpretation of the term "from the state" to the courts. In contrast, § 414 defines and delimits the application of the Uniform Act in interstate transactions with only some of their elements in the state. 12 J. Long, *Blue Sky Law*. App. D-61.

The *Amici* brief quotes from 12 J. Long, *Blue Sky Law* § 3.02[3] as follows:

... the mere maintenance of a principal place of business or any place of business within the state is not sufficient to trigger the local version of the Uniform Act. (Emphasis added)

Factually this case has considerably more connections within Arizona than the mere maintenance of a principal place of business in this state. In 12 J. Long, *Blue Sky Law*, § 3.01 at 3-4 and 3-5, we read: "Nor is this discussion intended to suggest what necessarily should be the jurisdictional rules in those states which have not adopted § 414 or an equivalent statute." Arizona has not adopted § 414 or an equivalent statute.

We conclude that the offering of the stock and the sales of the stock were "from" Arizona.

II.

The other issue on appeal is:

Did the trial court err in concluding that A.R.S. § 44-1841, as applied in this case, did not violate the Commerce Clause of the United States Constitution?

The Commerce Clause (Article I, Section 8, Clause 3 of the United States Constitution) regulates commerce occurring "among the several states." The Commerce Clause provided Congress with the

power to enact laws protecting and encouraging commerce among the states, and the power to "by its own force created an area of trade free from interference by the states ... [that] even without implementing legislation by Congress [serves as a] limitation upon the power of the state." *Great Atlantic and Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 370-371, 96 S.Ct. 923, 927-28, 47 L.Ed.2d 55, 60 (1976), quoting *Freeman v. Hewit*, 329 U.S. 249, 252, 67 S.Ct. 274, 276, 91 L.Ed. 265, 271-272 (1946).

[3] As interpreted by the United States Supreme Court, the Commerce Clause invalidates any state statute which directly burdens interstate commerce. *Edgar v. Mite Corp.*, 457 U.S. 624, 640, 102 S.Ct. 2629, 2639-40, 73 L.Ed.2d 269, 282 (1982); *Shafer v. Farmer's Grain Co.*, 268 U.S. 189, 45 S.Ct. 481, 69 L.Ed. 909 (1925). Moreover, any state statute which incidentally affects commerce will be struck down under the Commerce Clause if the burden imposed upon commerce is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174, 178 (1970); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443, 80 S.Ct. 813, 815-16, 4 L.Ed.2d 852, 856 (1960).

We hold that the application of the statutes to the facts of this case constitutes an improper interference with interstate commerce.

Edgar involved an Illinois statute regulating takeover offers. The statute required the shares of a target company to be registered with the Illinois Secretary of State. A target company is defined as a corporation or other issuer of securities in which Illinois shareholders own 10% of the class of equity securities subject to the takeover offer or when any two of the following conditions are met: the corporation has its principal executive offices in Illinois, is organized under the laws of Illinois, or has at least 10% of its stated capital and paid-in surplus represented within the state. *Mite Corp.* was incorporated under the laws of Delaware, with its principal executive offices in Connecticut. *Mite*

initiated a tender offer for all outstanding shares of Chicago Rivet & Machine Co., a publicly held Illinois corporation, without complying with the Illinois statute. The State of Illinois sought to prevent Mite from proceeding with its tender offer to not only the shareholders living in Illinois, but also to those living in other states.

The Court stated:

The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const., Art. I, § 8, cl. 3. "[A]t least since *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 13 L.Ed. 996 (1852), it has been clear that 'the Commerce Clause . . . even without implementing legislation by Congress is a limitation upon the power of the States.'" Not every exercise of state power with some impact on interstate commerce is invalid. A state statute must be upheld if it "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. The Commerce Clause, however, permits only *incidental* regulation of interstate commerce by the States; *direct regulation is prohibited*.

States have traditionally regulated intrastate securities transactions, and this Court has upheld the authority of States to enact "blue-sky" laws against Commerce Clause challenges on several occasions. The Court's rationale for upholding blue-sky laws was that they only regulated transactions occurring within the regulating States. "The provisions of the law . . . apply to dispositions of securities *within* the State and while information of those issued in other States and foreign countries is required to be filed . . . , they are only affected by the requirement of a license of one who deals with them *within* the State. . . . Such regulations affect interstate commerce in [securities] only incidentally. *Hall v. Geiger-Jones Co.*, *supra*, 242 U.S. [539]

at 557-558, 37 S.Ct. [217] at 223 [61 L.Ed. 480, 492]. (Citations omitted)

While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders. Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law. (Emphasis added)

Edgar, 457 U.S. at 640-44, 102 S.Ct. at 2639-41, 73 L.Ed.2d at 282-284.

Subsequently, in *CTS Corporation v. Dynamics Corporation of America, et al.*, 481 U.S. 69, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987), the United States Supreme Court upheld an Indiana Act which regulated tender offers made to shareholders of corporations incorporated in Indiana. The Court stated:

No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders. See restatement (Second) of Conflict of Laws § 304 (1971) (concluding that the law of the incorporating State generally should "determine the right of a shareholder to participate in the administration of the affairs of the corporation"). Accordingly, we conclude that the Indian Act does not create an impermissible risk of inconsistent regulation by different States.

It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs.

There can be no doubt that the Act reflects these concerns. *The primary purpose of the Act is to protect the shareholders of Indiana corporations.*

....
We agree that Indiana has no interest in protecting nonresident shareholders of nonresident corporations. (Emphasis added)

CTS Corporation, 481 U.S. at —, 107 S.Ct. at 1644-51, 95 L.Ed.2d at 85-87.

In this case, Media was not incorporated in Arizona. All of the stock purchasers are nonresidents.

[4] Under the facts of this case, Arizona had no duty to the purchasers whose home states had already determined that the offerings met their own state's standards and had registered the offerings in those states and with the Securities and Exchange Commission. To hold otherwise would allow the Commission to have an effective veto over offerings and sales approved by the Securities and Exchange Commission and securities officials from other states, even though no purchases were made by Arizona residents. The business reputation of the State of Arizona is not at stake under the facts of this case.

We conclude that the Act, as applied in this case, constitutes a direct burden upon interstate commerce. Even if we assume that the burden imposed is incidental, rather than direct in order to satisfy constitutional scrutiny, the burden may not be excessive in relation to the local interests sought to be served. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

The state asserts that if a statute as applied to this case creates a burden on interstate commerce, it is only incidental and the burden is not excessive in relation to the local interests sought to be served. The state correctly asserts that Arizona has an important interest in keeping itself free of enterprises which offer questionable investment opportunities.

In 12 J. Long, *Blue Sky Laws* § 3.04[3][a], Mr. Long states: "A state has an interest in seeing that its territory is not used as a base of operations to conduct illegal sales in other states. Thus, the host state has an interest in protecting its repu-

tation as not being a center for illegal or questionable securities activity."

The relevant facts on this issue are:

1. Media was incorporated in the State of Delaware and the prospectus so stated.
2. The underwriter, brokers and dealers involved in the securities offerings and sales were not Arizona residents.
3. No sales were solicited or made to Arizona residents.
4. The purchase contracts were not made in Arizona.
5. The offer and sale of the securities were properly registered with the federal Securities and Exchange Commission and in the states where the purchasers resided.
6. Media's Supplemental Prospectus, dated December 30, 1986, stated:

The Company has withdrawn its application to sell shares included in this offering to Arizona residents due to objections raised by the Arizona Securities Division (the "Division"). The Division may still claim that the offering should not be made to non-Arizona residents even though the offering has been declared effective by the Federal Securities and Exchange Commission and by the State Securities Commissioners of 12 other states. The Company disputes any such claim by the Division and would vigorously contest it. However, if such a claim is successfully pursued, the Company could be subject to injunctive and other remedies, including penalties of up to \$1,000,000 and possible rescission by purchasers in this offering. This could have a negative impact on the selling effort of the Underwriter and on the ability to complete the offering within the original 90 day period. *In addition, the defense costs in any such litigation would be an additional use of the working capital of the Company.* (Emphasis added)

The prospectus and supplement placed prospective purchasers on notice that Media was a Delaware corporation, that the offerings and sales were not approved by

the Arizona Corporation Commission, and that the Arizona Corporation Commission might file suit asking for injunctive and other remedies. These statements negate the Commission's position that if the sale was unfair, blame could be placed on Arizona, tarnishing its reputation. Any out-of-state buyer who familiarized himself with the prospectus and supplement would be advised that it was his own state, not Arizona, that regarded the offer as appropriate. In this case, the state does not have an overriding regulatory policy need. Under the facts of this case the burden, even if it were only incidental, is excessive.

[5] Media has requested attorney fees pursuant to A.R.S. § 12-348 and rule 21(c), Arizona Rules of Civil Appellate Procedure. The state failed to respond to this request. The discretionary provisions of § 12-348 do not apply in this case; therefore, this court has no discretion to deny attorney fees. Media is awarded attorney fees under rule 21(c).

The judgment of the trial court is reversed and the case is remanded to the trial court with directions to enter judgment in favor of Media.

FIDEL, J., concurs.

CORCORAN, Judge, dissenting:

I respectfully dissent from that portion of the opinion that concludes that Arizona's interest in its business reputation is insufficient to justify the incidental burden imposed on interstate commerce by the Arizona Securities Act. I would uphold the trial court's conclusion that "Arizona has a sufficient state interest in the issuance of securities by a company with a base of operations in the state, even though it was incorporated in the State of Delaware so that Arizona's prohibition of the sale of Media Products stock in other states is not an impermissible burden on interstate commerce in contravention to the United States Constitution."

The facts cited by the majority to conclude that the offering and sale of the stock were "from" Arizona within the meaning of A.R.S. § 44-1841 also support

the legitimate state interest Arizona has in requiring registration under these facts. Arizona is not only the corporation's principal place of business or "base of operations," but is also the corporation's *only* place of business. Media Products has no headquarters outside of Arizona. It is an "Arizona" enterprise.

Furthermore, all the important aspects of the transaction took place in Arizona: the terms of the sale were formed here; the escrow was set up and closed here; and all the stock was issued from Arizona. The corporation's entire existence centers around Arizona; its formal incorporation in Delaware gives it only the most tenuous and fictional relationship with that state. The impression afforded the corporation's nonresident investors under these circumstances is that they are investing in a *de facto* Arizona corporation. Additionally, if litigation results from this securities transaction, the courts of Arizona may be called upon to host the proceedings. Arizona will have redressive jurisdiction; it should also have preventive jurisdiction.

This is not a case where regulation is excessive because the state has no local interest in protecting nonresident investors. *Cf. Edgar v. MITE Corp.*, 457 U.S. 624, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982). Here, the state's legitimate local interest is in protecting its business reputation. The state's interest in preventing its territory from being used as a base of operations for unregulated transactions has been widely recognized under federal securities law. *See* 12 J. Long, *Blue Sky Law* § 3.04[3][a] at 3-46 (rev. ed. 1987), and cases cited therein. Professor Long relates circumstances in the 1970s that gave Tennessee a "black eye" in the municipal bond industry, gave Oklahoma and Texas a bad name in the oil and gas lease market, and allowed Utah to become known as a "cesspool of securities fraud." *Id.* Professor Long concludes that "the host state has an interest in protecting its reputation as not being a center for illegal or questionable securities activity." *Id.*

Under the specific facts of this case, I would hold that Arizona had a sufficient

interest in its business reputation among the nonresident purchasers of Media Products stock to justify its regulation of the offering and sale of that stock under the Securities Act. I would affirm on that basis.



158 Ariz. 471
The STATE of Arizona, Appellee,

v.

Melvin Bernard COLEY, Appellant.

No. 2 CA-CR 87-0519.

Court of Appeals of Arizona,
Division 2, Department B.

June 21, 1988.

Review Denied Nov. 15, 1988.

Defendant was convicted before the Superior Court, Pima County, Cause No. CR-20797, Bernardo P. Velasco, J., of two counts of possession of a deadly weapon by a prohibited possessor and he appealed. The Court of Appeals held that evidence warranted jury instruction on constructive possession.

Affirmed.

Weapons §-17(6)

Evidence that defendant and another were accomplices in scheme to buy and ship military weapons and that weapon was transported in defendant's van at time that defendant knew weapon was being transported warranted jury instruction on constructive possession.

Robert K. Corbin, Atty. Gen. by William J. Schafer III and Jack Roberts, Phoenix, for appellee.

Daniel F. Davis, Tucson, for appellant.

OPINION

PER CURIAM.

Appellant was found guilty after a jury trial of two counts of possession of a deadly weapon by a prohibited possessor, in violation of A.R.S. § 13-3102(A)(4). He was sentenced to aggravated sentences of 4.5 years in prison on the two counts, the terms to run consecutively to sentences imposed in other cause numbers.

On appeal appellant argues that he could not have been properly convicted of count one under the theory of constructive possession which was given to the jurors by the trial court. The record shows that while counsel did not object to the form or content of the instruction, counsel objected that she did not believe there was any proof that appellant was in constructive possession of a weapon. The state argues that absent a specific instruction, the point has been waived unless fundamental error was present, citing *State v. Nirschel*, 155 Ariz. 206, 745 P.2d 953 (1987). In any case, we do not believe the giving of a constructive possession instruction was erroneous. The state presented evidence that a conspiracy to buy and ship military weapons existed. The evidence showed that appellant and another man were accomplices in the weapons scheme. Although it is true that appellant did not touch the weapon in question, it was transported in appellant's van and it is obvious that appellant knew the weapon was being transported in his van. Under these circumstances, and recognizing that A.R.S. § 13-105(27) does not limit the definition of "possess" to knowing physical possession but includes the concept of "otherwise exercising dominion or control over property," we find that the trial court properly instructed the jury on constructive possession.

Appellant's reliance on Division One's decision in *State v. Kerr*, 142 Ariz. 426, 690 P.2d 145 (App.1984), is misplaced. That case dealt with A.R.S. § 13-3102(A)(3), which forbids possession of prohibited weapons, not the possession of deadly weapons by prohibited possessors. Division One's interpretation of "possess" in A.R.S. § 13-3102(A)(3) to include only one