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Arizona Corporation Commission

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COMMISSIONERS:
GARY PIERCE, CHAIRMAN 11:05
BOB STUMP 2012 AUG 24
SANDRA D. KENNEDY
PAUL NEWMAN
BRENDA BURNS

In the matter of:

Docket No. S-20823A-11-0407

THOMAS LAURENCE HAMPTON,
CRD #2470192, and STEPHANIE YAGER,
husband and wife,

RESPONDENTS TIMOTHY D. MORAN
AND PATRICIA MORAN'S ANSWER
AND MOTION TO DISMISS

TIMOTHY D. MORAN, CRD # 2326078, and
PATRICIA MORAN, husband and wife,

PATRICK MORAN, CRD # 1496354, and
KELLY MORAN, husband and wife,

HAMPTON CAPITAL MARKETS, LLC, an
Arizona limited liability company,

Respondents.

Respondents Timothy D. Moran ("Mr. Moran") and Patricia Moran ("Mrs. Moran") (collectively the "Morans" or the "Respondents") answer the Amended Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order For Restitution, Order For Administrative Penalties, Order of Revocation and For Other Affirmative Action dated July 12, 2012 (hereafter, the "Notice"), by admitting, denying and alleging as set forth below. In addition, the Morans move that the Commission dismiss the Notice for failing to state a claim upon which relief may be granted against them.

MOTION TO DISMISS

I. Motions to dismiss are authorized and important.

Motions to dismiss are specifically allowed by the Commission's rules, which provide that the "answer shall include a motion to dismiss if a party desires to challenge the sufficiency of the complaint." A.A.C. R14-3-106(H). We understand and sympathize that motions to dismiss place the Administrative Law Judge in an awkward position. However, the Administrative Law Judge

1 has the authority to prepare a Recommended Opinion and Order for the Commission with respect
2 to the granting or denying of a motion to dismiss. Alternatively, the Administrative Law Judge
3 may order the administrative closure of a docket if the Applicant (here the Division) fails to amend
4 their filing to conform to legal requirements. Indeed, this is commonly done in utility proceedings
5 before the Commission, which are governed by the same procedural rules that apply to this case.

6 Moreover, the Commission must follow its own rules. *Gibbons v. Arizona Corp. Comm'n*,
7 95 Ariz. 343, 347, 390 P.2d 582, 585 (1964). That obligation includes the Commission's motion to
8 dismiss rule, which would be rendered a nullity if motions to dismiss are not addressed on their
9 merits.

10 In addition, motions to dismiss serve an important purpose in the legal system. As the
11 United States Supreme Court recently explained, "Litigation... exacts heavy costs in terms of
12 efficiency and expenditure of valuable time and resources" and therefore Plaintiffs must submit a
13 well-pleaded complaint or their case should be dismissed on a motion to dismiss. *Ashcroft v. Iqbal*,
14 556 U.S. 662, 685 (2009); *see also Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 973 (8th Cir.
15 1968)(explaining that a "motion to dismiss for failure to state a cause of action can serve a useful
16 purpose in disposing of legal issues with a minimum of time and expense to the interested parties").

17 Here, there is a significant disparity in resources. The Division has a stable of experienced
18 attorneys on staff, and it incurs little or no incremental expense by pursuing this litigation. In
19 contrast, to defend themselves, the Morans must pay for expensive private counsel. Because the
20 Division has failed to adequately allege a claim for relief against the Morans, it is unfair to force the
21 Morans to go through the ruinously expensive litigation process. Instead, the claims against the
22 Morans should be dismissed, as expressly allowed by the Commission's rules.

23 **II. The Notice fails to state a claim for relief against the Morans.**

24 The purpose of a complaint is to "give the opponent fair notice of the nature and basis of the
25 claim." *Mackey v. Spangler*, 81 Ariz. 113, 115, 301 P.2d 1026, 1027-28 (1956). Therefore, where
26 a complaint brings claims against multiple defendants, the complaint must allege facts sufficient to
27 demonstrate that the claimant is entitled to relief against each defendant or respondent. Otherwise,

1 the defendant will not have notice of the basis of the claims against him or her, as opposed to the
2 other defendants. Thus, “[w]here a complaint pleads facts that are merely consistent with a
3 defendant's liability”, the complaint must be dismissed. *Ashcroft v. Iqbal*, 556 U.S. 662, 678
4 (2009)(internal citations and quotation marks removed).

5 The Notice is remarkable in that it never alleges that that Mr. Moran offered or sold anyone
6 a security. Instead, the Notice vaguely claims that “Respondents” offered and sold securities.
7 (Notice, ¶ 78). That simply isn’t enough. For example, a complaint that defines “Respondents” as
8 A and B, makes numerous factual allegations against A alone, and then claims “Respondents”
9 violated securities laws doesn’t state a valid claim against B. Here, as laid out in the Notice itself,
10 the alleged securities were offered and sold by Mr. Hampton and HCM. The only sales allegation
11 specific to Mr. Moran is that “TIM and PAT introduced certain individuals to HAMPTON, to
12 whom HAMPTON, offered/or sold securities to.” (Notice, ¶ 21). Arizona law does not attach
13 liability to “introducing” people to each other. Rather Arizona law makes it “unlawful to sell or
14 offer for sale within or from this state any securities....” unless the securities are registered or
15 exempt. A.R.S. § 44-1841(A). The Morans do not believe that there is any dispute that Mr. Moran
16 did not himself make any offer or sale. If the Division believes otherwise, it should plead some
17 specific instance of an offer or sale by Mr. Moran. Otherwise, the Division’s claim against Mr.
18 Moran under A.R.S. § 44-1841 should be dismissed.

19 Likewise, the Division alleges “Respondents” committed securities fraud. (Notice, ¶ 78).
20 But the Division fails to allege that Mr. Moran made any untrue statement, or omitted any material
21 fact. Rather, the Division alleges “HAMPTON and HCM failed to disclose to investors that...”
22 and “HAMTPON and HCM misrepresented to certain investors...” (Notice, ¶¶ 78(a) and 78(b)).
23 While these allegations may be sufficient to state a claim against Mr. Hampton and HCM, they fail
24 to state a claim against Mr. Moran. Accordingly, the Division’s claim against Mr. Moran for
25 securities fraud should be dismissed.

26 Lastly, the Division seeks to revoke Mr. Moran’s securities registration under A.R.S. § 44-
27 1962. But Mr. Moran is not registered, as stated in the Division’s own Notice. (Notice, ¶ 6).

1 Moreover, the only basis for revocation asserted by the Division are the “offer and sale” and
2 “securities fraud” allegations discussed above. For the same reasons, the Division’s revocation
3 claim is deficient and should be dismissed.

4 **ANSWER OF MRS. PATRICIA MORAN**

5 Importantly, Mrs. Moran had absolutely no involvement whatsoever with regard to the
6 allegations in the Notice. Therefore, Mrs. Moran’s response to each and every allegation is that she
7 is without sufficient information to form a belief as to each allegation and, therefore, denies every
8 allegation.

9 **ANSWER OF MR. TIMOTHY D. MORAN**

10 **I.**

11 **JURISDICTION**

12 1. There are two paragraphs numbered paragraph one in the Notice. Answering the
13 first Paragraph 1 of the Notice, Mr. Moran states that this paragraph presents a legal conclusion that
14 does not require an Answer. In addition, Mr. Moran denies that the Commission has any
15 Constitutional authority in this matter. *See Corporation Comm’n v. Pacific Greyhound Lines*, 54
16 Ariz. 159, 94 P.2d 443 (1939)(holding that the Arizona Corporation Commission’s constitutional
17 authority is limited to setting utility rates).

18 **II.**

19 **RESPONDENTS**

20 2. Answering the second Paragraph 1 of the Notice, Mr. Moran is without sufficient
21 information to form a belief as to each allegation and, therefore, denies every allegation.

22 3. Answering Paragraphs 2 through 4 of the Notice, Mr. Moran is without sufficient
23 information to form a belief as to each allegation and, therefore, denies every allegation.

24 4. Answering Paragraph 5 of the Notice, Mr. Moran notes that the phrase “at all
25 relevant times” is not defined, so therefore he cannot accurately respond to the allegation, and
26 accordingly he denies the allegation. Mr. Moran admits he is currently a resident of Arizona.

27 5. Mr. Moran admits the allegations of Answering Paragraphs 6 and 7 of the Notice.

1 explain who the alleged statement was made to, and accordingly Mr. Moran lacks sufficient
2 information to admit or deny and accordingly he denies the allegation.

3 15. Mr. Moran denies the allegations of Paragraphs 19 and 20 of the Notice.

4 16. Answering the allegations of Paragraphs 21 to 72 of the Notice, Mr. Moran is
5 without sufficient information to form a belief as to each allegation and, therefore, denies every
6 allegation.

7 **IV.**

8 **VIOLATION OF A.R.S. § 44-1841**

9 **(Offer or Sale of Unregistered Securities)**

10 17. Mr. Moran denies the allegations of Paragraph 73 of the Notice.

11 18. Answering the allegations of Paragraph 74 of the Notice, Mr. Moran is without
12 sufficient information to form a belief as to each allegation and, therefore, denies every allegation.

13 19. Mr. Moran denies the allegations of Paragraph 75 of the Notice.

14 **V.**

15 **VIOLATION OF A.R.S. § 44-1842**

16 **(Transactions by Unregistered Dealers or Salesmen)**

17 20. Answering the allegations of Paragraphs 76 and 77 of the Notice, Mr. Moran notes
18 that these allegations do not pertain to him, and he is without sufficient information to form a belief
19 as to each allegation and, therefore, denies every allegation.

20 **VI.**

21 **VIOLATION OF A.R.S. § 44-1991**

22 **(Fraud in Connection with the Offer or Sale of Securities)**

23 21. Mr. Moran denies the allegations of Paragraphs 78 and 79 of the Notice.

24 ...

25 ...

26 ...

27 ...

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VII.

REMEDIES PURSUANT TO A.R.S. § 44-1962

(Denial, Revocation, or Suspension of Registration of Salesman; Restitution, Penalties, or Other Affirmative Action)

22. Mr. Moran denies the allegations of Paragraph 80 of the Notice.

VIII.

REQUESTED RELIEF

23. Answering Paragraphs 1 through 6 under the heading "Requested Relief" Mr. Moran denies that the Division is entitled to any relief.

IX.

HEARING OPPORTUNITY

24. The Morans have requested a hearing pursuant to A.R.S. § 44-1972.

X.

ANSWER REQUIREMENT

25. As set forth above, the Morans have answered. The Morans deny each and every allegation not specifically admitted above.

AFFIRMATIVE DEFENSES

26. For their first affirmative defense, the Morans allege that the Notice fails to state a claim upon which relief can be granted and this matter should be dismissed in its entirety with prejudice, and with attorney's fees awarded to the Morans.

27. For their second affirmative defense, the Morans allege that no securities are involved in the alleged transactions.

28. For their third affirmative defense, the Morans allege that any ruling in this action would be unconstitutional under the laws of the State of Arizona and under the laws of the United States of America for, *inter alia*, failing to provide due process, among other provisions.

...

1 29. For their third fourth affirmative defense, the Morans allege that application of
2 A.R.S. § 44-2031(C) in this case exceeds the authority granted to the Commission by the Arizona
3 Constitution.

4 30. For their fifth affirmative defense, the Morans allege that to the extent the
5 documents that were allegedly offered or sold are determined to be securities the Respondents and
6 the subject documents are exempt from the registration provisions of the Arizona Securities Act.

7 31. For their sixth affirmative defense, the Morans allege that all of Mr. Moran's actions
8 were taken for a proper purpose.

9 32. For their seventh affirmative defense, the Morans allege that Mr. Moran has not
10 taken any improper action within or from the State of Arizona.

11 33. For their eighth affirmative defense, the Morans allege that the Commission's
12 claims are barred by the applicable statute(s) of limitations.

13 34. For their ninth affirmative defense, the Morans state that Mr. Moran did not offer or
14 sell investment contracts or any securities under Arizona law with respect to the alleged securities
15 referred to in the Notice.

16 35. For their tenth affirmative defense, the Morans allege that the claims in the Notice
17 are barred by estoppel.

18 36. For their eleventh affirmative defense, the Morans allege the claims in the Notice are
19 barred by laches.

20 37. For their twelfth affirmative defense, the Morans allege that the claims in the Notice
21 are barred by waiver.

22 38. For their thirteenth affirmative defense, the Morans allege that the claims in the
23 Notice are barred by assumption of risk.

24 39. For their fourteenth affirmative defense, the Morans allege that the Securities
25 Division has failed to allege securities fraud with reasonable particularity as required by Rule 9(b)
26 of the Arizona Rules of Civil Procedure.

27

1 40. For their fifteenth affirmative defense, the Morans allege that Mr. Moran did not
2 know, and in the exercise of reasonable care could not have known, of any alleged untrue
3 statements or material omissions as set forth in the Notice.

4 41. For their sixteenth affirmative defense, the Morans allege that Mr. Moran has not
5 acted with the requisite scienter.

6 42. For their seventeenth affirmative defense, the Morans allege that Mr. Moran has not
7 employed a deceptive or manipulative device in connection with the offer, purchase or sale of any
8 security.

9 43. For their eighteenth affirmative defense, the Morans state that the alleged purchasers
10 have suffered no injuries or damages as a result of the Morans' acts.

11 44. For their nineteenth affirmative defense, the Morans state that Mr. Moran did not
12 make any misrepresentations or omissions, material or otherwise.

13 45. For their twentieth affirmative defense, the Morans alleges that Mr. Moran acted in
14 good faith and did not directly or indirectly induce the conduct at issue.

15 46. For their twenty-first affirmative defense, the Morans allege that they have caused
16 no damages.

17 47. For their twenty-second affirmative defense, the Morans alleges that purchasers
18 relied on others, and not Mr. Moran, in connection with the matters at issue in the Notice.

19 48. For their twenty-third affirmative defense, the Morans allege alleges that restitution
20 is barred because the damages, if any, were caused by the purchasers' own acts or omissions.

21 49. For their twenty-fourth affirmative defense, the Morans allege that restitution is
22 barred, in whole or in part, because purchasers failed to mitigate their damages.

23 50. For their twenty-fifth affirmative defense, the Morans allege that the claims in the
24 Notice and restitution are barred, in whole or in part, because purchasers' damages, if any, were
25 caused by the acts of others over whom Mr. Moran had no control, and for whose acts Mr. Moran is
26 not legally answerable.

27

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1 RESPECTFULLY SUBMITTED this 24th day of August, 2012.

2 ROSHKA DeWULF & PATTEN, PLC

3
4 By 

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10 Attorneys for Respondents
11 Timothy D. Moran and Patricia Moran

12 ORIGINAL and thirteen copies of the foregoing
13 filed this 24th day of August, 2012 with:

14 Docket Control
15 Arizona Corporation Commission
16 1200 West Washington Street
17 Phoenix, Arizona 85007

18 Copy of the foregoing hand-delivered
19 this 24th day of August, 2012 to:

20 Marc E. Stern, Administrative Law Judge
21 Hearing Division
22 Arizona Corporation Commission
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23 Phong (Paul) Huynh, Esq.
24 Securities Division
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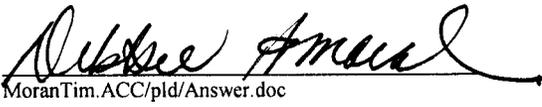
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Copy of the foregoing mailed
this 24th day of August, 2012 to:

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