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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission
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COMMISSIONERS

BOB STUMP, Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

DOCKETED BY [Signature]

In the matter of:
OUT OF THE BLUE PROCESSORS, LLC,
an Arizona limited liability company, d/b/a
Out of the Blue Processors II, LLC,
MARK STEINER (CRD# 1834102) and
SHELLY STEINER, husband and wife,
Respondents.

DOCKET NO. S-20837A-12-0061
SECURITIES DIVISION'S RESPONSE
TO RESPONDENT'S MOTION TO
DISMISS, ALTERNATIVELY MOTION
TO CONTINUE PRE-HEARING
CONFERENCE, AND REPLY TO
SECURITIES DIVISION'S RESPONSE
TO RESPONDENTS' MOTION TO
VACATE JANUARY 10, 2013 PRE-
HEARING CONFERENCE

A. SUMMARY

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") responds to Respondents' Motion to Dismiss, Alternatively Motion to Further Continue Pre-Hearing Conference, and Reply to Securities Division's Response to Respondent's Motion to Vacate January 10, 2013, Pre-Hearing Conference ("Motion") and ask that it be denied.¹ A review of A.A.C. R14-3-106 and the facts of this case will establish that the Respondent's motion to dismiss is untimely and should be denied since it was not filed back in March 2012.

Alternatively, the Division requests that the due-date to reply to Respondents' motion to dismiss be held in abeyance until the conclusion of the administrative hearing and upon a more detailed filing by Respondents. Respondents' motion to dismiss fails to cite to any particular code, rule, or statute in which they base their request and fails to assert in detail what relief they request, other than "that the status quo be continued for at least several more months." *Respt. Mot.* p.2, lns. 10-11. Thus, the Division requests, without waiving any of its defenses, an order holding in abeyance a

¹ On January 29, 2013, a pre-hearing conference was held in this matter. Thus, the Respondents' motion to continue the pre-hearing conference is moot and is not addressed here.

1 response to the motion to dismiss until the conclusion a final evidentiary hearing in this matter and
2 upon a more detailed filing by Respondents that cites to an applicable code, rule, or statute, and
3 contains the factual basis to support such a motion. Otherwise, the Division would be required to
4 postulate every possible legal basis and supporting fact that Respondents' vague motion could be
5 based on.

6 Finally, as noted by Administrative Law Judge Marc E. Stern ("ALJ Stern") at the January 29,
7 2013, pre-hearing conference, his ability to recommend a dismissal of a party or respondent occurs
8 after an evidentiary hearing has been held and thereafter can be presented as a recommended opinion
9 and order to the Commission. *Tr.* p.6, ln. 25 – p.7, ln. 12.

10 **B. ARGUMENT**

11 **1. The Respondents motion to dismiss is untimely because it was not filed with the Respondents' answer, as required by A.A.C. R14-3-106(H).**

12 The Respondents motion to dismiss is untimely since Respondents' failed to comply with
13 A.A.C. R14-3-106(H), which requires that a motion to dismiss, based on the sufficiency of the
14 complaint, shall be filed within 20 days after the Respondent has been served with the notice. The
15 procedures governing the Division's investigations, examinations, and administrative proceedings
16 are found under the Arizona Administrative Code ("A.A.C.") and chapters 3 and 4 of the A.A.C.
17 Since this matter is before the Commission, A.A.C. R14-3-106 applies and this response will assume,
18 only for the sake of argument, that Respondents' motion to dismiss was in attempted conformity
19 therewith.

20 Since Respondents failed to cite a statute, rule, or code as the basis of their motion to dismiss,
21 the Division is forced to guess. Since the apparent basis cited by Respondents to dismiss this matter is
22 that there is an "absence of credible evidence on which to base the Temporary Orders," it appears that
23 the Respondents are attacking the sufficiency of the Division's Notice. *Respt. Mot.* p.1, ln.27 – p.2,
24 ln1. A.A.C. R14-3-106(H) states that "the answer **shall** include a motion to dismiss if a party desires
25 to challenge the sufficiency of the complaint." (emphasis added). The Respondents failed to include
26 such a motion within 20 days or with their answer. In fact, Respondents' answer failed to state any

1 affirmative defenses. The Respondents were served with the complaint nearly 11 months ago,
2 specifically on February 23, 2012, by personal service. Respondents' deadline to file such a motion
3 expired back in March 2012. Thus, their motion to dismiss is untimely and should be denied.

4 **2. The Division's Notice satisfies the pleading standards applicable to this proceeding.**

5 Even for the sake of argument, if Respondents had timely filed a motion to dismiss pursuant to
6 A.A.C. R14-3-106(H), the Respondents' motion should still be denied since the Division's Notice is
7 sufficient and in compliance with A.A.C. R14-4-306, which is a notice pleading rule. Under
8 A.A.C. R14-4-306, a complaint should notify the opposing party of the nature of the claim. This is
9 entirely consistent with §41-1061(B)(4) of the Arizona Administrative Procedure Act ("AAPA"),
10 which states that a notice shall include "[a] short and plain statement of the matters asserted. If the
11 agency or other party is unable to state the matters in detail at the time the notice is served, the
12 initial notice may be limited to a statement of the issues involved." The Division's Notice satisfies
13 these notice requirements by alleging that from on or about January 3, 2012, Respondents have
14 been offering or selling securities in the form of investment contracts, within or from Arizona,
15 while not registered as dealers or salesmen, in violation of the Securities Act. In fact,
16 Respondents' motion acknowledges in multiple instances the offer or sale of securities, but argue
17 that those transactions are exempt. A few of the relevant excerpts are as follows:

- 18 • "All Blue's offers and sales of member units fit comfortably within the SEC rules
19 relating to exempt transactions and limited public offerings; *Respt. Mot.* p.6, Ins. 8-9
20 • There was an interstate offering; *Id* at Ins. 12-13
21 • For the most part the investors are personal friends of Mr. Steiner. Lunsford has
22 promised to pay a portion of its receipts to Blue and Blue is obligated to pay nearly all
23 the amounts received from Lundsford to the investors, in perpetuity; *Respt. Mot.* p. 2,
24 Ins. 15-17

25 These examples, along with the rest of Respondents' Motion reveal that they are fully aware of the
26 nature of the claims and allegations against them. The issues that remain outstanding are legal

1 determinations to be made by the ALJ at the conclusion of the hearing, specifically, whether the
2 Respondents can meet their burden of proof regarding applicable exemptions and the extent, if
3 any, of restitution and penalties if violations of the Securities Act are established. Thus, their
4 motion to dismiss should be denied.

5 **3. A hearing on the merits, as currently scheduled, is the appropriate forum in which the**
6 **Respondents can contest the allegations of the Division's Notice.**

7 If the Division's denial of the motion to dismiss is not granted, then the Division respectfully
8 requests an order holding in abeyance its response to the motion to dismiss until the conclusion a final
9 evidentiary hearing in this matter and upon a more detailed filing by Respondents that cites to an
10 applicable code, rule, or statute, and contains the factual basis to support such a motion. To require
11 the Division to consider every possible legal basis and supporting fact that Respondents failed to
12 present or cite in their vague motion to dismiss, would be inefficient and improper. (*See also* A.A.C.
13 R14-3-106(K), which also states that "Motions shall conform insofar as practicable with the rules of
14 Civil Procedure for the Superior Court of the state of Arizona." Respondent's motion to dismiss does
15 not conform and it would take a yeoman's effort to guess which civil rule Respondents may claim and
16 thereafter to fully respond).

17 Rather, a hearing on the merits, which is currently scheduled for September 16 – 20, 2013, is
18 the appropriate forum in which the Respondents' can contest the Division's allegations and rebut the
19 Division's evidence. Respondents go to great lengths discussing the credibility and "genuineness of
20 the business plan" and that the "Division neither has nor can it obtain any credible evidence to the
21 contrary." *Respt. Mot.* p. 3, lns. 9-12. Those arguments miss the point because the legitimacy of a
22 proposed business plan does not make a securities offering exempt from the registration requirements
23 of the Securities Act. Currently, the Division's Notice alleges violations of A.R.S. §§ 44-1841 and
24 44-1842, which are registration statutes. As noted above, Respondents do not dispute that offers or
25 sales of unregistered securities have occurred. Rather, the Respondents argue that such transactions
26 are exempt from the registration requirements. This is a legal determination that can be made by the

1 trier-of-fact at the conclusion of the administrative hearing. Thus, dismissal of the Division's Notice
2 at this point is inappropriate.

3 Finally, as noted by ALJ Marc E. Stern, at the conclusion of an evidentiary hearing, if the ALJ
4 determines that the facts, or lack thereof, support a dismissal of a respondent, he would be in position
5 to make such a recommendation to the Commission as part of a recommended opinion and order.
6 Under the facts of this case, only at the conclusion of the evidentiary hearing would a dismissal be
7 appropriate.

8 **C. CONCLUSION**

9 WHEREFORE, the Division requests that the Respondents' motion to dismiss be denied since
10 it is untimely. Alternatively, the Division requests that the due-date to reply to Respondents' motion
11 to dismiss be held in abeyance until the conclusion of the administrative hearing and upon a more
12 detailed filing by Respondents that cites to an applicable code, rule, or statute, and contains the factual
13 basis to support such a motion.

14 Dated this 12th day of February, 2013.

15
16 ARIZONA CORPORATION COMMISSION

17 By _____

18 
Phong (Paul) Huynh

19 Attorney for the Securities Division of the
20 Arizona Corporation Commission
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1 ORIGINAL AND EIGHT (8) COPIES of the foregoing
2 filed this 12th day of February, 2013 with

3 Docket Control
4 Arizona Corporation Commission
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7 COPY of the foregoing
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