

ORIGINAL



0000143522

THE LAW FIRM OF  
**HEURLIN SHERLOCK**

1636 N. SWAN ROAD, STE. 200  
TUCSON, ARIZONA 85712-4096  
TEL 520.319.1200  
FAX 520.319.1221

2013 MAR 15

Bruce R. Heurlin, SBN 003214, BHeurlin@AZtopLawyers.com  
Catherine N. Hounfodji, SBN 027389, CHounfodji@AZtopLawyers.com  
Attorneys for Respondents David Shorey, Mary Jane Shorey

**BEFORE THE ARIZONA CORPORATION COMMISSION**

In the matter of:

JOSEPH COSENZA and ANDREA BENSON,  
husband and wife;

U.S. MEDIA TEAM, LLC, an Arizona limited  
liability company;

THOMAS BRANDON and DIANE M.  
BRANDON, husband and wife;

CELL WIRELESS CORPORATION, a  
Nevada corporation, formerly known as U.S.  
SOCIAL SCENE, a Nevada corporation;

DAVID SHOREY and MARY JANE  
SHOREY, husband and wife;

Respondents.

**DOCKET NO. S-20763-A-10-0430**

**RESPONDENTS DAVID  
SHOREY AND MARY JANE  
SHOREY'S AMENDED  
APPLICATION  
FOR REHEARING**

Arizona Corporation Commission  
DOCKETED

MAR 15 2013

DAVID SHOREY  
M. J. SHOREY  
*DSM*

Pursuant to A.R.S. § 44-1974, David and Mary Jane Shorey apply to the Arizona Corporation Commission ("Commission") for a rehearing of Decision No. 73656 (February 6, 2013) ("Decision"). In the Decision, the Commission found that David Shorey was a "controlling person" under A.R.S. § 44-1999(B). The Commission should grant a rehearing on the issue of controlling person liability as to Shorey because the Decision, on this issue, is not justified by the evidence and is contrary to the law. See

1 A.A.C. R14-3-112(C)(7). Pursuant to A.A.C. R14-3-112(B), Respondents submit this  
2 amended application for rehearing to address the response filed by the Securities  
3 Division. Additions have been made in redline to facilitate the Commission's review of  
4 this amended application.

5 **I. Introduction**

6 Following a three-day hearing in front of ALJ Marc E. Stern, including the  
7 testimony of several witnesses and the presentation of many exhibits, ALJ Stern issued a  
8 proposed order that included a finding that David Shorey was not liable as a "controlling  
9 person" under § 44-1999(B). ALJ Stern had read all of the briefs, heard all of the  
10 evidence, seen all of the witnesses testify, and judged the credibility of each of the  
11 witnesses. The testimony at the hearing and the argument in the briefs included the issue  
12 of Shorey's liability as a control person. Having gathered that information and having  
13 evaluated the legal positions of the parties, ALJ Stern, the finder of fact, found that  
14 Shorey was not liable.

15 The Securities Division ("Division") filed exceptions to the proposed order  
16 ("Exceptions"), to which Shorey was **not permitted, by rule, to respond in writing.**

17 The Commission then considered ALJ Stern's ruling and the Exceptions at an  
18 Open Meeting on January 31, 2013. Following ALJ Stern's recital of his findings of fact  
19 and conclusions of law, the Division was permitted to reiterate its exceptions and to  
20 supplement its argument. At that time, Shorey, through counsel, was permitted to  
21 respond. Throughout the time that this issue was discussed, Shorey's counsel repeatedly  
22 had to request permission to respond to both the Division's comments and the comments  
23 of the individual Commissioners.

24 After some discussion, Chairman Stump introduced an amendment modifying ALJ  
25 Stern's proposed order. The amendment was approved by a 4-1 vote of the Commission.  
26 The order, as amended, was then also approved by a 4-1 vote.

27  
28

1 **II. David Shorey was not a “controlling person” under A.R.S. § 44-1999(B).**

2 In the Decision, the Commission found that “a preponderance of the evidence  
3 establishes that Mr. Shorey is a controlling person of CWC/USSS.” Decision p. 29 at ¶  
4 223. The Commission, thus, concluded that “David Shorey directly or indirectly  
5 controlled CWC/USSS within the meaning of A.R.S. § 14-1999(B).” Decision p. 30 at ¶  
6 12. However, the Commission used the wrong legal standard in arriving at this finding.

7 Section 44-1999(B) states:

8 Every person who, directly or indirectly, controls any person liable for a  
9 violation of section 44-1991 or 44-1992 is liable jointly and severally with  
10 and to the same extent as the controlled person to any person to whom the  
controlled person is liable unless the controlling person acted in good faith  
and did not directly or indirectly induce the act underlying the action.

11 Thus, in order to find someone a “controlling person” under this law, the Commission  
12 must find that the individual directly or indirectly controlled any person or entity liable  
13 for a violation of A.R.S. §§ 44-1991 or 44-1992. See A.R.S. §§ 44-1801, 44-1999(B).  
14 CWC/USSS was found liable for violations of § 44-1991. Decision p. 30 at ¶ 8. But  
15 Shorey did not “control” CWC/USSS in the sense contemplated by § 44-1999(B), which  
16 is described in detail through the case law below.<sup>1</sup> However, *Cosenza was found liable*  
17 *as a control person of CWC/USSS*. Exhibit 1 (Commission order finding Cosenza  
18 liable) p. 7 at ¶ 6.

19 In *Eastern Vanguard Forex, Ltd. v. Arizona Corporation Commission*, 206 Ariz.  
20 399, 79 P.3d 86 (App. 2003), the court held that, though specific knowledge of the  
21 activities was not required, to be liable as a control person, the person had to have the  
22 power “to directly or indirectly *control the activities* of those persons or entities liable as  
23 primary violators.” 206 Ariz. 399, ¶ 42, 79 P.3d at 99 (emphasis added).

24 Recent case law from the United States Supreme Court is also instructive. In  
25 *Janus Capital Group, Inc. v. First Derivative Traders*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 2296, 2304  
26

27 <sup>1</sup> There is ample evidence that Shorey could not and did not control Cosenza. See, e.g.,  
28 Decision p. 22 at ¶ 158, pp. 28-29 at ¶ 218. Consequently, Shorey was not found liable  
under § 44-1999(B) for controlling Cosenza.

1 (2011), the Court held that an entity with “significant influence” over the liable entity  
2 could not be primarily liable and, further, indicated that “**significant influence**” over the  
3 **primary violator would not be sufficient for secondary liability based on control**  
4 **either.**<sup>2</sup> See also Darryl P. Rains, *The Future of Control Person Liability after Janus*,  
5 Securities Litigation Report, Feb. 2012, vol. 9:2 at 10, 13.

6 Here, Shorey did manage certain aspects of the business, but *he did not have the*  
7 *power to control the activities of the primary violator, for which CWC/USSS was found*  
8 *to have violated the Act.*

9 Shorey was the sole signatory on a company bank account because Cosenza  
10 refused to sign the bank’s signature card; he was a director of the entity; he was an officer  
11 and the Chief Financial Officer of the entity; and he signed certain documents at the  
12 direction of the Board of Directors. While Shorey may have had “significant influence”  
13 over CWC/USSS, that alone is not sufficient to make him liable as a control person. See  
14 *Janus*, 131 S.Ct. at 2304.

15 Furthermore, although the Division emphasized that Shorey used his home address  
16 as the office address – and although that assertion seemed to carry great weight with the  
17 Commission – that is not accurate. **CWC/USSS’s office was in Phoenix at Cosenza’s**  
18 **addresses.** The business office was **not** Shorey’s home address in Tucson.

19 Cosenza’s Phoenix-area addresses were listed consistently on a wide variety of  
20 corporate documents. The receipts for the sales of securities (Exhibits 2, 3, 4), corporate  
21 checks (Exhibit 5), corporate letters (Exhibits 6, 7), and bills from vendors (Exhibit 8), all  
22 reflect Cosenza’s Phoenix-area addresses. Likewise, a draft license agreement confirms  
23 that the business address was not in Tucson. See Exhibit 9.

24  
25  
26 <sup>2</sup> Despite the Division’s attempt to disregard *Janus*, cases decided by the United States  
27 Supreme Court do have a significant bearing on the law in Arizona, and the Court did  
28 address control person liability. The Court’s conclusion that “significant influence” is  
not sufficient to assign secondary control person liability is directly related to this  
case and should inform the decision of the Commission.

1 Cosenza kept the checkbook in Scottsdale and paid company expenses from that  
2 address. Shorey did have access to one corporate bank account, but there were very few  
3 transactions on that account between January 1, 2008 and June 30, 2008.

4 **For the Division to meet its burden of proof that Shorey was secondarily**  
5 **liable as a control person, it needed to prove that Shorey had the power to control**  
6 **the activities in question.** And the fact of the matter is that *Shorey did not have the*  
7 *power to control the activities of CWC/USSS that violated the Act* because Cosenza was  
8 acting as a renegade by seeking investments without Shorey's knowledge.<sup>3</sup> To revise the  
9 subscription agreements, Cosenza made changes to a form from EDGAR that Shorey had  
10 given him previously, but Shorey had no knowledge that this form had been used.

11 Cosenza kept Shorey in the dark regarding certain business transactions, including  
12 the investments for which Cosenza was found liable. While Shorey was the sole  
13 signatory on a corporate bank account, **Cosenza used a different bank account, over**  
14 **which Shorey had no control whatsoever, to keep the "invested" funds.** See Decision  
15 pp. 19-20 at ¶ 138; Exhibit 1 p. 5 at ¶ 29. Shorey had no knowledge of these transactions  
16 whatsoever until April 2008, when the individuals complained that they had not received  
17 their stock certificates. See Decision p. 22 at ¶ 165. Moreover, because the account  
18 Cosenza used was separate from the corporate account, Shorey could not have known  
19 about the "investments" despite his role as CFO. As part of the investment agreement,  
20 Cosenza also appointed these investors as Directors and Officers, **without any notice to**  
21 **Shorey.** See Exhibit 10. This action further demonstrates Cosenza's control over  
22 CWC/USSS, as well as his blatant disregard for the corporate structure and its  
23 requirements.

24  
25  
26  
27 <sup>3</sup> Furthermore, the Commission concurred that Shorey did not have the power to control  
28 the activities of Cosenza. See, e.g., Decision p. 22 at ¶ 158, pp. 28-29 at ¶¶ 218, 223, p.  
30 at ¶ 12 (noting evidence and not finding Shorey secondarily liable for Cosenza's  
violations).

1           Additionally, the Division is blatantly wrong and misleads the Commission when  
2 it claims that “the evidence supporting the finding that Respondent David Shorey was a  
3 control person was uncontested.” Response p. 3: 15-16. **Both Shorey and Brandon**  
4 **testified that Shorey was not a control person.** Moreover, the evidence described  
5 above – especially the fact that Shorey did not control all of the corporation’s bank  
6 accounts – make it clear that there was substantial evidence to show that Shorey was not  
7 a control person. And though the Division cites to the finding of ALJ Stern, they neglect  
8 to mention that he, in fact, concluded that Shorey was not a control person.  
9 Consequently, their argument that their evidence was uncontested is dishonest. At the  
10 end of the day, **the Division had the burden of proof, and it failed to meet that**  
11 **burden.**

12           Furthermore, Respondents do not claim, as the Division asserts, that his lack of  
13 knowledge necessarily means that he is not a control person. Instead, Respondents argue  
14 that **Shorey cannot be liable as a control person because Shorey had no power to**  
15 **control the activities that violated the Act. See *Eastern Vanguard*, 206 Ariz. 399, ¶ 42,**  
16 **79 P.3d at 99 (to be liable as control person, person had to have power “to directly or**  
17 **indirectly *control the activities* of those persons or entities liable as primary violators”)**  
18 (emphasis added).

19           **Because Shorey had no power to control the activities that violated the Act, he**  
20 **cannot be liable** as a control person. Consequently, the Decision finding him liable is not  
21 justified by the evidence and is contrary to the law, and a rehearing on this issue should  
22 be granted.

23 **III. David Shorey acted in good faith and did not induce the investments.**

24           In the alternative, if the Commission finds that Shorey was a control person or  
25 denies his application for a rehearing on that issue, it should hear, and find, that Shorey  
26  
27  
28

1 “acted in good faith and did not directly or indirectly induce the act underlying the  
2 action.” A.R.S. § 44-1999(B).<sup>4</sup>

3 “To prevail using this defense, the controlling person must demonstrate both good  
4 faith and lack of inducement.” *E. Vanguard*, 206 Ariz. 299, ¶ 48, 79 P.3d at 100. In its  
5 exceptions to ALJ Stern’s proposed order, the Division concedes that Shorey did not  
6 induce the violations. *See* Exceptions pp. 12-13. And the findings of fact in the Decision  
7 support this conclusion. *See, e.g.*, Decision p. 8 at ¶ 41, p. 10 at ¶ 60, p. 13 at ¶¶ 87-88, p.  
8 21-22 at ¶¶ 147-156, 165, p. 23 at ¶¶ 169-170, p. 28-29 at ¶¶ 218-221. The only issue,  
9 therefore, is whether Shorey acted in good faith.

10 As the Division noted in its Exceptions, Shorey had a duty, as a director, to protect  
11 the interests of the corporation. That is precisely what Shorey did. Shorey was acting at  
12 all times to protect the interests of the corporation and its shareholders. Had he backed  
13 out when Cosenza was being difficult about signing the bank’s signature card, for  
14 example, the corporation and its shareholders would have been harmed. Had he ceased  
15 processing payments for advertising activity and **paying the corporation’s bills (with**  
16 **his personal funds)**, the corporation and its shareholders would have been harmed. Had  
17 he ceased producing minutes of the directors’ meetings, the corporation and its  
18 shareholders would have been harmed. And had he resigned and walked away, as the  
19 comments of the commissioners seemed to suggest that he should have, *he would have*  
20 *abdicated his corporate duties to Cosenza, the renegade*, who was, as the Commission  
21 pointed out, already being somewhat uncooperative. Shorey acted to protect the  
22 corporation and its shareholders.

23 Shorey testified that at all times he acted in good faith and at the direction of the  
24 Board of Directors. In an effort to keep the corporation in good standing, Shorey

25  
26  
27 <sup>4</sup> The Division contends that Shorey waived his right to assert this affirmative defense.  
28 But the Division’s argument is misguided. Shorey’s answer denied control liability  
outright -- he was not admitting being a control person but relying on the affirmative  
defense. He is not precluded for asserting that defense now.

1 continued to exercise his duties in good faith. Moreover, in April, when Shorey learned  
2 of the investments, he tried to get stock certificates issued to the investors. When that  
3 failed, he resigned. The evidence presented to ALJ Stern during the three-day hearing  
4 and in the briefs supports a finding that Shorey acted in good faith and did not induce the  
5 violation.

6 The Division, and, by its Decision, the Commission, are trying to hold Shorey  
7 liable for not acting **when he did not even know anything was going on**. He could not  
8 have known. By design, Cosenza kept Shorey in the dark so that he, Cosenza, could  
9 successfully steal the potential investors' money. If Shorey is to be held liable for  
10 Cosenza's actions, made through the corporation, in spite of Shorey's efforts to diligently  
11 undertake his duties as a director and in the absence of any action inducing the violation,  
12 *then any director or officer of a corporation could similarly be held liable for the*  
13 *corporation's violations despite no knowledge, no inducement, and acting in good*  
14 *faith.*

15 Furthermore, A.R.S. § 10-830(D) establishes a presumption that the director of a  
16 corporation has acted in accordance with his duties, and the party challenging the  
17 director's actions has the burden of rebutting this presumption by **clear and convincing**  
18 **evidence**. The Division has not met this burden.

19 The Commission's finding of fact that "Mr. Shorey failed to present sufficient  
20 evidence that he acted in good faith and did not directly or indirectly induce the antifraud  
21 violation of the Act by CWC/USSS" is *not*, consequently, justified by the evidence and is  
22 contrary to the law. Thus, a rehearing on this issue should be granted.

#### 23 **IV. CONCLUSION**

24 For the reasons stated herein, David and Mary Jane Shorey request that the  
25 Commission grant this application for rehearing to address the issue of control person  
26 liability as to David Shorey because the Decision is not justified by the evidence and is  
27 contrary to the law.

28

HEURLIN SHERLOCK  
1636 N. SWAN ROAD, STE. 200  
TUCSON, ARIZONA 85712  
520.319.1200

1 DATED March 14, 2013.

2  
3 HEURLIN SHERLOCK

4 By:   
5 Bruce R. Heurlin  
6 Catherine N. Hounfodji  
7 Attorneys for Respondents David Shorey,  
8 Mary Jane Shorey

9 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing  
10 By Federal Express Overnight Delivery on 3/14/2013, to:

11 Docket Control  
12 Arizona Corporation Commission  
13 1200 West Washington  
14 Phoenix, Arizona 85007

15 COPY of the foregoing mailed on March 14, 2013, to:

16 Matt Neubert, Director, Securities Division  
17 Arizona Corporation Commission  
18 1300 West Washington 3rd Floor  
19 Phoenix, Arizona 85007-2996

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

24 Aikaterine Vervilos  
25 Securities Division Attorney  
26 Arizona Corporation Commission  
27 1300 West Washington 3rd Floor  
28 Phoenix, Arizona 85007-2996

Thomas L. Brandon and Diane M. Brandon  
10206 E Desert Flower Place  
Tucson, Arizona 85749