

ORIGINAL



BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

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

ARIZONA CORPORATION COMMISSION
OFFICE OF THE CLERK
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In the matter of:

SEED Corporation, an Arizona Corporation dissolved by administrative action;

Randall Duane Simonson and Marilyn J. Simonson, husband and wife;

Karl Henry Rehberg a/k/a Shawn Pierce, and Helen Rehberg a/k/a Lisa Pierce, husband and wife;

Respondents.

DOCKET NO. S-20844A-12-0122

SECURITIES DIVISION'S POST HEARING BRIEF

Hearing Date: February 19, 2013

Assigned to Administrative Law Judge Marc E. Stern

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

A. SUMMARY OF THE ISSUES.

The main questions presented in this case are: (1) whether unregistered dealers and salesmen, based out of Phoenix, Arizona, have violated the registration provisions of the Securities Act when they offered and sold securities; (2) whether lack of scienter or advice of counsel are affirmative defenses against Securities Act liability; and (3) whether the community property of a spouse living in a non-community state may be held liable for violations of the Securities Act committed while the spouse resided in Arizona.

Arizona Corporation Commission
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1 **B. JURISDICTION.**

2 The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona
3 Constitution and the Securities Act of Arizona, A.R.S. § 44-180 1 et seq. (“Securities Act”).

4 **C. FACTS.**

5 Randall Duane Simonson (“Simonson”) resided in Arizona for all relevant times. Hr’g Tr.
6 164:20, Feb. 19, 2013. Marilyn J. Simonson (“Mrs. Simonson”) was at all relevant times the
7 spouse of Simonson. Hr’g Tr. 164:25. Karl Henry Rehberg a/k/a Shawn Pierce (“Rehberg”) was at
8 all relevant times an Arizona resident. Helen Rehberg a/k/a Lisa Pierce (“Mrs. Rehberg”) was at all
9 relevant times the spouse of Rehberg. Hr’g Tr. 97:13 (“they were married in 1982”); Ex. 3(d)
10 p. 5 “she has had no contact with her husband” (as of August 20, 2008). SEED Corporation
11 Inc. (“SEED”) was an Arizona corporation which conducted all business operations in and from
12 Arizona at all relevant times and is now dissolved by administrative action. Ex. 2(a) and (c).
13 Simonson was the president and chief executive officer of SEED at all relevant times. Hr’g Tr.
14 129:1. Simonson, Rehberg, and SEED may be referred to in any combination as “Respondents.”
15 Between the timeframe of May, 2007 to September, 2008, Simonson was not a registered dealer or
16 salesman with the Commission. Ex. 1(b). From May, 2007 to September, 2008, Rehberg was not a
17 registered dealer or salesman with the Commission. Ex. 1(c). From May, 2007 to September,
18 2008, SEED was not a registered dealer with the Commission. Ex. 1(a). Respondents have not
19 made any state securities filings to date. Hr’g Tr. 11:25.

20 From at least as early as May, 2007 to at least as late as September, 2008, Respondents
21 offered from within Arizona securities in the form of common stock shares and a note. Simonson
22 incorporated SEED to finance and develop a self-storage and document storage facility that was to
23 be built and operated in Mesa, Arizona (the “Fiesta Mesa Facility”). SEED purchased a parcel of
24 land in Mesa, AZ suitable for construction of the Fiesta Mesa Facility in the fall of 2007 for \$1.2
25 million, paying with approximately \$650,000 cash and \$550,000 debt financed through a mortgage.
26 Hr’g Tr. 147:17. SEED rented an office at 4049 E. Presidio St., Mesa, AZ, paid employees for

1 services such as book keeping and market research, and worked to secure document storage
2 customers in anticipation of opening its Fiesta Mesa Facility. Hr'g Tr. 147:15; 149:12.

3 SEED also made investments in green technologies that it planned to use in its Fiesta Mesa
4 Facility, such as contributing to the development of energy efficient air conditioning, and toward
5 the development of radio tag technology that would enable SEED to locate stored items within its
6 facility. SEED also incurred professional service fees for appraisals, accounting, and attorneys.
7 While the construction cost of the Fiesta Mesa Facility was projected to be approximately \$8.75
8 million, SEED ultimately raised approximately \$1.629 million through selling stock and \$20,000
9 through sale of a note. Ex. 80(b).

10 Simonson made several applications to financial institutions seeking loans in order to
11 finance construction of the Fiesta Mesa Facility. Hr'g Tr. 151:25. SEED was not able to close a
12 commercial loan to fund construction of its facility. *Id.* Lacking operating capital, SEED was
13 unable to break ground on the Fiesta Mesa Facility, and returned title of the Mesa Land parcel to its
14 seller after defaulting on or around November 1, 2009 on interest payments. Hr'g Tr. 164:7

15 **A. The First Security Offering.**

16 Between June, 2007 and April, 2008, Respondents sold approximately 538,000 shares of
17 SEED Corporation Class A Common stock (the "First Security Offering") at a purchase price of
18 \$4.25 to approximately 48 investors located within Arizona and other jurisdictions. Ex. S-15 p.
19 ACC2090. Respondents provided no evidence that SEED registered the First Security Offering
20 with the Commission at any relevant time.

21 SEED Corporation issued to offerees and/or investors a document titled "SEED Corporation
22 Subscription Agreement" (the "Subscription Agreement"). *See* Exs. 29-79. The document bore a
23 footnote stating "Copyright 2007 S. Pierce, All Rights Reserved. Confidential PPM. . . ." *E.g.*, Ex.
24 S-29. S. Pierce is Shawn Pierce, who investors believed to be a consultant to SEED. "Shawn
25 Pierce" was subsequently discovered to be an alias used by Respondent Karl Henry Rehberg.
26 Despite bearing a footnote stating "Confidential PPM," the Subscription Agreement explicitly

1 states that it is being provided to the offeree/investor “without a SEED CORPORATION’S
2 Confidential Private Placement Memorandum” *E.g. Id.* at ACC002455 (emphasis added). The
3 SEED subscription agreement did not contain the sort of information that would allow a
4 sophisticated investor to not need the protection of the securities laws.

5 In addition to Rehberg contacting likely investors, others heard of an investment
6 opportunity with SEED by word of mouth, including investors Susan Sica and Howard Lein, and
7 also including through discussions at investments clubs. Hr’g Tr. 44:1; 72:10; 148:15. Rehberg
8 and/or Simonson invited offerees to SEED’s Mesa, Arizona offices to make investment
9 presentations. Rehberg, Simonson, and/or other SEED representatives provided a guided tour of
10 SEED’s offices and discussed investing in the project. Hr’g Tr. 44:3. Even though the
11 Subscription Agreement was accompanied by an investor suitability questionnaire, SEED allowed
12 13 investors to purchase stock without indicating that they were Accredited Investors. Exs. 29-79.
13 The suitability questionnaire was provided contemporaneously with the offers made to potential
14 SEED investors. Hr’g Tr. 44:25.

15 In a September 24, 2007 SEED letter to SEED stockholders, Simonson informed investors
16 that SEED had recently retained a local law firm which conducted an investigation in which it
17 “discovered that our private placement offering earlier this summer did not meet federal or state
18 securities law guidelines due to, among other things, inadequate disclosure and documentation.”
19 Ex. 9 ACC002083. By the time Simonson wrote the stockholders asking them to send in the
20 detailed investor questionnaires, 44 investors had already purchased approximately \$1.432 million
21 worth of SEED Corporation shares. Ex. S-80(a). By SEED’s own account, at least “[f]our of the
22 prior investors were determined to be unaccredited investors, and so SEED required those investors
23 to rescind.” Ex. 16 p. ACC002041.

24 Throughout the course of SEED’s sales and marketing efforts, Shawn Pierce was held out to
25 be an authorized representative of SEED, and an advisor to SEED possessing experience and
26 expertise in securities fundraising. Ex. 10 at ACC002064. The Executive Summary document

1 SEED provided to investors describes the involvement of "Shawn Pierce." "Shawn Pierce" is
2 credited with "making this project possible, and further develop[ing] the concept and financial
3 structure for SEED." *Id.* The Executive Summary also describes "Shawn Pierce" as a "consultant"
4 to SEED who "provides the liaison between the companies [SEED and its affiliates] and has
5 developed some of the principal ideas behind several of the Consortium's [SEED and its affiliates]
6 products and financial strategies." *Id.*

7 In truth and unknown to SEED investors, "Shawn Pierce" was an alias taken by Respondent
8 Karl Henry Rehberg, with no apparent connection to any of those persons in the state of Arizona
9 who are truly named Shawn Pierce. Unknown to SEED investors and offerees, Rehberg and his
10 wife had been investigated for fraud in connection with \$21 million in unregistered securities
11 offerings in Florida. After learning they were targets of a federal grand jury investigation and
12 negotiating a plea agreement to settle the criminal matter, Rehberg and his wife fled prosecution in
13 September 1998 in order to avoid serving time in prison. Ex. 3(d) p. 5.

14 A criminal warrant for Rehberg's arrest was issued in December, 1998, which was
15 outstanding for the entire time Rehberg was involved with SEED. Hr'g Tr. 168:9. Rehberg was
16 arrested during the course of the fundraising on or about August 17, 2007 by the Mesa Police
17 Department, and was soon after discovered to be Karl Henry Rehberg. Hr'g Tr. 103:3. Rehberg and
18 his wife were arrested on outstanding federal warrants, plead guilty to criminal charges before the
19 U.S. District Court for the Middle District of Florida, and were imprisoned. Exs. 3(b)-(d).

20 After learning of Rehberg's deception, Simonson sought the advice of legal counsel
21 regarding the business consequences of Rehberg's arrest and misrepresentations. Simonson
22 disclosed to SEED stockholders that Rehberg had been a fugitive using the name Shawn Pierce in a
23 September 24, 2007 SEED Corporation letter to stockholders. Ex. S-9 ACC002084.

24 Subsequently, Simonson and SEED issued from within Arizona several documents to its
25 existing investors, including a Private Placement Memorandum dated October 30, 2007 (the
26 "October PPM") which offered SEED investors rescission of their purchase of SEED Stock (the

1 “Rescission Offer”). Ex. S-15. The October PPM and subsequent documents disclosed Rehberg’s
2 history. *See Id.* at ACC002105. The October PPM notified investors that SEED intended to raise up
3 to \$5 million worth of equity financing through an additional stock offering which was made just
4 two weeks later. Ex. S-16. SEED communicated the Rescission Offer documents to SEED
5 investors, without prior knowledge whether all of the offerees were accredited. *E.g.*, Ex. S-41
6 (containing a blank Investor Suitability form at ACC002610.)

7 The October PPM states: “Not later than December 31, 2007, the Company will forward to
8 Investors stock certificates (and warrants, if applicable) or rescission proceeds, as the case may be .
9 . . .” Exhibit S-35 ACC002096. Ultimately, approximately 18 investors requested rescission. Four
10 of the prior investors who requested rescission were refunded a total of \$221,000. No other
11 investors who requested rescission have to date received a return of their funds. Ex. S-16
12 ACC002041.

13 Two weeks later, Simonson and SEED issued a November 12, 2007 Private Placement
14 Memorandum which offered up to \$5 million in Class A Common Stock of Seed Corporation (The
15 “November Offer”) for the purpose of raising equity financing for SEED. Ex. 16. The November
16 Offering was made only approximately 80 days after the most recent sale pursuant to the First
17 Security Offering and was issued to, without limitation, existing SEED shareholders. At least four
18 investors purchased approximately \$139,200 of SEED stock during the course of the November
19 Offering. Ex. 80 (b).

20 On or about September 28, 2008 Simonson caused SEED to execute a 2 Year SEED
21 Corporation Promissory Note (the “SEED Note”) with a principal amount of \$20,000 to an Arizona
22 resident (the “Note Investor”). Hr’g Tr. 90:7. The unsecured SEED Note guaranteed repayment in
23 quarterly installments of \$500 commencing January, 2009. Hr’g Tr. 90:13. SEED made only one
24 \$500 payment. Hr’g Tr. 95:2. At no relevant time did SEED register the SEED Note with the
25 Commission.
26

1 Simonson had no prior relationship with the Note Investor before being introduced through
2 a friend of a mutual friend. Hr'g Tr. 87:5. Simonson met the Note Investor in person in Benson,
3 Arizona on or about September 28, 2008 for the purpose of discussing making an investment in
4 SEED. *Id.* Simonson did not inquire into the Note Investor's net worth or financial position. Hr'g
5 Tr. 89:3.

6 The two year period for repayment specified by the SEED Note elapsed on or about
7 September 28, 2010. To date SEED has made a single \$500 payment toward its SEED Note
8 obligation, leaving a principal balance of \$19,500 due and owing to the Note Investor. Hr'g Tr.
9 92:6.

10 **D. LEGAL ARGUMENTS.**

11 **I. INTRODUCTION.**

12 The Respondents offered and sold unregistered SEED Stock from the state of Arizona due
13 to Messrs. Simonson and Rehberg's direct solicitation of investors, while residing and operating in
14 Arizona in the subscription agreements for review and execution by investors. Respondents'
15 activities and actions prove that they offered and sold SEED Stock and a SEED Note from the state
16 of Arizona.

17 **II. THE SEED NOTE IS A SECURITY THAT WAS REQUIRED TO BE**
18 **REGISTERED PURSUANT TO A.R.S. § 44-1841.**

19 The SEED promissory note ("SEED Note") issued to investor Edward Welday is a security
20 within the meaning of A.R.S. § 44-1801(26). *See* A.R.S. § 44-1801(26). In *State v. Tober*, 173
21 Ariz. 211, 213, 841 P.2d 206, 208(1992), the Arizona Supreme Court held, for purposes of the
22 registration provisions of the Securities Act, that **all** notes are securities that must be registered
23 unless the securities are exempted from registration. *Id.* Consequently, under *Tober*, the SEED
24 Note is a security, and its registration was required, unless it was exempted from registration.

25 A.R.S. § 2033 states that, "[i]n any action, civil or criminal, when a defense is based upon
26 **any exemption** provided for in this chapter, the **burden of proving the existence of the**

1 **exemption shall be upon the party raising the defense [...].**” A.R.S. § 44-2033 (emphasis
2 added). The Arizona Supreme Court has held, concerning the “burden of proof” section of the
3 Securities Act (A.R.S. § 44-2033), that “[b]ecause of the vital public policy underlying the
4 registration requirement, there must be **strict compliance with all the requirements** of the
5 exemption statute.” *State v. Baumann*, 125 Ariz. 404, 411, 610 P.2d 38, 45 (1980) (*en banc*)
6 (emphasis added). Respondents failed to present any evidence that the SEED Noted was
7 exempted from registration. Accordingly, Respondents Simonson and SEED violated the
8 registration provisions of the Securities Act by selling an unregistered security while being
9 unregistered as a securities salesman and dealer, respectively. *See* A.R.S. §§ 44-1841 and 44-
10 1842.

11 **III. THE SEED STOCKS ARE SECURITIES THAT WERE REQUIRED TO BE** 12 **REGISTERED PURSUANT TO A.R.S. § 44-1841.**

13 **i. THE SEED STOCKS ARE STOCKS WITHIN THE MEANING OF** 14 **A.R.S. § 44-1801(26).**

15 The SEED stocks are securities within the meaning of A.R.S. § 44-1801(26), which
16 includes the terms “stock” and therefore must be registered unless an exemption to registration
17 applies. *See* A.R.S. § 44-1841(A). Besides the Respondents referring to the SEED securities as
18 stock, the characteristics detailed in their offering documents and corporate filings also reveal that
19 the security is a stock, within the meaning of A.R.S. § 44-1801(26). SEED is an Arizona
20 corporation that was incorporated on or about April 18, 2007 and capitalized with 25 million shares
21 of Class A and B stock. Ex. S-2(a). The SEED Stock provides shareholders with voting rights and
22 an opportunity to receive dividends from the company. *Id.* These characteristics are usually
23 associated with stock, thereby indicating a security. *See Landreth Timber Co. v. Landreth*, 471 U.S.
24 681, 686, 105 S. Ct. 2297, 2302 (1985). Though *Landreth* is a federal case, the Arizona Supreme
25 Court has stated that in interpreting Arizona Securities Act provisions which are identical or similar
26 to federal statutes, the Arizona Supreme Court will follow the reasoning of the U. S. Supreme
Court unless there is good reason not to. *See State v. Gunnison*, 127 Ariz. 110, 112-113, 618 P.2d

1 604, 606-607 (1980). In addition, the court of appeals has looked to opinions of lower federal
2 courts in interpreting Securities Act provisions identical or similar to corresponding federal
3 securities statutes. *See Greenfield v. Cheek*, 122 Ariz. 70, 73-74, 593 P.2d 293, 296-97 (App.
4 1978)(A. R. S. §44-1991), *overruled in part on other grounds, Gunnison*, 127 Ariz. at 113, 618
5 P.2d at 607; *Rose v. Dobras*, 128 Ariz. 209, 211-13, 624 P.2d 887, 889-91 (App. 1981) (definition
6 of security at A.R.S. § 44-1801). A review of the pertinent case law supports the determination
7 that the SEED stocks fit the definition of “stock” and was required to be registered prior to
8 Respondents’ offers and sales. Accordingly, Respondents violated the Securities Act by selling
9 unregistered securities. *See* A.R.S. §§ 44-1841.

10
11 **ii. THE SEED STOCKS DO NOT QUALIFY FOR AN EXEMPTION**
12 **FROM THE REGISTRATION REQUIREMENTS OF A.R.S. § 44-**
13 **1841.**

14 The SEED stocks are securities and are required to be registered unless an exemption from
15 registration applies. *See* A.R.S. §§ 4-1801(26) and 44-1841. Respondents do not dispute that the
16 SEED Stock offering was not registered with the Commission. However, Respondents assert that
17 SEED Stock offerings were exempt from the registration provisions of the Securities Act because
18 they were being offered pursuant to federal Rules 504^[1] and/or 506 of Regulation D.^[2] *See* 17
19 C.F.R. §230.504 and § 230.506. The Division disagrees. First, federal Rule 504 of Regulation
20 D (“Rule 504”) provides an exemption from registration requirements of the federal securities laws
21 for limited offerings of not more than \$1 million in a 12-month period to accredited investors,
22 provided an appropriate federal filing is made. 17 C.F.R. §230.504(b)(2). Here, Respondents
23 raised approximately \$1.6 million through their sale of SEED Stock. Furthermore, under Rule 504,
24 if the issuer uses general solicitation, all investors must be accredited or the offering must be state

25 ^[1] Although not made part of the administrative hearing record, Rehberg asserts in his January 7, 2013 and January 15,
26 2013 letters docketed with the Commission that the SEED Stock were issued pursuant to Regulation D, Rule 504 and,
therefore, exempt from the registration requirements of the Securities Act. However, no evidence was presented at the
administrative hearing in support thereof.

^[2] *See, e.g.* Ex. S-29.

1 registered. *Id.* The SEED Stock was sold to unaccredited investors. *See* Ex. 16 ACC2041.
2 Finally, the administrative record does not contain evidence of any filing made on behalf of SEED
3 with the either the SEC regarding a Rule 504 exemption or that it met the filing fee requirement of
4 Arizona Rule 140(L). A.A.C. R14-4-140(L). Accordingly, the Rule 504 exemption was
5 unavailable to the SEED Stock offerings.

6 Respondent SEED does not qualify for an exemption under federal Rule 506 of Regulation
7 D ("506") because Respondents engaged in a general solicitation of the SEED Stock.^[3] *See* 17
8 C.F.R. 230.506 and 230.508(2). In determining whether a general solicitation has occurred, the
9 SEC has focused on whether the issuer, or a dealer acting on behalf of the issuer, had a relationship
10 with the offeree that was both "substantive" and "preexisting." *See e.g., E.F. Hutton Co.*, SEC No-
11 Action Letter, 18 Sec. Reg. & L. Rep. (BNA) 171 (December 3, 1985) (providing that no general
12 solicitation exists when an offer is made to customers of a broker-dealer because of the broker's
13 preexisting, substantive relationship with its customers; further, providing that the requisite
14 relationship could be established through a questionnaire *unrelated* to a specific offering providing
15 the broker-dealer with sufficient information to evaluate the offeree's sophistication and financial
16 condition.). Here, the Respondents had no substantive or preexisting relationship with investors to
17 whom SEED stocks were sold. As noted at the hearing, SEED stocks were spread by word of
18 mouth. Hr'g Tr. 179:14. J. R. Reed first informed investors Susan Sica and Howard Lein of the
19 SEED stock offering. Being a friend of a friend does not create a substantive preexisting
20 relationship. This general solicitation disqualifies the Respondents from relying on a Rule 506
21 exemption. *Baumann*, 125 Ariz. at 411, 610 P.2d at 45.

22 Second, though Rule 506 does not limit the number of accredited investors who can be sold
23 securities during an offering, Rule 506 does require that the investor be accredited or the issuer
24 must reasonably believe the investor is accredited before the sale of the securities. *See* 17 C.F.R.

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

1 230.501(a); 17 C.F.R. 230.506; Hr'g Tr. 44:22 ("And is it true that you had no preexisting
2 relationship with anyone at SEED before the meeting? Yes, that's true.") Because SEED had no
3 preexisting relationship with offerees, SEED cannot establish that it only offered securities to
4 Accredited investors.

5 Third, Rule 506 limits the number of nonaccredited investors to 35. See 17 CFR
6 230.506(b)(2). All nonaccredited investors must be sophisticated, or the issuer must believe the
7 investors were sophisticated prior to the time the investors purchased the securities. 17 CFR
8 230.506 (b)(2)(ii). A sophisticated investor either alone or with a qualified purchaser representative
9 has the knowledge and experience in financial and business matters that makes the investor capable
10 of evaluating the merits and risks of the prospective investment. *Id.* An offer to even one
11 unsophisticated person can result in the loss of the exemption. See *Mark v. FSC Sec. Corp.*, 870
12 F.2d 331, 334 (6th Cir. 1989). Selling to more than 35 nonaccredited investors results in loss of the
13 exemption from registration as a matter of law. See 17 C.F.R. 230.508(a)(2).

14 SEED had 13 investors who signed on to purchase stock without completing the investor
15 questionnaire, which was only provided to investors either *after* or contemporaneously with the
16 offer to purchase stock, rather than before. *E.g.*, ("I received paperwork at the time of the meeting
17 only to fill out -- I received the subscription agreement after this check was filled out.") Hr'g Tr.
18 47:16. "It is incumbent upon the defendant to establish that all offerees had access to or disclosure
19 of the same type of information a registration statement would provide." *McDaniel v. Compania*
20 *Minera Mar de Cortes, Sociedad Anonimo, Inc.* 528 F. Supp. 152, 164 (Dist. Ct. Ariz. 1981). See
21 also A.A.C. R14-4-126(F)(2)(b). The subscription agreement falls short of this standard by,
22 without limitation, failing to disclose risks to the investors. The subscription agreement explicitly
23 states it is being provided *without* a PPM. *E.g.*, Ex. S-29 ACC002045 ("This subscription
24 agreement is submitted to the Purchaser in accordance with and subject to the terms and conditions
25 described in this Subscription Agreement and without a SEED CORPORATION'S Confidential
26

1 Private Placement Memorandum . . .”). Respondents also failed to present evidence of which, if
2 any, of the unaccredited investors were sophisticated.

3 Without such evidence, Respondents cannot establish how an offeree has the knowledge
4 and experience in financial and business matters that makes the investor capable of evaluating the
5 merits and risks of the SEED Stock investment. Instead, the evidence supports that the SEED
6 Stock was offered to unsophisticated investors, since sophistication was not established for as
7 many as 13 investors, which resulted in the loss of a Rule 506 exemption.

8 Since neither a Rule 504 nor Rule 506 exemption is applicable, SEED must comply with
9 the registration provisions of the Securities Act, which it failed to do. Accordingly, the
10 Respondents sold the SEED Stock in violation of A.R.S. § 44-1841.

11 **iii. SIMONSON, REHBERG, AND SEED ARE NOT REGISTERED AS**
12 **SECURITIES SALESMEN, DEALERS, OR BROKERS AND**
13 **THEREFORE ANY OFFER OR SALE OF A SECURITY BY THEM**
WAS IN VIOLATION OF A.R.S. § 44-1842.

14 No Respondent was registered as a dealer or salesman with the Commission with respect
15 to the sale of SEED stocks. Exs. S-1 (a)-(c). Furthermore, Respondents presented no evidence at
16 the administrative hearing regarding the applicability of any exemption from the dealer and
17 salesman registration requirements of A.R.S. § 44-1842. *See* A.R.S. § 44-1842. Accordingly, the
18 Respondents Simonson, Rehberg, and SEED violated the Securities Act by selling securities while
19 acting as unregistered securities salemen and a dealer, respectively. *Id.*

20 **IV. THE FAILURE TO DISCLOSE REHBERG’S USE OF AN ALIAS, PAST**
21 **CRIMINAL SECURITIES VIOLATIONS, AND OUTSTANDING ARREST**
22 **WARRANT ARE MATERIAL OMISSIONS AS A MATTER OF LAW AND**
23 **VIOLATIONS OF THE ANTI-FRAUD PROVISIONS OF THE SECURITIES**
ACT.

24 The Respondents’ failure to disclose Rehberg’s true background is an omission of a
25 material fact. Under A.R.S. § 44-1991(A)(2), it is a fraudulent practice and unlawful for a person,
26 in connection with a transaction or transactions within or from this state involving an offer to sell

1 or buy securities, or a sale or purchase of securities, to directly or indirectly, **make untrue**
2 **statements of material fact, or omit to state any material fact necessary** in order to make the
3 statements made, in the light of the circumstances in which they were made, not misleading. *See*
4 A.R.S. § 44-1991(A)(2) (emphasis added). In the context of these provisions, the term
5 “materiality” requires a showing of substantial likelihood that, under all the circumstances, the
6 misstated or omitted fact would have assumed actual significance in the deliberations of a
7 reasonable buyer. *See Trimble v. Am. Sav. Life Ins. Co.*, 152 Ariz. 548, 553, 733 P.2d 1131, 1136
8 (1986), citing *Dobras*, 128 Ariz. at 214, 624 P.2d at 892, quoting *TSC Indus. v. Northway, Inc.*, 426
9 U.S. 438, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976). Under this objective test, there is no need to
10 investigate whether an omission or misstatement was actually significant to a particular buyer.
11 *Trimble*, 152 Ariz. at 553, 733 P.2d at 1136. Certainly, Rehberg’s criminal conviction for
12 investment fraud is material. Furthermore, investor Susan Sica testified that she would not have
13 invested had she known about Rehberg’s criminal past. Hr’g Tr. at 50:11.

14 **V. SCIENTER IS IRRELEVANT TO VIOLATIONS OF A.R.S. § 44-1991(A)(2).**

15
16 A misrepresentation or omission of a material fact in the offer and sale of a security is
17 actionable even though it may be unintended or the falsity or misleading character of the statement
18 may be unknown. In other words, scienter or guilty knowledge is not an element of a civil
19 violation of A.R.S. § 44-1991(A)(2). *See Gunnison*, 127 Ariz. at 113, 618 P.2d at 607. Moreover,
20 a seller of securities is strictly liable for any of the misrepresentations or omissions he makes.
21 *Dobras*, 128 Ariz. at 214, 624 P.2d at 892. Thus, by establishing that Respondents never disclosed
22 Rehberg’s past, the elements of a violation A.R.S. § 44-1991(A)(2) have been met.

23 **VII. GOOD FAITH RELIANCE ON ADVICE OF COUNSEL IS NOT A** 24 **VALID DEFENSE AGAINST VIOLATIONS OF THE SECURITIES ACT.**

25 The Respondents’ argument that good faith reliance on advice of counsel is a defense
26 against violations of the Arizona Securities Act is without merit. Mr. Simonson testified that he

1 and SEED relied on the subscription agreement and private placement documents that were created
2 by Bob Pacionek ("Mr. Pacionek"), counsel for SEED. Hr'g Tr. 156:8. Violations of A.R.S. §§ 44-
3 1841 and 44-1842 are strict liability offenses because A.R.S. § 13-202(B) provides:

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

10 As a strict liability offense, the analysis hinges on whether the omission or misstatement is material
11 to a reasonable investor, not whether the Respondent had the intent or "scienter" to misrepresent.

12 This is in contrast to federal law where claims under Rule 10b-5 do "require a plaintiff to allege
13 and prove conduct which, at the very least, is either knowing or intentional." *Stewart v. Bennett*,
14 359 F.Supp. 878, 885 (1973); *see also* 17 C.F.R. § 240.10b-5. Because scienter is a factor under
15 federal law, the defense of good faith reliance of counsel is applicable in federal actions as a
16 "factor to be considered in determining the propriety of injunctive relief." *See SEC v. Goldfield*
17 *Deep Mines Co. of Nev.*, 758 F.2d 459, 467 (9th Cir. 1985). However, the registration and antifraud
18 provisions of the Securities Act are strict liability statutes. This means Respondents need not know
19 that the conduct in which they are engaging in is proscribed, or even know that the investment
20 involved is a security. Therefore, "advice of counsel" is not an available defense to a violation
21 under the Securities Act. *See, e.g., Tober*, 173 Ariz. at 213, 841 P.2d at 208, citing *State v.*
22 *Barrows*, 13 Ariz. App. 130, 464 P.2d 849 (1970); *Garvin v. Greenback*, 856 F.2d 1392, 1398 (9th
23 Cir. 1988), *as modified by* A.R.S. § 44-1995.

24 **VIII. THE MARITAL COMMUNITIES OF MR. SIMONSON AND MRS.**
25 **SIMONSON; AND MR. REHBERG AND MRS. REHBERG ARE LIABLE**
26 **FOR ANY RESTITUTION AND ADMINISTRATIVE PENALTY**
 ORDERED.

Pursuant to A.R.S. § 25-211, all property acquired by either husband or wife during the

1 marriage is the community property of the husband and wife except for property that is acquired
2 by gift, devise, descent or is acquired after service of a petition for dissolution of marriage, legal
3 separation or annulment if the petition results in a decree of dissolution of marriage, legal
4 separation or annulment. During marriage, “the spouses have equal management, control and
5 disposition rights over their community property and have equal power to bind the community.”
6 A.R.S. § 25-214(B). In addition, “..., either spouse may contract debts and otherwise act for the
7 benefit of the community ...” A.R.S. § 25-215(D). “(T)he presumption of law is, in the absence
8 of the contrary showing, that all property acquired and all business done and transacted during
9 coverture, by either spouse, is for the community.” *Johnson v. Johnson*, 131 Ariz. 38, 45, 638
10 P.2d 705, 712 (1981) (emphasis added).

11 First, Simonson and Rehberg were married during the time period in which violations of
12 the registration and antifraud provisions of the Securities Act occurred. Simonson was married
13 to Marilyn J. Simonson and Rehberg was married to Helen Rehberg.

14 Second, Simonson, Rehberg and Respondent Spouses failed to rebut the presumption that a
15 debt incurred during marriage is a community obligation. The Arizona Court of Appeals has
16 stated, “[a] debt incurred by a spouse during marriage is presumed to be a community obligation; a
17 party contesting the community nature of a debt bears the burden of overcoming that presumption
18 by clear and convincing evidence.” *Hrudka v. Hrudka*, 186 Ariz. 84, 91, 919 P.2d 179, 186 (Ct.
19 App. 1995). Furthermore, “... a debt is incurred at the time of the actions that give rise to the debt.”
20 *Arab Monetary Fund v. Hashim*, 219 Ariz. 108, 111, 193 P.3d 802, 806 (Ct. App. 2008). Here, the
21 actions giving rise to the debt occurred while the Simonsons and the Rehbergs were married.
22 Therefore, the debt was incurred during marriage and is presumed to be a community debt. Since
23 Simonson, Rehberg, and the Respondent Spouses failed to overcome this presumption, the debt
24 remains a liability of their respective marital communities.

25 Based on the foregoing, the restitution and administrative penalty is a community debt.
26 The Commission need not determine whether the Respondent Spouses had knowledge,

1 participation, or intent in order to bind the community for the debt incurred. The presumption of
2 intent is enough to bind the community, even if the Respondent Spouse was unaware or did not
3 approve of their participant spouses' actions. The *Ellsworth* court stated, "[I]f the husband acts
4 with the object of benefiting the community, a fact not questioned here, the obligations so
5 incurred by him are community in nature, whether or not the wife approved thereof." *Ellsworth v.*
6 *Ellsworth*, 5 Ariz. App. 89, 92, 423 P.2d 364, 367 (Ct. App. 1967) citing *Donato v. Fishburn*, 90
7 Ariz. 210, 367 P.2d 245 (1961). Since Simonson, Rehberg, and the Respondent Spouses failed to
8 meet their burden and present "highly probable" evidence to rebut the presumptions, the debts are
9 liabilities of their respective marital communities. See A.R.S. § 25-215.

10 The Rehbergs presently reside in Florida, which is not a marital community property
11 state. *Estabrook v. Wise*, 348 So.2d 355, 357 (1977). In Florida, community property of new
12 residents generally retains its character unless the owners take some action inconsistent with the
13 community property nature of the property. See *Republic Credit Corp. I v. Upshaw*, 10 So.3d
14 1103, 1104-05 (Fla. 4th DCA 2009); *De Quintana v. De Ordone*, 195 So.2d 577 (Fla. 3rd DCA
15 1967). Therefore, the marital communities of Simonson, Rehberg, and Respondent Spouses are
16 subject to any order of restitution or administrative penalties.

17
18 **E. CONCLUSION.**

19 Based on the foregoing, the Division respectfully requests the A.L.J. to recommend to the
20 Commission an order for restitution in the amount of \$1,211,577.31 (\$1,432,577.31 - \$221,500) as
21 to Mr. and Mrs. Rehberg jointly, and \$1,408,077.31 (1,629,577.31 - \$221,500) as to SEED and Mr.
22 and Mrs. Simonson jointly, and order an administrative penalty in the amount of \$25,000 as to
23 SEED, Mr. Simonson, and Mrs. Simonson, and order an administrative penalty in the amount of
24 \$50,000 as to Mr. and Mrs. Rehberg to address the Respondents' conduct that includes raising in
25 excess of \$1 million, the general solicitation, and multiple material omissions regarding Rehberg's
26

1 past. The Division further respectfully requests the A.L.J. to order any additional relief the
2 Commission deems appropriate.

3
4 Respectfully submitted this 1st day of April, 2013

5
6 By: 

7 Steven Briggs
8 Attorney for the Securities Division of the
9 Arizona Corporation Commission
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1 ORIGINAL AND EIGHT (8) COPIES of the foregoing
2 filed this 15th day of April, 2013 with:

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

7 COPY of the foregoing hand-delivered this
8 15th day of April, 2013 to:

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

14 COPY of the foregoing mailed this
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