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AZ CORP COMMISSION
DOCKET CONTROL

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

In the matter of:

PATRICK LEONARD SHUDAK, a single man,
PROMISE LAND PROPERTIES, LLC, an Arizona
limited liability company,

and

PARKER SKYLAR & ASSOCIATES, LLC, an
Arizona limited liability company,

Respondents.

DOCKET NO. S-20859A-12-0413

**RESPONDENT'S POST-HEARING
REBUTTAL BRIEF**

Respondent Patrick Leonard Shudak ("Shudak") submits his post-hearing rebuttal brief in response to the post-hearing brief filed by the Securities Divisions (the "Division"). Not surprisingly, Shudak disagrees with much of what the Division alleges in its post-hearing brief. The Division's portrayal of the evidence presented at the hearing is not supported by the record, and by extension, its legal analysis suffers from the same defects. Most of those disagreements were anticipated and addressed in Shudak's own post-hearing brief, which is incorporated here by reference.

Arizona Corporation Commission

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THE EVIDENCE

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2 The most disturbing aspect of the Division's brief is the often-repeated fabrication that
3 there is evidence concerning what all the investors believed, expected, knew, relied upon, or
4 were told. That evidence simply does not exist. The Division presented testimony from only
5 three investors, and all three told very different stories. To fill-in all the missing evidence, the
6 Division has offered nothing more than conjecture and hypothesis to support its claims relating
7 to the other investors. For example, the Division contends that "Shudak failed to inform
8 subsequent Parker Skylar investors" about the loan to Nascent. Division Br. at 6. The Division
9 does not cite to any part of the record to support that contention, because it cannot. There is only
10 testimony from one investor, Martin Schwank. *Id.* The rest is pure speculation. In another
11 example, the Division proposes that "[s]everal of these investors had no pre-existing relationship
12 with Shudak." Division Br. at 7. The only evidence is that Schwank *did have a pre-existing*
13 *relationship with Shudak*, and the two other testifying investors were introduced to Shudak
14 through a mutual acquaintance. *Id.* In yet another example, the Division ventures to guess that:
15 "Investors did not expect to have any role in management or decision-making for the Bisbee
16 Project." Division Br. at 8. There is no evidence indicating what all the investors expected.
17 Similarly, the Division claims that "Shudak failed to inform potential investors that several of
18 Shudak's creditors were suing Shudak" Division Br. at 14. The fact that the Division makes
19 that claim without any citation to the record demonstrates the unproven character of the
20 allegation. There is no evidence supporting that claim.

21 The hypocrisy of the Division's efforts to lump together all the investors, but only when
22 it suits the Division's purposes, is reflected in the Division's claim that "the offering was made
23 to unaccredited investors." *See* Division Br. at 12. The Division's own records show that the
24 investors completed "Investor Suitability Questionnaires" representing that they were accredited
25 investors. *Id.* While the Division asks the tribunal to paint every investor with the same brush
26 for purposes of supporting its fraud claim, the Division asks the tribunal to reverse course, and
27 demand proof from each investor, on this issue. Here, though, there actually is evidence in the
28 record that each investor signed Investor Suitability Questionnaires indicating that they were

1 accredited investors; there is no evidence that they misrepresented their accredited investor
2 status.

3 THE LAW

4 A. THE FRAUD CLAIMS FAIL

5 The Division's ever-evolving fraud case against Shudak has been reduced to four acts.
6 Division Br. at 23-24. The evidence does not establish any of the fraud claims. The Division's
7 fraud claims are further weakened by at least two notable admissions. The Division
8 acknowledges that:

9 • Alan Thome, not Shudak, was "primarily responsible for [CC1900's] operations
10" Division Br. at 4. In other words, Thome (and later the investors themselves) was
11 responsible for the development of the property, and, by extension, the outcome of the
12 investment. If the investors ultimately suffer any losses, it will not be because of
13 anything Shudak did or said.

14 • It is "possible that Shudak was involved in some of CC 1900's operations – such
15 as purchasing the property and marketing." Division Br. at 4. Thus, it is just as
16 "possible" that Shudak received payments for the work he did beyond raising capital.
17 The Division's concession further illustrates that there is absolutely no evidence that
18 Shudak personally received any inappropriate payments.

19 Based on these acknowledgments, the Division cannot credibly argue that Shudak caused the
20 investors' damages or that Shudak misused funds. The evidence does not exist.

21 The Division's fraud claims suffer from additional defects:

22 First, the Division contends that Shudak oversold membership units in Parker Skylar. As
23 discussed in Shudak's brief, the Division failed to prove how many units were sold. Based on
24 the evidence, it appears that only 88 units were sold. The Division also fails to address the net
25 benefit each investor received if Shudak sold more units. Either way, there was no evidence of
26 fraud.

27 Second, the Division contends that Shudak failed to disclose the Nascent loan. As
28 discussed above, the record is devoid of any evidence supporting that contention, except for

1 Schwank’s testimony about how he learned about the loan. The Division also fails to account for
2 the fact that three of the investors (Frank Lamer, Tim Olp, and Craig Swandal) invested *before*
3 the loan was made. *See* Exh. S-48.

4 Third, the Division postulates that investor funds were misused. Not only is there no
5 evidence of how the investor funds were used, let alone misused, there is no evidence addressing
6 what the investors knew or believed, or what Shudak told them, about how their funds were to be
7 used – even with respect to the three investors who testified. At best, the Division did nothing
8 more than identify the existence of certain bank transactions. There is no evidence establishing
9 where the money ultimately went, or for what purposes. Again, this claim is based on pure
10 speculation.

11 Fourth, the Division makes the curious claim that Parker Skylar misrepresented Shudak’s
12 capability “of raising capital for a significant residential real estate development.” Division Br.
13 at 24. Setting aside whether that representation was made to all the investors (there is no
14 evidence that it was), according to the Division’s own allegations, Shudak was capable of raising
15 capital. The Division’s argument is that, if anything, Shudak was *too* capable of raising the
16 capital, and oversold the investment opportunity. Thus, if the representation was made, it proved
17 to be true and cannot support a fraud claim.

18 Lastly, the Division does not attempt to link any of these fraud allegations to the Van
19 Hooks. The record is devoid of any communications that they had with Shudak, or what they
20 knew or believed.

21 **B. THE DIVISION FAILED TO PROVE LOSS CAUSATION**

22 The Division did not address loss causation in its post-hearing brief. As detailed in
23 Shudak’s brief, loss causation is an element of securities fraud under Arizona law. Given all the
24 intervening acts that occurred between the time the investors made their investments and today,
25 including the investors’ decision to take control of the company and the development, there is no
26 credible evidence that Shudak’s alleged fraud proximately caused the investors’ yet-to-be-
27 established losses.

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C. THE DIVISION'S REGISTRATION CLAIM FAILS

For the reasons discussed in Shudak's brief, the evidence demonstrates that the investments were part of a private offering and, therefore, exempt from registration under A.R.S. § 44-1844(A)(1). There is no evidence cited in the Division's brief that supports a different conclusion.

D. THE DIVISION'S RESTITUTION CALCULATION IS CONTRARY TO ARIZONA LAW AND UNRELIABLE

The Division's request for restitution is a moving target. In its brief, it finally concedes that payments were made to at least one investor totaling \$55,000, and that the restitution amount should be offset accordingly. Division Br. at 26-27. As detailed in Shudak's brief, the Division's calculations are unreliable and unproven. The evidence simply does not exist to determine the aggregate amount of investor funds, and any corresponding set-off.

More fundamentally, the Division is not asking for restitution, as that term is defined under Arizona law. The Division relies on A.R.S. § 44-2032 as its authority; however, as discussed in Shudak's brief, the Division's methodology for calculating restitution, which provides the investors with a windfall, does not comport with the definition of restitution under Arizona law.

E. THE DIVISION IS NOT ENTITLED TO ANY PENALTY AWARDS

In its brief, the Division argues that Shudak committed 90 violations of the securities laws, and asks for an administrative penalty in the amount of \$150,000. For all the reasons discussed in Shudak's brief, and herein, the tribunal should not order that any penalties be paid. The Division has failed to meet its burden of proving any violations of the securities laws.

CONCLUSION

For the foregoing reasons, the Division's claims should be denied and this administrative action should be dismissed in its entirety.

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DATED this 30th day of August, 2013.

GREENBERG TRAURIG, LLP

By: 

BRIAN J. SCHULMAN

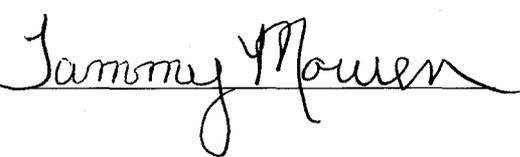
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