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AZ CORP COMMISSION
DOCKET CONTROL

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

10 DOUG LITTLE, Chairman
11 BOB STUMP
12 BOB BURNS
13 TOM FORESE
14 ANDY TOBIN

Arizona Corporation Commission

DOCKETED

AUG 09 2016

DOCKETED BY

15 In the matter of:

16 USA BARCELONA REALTY ADVISORS,
17 LLC, an Arizona limited liability company,

18 USA BARCELONA HOTEL LAND
19 COMPANY I, LLC, an Arizona limited liability
20 company,

21 RICHARD C. HARKINS, an unmarried man,

22 ROBERT J. KERRIGAN (CRD no. 268516)
23 An unmarried man,

24 GEORGE T. SIMMONS and JANET B.
25 SIMMONS, husband and wife,

26 BRUCE ORR, an unmarried man,

DOCKET NO. S-20938A-15-0308

**POST-HEARING BRIEF OF
RESPONDENT GEORGE T. SIMMONS**

BRIEFING ISSUES

The Securities Division's Unauthorized "Amended Brief" Should Be Stricken

28

1 Judge Preney set July 8, 2016 as the “deadline date for the initial brief from the Division”,
2 August 8, 2016 “for posthearing brief from the respondents”, and then August 23, 2016 “for a reply
3 brief from the Division.”^A

4 The Securities Division’s Post-Hearing Brief (the “*Division’s Brief*”) was filed with the
5 Docket on July 8, 2016, as ordered by Judge Preney. The Division’s Brief was served on the parties,
6 and Mr. Simmons’ post-hearing brief was prepared to respond to the Division’s Brief, as well as
7 addressing the Division’s new claims, as is set forth below.

8
9 In reviewing the Docket Details of this case on the Arizona Corporation Commission
10 website on August 7, 2016, counsel for Mr. Simmons discovered that the Division had filed an
11 “*Amended Brief*” that was docketed on July 11, 2016. The Amended Brief was filed three days
12 after the Division’s Brief was due and filed, was filed without an order from the Hearing Division
13 authorizing such a filing, and was filed without giving prior notice to the Respondents. In a
14 footnote on page 1 of the Amended Brief, presumably attempting to justify its flaunting of
15 procedure and due process, the Division stated that:

16
17 “This amended brief is corrected to reflect the fact that Robert J. Kerrigan, George T,
18 Simmons, and Bruce L. Orr were not controlling persons at the time of the first investment in USA
19 Barcelona Realty Advisors, LLC.”

20
21 The Division does not explain what its footnote means, that is, what parts of the Division’s
22 Brief were amended, and specifically how the Division’s Brief was changed. While the
23 unauthorized Amended Brief states that it was mailed to the Respondents, the Respondents were not
24 informed by the Division or the Hearing Division about the authorization of, or ability to, make
25 such a filing, or the Respondents’ schedule for responding to the unauthorized Amended Brief. No
26

27 ^A Hearing Transcript, page 1267, line 22 through page 1268, line 2 (references to the Transcript are cited as T.
28 (page), followed by a colon and line numbers; References to hearing Exhibits are cited as the numbers used at the hearing.

1 Respondent was specifically informed of any “amended” filing, so if copies of the Amended Brief
2 were in fact mailed to, and received by, the Respondents, they were perceived as additional copies
3 of the Division’s Brief, which was filed as ordered on July 8, 2016.

4 The unauthorized Amended Brief should be stricken from the record. The Division, in its
5 arrogance, now believes that it can establish its own rules, ignore existing rules and procedures,
6 exclude Respondents from the process, and make filings without requesting and obtaining
7 permission from the Hearing Division.
8

9 **BRIEF OF RESPONDENT GEORGE T. SIMMONS**

10 Respondent George T. Simmons (“*Mr. Simmons*”) submits this post-hearing brief relative to
11 the administrative hearing, which began on May 9, 2016 and ended on May 19, 2016, as follows:

12 **I.**

13 **SUMMARY OF THE CASE**

14 **The claims against Mr. Simmons.**

15 The sole allegations against Mr. Simmons in the Original Notice and the Amended Notice
16 (as defined in Part II below), which were the only claims made against Mr. Simmons in any
17 pleading, and the only claims against which he was defending at the hearing, were that Mr.
18 Simmons “directly or indirectly controlled” USA Barcelona Advisors Realty Advisors, LLC
19 (“*Barcelona Advisors*”) and USA Barcelona Hotel Land Company I, LLC (“*Barcelona Land*
20 *Company*”), and that therefore Mr. Simmons was “jointly and severally liable to the same extent as”
21 those companies for alleged violations of A.R.S. § 44-1991 (fraud in connection with the offer or
22 sale of securities).
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1 **Mr. Simmons was not a “Controlling Person” of Barcelona Advisors or Barcelona**
2 **Land Company.**

3 The law is clear that that to establish controlling person liability under A.R.S. § 44-1999(B),
4 it must be proven that the person “has the [legal] power to directly or indirectly control the activities
5 of those persons or entities liable as primary violators of A.R.S. § § 44-1991.” Eastern Vanguard
6 Forex Ltd v. Ariz. Corp. Comm’n, 2016 Ariz. 399, 412 Par. 42 (Ct. App. 2003). As is shown in
7 detail below, no credible evidence was presented at the hearing that Mr. Simmons ever acted as a
8 controlling person of either Barcelona Advisors or Barcelona Land Company (sometimes referred
9 to collectively as “*USA Barcelona*”). In fact, all evidence showed that Richard C. Harkins
10 (“*Harkins*”) was the sole controlling person of both companies, and that neither Mr. Simmons, nor
11 any other person named as an Executive Member other than Harkins, ever voted on any Major
12 Decision, or otherwise acted as a controlling person. In fact, Mr. Simmons was excluded from
13 involvement in capital-raising activities, which were conducted by Harkins and Kerrigan, with some
14 involvement of Wilkerson and McDonough.
15
16

17 **The Division Cannot Allege New Claims against Mr. Simmons in its Post-Hearing Brief**
18 **that Were Not at Issue in the Hearing.**

19 In the Division’s Post-Hearing Brief, they allege for the first time, and attempt to establish,
20 new direct claims against Mr. Simmons that were not at issue in the hearing. The only allegations
21 against Mr. Simmons in the Original Notice and the Amended Notice were and still are that he is
22 liable as “controlling person” for any liability of Barcelona Advisors and or Barcelona Land
23 Company in connection with offers and sales of securities.
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1 At the end of the presentation of its case, apparently recognizing that it had not proven any
2 “controlling person” liability, the Division made a motion to conform its notice to the evidence.
3 The Division never indicated what new claims, if any, it intended to raise by such “conforming.”
4 The Division falsely states that “All of the issues in the hearing were tried with the express consent
5 of the parties because there was no objection to the motion.” **Mr. Simmons objected to the**
6 **motion, and the motion was never granted.** Judge Preny took the Division’s motion under
7 advisement, together with Mr. Simmons’ simultaneous motions to dismiss the claims against him
8 and Barcelona Land Company, and the motions were never granted.
9

10 Raising claims for the first time in a post-hearing brief that were not included in any
11 pleadings, as to which Mr. Simmons had no notice, did no discovery, and did not defend, is
12 disingenuous at least, but worse than that it is unethical, and worthy of imposing sanctions against
13 the Division. It would be fundamentally unfair, particularly after conclusion of the hearing, to
14 “conform its notice to the evidence” in a fashion that the Division claims would permit it to bring
15 new claims against Mr. Simmons or any other Respondent. “Controlling person” allegations were
16 the sole claims made against Mr. Simmons (and against Bruce Orr) in both the Notice and the
17 Amended Notice, and are the only claims pled against Mr. Simmons to this date. Those claims
18 never changed during the hearing, and were the only allegations Mr. Simmons could conceivably
19 address in his pleadings and in his defense at the hearing.
20
21

22 The Division, in its Post-Hearing Brief, attempts a blatant “bait-and switch”. Having never
23 included any direct claims against Mr. Simmons in pleadings filed before or during the hearing, the
24 Division uses Part IV of its Post-Hearing Brief to claim *for the first time* that Mr. Simmons: (a)
25 offered or sold securities within and from Arizona; (b) acted as an unregistered securities salesman
26 or dealer; and (c) violated anti-fraud provisions of the Arizona Securities Act.
27
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1 There are procedural rules, even in an administrative proceeding such as this one, to ensure
2 due process, affording respondent parties a fundamental right to know the accusations against them,
3 file responsive pleadings, and present evidence on their behalf. The Division's attempt to ambush
4 Mr. Simmons with new claims of direct liability in a post-hearing brief is unfair and reprehensible.
5 Had Mr. Simmons known of any direct allegations against him that were not "controlling person"
6 claims, he would have had the opportunity to answer, object to, or otherwise respond to such
7 allegations in pleadings, conduct discovery with respect to such claims, and call additional
8 witnesses. In this case, Mr. Simmons certainly would have called one or more additional witnesses
9 had he known that the Division would attempt to assert new claims of direct participation in
10 securities violations. The Division had ample opportunities to amend its Original Notice prior to
11 the hearing, and in fact did file an Amended Notice that did not change the claims against Mr.
12 Simmons. To allege new claims in a post-hearing brief is far too late.

15 **Addressing the New Claims**

16 The Hearing Division should not even consider the new claims raised in the Division's post-
17 hearing brief. To do so would deny Mr. Simmons and other Respondents fundamental due process.

18 Mr. Simmons should not need to defend himself against new claims first raised by the
19 Division, untimely and improperly, in its post-hearing brief. However, in the unlikely event that the
20 Hearing Division even considers such claims, they are addressed briefly below. Fundamental
21 fairness and due process would require that Mr. Simmons be able to respond to the new claims
22 before a hearing, conduct discovery with respect to those new claims, and be cognizant of the
23 claims against him so that he could present evidence at the hearing refuting those claims. No
24 respondent should need to speculate about, and defend against, new claims that the Division decides
25 to make after the hearing is concluded.
26

1 **The “Controlling Person” Claims**

2 The sole claims made in any pleading against Mr. Simmons to this date were and are that he
3 had joint and several “controlling person” liability for purported securities fraud violations relating
4 to offers and sales by Barcelona Advisors and purported offers by Barcelona Land Company. As is
5 demonstrated below, no credible evidence supports those claims.
6

7 **II.**

8 **PROCEDURAL HISTORY**

9 The Securities Division (the “*Division*”) of the Arizona Corporation Commission (the
10 “*Commission*”) filed its Temporary Order to Cease and Desist and Notice of Opportunity for
11 Hearing dated August 26, 2015 (the “*Original Notice*”). On January 25, 2016, the Division filed an
12 Amended Temporary Order to Cease and Desist and Notice of Opportunity for Hearing (the
13 “*Amended Notice*”), which added certain allegations. The sole allegations against Mr. Simmons in
14 the Original Notice and the Amended Notice were identical, claiming joint and several “controlling
15 person” liability for purported securities fraud violations relating to offers and sales by Barcelona
16 Advisors and purported offers by Barcelona Land Company.
17

18 On October 1, 2015, Mr. Simmons filed his Answer to the Original Notice, and on February
19 26, 2016, Mr. Simmons filed his Answer to the Amended Notice. Both Answers **denied**, among
20 other things, that he:
21

22 (a) engaged in acts, practices or transactions that constituted violations of the Securities Act
23 of Arizona, A.R.S. § 44-1801 *et seq.* (the “*Securities Act*”),

24 (b) directly or indirectly controlled USA Barcelona Realty Advisors, LLC (“*Barcelona*
25 *Advisors*”) within the meaning of A.R.S. § 44-1999; and
26
27
28

1 (c) is jointly and severally liable under A.R.S. § 44-1999 to the same extent as Barcelona
2 Advisors for any alleged violations of the Securities Act.

3 As stated in the Original Notice and the Amended Notice (sometimes referred to collectively
4 as the “*Notices*”), Janet B. Simmons was joined in the action and named as Respondent Spouse
5 solely for purposes of determining the liability of her marital community; when used in this brief,
6 the term “*Mr. Simmons*” includes the marital community of George T. Simmons and Janet B.
7 Simmons.
8

9 **III.**

10 **JURISDICTION**

11 Mr. Simmons admitted that the Commission has jurisdiction over this matter pursuant to
12 Article XV of the Arizona Constitution and the Securities Act.
13

14 **IV.**

15 **FACTS**

16 Terms used in this brief, and not otherwise defined herein, such as references to parties, will
17 utilize the same definitions set forth in the Division’s Brief.

18 Evidence in the record supports the Commission making the following findings of fact:

19 **A. Respondents**

20 1. Mr. Simmons is a married man and a resident of the State of Arizona since before
21 October 2012, and has never been registered by the Commission as a securities dealer or salesman.¹
22 He usually goes by the name Tom Simmons.²
23
24
25

26

¹ Admitted in Simmons Answer.

27 ² T. 1130:23-1131:2

1 2. Since before October 2012, Janet B. Simmons has been the spouse of Mr. Simmons,³
2 and she is a Respondent Spouse joined in this action under A.R.S. § 44-2031 (C) solely for purposes
3 of determining the liability of her marital community.⁴
4

5 **B. Control of Barcelona Advisors and Barcelona Land Company**
6

7 3. Since October 2012, Harkins has been the President, Manager and sole controlling
8 person of Barcelona Advisors, with complete authority and exclusive control to conduct any
9 business on behalf of Barcelona Advisors.⁵ Harkins drafted all versions of the Operating
10 Agreements which included the concepts of “Executive Members,” “Executive Committee” and
11 “Major Decisions”.⁶ All versions of the Operating Agreements included provisions that set up
12 Harkins, the Manager, as the gatekeeper for any Major Decision, and required that “the Manager
13 request approval of any Major Decision by the Executive Committee.”⁷
14

15 4. All persons named by Harkins as Executive Members – Simmons, Kerrigan, Orr and
16 Eaves - agreed that no decision, let alone a Major Decision, or any decision relating to the offer or
17 sale of securities, was ever submitted to the Executive Members.⁸ Harkins solicited input from
18 Executive Members and others, but all business decisions for Barcelona Advisors and Barcelona
19 Land Company were made by Harkins as the sole controlling person, and, in Harkins’ words, Orr
20 and Simmons “didn’t control a dadgum thing.”⁹
21

22 ³ Admitted in Simmons Answer.

23 ⁴ Amended Notice, paragraph 8

24 ⁵ Harkins established this in his opening statement, T. 29:23-30:3, and testified to that effect, e.g. T.835:7-9; T.835:17-
25 838:1; T.902:9-12; T.904:7-17; T.905:5-14, 22-25; T. 909:5-7. Harkins’ admission was consistently supported by other
26 persons who were named as Executive Members-e.g., Orr -T. 721:25-722:2; T. 762:9-18; Simmons-T. 1145:23-
27 1146:3; T. 1233:23-1234:6; T. 1243:2-5; Eaves-T. 313:14-17

28 ⁶ T. 836:1-3; T. 900:7-20

⁷ See versions of the Operating Agreement included in S-5 and S-57.

⁸ See, e.g., Simmons- T. 1242:11-16; T. 1175:9-10; Orr-T. 720:15-18; T. 761:14- T. 762:18; T. 763:7-12; Eaves-T.
351:15-17

⁹ T. 1265:4

1 5. Harkins named: (a) Harkins, Kerrigan, Simmons and Orr as Executive Members of
2 Barcelona Advisors in a Confidential Private Placement Offering Memorandum dated February 1,
3 2013 (the "*February Memorandum*");¹⁰(b) Simmons as an Executive Member in an Operating
4 Agreement dated October 18, 2012 included as a part of the February Memorandum;¹¹ and (c)
5 Harkins, Kerrigan, Simmons and Orr as Managers of Barcelona Advisors in a filing Harkins made
6 with the Arizona Corporation Commission on April 12, 2013 (the "*April 2013 Filing*"). However,
7 Simmons was not aware of being so named, did not consent to being named, and in fact did not
8 become actively involved with Barcelona Advisors until July, 2013.¹² Harkins also named Mr.
9 Simmons as a 20% owner of Barcelona Advisors in the April 2013 Filing, but Mr. Simmons
10 testified, and records showed, that he never had an ownership interest of more than 10%, and that
11 his ownership percentage was actually 6%.¹³
12

13 6. No evidence was ever introduced showing that any person named as an Executive
14 Member, other than Mr. Harkins (who drafted the various versions of the PPMs) ever agreed to the
15 terms of any operating agreement, the contents of any corporate filing, or the disclosures about
16 Executive Members or officers contained in any PPM.
17

18 7. For some time, Mr. Simmons was assigned the titles of Executive Vice President and
19 Chief Operating Officer of Barcelona Advisors, which was an evolving role in a startup company,
20 and not equivalent to those roles in a "reasonable sized establishment".¹⁴ The Division seeks to
21 describe his authority by referring to language from a form of operating agreement Harkins
22 included in one of his Confidential Private Placement Offering Memoranda, but no testimony
23 substantiated or supported that description. Mr. Simmons' role, as described in testimony by all
24

25 ¹⁰ See S-5

26 ¹¹ See S-5

27 ¹² T. 1140:10-14

28 ¹³ T. 1176:18-24

¹⁴ T. 1186:9-19

1 Executive Members, was an evolving one in which he carried out certain management decisions
2 made by Harkins.¹⁵

3 8. The Division cites Harkins' filings to claim that Simmons, Kerrigan and Orr were
4 Executive Members of Barcelona Advisors from at least February 1, 2013. (see the Division's
5 Brief) However, all testimony from anyone other than Harkins contradicted that claim, at least as to
6 Mr. Simmons and Orr. Mr. Simmons became an Executive Member in July 2013, when he joined
7 the Company. He did not serve as an Executive Member before then.¹⁶

9 9. As described above, the Executive Committee had the power to approve "Major
10 Decisions" only if the Manager, Harkins, requested submitted an issue for decision.¹⁷ No Major
11 Decision was ever requested or submitted for approval.¹⁸

12 **C. 12-6-12 Offering**

13 10. No evidence was introduced that Mr. Simmons had any direct participation in the 12-
14 6-12 Offering, and no "controlling person" decision was ever submitted for approval with respect to
15 that offering.¹⁹ In fact, Mr. Harkins stated that "Mr. Simmons was not in a position to know we
16 were managing our offering business."²⁰

18 **Rodney and Melissa Eaves**

19 No allegations were pled in the Notices that Mr. Simmons offered or sold investments to
20 Eaves, and Mr. Simmons should not need to address such claims. To the extent that any such
21 allegations are considered, Mr. Simmons responds as follows:
22
23

24 _____
25 ¹⁵ See e.g. T. 1151:5-8, T. 1172:23-T. 1173:10

26 ¹⁶ T. 1140:11-14, T. 1147:25; T. 1148:18-20

27 ¹⁷ See Operating Agreements included in S-5 and S-57

28 ¹⁸ See footnote 8 above

¹⁹ See footnote 8 above

²⁰ T. 1202:5-7

1 14. Ignoring Woods wishes, the Division claimed, in the words of Mr. Kitchin, that:
2 “It is – the technical rules of evidence do not apply. Hearsay is admissible if it’s reliable.
3 Mr. Darius is testifying as to things that he personally heard this person say. The circumstances
4 under which he said them shouldn’t particularly matter. It might typically be an interview, but in
5 this case it didn’t happen to be that way. But if Mr. Woods said things, and Mr. Taylor heard them,
6 he can repeat what they were.”²⁷

8 15. Of course, the Division’s procedure also prohibits Respondents from cross-
9 examining the person whose “statements of fact” are being placed in the record. No person testified
10 who had the legal capability to do so with respect to any facts involving Woods.

11 16. However, the substance of the “testimony” of Taylor is telling, as it reveals how the
12 Division rehearsed the investor witnesses. A Division employee, who listened to the “prep” of
13 Woods, was asked each of the questions Mr. Harkins referred to as the “Kitchin 8”, and gave
14 responses virtually identical to the responses given by all other investor witnesses who had been
15 prepared by the Division. Each was asked what they “thought” of certain statements prepared by
16 the Division with varying degrees of factual accuracy, then asked if they would have been
17 significant, and finally asked “would you have invested had you known.” Of course, Taylor only
18 said that he was repeating words of an investor being prepared when that person was not under oath.
19 There was no need even to swear in Taylor as a witness. Unsworn statements of an investor being
20 “channeled” by a Division employee is at best prepared hearsay of prepared hearsay, and should be
21 given no weight at all. The Woods scenario demonstrates perhaps the most egregious of the
22 Division’s attempts to improperly present this case against Respondents.
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27 ²⁷ T. 660:23-661:6

1 18. The testimony of Richard Andrade (“*Andrade*”) contains many aspects that
2 curiously conform his recollections to try and create a case which was not pled by the Division in
3 the Notices. Significantly, the Division chose not to call as a witness, Jim Wilkerson, Andrade’s
4 financial advisor, whose testimony likely would have corroborated that of Mr. Simmons in all
5 material respects. Not calling Wilkerson allowed the Division to rely on certain Andrade testimony,
6 much of which is directly in conflict with that of Mr. Simmons and Mr. Harkins. Had Mr. Simmons
7 been aware of any claims against him, other than “controlling person” claims, he certainly would
8 have interviewed Wilkerson and called him as a witness.
9

10 19. The Division, both in its characterizations of statements, misrepresents many of
11 Andrade’s his interactions with both Wilkerson and Mr. Simmons. The Division states that
12 Andrade had a lunch meeting with Mr. Simmons in on December 23, 2013 (See the Division’s
13 Brief). In fact, at Wilkerson’s invitation, Mr. Simmons actually joined a lunch meeting that
14 Wilkerson, Andrade’s financial advisor, hosted with Andrade.³¹ Prior to that meeting, Wilkerson
15 informed Mr. Simmons that Andrade had seen Mr. Simmons’ name in Barcelona Advisor’s offering
16 documents presented by Wilkerson to Andrade, and Andrade recognized Simmons’ name as
17 someone whom he had worked with at Intel 30 years ago, and Andrade wanted to get
18 reacquainted.³²
19

20 20. Prior to the December 2013 luncheon, as was his custom, Mr. Simmons advised
21 Wilkerson that Harkins, not Simmons, was the right person to talk about an investment, and that the
22 meeting could only be a social one, and that is what it was.³³ Mr. Simmons did not discuss any
23 possible investment by Andrade in USA Barcelona, and was not directly involved in soliciting or
24
25

26 ³¹ T. 1169:22-25

27 ³² T. 1169:13-18

28 ³³ T. 1170:2-15

1 selling investors. He did not make statements attributed to him in the rehearsed testimony given by
2 Andrade.

3 21. Wilkerson brought Andrade to USA Barcelona as an investor of \$50,000 in early
4 April 2014, in a transaction was structured by Wilkerson where Andrade invested through his self-
5 directed IRA, and which coincides with Wilkerson joining USA Barcelona in late March.³⁴ From
6 December 2013 until April 2014, Andrade testified that he looked at other investments, and this
7 seemed to have a higher payoff.³⁵ Presumably the other investments were presented to him by his
8 investment advisor, Wilkerson, who was trying to maintain relationships with a client whom he
9 perceived was a potential investor in the company to which Wilkerson intended to move. In fact,
10 Andrade's investment was immediately after Wilkerson departed from an investment advisory firm
11 (where he worked with Kerrigan) to join Barcelona Advisors. Wilkerson controlled the delivery
12 and execution of all investment documents, and had all discussions with Andrade, with respect to
13 his investment in Barcelona Advisors.
14

15
16 22. Mr. Simmons did sign Andrade's subscription agreement when Wilkerson and
17 Andrade showed up at Barcelona Advisors' office unannounced.³⁶ When Wilkerson determined
18 that Harkins was not available to sign the Subscription Agreement, he requested that Mr. Simmons
19 do so, stating that Andrade was leaving on a trip that day, was short on time, and could not wait for
20 Harkins to return.³⁷ Mr. Simmons signed the subscription agreement at the instruction of Harkins,
21 whom he called for approval before signing.³⁸
22

23 23. Andrade's varying testimony about this investment was contradicted by all others
24 involved. Andrade first stated that he was not present when Mr. Simmons signed the subscription
25

26 ³⁴ T. 1167:15-19

27 ³⁵ T. 406:4-11

28 ³⁶ T. 1172:5-12

³⁷ T. 1172:12-17

³⁸ T. 412:13-20

1 agreement, and that he did not come to the USA Barcelona office to have the subscription
2 agreement signed. Andrade told two stories: first, that his wife dropped the signed subscription
3 agreement off at the USA Barcelona office, and second, that he mailed the signed subscription
4 agreement to the USA Barcelona office, and received a countersigned document back in the mail.³⁹

5 Both stories were false. Actually, Andrade came with Wilkerson to the office in person to sign the
6 subscription agreement. This was substantiated by testimony from both Harkins and Mr.
7 Simmons.⁴⁰

8
9 24. Andrade testified that he received a subscription agreement in the mail, that had been
10 filled out mostly completed to reflect an investment by his self-directed IRA.⁴¹ Andrade said that
11 did not know who completed the subscription documents, but it could only have been Wilkerson,
12 who, as Andrade's investment advisor, was the only person connected with USA Barcelona who
13 knew about Andrade's IRA.

14
15 25. Mr. Simmons was not present in any meeting with Andrade in June, 2014 where an
16 additional investment was discussed.⁴² This is supported by Andrade's testimony, where he recited
17 many statements made by Harkins at the alleged meeting, but did not recount any statements made
18 by Mr. Simmons, until, after prompting by the Division, he vaguely recalled that "[Mr.] Simmons
19 "was affirmative that things were okay...."⁴³ Mr. Simmons testified that he was not at a meeting
20 where an investment was discussed.⁴⁴ Harkins testified that he did not recall Mr. Simmons
21 attending the meeting. In fact, once the in-office meeting concluded, Harkins and Andrade went out
22
23

24
25 ³⁹ T. 386:8-14

⁴⁰ See e.g. T. 1172:8-1173:10

⁴¹ T. 412:3-22

⁴² T. 1173:12-24

⁴³ T. 390:9-391:5

⁴⁴ T. 1173:12-24

1 of the office to view Andrade's Porsche automobile.⁴⁵ Upon returning to the office, Harkins first
2 informed Mr. Simmons about Harkins' meeting with Andrade, remarking that Harkins had
3 previously owned the same model automobile as Andrade.⁴⁶
4

5
6 **E. Harkins**

7 26. Harkins stated many times that he was the only controlling person of Barcelona
8 Advisors and Barcelona Land Company.⁴⁷ This was confirmed by Kerrigan, Orr, and Mr.
9 Simmons, as well as by Eaves for the time period that he was an Executive Member.⁴⁸ Those
10 persons, as well as others, such as Mr. Teets, participated in, but did not control management of,
11 either USA Barcelona entity.⁴⁹
12

13
14 **F. Kerrigan**

15 27. Kerrigan provided the contacts with his investment advisor that USA Barcelona used
16 to raise capital. He did not recall making any decisions as an Executive Member.
17

18
19 **G. Mr. Simmons**

20 28. Mr. Simmons did not start working at Barcelona Advisors until mid-July 2013.⁵⁰
21 Prior to that time, he was primarily involved in other projects, such as acting as chairman of the
22 board of the Franciscan Renewal Center.⁵¹ Harkins may have listed Mr. Simmons in corporate
23

24 ⁴⁵ T. 1173:19-24

25 ⁴⁶ T. 1258:9-16

26 ⁴⁷ See footnote 5

27 ⁴⁸ See footnote 5

28 ⁴⁹ T. 1242:11-16

⁵⁰ T. 1140:10-14

⁵¹ T. 1134:6-14

1 filings, emails and PPMs prior to July 2013, but Mr. Simmons had no knowledge of, nor did he
2 consent to, those listings, nor was he informed of the content in those listings when made.

3 29. No Major Decisions were ever made by Executive Members. This was confirmed by
4 the testimony of Executive Members Harkins, Kerrigan, Orr, Eaves and Mr. Simmons.⁵²
5 McDonough's assertion that he was at meetings where decisions were made was fabricated, and
6 was totally uncorroborated.
7

8 30. Mr. Simmons sometimes signed business documents when asked to do so by
9 Harkins, such as job offers and independent contractor agreements. He also checked expense
10 reports.⁵³

11 31. From time to time, Mr. Simmons was asked to participate in discussions of draft
12 PPMs that were intended to be used in an offering by Barcelona Land Company, and Mr. Simmons
13 participated in practice sessions of potential presentations McDonough or Wilkerson might make
14 about Barcelona Land Company to potential investors.⁵⁴ However, the Barcelona Land Company
15 offering was never made.⁵⁵
16

17 32. While Mr. Simmons, as did all other USA Barcelona personnel, discussed capital
18 needs and potential sources of capital, he had absolutely no direct personal involvement in creating
19 offering documents or raising capital from anyone.⁵⁶
20

21 33. Testimony from Andrade that Mr. Simmons was involved in offering and selling any
22 investments to him is totally out of character with all other activities of Mr. Simmons at USA
23 Barcelona. Mr. Simmons did not mention the December lunch meeting, where, at Wilkerson's
24 request, he joined Wilkerson and Andrade, in his EUO because in the context of the EUO questions,

25 ⁵² See footnote 5

26 ⁵³ See, e.g. T. 125:4,10

27 ⁵⁴ T. 89:12-25

28 ⁵⁵ T. 900:22-901:8

⁵⁶ T. 1179:25-1180:14

1 that lunch meeting had nothing to do with Andrade's investment. The investment was made nearly
2 four months later, and was timed by Wilkerson to coincide with his joining USA Barcelona, so that
3 Wilkerson would receive credit for the investment. Mr. Simmons was not involved in soliciting
4 Andrade as an investor, and did not perceive the luncheon, where he caught up with Andrade after
5 30 years, as being part of the investment process. Mr. Simmons joined the lunch meeting merely as
6 an accommodation to Wilkerson to renew an old acquaintance, and was unrelated to Andrade's
7 investment.⁵⁷

10 **H. Orr**

11 34. Orr's experience and testimony was substantially similar to Mr. Simmons, except
12 that Orr's involvement in the USA Barcelona business was even more circumscribed, and Orr
13 resided in California, so that he was only in the USA Barcelona office on a part time basis. While
14 he initially believed that Executive Members voted on one issue, on reflection he agreed that no
15 Major Decisions were made by the Executive Members.⁵⁸

18 **I. Omissions**

19 No allegations were pled in the Notices that Mr. Simmons omitted any information in
20 connection with the offer or sale of a security. To the extent that any such allegations are
21 considered, Mr. Simmons responds as follows:

22 35. All statements or claimed omissions with respect to the so-called: "*AVC Failure;*
23 *Meka Conviction; Kerrigan Debts; Plan B Business Plan; Failure to Pay Kerrigan Notes;*
24 *Promised Use of Funds to Repay Kerrigan; Delayed 12-6-12 Interest Payments; and Use of 10-5-*

26 ⁵⁷ T. 1169:13-18

27 ⁵⁸ T. 762:7-8

1 10 Proceeds to pay 12-6-12 Investors were made by others, and Mr. Simmons had no involvement
2 in them.

3
4 **J. Misrepresentations**

5 No allegations were pled in the Notices that Mr. Simmons made any misrepresentations in
6 connection with the offer or sale of a security. To the extent that any such allegations are
7 considered, the evidence cited above shows that Mr. Simmons had no involvement in preparing
8 offering materials, or making offers and sales.
9

10
11 **V.**

12 **ARGUMENT**

13
14 **A. Mr. Simmons Was Not a Controlling Person of either Barcelona Advisors or**
15 **Barcelona Land Company, and Is Not Liable For Violations, If Any Committed By Those**
16 **Companies.**

17 36. The law is very clear that to be a controlling person, one must do substantially more
18 than hold a title. The Division correctly cites Eastern Vanguard Forex Ltd v. Ariz. Corp. Comm'n,
19 2016 Ariz. 399 (Ct. App. 2003), as the first case interpreting A.R.S. § 44-1991. That court noted
20 that A.R.S. § 44-1991 is substantially similar to Section 20(a) of the Securities Exchange Act of
21 1934.

22
23 37. The status of a person as an officer or directors of a company is insufficient to
24 establish that person's liability as a controlling person. See, e.g., Kaplan v. Rose, 49 F.3d 1363,
25 1382 (9th Cir.1994) (director status is a "red light" but a director is not automatically liable as a
26 controlling person). Instead, as interpreted by the court in Eastern Vanguard, a person can only be
27

1 held liable under A.R.S. § 44-1999(B) if that person “has the [legal] power to directly or indirectly
2 control the activities of those persons or entities liable as primary violators of A.R.S. § 44-1991
3 and 1992.” While it may be argued that Sell v Gama, 295 P.3d 421 (Ariz. 2012) made that standard
4 even more stringent, the evidence presented does not come close to establishing that Mr. Simmons
5 was a controlling person in this case.
6

7 38. To determine if any person is a controlling person, the evidence must show that Mr.
8 Simmons had the legal power to control the USA Barcelona entities. In this case, that is an easy
9 examination. All evidence presented proved that Harkins was the sole controlling person with the
10 legal power to control, and the sole person who actually controlled, the USA Barcelona entities.
11 Neither Mr. Simmons, nor any other Respondent, was a controlling person.
12

13 **B. No Motion Was Granted to Conform the Notice to the Evidence**

14 39. As is discussed in “Summary of the Case” above, It is true that the Division moved
15 during the hearing to conform its notice to the evidence. **Mr. Simmons objected to the motion,**
16 **and it was never granted.**⁵⁹ Presumably the Division made such a motion because it was aware
17 that it had produced no credible evidence to support the controlling person allegations against Orr
18 and Mr. Simmons. Orr and Mr. Simmons opposed the motion, unless allegations against them, and
19 allegations relating to Barcelona Land Company, were dismissed.
20

21 40. Judge Preny took the Division’s motion, together with Mr. Simmons motions, under
22 advisement, and the motions were never granted. It would be fundamentally unfair to “conform its
23 notice to the evidence”, whatever that would mean in this case. The sole allegations against Mr.
24 Simmons in both the Notice and the Amended Notice were that he had joint and several
25

26
27 ⁵⁹ T. 699:20-702:19

1 “controlling person” liability for purported securities fraud violations relating to offers and sales by
2 Barcelona Advisors and purported offers by Barcelona Land Company. After going through
3 pleadings, discovery, and a full administrative hearing where Mr. Simmons was only defending
4 against allegations of controlling person liability, the Division seeks to change the playing field, and
5 have Mr. Simmons defend, after the fact, new allegations that were not at issue when the hearing
6 was held. The Division’s statement that “there was no objection “ to the motion to conform the
7 notice to the evidence, and that “the issues in the hearing were tried with the express consent of the
8 parties” is completely false.

10 41. Mr. Simmons agrees that Judge Preny had the discretion to grant a motion to
11 conform the notice under proper circumstances, such as correcting minor discrepancies. However,
12 it is never proper to “conform” the pleadings to add new claims or causes of action. Had the motion
13 been granted during the hearing, over Mr. Simmons’ objection, at the close of the Division’s case,
14 at least Mr. Simmons would have had the opportunity require that the Division state the additional
15 claims that it believed the evidence supported, and defend against allegations that were not
16 contained in the Notices. Because the motion was not granted, and the Division raised no new
17 claims at the hearing, Mr. Simmons need only respond to the only allegations against him in the
18 Notices, that is, controlling person liability.

21
22 **C. Credibility Issues**

23 The sole allegations against Mr. Simmons in the Original Notice and the Amended Notice
24 were identical, claiming joint and several “controlling person” liability for purported securities
25 fraud violations relating to offers and sales by Barcelona Advisors and purported offers by
26 Barcelona Land Company. No allegations were pled in the Notices that Mr. Simmons was directly

1 involved in any offer or sale of a security. To the extent that any such allegations are considered,
2 Mr. Simmons responds as follows:

3 42. The Division's attempt to disparage Mr. Simmons and his credibility, is unseemly,
4 but is completely in character with the Division's handling of this case. The Division's repeated
5 attacks are based on half-truths and deliberate misleading statements. For example, the Division
6 refers to Mr. Simmons' "detailed knowledge of Barcelona Advisors' offerings, so detailed that he
7 and Harkins trained others on how to present them."

8
9 43. In fact, the only offerings about which Mr. Simmons had such knowledge or was
10 involved in training, related to the Barcelona Land Company, where no securities were ever offered
11 or sold. The Division's statement that Mr. Simmons "slipped up" by "admitting that he was shown
12 final PPMs" is disingenuous. While he may have been handed final PPMs, and asked if they had
13 been reviewed by counsel, the testimony is clear that Mr. Simmons neither participated in the
14 preparation of any PPM that was used to offer or sell securities, nor was he actively involved in the
15 offer or sale of securities.
16

17 44. As demonstrated above, Mr. Simmons was consistent and credible in his testimony
18 about not being involved in raising capital activities. All persons testified that everyone involved
19 with USA Barcelona was asked about potential contacts who might be potential investors. The
20 significant errors in Eaves' rehearsed testimony, including his confident testimony that both Orr and
21 Mr. Simmons were present at meetings where they proved they were not present, (and in the case of
22 Orr, was not even in Arizona), were representative of major flaws in Eaves' testimony, not
23 Simmons' credibility. The Division citing what they posit as significant testimony from
24 McDonough that Simmons mentioned to McDonough about McDonough possibly approaching
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1 potential investors at Simmons country club actually supports Simmons' consistent position that he
2 refused to approach potential investors himself.

3 45. The Division also tried to fashion Andrade's rehearsed testimony to create a false
4 impression that Mr. Simmons was a significant participant in Andrade's investment. The Division
5 deliberately did not call Wilkerson as a witness, who was Andrade's financial advisor, and whose
6 truthful testimony would corroborate Mr. Simmons' version of events. Of course, Andrade's
7 recollection of events differs from all other persons who testified about those same events. What is
8 clear is that all contacts and correspondence with Andrade were arranged by Wilkerson, who
9 presented all of the USA Barcelona investments to Andrade.
10

11 46. Mr. Simmons indicated that he did not mention the December lunch meeting with
12 Wilkerson and Andrade because he did not consider it a meeting related to Andrade's investment,
13 which occurred several months later, promptly after Wilkinson joined USA Barcelona.
14

15 47. The June meeting between Andrade and Harkins is another instance where
16 Andrade's recollection differs from that of Mr. Simmons and Harkins, both of whom testified that
17 Simmons was not there. Andrade recalled many statements made by Harkins, but then referred
18 vaguely to Simmons' assurances that everything was OK. His recollections were remarkably similar
19 to the testimony of virtually all of the investor witnesses who had been rehearsed by the Division.
20

21 48. The Division attempts to cite public filings made solely by Mr. Harkins, and PPMs
22 and other documents to attack Mr. Simmons' credibility on the subject of when Mr. Simmons
23 became an Executive Member. As discussed above, none of those documents diminish in any way
24 the validity of the testimony of all other Executive Members, which supports Mr. Simmons'
25 account of the relevant events.
26
27
28

1 untrue statement of a material fact, or omitted to state a material fact necessary to make any
2 statement made, in the light of the circumstances under which they were made, not misleading. No
3 allegation was made that Mr. Simmons violated anti-fraud provisions in connection with any offer
4 or sale of a security. To the extent that any such allegations are considered, Mr. Simmons responds
5 as follows:

6
7 51. No evidence was introduced that Mr. Simmons, in connection with the offer or sale
8 of any security, omitted telling any person any information about Harkins or his relationship with
9 Meka.

10 52. No evidence was introduced that Mr. Simmons, in connection with the offer or sale
11 of any security, stated to any investor that Barcelona Advisors would pay its notes by a specific
12 maturity date, or that they had no reason to be worried about investing. Mr. Simmons testified that
13 he never made such statements. Similarly, there is no evidence that Mr. Simmons omitted telling
14 any investor that Barcelona Advisors had failed to timely pay two \$30,000 promissory notes to
15 Kerrigan. In fact, Mr. Simmons had no knowledge of the existence of Mr. Kerrigan's promissory
16 notes.
17

18 **F. The Marital Community of Mr. Simmons and Janet Simmons is Not Liable Under**
19 **the Act.**

20 53. All evidence presented showed that Mr. Simmons has no liability for any of the
21 violations alleged by the Division, and therefore there is nothing for which the marital community
22 could be liable.
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V.

CONCLUSION

A. Conclusions of Law:

Based on the evidence submitted in this case, Mr. Simmons respectfully requests that Judge Preny recommend that the Commission make the following conclusions of law:

54. Mr. Simmons did not directly or indirectly control either Barcelona Advisors or Barcelona Land Company within the meaning of A.R.S. § 44-1999, and he is not jointly and severally liable under A.R.S. § 44-1999 to the same extent as either Barcelona Advisors or Barcelona Land Company for any violations of A.R.S. § 44-1991;

55. Mr. Simmons did not violate A.R.S. § 44-1841 by the offer or sale of unregistered securities within or from Arizona.

56. Mr. Simmons did not violate A.R.S. § 44-1842 by the offer or sale of unregistered securities within or from Arizona while not registered as a securities dealer or salesman.

57. Mr. Simmons did not violate A.R.S. § 44-1991(A)(2) by making untrue statements of material fact or materially misleading omissions in connection with an offer to sell securities within or from Arizona.

B. Relief:

58. Mr. Simmons respectfully requests that the Hearing Division recommend to the Commission that it:

(a) dismiss all claims in the Notices relating to Mr. Simmons;

(b) dismiss all claims relating to Mr. Simmons not set forth in the Notices but raised by the Division;

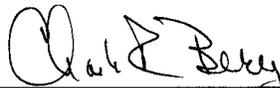
1 (c) enter an order that Mr. Simmons, including specifically his marital community, is not
2 required to pay any amounts, whether as restitution, administrative penalties, interest or otherwise;

3 (d) dismiss any and all cease and desist orders relating to Mr. Simmons; and

4 (e) grant any further relief that the Commission deems appropriate, including, without
5 limitation: (i) imposing sanctions against the Division for improperly raising claims direct claims
6 against Mr. Simmons for the first time in the Division's post-hearing brief: and (ii) reimbursing Mr.
7 Simmons for his costs and fees required to deal with the Division's claims improperly raised its
8 post-hearing brief.
9

10
11
12 RESPECTFULLY SUBMITTED August 8, 2016.

13
14 Clark Hill PLC

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20 *Counsel for Respondents*
21 *George T. Simmons and*
22 *Janet B. Simmons*

23 ORIGINAL and thirteen copies of the foregoing
24 filed this August 8, 2016:

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26 Arizona Corporation Commission
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28 Phoenix, AZ 85007

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2 This 8 day of August, 2016 to:

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14 Paul Kitchin
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20 this 8 day of August, 2016 to:

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