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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

DOCKETED

AUG 22 2016

COMMISSIONERS

DOUG LITTLE - Chairman
BOB STUMP
BOB BURNS
TOM FORESE
ANDY TOBIN

DOCKETED BY [Signature]

In the matter of:
USA BARCELONA REALTY ADVISORS, LLC, an Arizona limited liability company,
USA BARCELONA HOTEL LAND COMPANY I, LLC, an Arizona limited liability company,
RICHARD C. HARKINS, an unmarried man,
ROBERT J. KERRIGAN (CRD no. 268516) an unmarried man,
GEORGE T. SIMMONS and JANET B. SIMMONS, husband and wife,
BRUCE L. ORR and SUSAN C. ORR, husband and wife,
Respondents.
DOCKET NO. S-20938A-15-0308
SECURITIES DIVISION'S REPLY TO POST-HEARING BRIEFS OF RESPONDENTS GEORGE T. SIMMONS AND BRUCE L. ORR

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The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") replies to the post-hearing briefs of Respondents George T. Simmons' ("Simmons") and Bruce L. Orr ("Orr") as follows. This reply addresses only specific issues that especially need correction. The Division otherwise relies on its original post-hearing brief.

I. Simmons Misstates the Standard for Conforming the Notice to the Evidence

Simmons' arguments about the Division's motion to conform the notice to the evidence misstate the relevant legal standard. Simmons argues that it would be "fundamentally unfair, particularly after conclusion of the hearing ... to bring new claims ..., " by conforming the notice to the evidence."

1 Post-Hearing Brief of Respondent George T. Simmons at p.5

1 Simmons does not, however, cite any authority to support any of his arguments about conforming the  
2 notice to the evidence. In fact, bringing new claims during or after the hearing based on the evidence  
3 actually presented is the entire purpose of conforming the notice to the evidence. Rule 15(b) of the  
4 Arizona Rules of Civil Procedure expressly provides that an amendment to conform “may be made at  
5 any time, even after judgment.” Ariz. R. Civ. P. 15(b). “The purpose of this rule, allowing amendments  
6 of pleadings to conform to the evidence, is to permit the case to be ultimately tried on its merits so that  
7 the parties to the litigation may, in one trial, receive all relief to which they are entitled.” Continental  
8 Nat’l Bank v. Evans, 107 Ariz. 378, 381 (1971). Conforming the notice may add “... a new or different  
9 theory from that alleged in the pleadings ...” for example by adding a claim for fraudulent  
10 misrepresentation to a complaint to quiet title. Leigh v. Swartz, 74 Ariz. 108, 112–113 (1952)  
11 (complaint was properly conformed at the end of trial).

12 The correct standard is that a motion to conform the notice to the evidence should be allowed  
13 when the additional issues were tried by express or implied consent of the parties. Ariz. R. Civ. P. 15(b).  
14 And even without consent, the motion should still be allowed if it promotes the merits of the case unless  
15 the opposing party shows that it would be prejudiced. See Ariz. R. Civ. P. 15(b). Motions to conform  
16 the notice to the evidence “should be liberally allowed in the interest of justice and are within the  
17 discretion of the trial court.” Leigh, 74 Ariz. at 112.

18 The Division’s motion should be allowed because the issues of Simmons’ offers to sell  
19 securities and his misleading omissions in connection with those offers were tried with Simmons’  
20 implied consent.<sup>2</sup> See Ariz. R. Civ. P. 15(b). In Herrera v. Valentine, a party’s new claim was tried with  
21 the opponent’s implied consent because, 1) the party’s opening statement effectively put the opponent  
22 on notice of the new claim, 2) the party introduced evidence to prove the new claim early in the trial,  
23 and 3) the opponent introduced evidence on the same issue as part of its defense. Herrera v. Valentina,

24 \_\_\_\_\_  
25 <sup>2</sup> In addition, the issues appeared to be tried with Simmons’ express consent since he did not object to the Division’s  
26 motion to conform the notice to the evidence and only sought additional motions to dismiss on the same basis.  
Simmons’ counsel stated, “If we have the, the notice conform to the evidence, I don’t think we have any objection to  
that, but I think it requires [dismissal of certain claims] ....” T.700:5–21. However, regardless of whether Simmons  
expressly consented to trying additional issues, the course of the hearing shows that he impliedly consented.

1 653 F.2d 1220, 1223–1224 (8th Cir. 1981) (motion to conform correctly granted).<sup>3</sup> The present case  
 2 included the same three implied consent factors. First, the Division’s opening argument put Simmons  
 3 on notice of the issues by stating, “The sale of the securities involved fraud, and Mr. Harkins, Mr.  
 4 Kerrigan, and Mr. Simmons were all directly involved in the fraud.”<sup>4</sup> This effectively announced the  
 5 issues of Simmons’ involvement in the sale of securities and the accompanying fraud. The Division  
 6 also outlined the primary evidence for these issues when it summarized Mr. Andrade’s expected  
 7 testimony: “Mr. Simmons encouraged [Mr. Andrade] to invest and misled him by telling him that Mr.  
 8 Harkins was a very successful business man and that this was a sure investment.”<sup>5</sup> Second, the Division  
 9 introduced the evidence for the new issues early in the hearing. On the second day of the seven-day  
 10 hearing, Mr. Eaves testified that Simmons asked him during a phone call to invest \$125,000,<sup>6</sup> and Mr.  
 11 Andrade testified that Simmons asked him to invest and told him that Respondent Richard C. Harkins  
 12 (“Harkins”) was very successful in real estate and that there was no reason for him to be worried about  
 13 investing.<sup>7</sup> Third, Simmons introduced evidence on the same issues as part of his defense. Simmons  
 14 cross-examined Mr. Eaves and Mr. Andrade on these issues.<sup>8</sup> Simmons testified on direct examination  
 15 that he never made such statements to Mr. Eaves or Mr. Andrade.<sup>9</sup> After the Division cross-examined  
 16 Simmons on these statements,<sup>10</sup> Simmons again denied during his redirect and further redirect  
 17 examinations that the statements ever occurred.<sup>11</sup> Based on these three factors, the issues of Simmons’  
 18 offers to sell securities and his misleading omissions were tried with his implied consent. See Herrera,  
 19 653 F.2d at 1223–1224.

20 \_\_\_\_\_  
 21 <sup>3</sup> Herrera v. Valentine applied Federal Rule of Civil Procedure 15(b), which is very similar to the corresponding  
 Arizona rule. See Herrera, 653 F.2d at 1223. Compare Fed. R. Civ. P. 15(b) with Ariz. R. Civ. P. 15(b).

22 <sup>4</sup> T.21:16–18 (emphasis added). In fact, Orr realized that the Division’s opening argument outlined direct securities  
 violations by Simmons, which Orr remarked on in his post-hearing brief. See Respondent’s, Bruce Orr, Post-Hearing  
 23 Brief at p.18 (“... [the Division’s] opening remarks ... stated that the complaint against [Orr] was as a “Control  
 Person,” and that the complaints on securities issues were against Mr. Harkins, Mr. Kerrigan and Mr. Simmons ...”  
 (emphasis added).

24 <sup>5</sup> T.23:23–T.24:2

<sup>6</sup> T.288:20–21

<sup>7</sup> T.380:10–14; T.381:2–7; T.391:1–5; T.397:15–18; T.398:2–6; T.399:5–10

25 <sup>8</sup> T.346:23–24; T.347:4–5; T.404:1–T.411:25

<sup>9</sup> T.1164:21–23; T.1170:2–15; T.1171:2–22; T.1173:11–24

26 <sup>10</sup> T.1204:14–24; T.1207:6–T.1208:5; T.1218:4–25; T.1219:13–22; T.1246:5–T.1247:8; T.1248:18–T.1250:3

<sup>11</sup> T.1235:2–T.1236:20; T.1251:1–6

1 Even if Simmons did not impliedly consent to trying these issues, the Division's motion should  
 2 still be allowed because Simmons has not shown how he would be prejudiced. See Ariz. R. Civ. P.  
 3 15(b). In U.S. v. Shanbaum, a party was not prejudiced by a new issue that was litigated at trial because  
 4 "all of the relevant factual and legal details were before the court at trial." U.S. v. Shanbaum, 10 F.3d  
 5 305, 313 (5th Cir. 1994). Likewise, in the present case, Simmons would not be prejudiced by  
 6 conforming the notice to include the new issues because all of the relevant details are before the  
 7 Commission. Simmons fully litigated the issues of Simmons' offers to sell securities and his misleading  
 8 omissions in connection with those offers. These issues arose on Simmons' direct examination, cross-  
 9 examination, redirect examination, recross-examination, and further redirect examination.<sup>12</sup> Simmons  
 10 then rested, apparently satisfied with his testimony on these issues.<sup>13</sup> Simmons argues that if Mr.  
 11 Andrade's financial advisor, Jim Wilkerson ("Mr. Wilkerson"), had testified, his testimony would  
 12 "likely" have corroborated Simmons' testimony, but that is speculation.<sup>14</sup> Simmons knew that Mr.  
 13 Wilkerson might have relevant testimony, and in fact Simmons' witness list disclosed Mr. Wilkerson  
 14 as a possible witness.<sup>15</sup> Mr. Andrade testified about these issues on May 10, 2016, and Simmons did  
 15 not rest his case until May 19, 2016, over a week later.<sup>16</sup> Simmons had ample time to arrange for Mr.  
 16 Wilkerson to testify in response to Mr. Andrade but chose not to. Therefore Simmons was not  
 17 prejudiced by trying the new issues, and the Division's motion should be allowed.

## 18 **II. The Division's Motion to Conform Should Be Allowed Despite Orr's Arguments**

19 Orr argues that the Division's motion to conform the notice to the evidence should be denied  
 20 because the Division did not allege the offer or sale of securities by Orr in its notice or opening  
 21 argument.<sup>17</sup> It is true that the Division did not make such an allegation at those times, but that was  
 22  
 23

24 <sup>12</sup> T.1164:21-23; T.1170:2-15; T.1171:2-22; T.1173:11-24; T.1204:14-24; T.1207:6-T.1208:5; T.1218:4-25;  
 T.1219:13-22; T.1235:2-T.1236:20; T.1246:5-T.1247:8; T.1248:18-T.1250:3; T.1251:1-6

25 <sup>13</sup> T.1253:2-6

26 <sup>14</sup> Post-Hearing Brief of Respondent George T. Simmons at pp.15, 25

<sup>15</sup> Simmons' March 14, 2016 Respondent's List of Witnesses and Documentary Evidence

<sup>16</sup> T.212-213; T.1226; T.1253:2-6

<sup>17</sup> Respondent's, Bruce Orr, Post-Hearing Brief at pp.8-9

1 because the evidence of Orr's offer to sell securities did not arise until Orr himself raised it during his  
2 own testimony.

3 The Division's motion to conform should be allowed because Orr impliedly consented to trying  
4 the issue by raising the issue with his own testimony. See Ariz. R. Civ. P. 15(b). In Slavitt v. Kauhi a  
5 plaintiff alleged a willful assault by a defendant, but in the defendant's trial testimony he denied a willful  
6 assault and instead testified to facts that supported a theory that he had negligently injured the plaintiff.  
7 Slavitt v. Kauhi, 384 F.2d 530, 531–532 (9th Cir. 1967). The trial court denied the plaintiff's motion to  
8 amend his complaint to add a new claim of negligent injury, but the 9th Circuit held that the trial court  
9 should have allowed the motion because the defendant had impliedly consented to the new claim  
10 because it arose out of his own testimony. Id. at 532–534. Similarly, Orr impliedly consented to trying  
11 the issue of his offer of securities because the theory arose out of his own testimony. The Division cross-  
12 examined Orr about the credibility of his claims that he never met with potential investors by  
13 confronting him with an expense report he had prepared claiming reimbursement for “Drinks  
14 (Prospective Investors).”<sup>18</sup> In response, Orr testified about meeting four people, telling them about  
15 Barcelona Advisors over drinks, and directing them to Mr. McDonough.<sup>19</sup>

16 Even if Orr did not impliedly consent to trying this issue, the Division's motion should still be  
17 allowed because Orr has not shown how he would be prejudiced. See Ariz. R. Civ. P. 15(b). Orr would  
18 not be prejudiced by conforming the notice to include the new issue because all of the relevant details  
19 are before the Commission. See Shanbaum, 10 F.3d at 313. Orr did not need any other evidence to  
20 defend himself because the Division's arguments that Orr offered to sell securities are based on simply  
21 accepting at face value Orr's own testimony about the meeting with four potential investors over drinks.

### 22 **III. The Division's Amended Brief Should Be Accepted**

23 The Division hereby moves that the Commission accept its Amended Post-Hearing Brief  
24 (“Amended Brief”), which was filed on July 11, 2016, one business day after the July 8, 2016, briefing  
25

26 <sup>18</sup> T.743:2–8; T.749:5–20; S-173 at ACC7316

<sup>19</sup> T.749:21–T.750:15

1 deadline when the Division filed its timely original Post-Hearing Brief. The purpose of the Amended  
2 Brief was to clearly concede that for purposes of Ms. Bair's \$20,000 investment on October 12, 2012,  
3 Respondents Simmons, Robert J. Kerrigan ("Kerrigan"), and Orr are not liable as controlling persons  
4 for that particular investment. There is good cause to accept the late-filed Amended Brief because it  
5 helps to more clearly document this concession and contains a more accurate prayer for relief.

#### 6 **IV. Simmons and Orr Misapply the Control Person Standard**

7 The Act's control person statute, A.R.S. § 44-1999(B), imposes presumptive liability on  
8 "[e]very person who, directly or indirectly, controls any person liable for a violation of §§ 44-1991  
9 or 44-1992 ...." Eastern Vanguard Forex v. Ariz. Corp. Comm'n, 206 Ariz. 399, 411-412 ¶ 41 (Ct.  
10 App. 2003) (quoting A.R.S. § 44-1999(B)). The term "control" means "the possession, direct or  
11 indirect, of the power to direct or cause the direction of the management and policies of a person,  
12 whether through the ownership of voting securities, by contract, or otherwise." Eastern Vanguard,  
13 206 Ariz. at 412 ¶ 41 (quoting the S.E.C.'s definition of "control" in 17 C.F.R. § 230.405 (1995))  
14 (emphasis in original). The term control "is intended to include actual control as well as what has  
15 been called legally enforceable control." Eastern Vanguard, 206 Ariz. at 412 ¶ 41 (internal quotation  
16 and citation omitted).

17 The control person statute is to be "liberally construed to effect its remedial purpose of  
18 protecting the public interest." Id. at 410 ¶ 36. Control liability "does not require actual participation  
19 in the wrongful conduct ...." Id. at 413 ¶ 44. Requiring evidence that a controlling person actually  
20 participated in the fraudulent activity would "frustrate the intent behind the creation of controlling  
21 person liability" under the Act. Id. at 412 ¶ 41.

22 Accordingly, liability may be premised on the mere power to control, regardless of whether  
23 the respondent(s) actually exercised that power. Id. at 412 ¶¶ 41-42. Thus, "those persons who have  
24 voluntarily assumed a status or position that ordinarily conveys certain authority to control," such as  
25 corporate directors or executive members of a limited liability company, may not avoid liability by  
26 ignoring "the duties and responsibilities – fiduciary and otherwise – attendant to that control." Loftus

1 C. Carson, II, The Liability of Controlling Persons under the Federal Securities Act, 72 Notre Dame  
2 L.Rev. 263, 284 (1997) (cited with approval in Eastern Vanguard, 206 Ariz. at 411–412 ¶¶ 38, 41).

3 To prove that someone was a control person, “the evidence need only show that the person  
4 targeted as a controlling person had the legal power, either individually or as part of a control group,  
5 to control the activities of the primary violator.” Id. at 412 ¶ 42. For example, in Eastern Vanguard,  
6 two defendants were held liable as control persons because, among other things, they consulted with  
7 the company’s manager on “hiring and terminating personnel,” they “closely tracked [the  
8 company’s] progress,” and “were consistently involved in [its] management and financial  
9 operations.” Id. at 412–413 ¶ 43.

10 Applying these principles, there is overwhelming evidence to find Simmons and Orr liable  
11 as controlling persons of Barcelona Advisors. First, Barcelona Advisors’ Articles of Organization,  
12 as amended on April 12, 2013, vest management of the company in its four managers: Simmons,  
13 Orr, Kerrigan, and Harkins.<sup>20</sup> Pursuant to A.R.S. § 29-681(B),<sup>21</sup> Simmons and Orr had the legal  
14 power, either individually or as part of a control group, to control the activities of the primary  
15 violator, Barcelona Advisors.

16 In addition to being managers, Simmons and Orr were also two of Barcelona Advisors’ four  
17 Executive Members. The Second Operating Agreement expressly stated, “[T]he Executive Members  
18 have control of the company through their exclusive power to approve all ‘Major Decisions.’”<sup>22</sup>

19 It is no defense that Simmons and Orr failed to effectively exercise the legal power they had  
20 as managers and Executive Members. To prevent those clothed with authority, such as Simmons and  
21 Orr, from abdicating their responsibilities, “the appropriate standard [for control person liability]  
22

23  
24 <sup>20</sup> S-3(b)

25 <sup>21</sup> A.R.S. § 29-681(B) provides: “If the articles of organization provide that management of the limited liability company  
26 is vested in one or more managers, management of the limited liability company is vested in a manager or managers,  
subject to any provisions in an operating agreement restricting or enlarging the management rights or responsibilities of  
one or more managers or classes of managers or reserving specified management rights to the members or classes of  
members.”

<sup>22</sup> S-57 at ACC789

1 must be flexible enough to include actions of omission as well as commission.” Eastern Vanguard,  
2 206 Ariz. at 414 ¶ 48.

3 Additional Control Person Evidence Against Simmons

- 4 • Simmons was the Executive Vice President and Chief Operating Officer of Barcelona  
5 Advisors. T.722:17–19; T.1186:3–6.
- 6 • As the Executive Vice President and Chief Operating Officer, Simmons worked on the  
7 internal organization of the company. T.1186:20–23.
- 8 • Simmons was hired to put the administrative structure into place so that Barcelona Advisors  
9 could operate. T.1183:18–22.
- 10 • Simmons was responsible for developing the management by objectives program for  
11 Barcelona Advisors, which the company planned to implement for its senior executives by  
12 early 2014. T.1184:15–18; S-177 (10/24/2013 Offer Letter to McDonough signed by  
13 Simmons).
- 14 • Simmons signed the letter dated October 24, 2013, from Barcelona Advisors to Patrick  
15 McDonough confirming the terms of the company’s offer of employment to Mr.  
16 McDonough. S-177; T.1198:8–17.
- 17 • Simmons signed the agreements between Barcelona Advisors and Mr. McDonough.  
18 T.1194:18–1195:22; H-6.
- 19 • Simmons signed Rodney Eaves’ independent contractor agreement. T.1193:22–24.
- 20 • Barcelona Advisors paid Simmons approximately \$99,000 in compensation. T.1199:19–24;  
21 S-88.
- 22 • All four Executive Members of Barcelona Advisors, including Simmons and Orr, participated  
23 at some level in working to capitalize the company. T.1203:9–15.
- 24 • On at least two occasions, Simmons critiqued dry run presentations by Mr. McDonough to  
25 explain the company to the broker/dealer community. T.1185:1–18.

26

- 1 • On January 7, 2014, Simmons wrote to Richard Andrade: "I'd like to schedule a time with  
2 you to come into the office this week to discuss our current capital raise and have you meet  
3 more of our team." S-171; T.1209:16–T.1210:12.
- 4 • Simmons signed the Subscription Agreement as Barcelona Advisors' Chief Operating  
5 Officer for Mr. Andrade's \$50,000 investment in the company's Series B 10-5-10 Notes. S-  
6 36; T.1213:5–T.1214:3.
- 7 • On September 4, 2014, Simmons exchanged emails with Mr. Andrade regarding the financial  
8 condition of Barcelona Advisors. S-172. Simmons stated that the company was "out of  
9 operating funds" and "we need operating capital badly, but we are doing everything possible  
10 to raise it..." S-172. Simmons concluded his email to Mr. Andrade: "We are doing everything  
11 we know of to fix the capital shortfall. Any ideas?" S-172; T.1220:16–T.1222:19.
- 12 • On approximately February 27 or 28, 2014, Simmons telephoned Mr. Eaves and asked him  
13 to invest another \$125,000. T.287:16–19; T.288:6–23; T.346:25–T.347:2.
- 14 • Simmons signed the December 31, 2013, letter to investors as an Executive Member of  
15 Barcelona Advisors. S-65; T.1197:1–6.
- 16 • Simmons signed the April 16, 2014, letter to investors as an Executive Member of Barcelona  
17 Advisors. S-26; T.1197:17–T.1198:3.
- 18 • Simmons never told any investor that he did not want them to consider him an Executive  
19 Member of Barcelona Advisors. T.1198:4–6.
- 20 • Simmons was the person at Barcelona Advisors who worked most closely with Bruce Orr.  
21 T.1187:5–7.
- 22 • Everything that Orr "ran up the flagpole went through [Simmons]." T.722: 21–22.
- 23 • Orr made presentations to Simmons on (1) hotel development projects, (2) the due diligence  
24 that Barcelona Advisors would need to do on those potential projects, and (3) the possible  
25 profitability of those projects. T.723:9–18.
- 26

- 1 • Orr submitted his expense reimbursement requests to Simmons for his approval. T.723:19–  
2 21.
- 3 • Simmons signed Orr’s expense reports. T.721:23–25.
- 4 • Simmons and Orr worked to find land parcels that were appropriate for the development of  
5 hotel properties. T.1187:20–24.
- 6 • Simmons and Orr also met with major hotel companies like Marriott and Hilton, which they  
7 called “flags”, to present opportunities these flags might be interested in approving as  
8 franchises. T.1187:25–T.1188:11.
- 9 • Simmons and Orr also met with management companies that operated hotels. T.1188:18–  
10 21.
- 11 • Simmons sometimes took the lead in working on arrangements or relationships with third  
12 parties that were required for Barcelona Advisors to do business. T.1186:24–T.1187:2.
- 13 • Simmons selected which third parties to talk to about potential opportunities for Barcelona  
14 Advisors. T.1189:5–11.
- 15 • If Simmons and Orr met with somebody that wanted to do business and decided that person  
16 was not a good fit for Barcelona Advisors, they did not have a second meeting with that  
17 person. T.1189:12–18.
- 18 • Harkins and Kerrigan raised money from investors for Barcelona Advisors to use as working  
19 capital to support the ability of Simmons and Orr to seek out and vet hotel development  
20 opportunities. T.1192:3–23.

21 Additional Control Person Evidence Against Orr

- 22 • Orr was told that Executive Members “would handle major decisions.” T.732:20–24.
- 23 • Orr and the other Executive Members discussed that they “would be “driving the company.”  
24 T.731:12–13.
- 25 • Orr testified that Executive Members were supposed to be able to hire the President, and then  
26 make major decisions. T.734:8–13.

- 1 • Orr's role, initially as a consultant and then as an Executive Member, was to bring in hotel  
2 development projects for Barcelona Advisors. T.734:16–T.735:2.
- 3 • Bringing in hotel development projects consisted of: (1) sourcing the projects; (2) doing  
4 financial analyses on the projects; and (3) presenting the projects, or the proposed projects,  
5 to other Executive Members of Barcelona Advisors. T.735:3–11.
- 6 • Barcelona Advisors then used the projects that Orr brought in to try and raise funds from  
7 investors. T.735:12–14.
- 8 • Orr was the Executive Member of Barcelona Advisors who knew how to find locations for  
9 the hotel development projects that the company wanted to do. T.735:15–19.
- 10 • Orr was also the Executive Member who had the majority of contacts within the hotel  
11 industry, including hotel and management companies. T.735:20–T.736:2.
- 12 • Orr, Harkins, and Simmons developed criteria for Barcelona Advisors to use to evaluate  
13 potential hotel development projects. T.1191:8–17.
- 14 • Early on during his tenure as an Executive Member, Orr offered his opinions to Harkins on  
15 Barcelona Advisors' draft PPMs. One of the things that Orr opined upon was how Harkins  
16 was presenting financial information in the PPMs. Specifically, if Orr thought the fees for  
17 Barcelona Advisors that Harkins was adding to the financial projections would be a burden  
18 to the hotel project, Orr raised that issue with Harkins. T.736:8–24.
- 19 • Orr knew that Barcelona Advisors wanted to use the 12-6-12 Notes to raise money from  
20 investors. T.738:5–7.
- 21 • Orr and the other Executive Members discussed how the 12-6-12 Notes were structured, that  
22 the company would have to pay bonuses, and what the interest rates were. T.738:8–12.
- 23 • Orr also knew that Barcelona Advisors wanted to use the 10-5-10 Notes to raise money from  
24 investors. T.739:3–5.
- 25 • With respect to the 10-5-10 Notes, Orr and the other Executive Members discussed that the  
26 company was going to have to pay bonuses and what the interest rates were. T.739:10–14.

- 1 • Orr requested that Rodney Eaves be added to the Executive Committee, and then Eaves was  
2 added. T.739:19–23.
- 3 • Orr authorized Simmons to sign Orr’s name as an Executive Member to Barcelona Advisors’  
4 December 31, 2013, letter to investors (S-65). T.741:6–22.
- 5 • Orr signed Barcelona Advisors’ April 16, 2014, letter to investors (S-26) as an Executive  
6 Member. T.741:23–T.742:12.
- 7 • Orr did not do anything to communicate to investors that, in his view, he was just an advisor  
8 to Barcelona Advisors. T.742:13–17.

9 The factual record clearly establishes that Simmons and Orr had significant authority over  
10 Barcelona Advisors and, moreover, they did in fact frequently exercise their authority. Based on this  
11 factual record and under the clear standards of Eastern Vanguard, Simmons and Orr are controlling  
12 persons under A.R.S. § 44-1999(B).

### 13 **V. Simmons and Orr Misstate the Record in Many Ways**

14 Simmons and Orr argue that Mr. Eaves falsely testified that he attended two meetings with  
15 Harkins, Orr, and Simmons and that Orr’s travel records refuted that testimony.<sup>23</sup> Simmons and Orr are  
16 misstating Mr. Eaves’ testimony. In fact, Mr. Eaves never testified that Orr was present at such a  
17 meeting, and instead agreed that Orr was not at such a meeting.<sup>24</sup> Simmons and Orr are confusing Mr.  
18 Eaves’ testimony with an allegation in the Division’s January 25, 2016, Amended Temporary Order to  
19 Cease and Desist and Notice of Opportunity for Hearing (“Amended Notice”), which alleged that  
20 Simmons and Orr attended two such meetings in December 2013 and February 2014 to ask Mr. Eaves  
21 to invest more.<sup>25</sup> These allegations were consistent with Harkins’ EUO testimony.<sup>26</sup> However, the  
22 Division concedes that Harkins was mistaken about those facts. Instead Mr. Eaves’ testimony should be  
23

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25 <sup>23</sup> Post-Hearing Brief of Respondent George T. Simmons at p.12; Respondent’s, Bruce Orr, Post-Hearing Brief at  
pp.14, 17

26 <sup>24</sup> T.325:21–25

<sup>25</sup> Amended Notice ¶¶ 43, 45

<sup>26</sup> S-32 p.100:20–101:22

1 credited, namely that it was Kerrigan who asked him to invest more in December 2013 and that it was  
2 Simmons who asked him to invest more over the phone in February 2014.<sup>27</sup>

3 Orr also misstates the record by citing Mr. Eaves' testimony as supporting the proposition that,  
4 "full due diligence packages ... were done on every property before we even discussed it as a possible  
5 target for the company."<sup>28</sup> Actually, Mr. Eaves' testimony was that the due diligence included only  
6 "some of the initial due diligence items" and was "fairly preliminary."<sup>29</sup>

7 Orr also misinterprets the evidence about when Mr. Eaves became an Executive Member of  
8 Barcelona Advisors. He argues that Mr. Eaves became an Executive Member in July 2014 when Orr  
9 ceased being an Executive Member, and Orr argues that Mr. Eaves was incorrect when he testified that  
10 he made no investments after becoming an Executive Member. However, it is Orr who is mistaken  
11 about when the Executive Member position changed hands. Although Harkins testified that it happened  
12 around approximately July 23, 2014, Harkins had previously created a detailed chronology of meetings  
13 from his diary that indicated that the meeting when Mr. Eaves took Orr's Executive Member position  
14 was on August 8, 2014.<sup>30</sup> Harkin's prepared chronology based on his diary is the more reliable evidence.  
15 It confirms that Mr. Eaves' final investment on July 31, 2014, occurred before he became an Executive  
16 Member on August 8, 2014.<sup>31</sup>

17 Simmons argues that the Executive Members had the power to approve Major Decisions only  
18 if Harkins submitted an issue for approval, citing the operating agreements in exhibits S-5 and S-57.  
19 This misrepresents the operating agreements, which state that Harkins was not allowed to act on a Major  
20 Decision without approval. The original operating agreement states in section 6.3 that, "... the Manager  
21 shall not take any action or incur any obligation binding on the Company within the scope of any of the  
22 Major Decisions ... unless expressly authorized ... or until the Major Decision has the Approval of a  
23 majority of the Executive Members."<sup>32</sup> The language of section 6.4 of the amended operating agreement

24 <sup>27</sup> T.282:6-23; T.287:16-22; T.290:1-6

25 <sup>28</sup> Respondent's, Bruce Orr, Post-Hearing Brief at p.13

26 <sup>29</sup> T.327:1-25

<sup>30</sup> T.997:1-10; S-30 at ACC6360; S-32 p.123:4-16

<sup>31</sup> S-31b

<sup>32</sup> S-5 at ACC7268

1 is almost identical.<sup>33</sup> According to the operating agreements, formally submitting a Major Decision for  
2 approval simply forced the Executive Members to reach a decision within five days or else be deemed  
3 to have approved the Manager's request.<sup>34</sup> Formally submitting a Major Decision was not a pre-  
4 requisite to the Executive Members having approval power over the decision.

5 Simmons argues that "records showed" that he never had an ownership interest of more than  
6 10% in Barcelona Advisors, but the record does not support that claim.<sup>35</sup> That was Simmons' testimony,  
7 but there were no documents corroborating that testimony as Simmons claims.<sup>36</sup> The documents  
8 regarding Simmons' ownership percentage indicated that he owned more than 10%. A corporate filing  
9 made by Harkins stated that Simmons owned more than 20% of Barcelona Advisors.<sup>37</sup> The April 2013  
10 offering memorandum stated that Simmons owned 15% of Barcelona Advisors' Class A units and that  
11 the Class A units represented 2000 of the 2004 total units (99.8%) issued at the time.<sup>38</sup>

12 Simmons argues that the Division "misrepresents many of Andrade's ... interactions with both  
13 Wilkerson and Mr. Simmons," and then recites facts consistent with Mr. Simmons' testimony.<sup>39</sup>  
14 However, this argument misrepresents the record. The Division has accurately characterized Mr.  
15 Andrade's testimony. Simmons can argue that Mr. Andrade's testimony should not be credited, but that  
16 does not mean that the Division has "misrepresented" the facts by arguing that Mr. Andrade's testimony  
17 should be credited over Simmons'.

18 Simmons misrepresents Mr. Andrade's testimony by claiming that Mr. Andrade "told two  
19 stories" about how his signed subscription agreement was sent to Barcelona Advisors.<sup>40</sup> Simmons  
20 argues that Mr. Andrade testified first that his wife dropped off the subscription agreement and testified  
21 later that he mailed the subscription agreement. Simmons is incorrect. Mr. Andrade testified that his  
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23 <sup>33</sup> S-57 at ACC791

24 <sup>34</sup> S-5 at ACC7269; S-57 at ACC792

25 <sup>35</sup> Post-Hearing Brief of Respondent George T. Simmons at p.10

26 <sup>36</sup> T.1176:18-24

<sup>37</sup> S-3b at p.3

<sup>38</sup> S-5 at ACC737-739

<sup>39</sup> Post-Hearing Brief of Respondent George T. Simmons at p.15

<sup>40</sup> Post-Hearing Brief of Respondent George T. Simmons at p.17

1 wife dropped off the signed subscription agreement.<sup>41</sup> He never gave any other testimony about how  
2 the subscription agreement was sent. Simmons might be confused about Mr. Andrade's testimony that,  
3 "Again, I received stuff in the mail ... that said, you know, sign here and mail back."<sup>42</sup> Therefore, Mr.  
4 Andrade testified that he was instructed to return documents by mail, but there was no testimony that  
5 he did so.

6 Simmons further misrepresents the record by claiming that no evidence was introduced that  
7 Simmons omitted any information about Harkins or the nonpayment of Kerrigan's notes and that there  
8 was no evidence that Simmons told any investor they had no reason to be worried about investing.<sup>43</sup> In  
9 fact, Mr. Andrade testified that Simmons told him Harkins had a long, successful history in real estate  
10 but did not tell him about the failure of the Arizona Village Communities real estate venture or that  
11 Meka closely assisted Harkins and had been convicted of a felony in connection with an investment  
12 fraud scheme.<sup>44</sup> Mr. Andrade also testified that Simmons told him there was no need to be worried  
13 about making his second investment but did not tell him about the company's failure to repay Kerrigan's  
14 notes.<sup>45</sup> Simmons can argue that the Commission should not credit this evidence, but claiming it does  
15 not exist misrepresents the record.

## 16 **VI. Simmons' Accusations About "Rehearsed" Witnesses Are Baseless**

17 Simmons argues that the Division "rehearsed" all of the investor witnesses, especially Mr.  
18 Eaves and Mr. Andrade.<sup>46</sup> There is absolutely no evidence that the Division suborned perjury, and the  
19 Respondents' efforts to establish such evidence on cross-examination failed.<sup>47</sup> What the evidence  
20 showed is that the Division did what any competent counsel does to prepare for litigation: meet with  
21  
22

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23 <sup>41</sup> T.385:20–T.386:20; S-36

24 <sup>42</sup> T.412:19–20

25 <sup>43</sup> Post-Hearing Brief of Respondent George T. Simmons at p.27

26 <sup>44</sup> T.380:10–14; T.397:15–18; T.398:2–6

<sup>45</sup> T.391:1–5; T.399:5–10

<sup>46</sup> Post-Hearing Brief of Respondent George T. Simmons at pp.13, 14, 16, 24, 25

<sup>47</sup> For example, Simmons' counsel asked Mr. Andrade if his answers had been rehearsed, and Mr. Andrade testified that his answers were truthful and not rehearsed. T.403:2–15

1 witnesses and ask them the expected questions in advance to learn what their answers will be.<sup>48</sup> With  
2 these arguments, Simmons is just figuratively pounding the table.

3  
4 RESPECTFULLY SUBMITTED this 22nd day of August, 2016.

5 ARIZONA CORPORATION COMMISSION

6 By: Paul Kitch

7 Paul Kitchin  
8 Attorney for the Securities Division of the  
9 Arizona Corporation Commission  
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26 <sup>48</sup> For example, Mr. Andrade and Ms. Carolin testified that they had previously been asked some of the questions asked during the hearing but testified that they were not told how to answer those questions. T.416:15-22; T.447:25-T.448:6.

1 On this 22nd day of August, 2016, the foregoing document was filed with Docket Control as a  
2 Securities Division Brief, and copies of the foregoing were mailed on behalf of the Securities  
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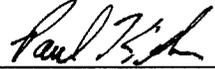
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