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0000173178

1 Charles R. Berry, 003379
 2 Stanley R. Foreman, 032320
 3 Clark Hill PLC
 4 14850 N. Scottsdale Road, Suite 500
 5 Scottsdale, AZ 85254
 6 Telephone: (480) 684-1100
 7 E-mails: cberry@clarkhill.com; sforeman@clarkhill.com
 8 Counsel for George T. Simmons and Janet B. Simmons

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Arizona Corporation Commission

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6 Bruce L. Orr
 7 3757 Falcon Avenue
 8 Long Beach, CA 90807
 9 E-mail: borr14@msn.com

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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

In the matter of:

- 15 USA BARCELONA REALTY ADVISORS,
16 LLC, an Arizona limited liability company,
- 17 USA BARCELONA HOTEL LAND
18 COMPANY I, LLC, an Arizona limited liability
19 company,
- 20 RICHARD C. HARKINS, an unmarried man,
- 21 ROBERT J. KERRIGAN (CRD no. 268516)
22 An unmarried man,
- 23 GEORGE T. SIMMONS and JANET B.
24 SIMMONS, husband and wife,
- 25 BRUCE L. ORR, an unmarried man,

DOCKET NO. S-20938A-15-0308

**RESPONSE OF RESPONDENTS
 GEORGE T. SIMMONS AND BRUCE L.
 ORR SECURITIES DIVISION'S REPLY
 TO POST HEARING BRIEFS**

25 Respondents George T. Simmons and Bruce L. Orr respond to the Securities
 26 Division's Reply to Post-Hearing Brief of Respondents George T. Simmons and Bruce L.
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1 Orr (the "**Reply**"). Mr. Simmons and Mr. Orr respond only to new issues raised by the
2 Securities Division (the "**Division**") of the Arizona Corporation Commission

3 **The Division's "Motion By Ambush" Tactics**

4 The Division introduced its Reply by stating that it "addresses only specific issues
5 that especially need correction." It then does everything but address those issues, and
6 presents new arguments. The Division conducts its motion practice in much the same
7 way that it conducted the hearing in this matter. As was addressed in detail in prior
8 briefs, the claims against Mr. Simmons and Mr. Orr set forth in the pleadings, and which
9 were defended by them in the hearing, were solely for "controlling person" liability. In
10 post-hearing pleadings, the Division first alleged and presented their argument that they
11 had brought and proven a case for direct liability. Mr. Simmons and Mr. Orr did not
12 defend against those claims, nor did they consent to do so.

13 In the same manner, the Division presented one case in the Securities Division's
14 Post-Hearing Brief filed July 8, 2016 (the "**PHB**"), only briefly addressing the merits of
15 its motion to conform the notice to the evidence (the "**motion to conform**"). Then the
16 Division used its "Reply" to present new arguments about the motion to conform. While
17 the Division's presentation of new arguments in the Reply is improper, Mr. Simmons and
18 Mr. Orr will address them here of necessity.

19 **Judge Preney Specifically Recognized that Neither Mr. Simmons nor Mr. Orr**
20 **Expressly or Impliedly Consented to Trying Issues of Direct Liability.** The Division
21 makes a flagrantly false and misleading statement in footnote 2 on page 2 of its Reply,
22 claiming that the "issues appeared to be tried with Simmons express consent, since he did
23 not object to the Division's motion...." In fact, Judge Preney specifically recognized and
24 accurately stated the objection of Mr. Simmons, and the other Respondents, on the
25 record. On page 1268, lines 6-14, of the Hearing Transcript, Judge Preney stated that,

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1 with respect to the motion to conform, “I believe **we have no agreement from the**
2 **respondents on that**....(emphasis added)”

3 **Briefing the Motion to Conform.** Judge Preny invited the Division to cover the
4 motion to conform in its PHB. Transcript: page 1268, lines 13-14 (Hereafter, references
5 to the Transcript are set forth as T: (page number); (lines). The Division chose not to
6 address the merits of its motion to conform in detail in its PHB. The treatment of its
7 motion to conform amounted to a total of *nine lines*. PHB, page 43, lines 12-20. The
8 Division simply cited Ariz. R. Civ. P. 15(b), and then ignored any further analysis,
9 relying solely on their false claim, addressed above, that “All of the issues in the hearing
10 were tried with the express consent of the parties because there was no objection to the
11 motion.” PHB, page 43, lines 15-16.

12 Mr. Simmons and Mr. Orr filed their post-hearing briefs by simply pointing out
13 the misstatements of the Division, particularly emphasizing the fact that each of these
14 Respondents specifically objected to the motion to conform (as acknowledged by Judge
15 Preny), and that the motion had not been granted.

16 **The Division’s Improper Use of a “Reply” Brief.** Rather than properly replying
17 to Mr. Simmons and Mr. Orr, the Division spends the first five pages of what is labeled a
18 “Reply” to present a new argument supporting their motion to conform. As a pretense to
19 support making its new argument, the Division cites a statement in Mr. Simmons Post-
20 Hearing Brief, and claims that Mr. Simmons misstated the relevant legal standard by
21 referring to the “fundamental unfairness” to Mr. Simmons if the motion to conform were
22 granted. The fact that fundamental unfairness and lack of due process exists if the motion
23 to conform were granted is not a misstatement of any standard. It is merely a fact.

24 **Rule 15(b).** The standard for granting a motion to conform to the evidence is
25 straightforward, and is fully set forth in Ariz. R. Civ. P. 15(b). Discretion to grant such a
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1 motion is always with the court. In order to avoid any possible confusion which may
2 arise from the Division's parsing, the applicable rule states in its entirety:

3 "When issues not raised by the pleadings *are tried by express or implied*
4 *consent of the parties*, they shall be treated in all respects as if they had
5 been raised in the pleadings. Such amendment of the pleadings as may be
6 necessary to cause them to conform to the evidence and to raise these
7 issues may be made upon motion of any party at any time, even after
8 judgment, but failure so to amend does not affect the result of the trial of
9 these issues. If evidence is objected to at the trial in the ground that it is
10 not within the issues made by the pleadings, the court may allow the
11 pleadings to be amended and shall do so freely when the presentation of
12 the merits of the action will be subserved thereby and the objecting party
13 fails to satisfy the court that the admission of such evidence would
14 prejudice the party in maintaining the party's action or defense upon the
15 merits. The court may grant a continuance to enable the objecting party to
16 meet such evidence. (emphasis added)"

17 **The Elements Required to Grant a Motion to Conform are Not Present in**
18 **this Case.** Granting a motion to conform requires several elements, none of which is
19 present in this case. The rule permits amendment *only* "when issues not raised in the
20 pleadings are tried by express or implied consent of the parties." Clearly, as recognized
21 by Judge Preny, Mr. Simmons and Mr. Orr objected to the motion to conform, and the
22 new claims raised by the Division in its post-hearing brief were not fully defended in
23 pleadings, in discovery, or in evidence presented at the hearing. Mr. Simmons and Mr.
24 Orr defended only those claims known to them, as set forth in the original or the
25 Amended Temporary Order to Cease and Desist and Notice of Opportunity for Hearing
26 (the "*Notice*").

1 **Neither Mr. Simmons nor Mr. Orr gave his Express or Implied Consent.** It is
2 uncontroverted that the Division never asked any of the Respondents to expressly consent
3 to trying issues not raised in the pleadings. Indeed, even in making its motions to
4 conform, the Division did not indicate what claims, if any, it believed conforming the
5 evidence would raise, and therefore, could be tried.

6 The Division, in its Reply, argues that remarks by Mr. Kitchin in his opening
7 statement that Mr. Simmons was “directly involved in fraud” somehow informed Mr.
8 Simmons of the unmentioned charges against him, and that therefore he gave his
9 “implied consent” to trying those issues. The Division intentionally ignores the many
10 occasions during the hearing where both Mr. Simmons and Mr. Orr specifically stated
11 that the only claims against them that were being heard were those of controlling person
12 liability that were set forth in the Notice, and that they were not dealing with direct
13 claims. Simmons- T: 26; 6, 17-21; T: 28; 8-22; T: 1242; 23-1243;1-6; Orr- T: 29; 4-15;
14 T: 1269;13-23.

15 Testimony at the hearing was so clear that no express or implied consent was
16 given that neither Mr. Simmons nor Mr. Orr believed that detailed analysis and argument
17 regarding Rule 15(b) was necessary. As noted above, Judge Preney recognized that
18 Respondents objected to the motion to conform. Clearly, the multiple statements of Mr.
19 Simmons and Mr. Orr specifically contradict any claim of either express consent (which
20 was never requested) or implied consent. In addition, the Division did not object or
21 respond, even when Mr. Simmons and Mr. Orr made it clear that they were only
22 defending the controlling person claims. The first required element for granting a motion
23 to conform, express or implied consent, does not exist.

24 **Granting the Motion to Conform would prejudice Mr. Simmons and Mr.**
25 **Orr.** Even if consent were present, the motion should not be granted because the
26 granting of the motion “would prejudice the party in maintaining the party’s...defense on
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1 the merits.” Rule 15(b). In this case, as stated in Mr. Simmons Post Hearing Brief, Mr.
2 Simmons and Mr. Orr were not afforded the opportunity to exercise their rights to (1)
3 answer or otherwise respond to the new claims in pleadings, (2) conduct discovery with
4 respect to these claims; and (3) present additional defense evidence. At a minimum, Mr.
5 Simmons would have filed additional pleadings, and called additional witnesses who
6 were on the witness lists of the Division (but whom the Division chose not to call to
7 testify, presumably because their testimony would not have supported the stories of other
8 Division witnesses). Those witnesses had nothing to add with respect to controlling
9 person claims. It goes without saying that, after the hearing, Judge Preny cannot, as
10 permitted by Rules 15(b), “grant a continuance to enable the objecting party to meet such
11 evidence.”

12 **The Division Concealed the Purpose and Intent of Their Motion.** One of the
13 most important and telling factors relating to the Division’s motion is that at no time
14 during the hearing, even when making their motion to conform, did they specifically state
15 the purpose of their motion. Had the Division stated that their purpose was to add claims
16 of direct liability not contained in their Notice, the Respondents might have been able to
17 better address the merits of their motion directly at the hearing. Instead, the Division
18 concealed the purpose of its motion to conform, first revealing it only in the Division’s
19 initial Post-Hearing Brief.

20 In its original and amended Notice, which were the only formal notice given to
21 Mr. Simmons and Mr. Orr of claims against them, the Division only alleged that Mr.
22 Simmons and Mr. Orr were liable solely because they were controlling persons of
23 Respondents USA Barcelona Realty Advisors, LLC (“*Barcelona Advisors*”) and/or USA
24 Barcelona Hotel Land Company (“*Barcelona Land Company*”) (Barcelona Advisors and
25 Barcelona Land Company are sometimes referred to collectively as the “*Barcelona*
26 *Entities*”). What the Division cites as conduct indicating that Mr. Simmons and Mr. Orr
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1 were defending direct claims against Mr. Simmons or Mr. Orr was actually defending
2 only against the controlling person claims. Judge Preny, by his comments, recognized
3 that Mr. Simmons and Mr. Orr opposed the motion to conform, and had only defended
4 against those controlling person claims. The fact that the Division presented evidence,
5 and that Mr. Simmons and Mr. Orr asked questions about evidence, used to try and
6 establish direct liability claims against the Barcelona Entities or some or all of the four
7 individual Respondents, does not show that: (a) either Mr. Simmons and Mr. Orr had
8 notice of claims that were neither contained in the pleadings nor specifically announced
9 during the hearing; or (b) that they defended against the unknown claims.

10 The Division did not expressly notify Mr. Simmons or Mr. Orr that they would
11 make claims of direct liability either in pleadings filed, or during the hearing. The
12 Division raised those claims for the first time in their PHB. Given the multiple
13 Respondents, the many issues being heard, and the varying positions of the Respondents
14 on many issues, the only possible way for Mr. Simmons and Mr. Orr to know what they
15 should or should not contest, was by referring to the pleadings in the Notice. There is no
16 dispute that the only allegations in the pleadings against Mr. Simmons and Mr. Orr were
17 for controlling person liability.

18 **Cases Cited by the Division are Distinctly Different than this Case.** The cases
19 cited for the first time in the Division's Reply are wholly unlike this case, and have a
20 significant similarity to each other. In each of the cases cited, whether a tax court appeal
21 (*Janis v Commissioner*) or a board of immigration deportation appeal (*Cortez-Pineda v*
22 *Holder*) the pleadings were conformed to cover a narrow issue clearly involving only one
23 party. More importantly, the party opposing the conforming motion was the only party
24 against whom the conforming claim could be made. In sharp contrast, this proceeding
25 involved dozens of claims pled against six Respondents, and tried against four separate
26 individual Respondents at the hearing. Neither of the Barcelona Entities could afford to
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1 hire counsel, and since a legal entity must be represented by counsel, they could not
2 defend themselves at the hearing. Because the only known claims against Mr. Simmons
3 and Mr. Orr were for controlling person liability, requiring the Division to prove claims
4 against the Barcelona Entities was also defending against the controlling person claims.
5 Actions taken to require the Division to prove claims against the Barcelona Entities in no
6 way implies that Mr. Simmons and Mr. Orr were not defending any unpled direct liability
7 claims against them.

8 **The Division Deliberately Misled the Respondents About the Issues the**
9 **Division Intended to Raise Post-Hearing.** On the multiple instances during the hearing
10 when Mr. Simmons and Mr. Orr stated that they were only defending the controlling
11 person claims, the Division kept silent, both misleading, and impliedly consenting to the
12 position of these Respondents. There was no way for Mr. Simmons and Mr. Orr to
13 discover what claims the Division would try to raise in post-hearing briefing, and defend
14 against them.

15 **The Division's Argument that Orr Consented to Trying the Issue of His**
16 **Direct Liability By Raising The Issue With His Own Testimony is Baseless.**
17 According to the Division's Reply, Orr testified that he had a "meeting with four people,
18 telling them about Barcelona Advisors over drinks, and directing them to Mr.
19 McDonough." Presumably, the Division is not joking when they accuse Mr. Orr of direct
20 liability for offering securities by having drinks and informing others of persons who
21 might be interested in investing.

22 Mr. Orr's testimony actually was that he had social drinks, and that he would turn
23 their contact information over to McDonough. The Division implies that Mr. Orr
24 solicited investments, yet his testimony clearly says that he did not. T: 749-750. This is
25 like accusing a Wells Fargo Bank employee of selling securities if he tells someone about
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1 his job, and then refers that person to a securities broker to purchase Wells Fargo Bank
2 shares. The employee is not offering or selling securities.

3 **There is No Credible Evidence That Either Mr. Simmons and Mr. Orr Were**
4 **Controlling Persons.** Mr. Simmons and Mr. Orr agree that, as stated by the Division,
5 “control” means the power to direct or cause the direction of the management and
6 policies of a person....” Eastern Vanguard Forex v. Ariz. Corp. Comm’n, 206 Ariz. 399,
7 412. **Every** person who was in a position to know, including Mr. Harkins, testified that
8 Richard Harkins (“*Harkins*”) was the sole controlling person of the Barcelona Entities.
9 All other persons named as Executive Members: Bob Kerrigan, Rod Eaves, Mr. Simmons
10 and Mr. Orr, all testified to that effect. No controverting testimony was ever presented.
11 This was established in the Respondents’ post-hearing briefs, and will not be re-argued
12 here. See, e.g., Mr. Simmons’ PHB, page 9. The unique control mechanisms set up by
13 Harkins in the operating structure for Barcelona Advisors gave him absolute control over
14 whether or not any issues were brought forward as a Major Decision. According to the
15 abundant testimony, referred to at length in the Respondents’ post-hearing briefs, no
16 Major Decision with respect to the offer or sale of securities was ever made.

17 **The Division Has Presented No Evidence of “Control” by Either Mr.**
18 **Simmons or Mr. Orr.** The Division’s Reply sets forth a four and one-half page long
19 laundry list of administrative tasks allegedly performed by Mr. Simmons and Mr. Orr, all
20 of which are totally irrelevant to determine whether either of them was a controlling
21 Executive Member making Major Decisions. An examination of the list shows that
22 virtually all of the points listed are either: (a) operational or administrative actions taken
23 at the direction of Harkins; or (b) documents prepared, or filings made, by Harkins
24 unilaterally without the consent or approval of Mr. Simmons or Mr. Orr. Objectively
25 examined, it is obvious that the piling on of pages of irrelevant amounts to no credible
26 evidence of control.

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Parts V and VI of the Division's Reply Argue About the Testimony Presented, and Are Not Properly Addressed Here. It is for Judge Preny to weigh the testimony, and determine credibility. The positions of Mr. Simmons or Mr. Orr on the evidence were set forth in their post-hearing briefs.

RESPECTFULLY SUBMITTED September 1, 2016.

Clark Hill PLC

By: Charles R. Berry
Charles R. Berry, 003379
Stanley R. Foreman, 032320
14850 N. Scottsdale Road, Suite 500
Scottsdale, AZ 85254
Counsel for Respondents
George T. Simmons and
Janet B. Simmons



Bruce Orr
3757 Falcon Avenue
Long Beach, CA 90807

ORIGINAL and thirteen copies of the foregoing filed this September 2, 2016:

Docket Control
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

COPY of the foregoing hand-delivered this 2 day of September, 2016 to:

Matthew J. Neubert
Director of Securities
Arizona Corporation Commission
1300 W. Washington Street, 3rd Floor
Phoenix, AZ 85007

1 Mark Preny
2 Administrative Law Judge
3 Hearing Division
4 Arizona Corporation Commission
5 1200 W. Washington Street
6 Phoenix, AZ 85007

7 Paul Kitchin
8 Securities Division
9 Arizona Corporation Commission
10 1300 W. Washington, 3rd Floor
11 Phoenix, AZ 85007

12 COPY of the foregoing mailed
13 this 2 day of September, 2016 to:

14 USA Barcelona Realty Advisors, LLC
15 c/o Richard C. Harkins
16 4422 East Lupine Avenue
17 Phoenix, AZ 85028

18 USA Barcelona Hotel Land Company I, LLC
19 c/o Richard C. Harkins
20 4422 East Lupine Avenue
21 Phoenix, AZ 85028

22 Richard C. Harkins
23 4422 East Lupine Avenue
24 Phoenix, AZ 85028

25 Robert J. Kerrigan
26 8062 E. Del Tornasol Drive
27 Scottsdale, AZ 85258

28 _____
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