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BEFORE THE ARIZONA CORPORATION COMMISSION

AZ CORP COMMISSION
DOCKET CONTROL

COMMISSIONERS

2016 SEP 29 AM 11:19

Arizona Corporation Commission

DOCKETED

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

SEP 29 2016

DOCKETED

In the matter of:
Shadow Beverages and Snacks, LLC, an Arizona
limited liability company,
Lucio George Martinez and Lisa K. Martinez,
husband and wife,
Samuel A. Jones, a married man,
Respondents.

DOCKET NO. S-20948A-15-0422

SECURITIES DIVISION'S REPLY TO
POST-HEARING BRIEF OF
RESPONDENT LUCIO GEORGE
MARTINEZ

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") replies to the post-hearing brief of Respondent Lucio George Martinez ("Martinez") as follows.

I. Shadow's Omissions Were Material

Martinez argues that Shadow Beverages and Snacks, LLC's ("Shadow") default on a note to its first note investor, Mr. Karas, was not material information for later investors because the note was informally extended due to Mr. Karas' illness. However, for any reasonable investor considering investing in a Shadow note, Shadow's failure to timely pay past note investors would be a significant decision point. Caruthers v. Underhill, 230 Ariz. 513, 524, ¶ 43 (Ct. App. 2012) (material if substantial likelihood that fact would be significant to deliberations of a reasonable investor). If Shadow had told investors of the default and its explanation, then the investors would have had an opportunity to deliberate on the explanation and its credibility. However, even if a reasonable investor would consider and accept the explanation, the underlying default would still be

1 significant to that investor's deliberation on whether to accept the explanation, so the default would
2 still be material.

3 Similarly, omitting Shadow's defaults on Mr. Tunnel's notes was material even if Shadow
4 was advised (incorrectly) that its settlement with Mr. Tunnel created some legal fiction that the
5 defaults did not occur. The defaults would be significant to a reasonable investor's deliberations,
6 and no legal fiction would change that significance.

7 Also, Shadow defaulted on every note raised in the evidence, and those other defaults would
8 still be material regardless of the Karas and Tunnel defaults.

9 **II. Martinez Was a Control Person Even If He Did Not Have Exclusive Control**

10 Martinez argues that he is not liable as a control person of Shadow because he "did not have
11 sole decision making powers" This argument mistakes the legal standard. An entity can have
12 multiple control persons. See Eastern Vanguard Forex Ltd. v. Ariz. Corp. Comm'n, 206 Ariz. 399,
13 413, ¶ 44 (Ct. App. 2003) (affirming Commission decision that two men were both control persons of
14 the same entity). Also, even if Martinez had not had the power to control Shadow on his own, he
15 would have had such power as part of a control group because he was a member of the board.¹ "...
16 [T]he evidence need only show that the person targeted as a controlling person had the legal power,
17 either individually or as part of a control group, to control the activities of the primary violator."
18 Eastern Vanguard, 206 Ariz. at 412, ¶ 42.

19 **III. Martinez's Marital Community Is Liable**

20 Martinez's arguments about the lack of benefit to the community and his wife's level of
21 knowledge apply the wrong standard. "If the husband acts with the object of benefitting the
22 community ... the obligations so incurred by him are community in nature, whether or not the wife
23 approved thereof." Ellsworth v. Ellsworth, 5 Ariz.App. 89, 92 (1967). Even if Martinez had never
24 drawn any salary from Shadow, his actions were intended to benefit the community. Martinez's goal
25 was for Shadow to be a significant financial success, similar to Vitamin Water, and his efforts were

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¹ T.123:11-13

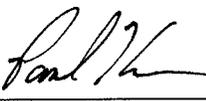
1 directed at that goal.² If Shadow had been successful, then his equity interest in Shadow would have
2 been a valuable community asset. The cases Martinez cites are not applicable because they are
3 intentional tort cases for which a different standard applies, but this is not a tort case.

4 **IV. Conclusion**

5 Based on a correct application of the relevant legal standards, Martinez's arguments should
6 be rejected.

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8 RESPECTFULLY SUBMITTED this 29th day of September, 2016.

9
10 ARIZONA CORPORATION COMMISSION

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12 By: 

13 Paul Kitchin
14 Attorney for the Securities Division of the
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² S-87 p. 59:25-p.60:13

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On this 29th day of September, 2016, the foregoing document was filed with Docket Control as a Securities Division Brief, and copies of the foregoing were mailed on behalf of the Securities Division to the following who have not consented to email service. On this date or as soon as possible thereafter, the Commission's eDocket program will automatically email a link to the foregoing to the following who have consented to email service.

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By:  _____