

ORIGINAL



0000175723

AZ CORP
DOCKET 00

2016 DEC 16 PM 2 37

Arizona Corporation Commission

DOCKETED

DEC 16 2016

DOCKETED BY

MCCARTHY LAW PLC

CANDID CONVERSATION. WISE COUNSEL.

Kevin Fallon McCarthy, 011017
Ashley Yuriel Tuchman 027263
4250 North Drinkwater Blvd, Suite 320
Scottsdale, AZ 85251
602-456-8900

Ashley.Tuchman@McCarthyLawyer.com
Kevin.McCarthy@McCarthyLawyer.com
Attorney for Respondents Ayers

BEFORE THE ARIZONA CORPORATION COMMISSION

In the matter of:

LOANGO CORPORATION, a Utah
corporation,

JUSTIN C. BILLINGSLEY and
HEATHER BILLINGSLEY, husband
and wife,

JEFFREY SCOTT PETERSON, an
unmarried man,

JOHN KEITH AYERS and JENNIFER
ANN BRINKMAN-AYERS, husband
and wife,

Respondents.

Docket No. S-20932A-15-0220

**RESPONDENTS AYERS' POST-
HEARING BRIEF RESPONSE**

COMMISSIONERS

DOUG LITTLE, CHAIRMAN

BOB STUMP

BOB BURNS

TOM FORESE

ANDY TOBIN

Respondents John Keith Ayers and Jennifer Ann Brinkman-Ayers ("Ayers")
submits its response to the Securities Division's post-hearing brief as follows:

I. PROCEDURAL HISTORY

An administrative hearing was conducted for violations of the Arizona
Securities Act. The hearing began on September 26, 2016 and concluded on September

1 28, 2016.¹ The Securities Division filed their post-hearing brief on November 16, 2016
2 arguing, as it specifically pertains to the Ayers, that Ayers is imputed liability for
3 violations of the A.R.S. §44-1991, not as a primary violator, but as a controlling person
4 under A.R.S. §44-1999(B).

5 II. FACTS

6 In addition to the facts stated by the Division and based on the evidence in the
7 record, the Commission can find the following as facts:

8 The Division has determined Ayers testimony to be credible.² That at no time
9 was Ayers involved in securing investments from investors and the investors did not
10 know Ayers nor did they speak to him prior to investing.³ Ayers role at LoanGo was to
11 generate leads for lending after investor funds were secured.⁴ Ayers was the only
12 officer/director of LoanGo to engage in any appropriate “wind-down” of LoanGo.⁵

13 III. ARGUMENT

14 A. Ayers Was Not A Controlling Person Of LoanGo Within The Meaning 15 That Satisfies Legislative Intent

16 The Court in *Eastern Vanguard Forex Ltd v. Ariz.Corp.Comm’n*, 206 Ariz. 399,
17 412, ¶42 (App. 2003) found that in order for a respondent to be considering a controlling
18 person and imputed liability under A.R.S. §44-1999(B), the evidence must show that the
19 respondent had the “legal power to control...the activities of the primary violator.” The
20 Court imputed liability on such a broad basis, instead of requiring actual participation
21 in the violative act, because of fear that the legislative intent would be diminished by
22 persons simply using sham surrogates to immunize themselves from liability. *Id.*

23 ¹ Ayers will use the same format for citations to the hearing transcript as the Securities Division which is T.[page]:lines number(s).

24 ² See Sec.Div.Post-Hearing Brief, Pg.6:15-11:6 (Division specifically points out evidence supporting the fact that Billingsley and Peterson’s testimony was not
25 credible but does not do the same for Ayers)

³ T.37:8-17; T.120:22-25; T.121:24-122:2; T.67:3-5; T.141:20-22; T.146:21-147:2

⁴ T.161:24-162; T.385:19-386:9; T.393:8-19; T.417:14-418:18; T.591:23-592:4

⁵ T.370:9-14; T.391:19-24; T.556:10-22; T.381:12-17; T.381:3-7; T.607:4-608:10

1 However, in the case at hand, a finding that Ayers is not a controlling person does cause
2 such a fear to be realized as the violating actors are not strawmen but the other officers
3 and directors of the violating entity. Furthermore, Ayer's role in LoanGo can be greatly
4 differentiated from the role and activities that were found to lend themselves to qualities
5 of a controlling person in *Eastern Vanguard*.

6 In *Eastern Vangaurd*, respondents Cheng, Yuen and Sharma argued that their
7 mere status as controlling shareholders, officers and directors of FISC and EVFL, both
8 violating entities, was not enough to establish liability as a controlling person. *Id.* at 411,
9 ¶39. Respondents Cheng and Yuen were found to be controlling persons because they
10 were the sole shareholders of a violating corporation, they both invested money in the
11 start-up of the company, they were the only directors, they hired the violating manager,
12 Tam, and consulted with Tam for major business decisions, they closely tracked FISC's
13 progress and funded nearly all of FISC operating expenses establishing sufficient
14 evidence to support a finding that they were "consistently involved in FISC's
15 management and its financial operations." *Id.* at 412, ¶43. Respondent Sharma was
16 found to be a controlling person of EVFL because Sharma was the only director and
17 shareholder of EVFL, was a co-signor on all of the bank accounts, investors could not
18 withdraw funds from their trading accounts unless Sharma gave authorization, Sharma
19 actively participated in setting up customer agreements with investors and Sharma
20 failed to oblige the Commission's order to produce records concerning Sharma's
21 compensation from EVFL. *Id.* at 413, ¶45. Recent Arizona Court of Appeals decisions
22 have stressed the same activities to show consistent involvement in management and
23 finances in order to be a controlling person. *See Shorey v. Ariz. Corp. Comm'n*, No. 1 CA-
24 CV 14-0510, ¶¶11-12 (Ariz. App. 2015) (memorandum decision).
25

1 Ayers control and participation in LoanGo can be greatly differentiated from
2 the facts in *Eastern Vanguard*. Ayers owned LoanGo equally with Mr. Billingsley and Mr.
3 Peterson,⁶ whom are the direct violators of the statute. Ayers did not contribute any
4 money to the initial startup of LoanGo compared to Mr. Billingsley and Mr. Peterson.⁷
5 Ayers had no control of the investors and their decisions as the investors did not even
6 know Ayers and never had contact with him prior to investing.⁸ In fact, the Division's
7 Special Investigator, Mr. Lowe, did not even contact Mr. Ayers during the investigation
8 as he was never mentioned by any of the investors.⁹

9 Mr. Ayers was always cooperative with the investigation and provided all
10 evidence the Division requested¹⁰ even when it may have exposed certain things that
11 may not have been in his best interests.¹¹ There was never any evidence presented that
12 Mr. Ayers was paid commissions or expected to receive commissions.

13 Furthermore, Mr. Peterson consistently made it clear throughout the Skype
14 conversations with Ayers and other employees that he was the controlling member:¹²
15 "Anyway, LoanGo is my business so we can control any risk there is in terms of
16 payroll."¹³ Ayers was not consulted about what was supposed to be in the offer
17 memorandum and simply took instructions from Mr. Peterson on what he needed to
18 provide.¹⁴ Ayers was instructed to find a printer so that a logo could be included on the
19 placement memorandum ("PMM") and he was instructed to provide a biography.¹⁵

20 ⁶ S-23

21 ⁷ S-36 at ACC1063 on 6/10/11 at 11:08:24-11:08:54; T.214:20-215:17

22 ⁸ T.37:8-17; T.120:22-25; T.121:24-122:2

23 ⁹ T.67:3-5; T.141:20-22; T.146:21-147:2

24 ¹⁰ T.71-98

25 ¹¹ T.150:6-18; Division's Post-Hearing Brief, Pg. 14, ¶51

¹² S-35 at ACC1056 on 4/18/12 at 2:36; S-35 ACC1027 on 4.18.12 at 2:38; T.154:3-155:17;

¹³ S-35 ACC1056 on 4/18/2012 at 2:37:25; T.282:18-19

¹⁴ T.161:12-20

¹⁵ T.183:1-6

1 Ayers had no control over the investment process¹⁶ which is consistent with Mr.
2 Rosov's testimony that he too took instruction from Mr. Peterson as it related to
3 preparing promissory notes and the review of the offer memorandum.¹⁷ Mr. Rosov, Mr.
4 Peterson's executive assistant and then attorney for LoanGo, described each members
5 roles as follows: "Ayers was the administrative aspect of how do we find clients once
6 the business gets going. Mr Peterson was sort of the administrative, the bigger idea guy.
7 And I believe that Mr. Billingsley was brought on to help find the financing...in
8 addition to Gilford being the ones that would actually sell securities..."¹⁸ Mr. Rosov
9 stated that his contact with Ayers was never to discuss promissory notes or anything
10 having to do with getting investments but rather to wind down LoanGo.¹⁹ Mr.
11 Billingsley also testified that Mr. Ayers was involved in lead generation to drive
12 consumerd to apply for payday loans, while Mr. Peterson was brought on for his
13 securities knowledge.²⁰

14 Lastly, Mr. Ayers was not a signatory on LoanGo's bank accounts and was not
15 in charge of taking care of the books. Mr. Peterson controlled the bank accounts²¹ and
16 was the sole member signatory on the bank accounts.²²

17 Ayers actions are more akin to the evidence used to support that a director is
18 not a controlling person in *Burgess v Premier*, 727 F.2d 826 (9th Cir. 1984) and *Paracor*
19 *Finance, Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151 (9th Cir. 1996). In both cases, the
20 respondent, although a director of the violating entity, was found to not be a controlling
21 person because there was not sufficient evidence introduced to show that the

22 ¹⁶ T.161:24-162:9

23 ¹⁷ T.385:19-386:9

24 ¹⁸ T.393:8-19

25 ¹⁹ T.370:9-14

²⁰ T.417:14-418:18; T.591:23-592:4.

²¹ T.163:20-22; T.164:9-12

²² Admitted in LoanGo and Peterson's Answer

1 respondent has direct or indirect control of the actual investments and had nothing to
2 do with preparation of the placement memorandum or prospectus. *Burgess*, at 832;
3 *Paracor*, at 1163-1164.

4 Based on the aforementioned, Ayers can not be said to have control of any of
5 the violating parties because there is no evidence of facts that would amount to the level
6 of consistent involvement in management and finances that the Court in
7 *EasternVangaurd* contemplated when applying such a broad standard for liability.

8 **B. Even If Ayers Is Found To Be A Controlling Person, Ayers Acted In**
9 **Good Faith And Did Not Induce The Violations**

10 Understandably, the standard to establish good faith and lack of inducement
11 has to be more than just a showing that the respondent has no knowledge of the
12 violations. Again, the legislative intent is not to encourage controlling persons to ignore
13 their duties in order to remain ignorant to avoid liability. *Eastern Vangaurd*, 206 Ariz. at
14 414, citing *Carson*, 72 Notre Dame L.Rev. at 305-06. Additionally, the controlling person
15 must have exercised due care by taking reasonable steps to ensure proper supervision
16 and control. *Id.* at 414. Ayers, in fact, did not have knowledge of the violations causing
17 harm to the investors, but more importantly, Ayers never ignored his role in LoanGo
18 and took proper measures to supervise and enforce proper procedures.

19 It has been established through consistent testimony that Ayer's role in
20 LoanGo was to generate web-based leads and drive business to LoanGo's website after
21 investments were secured.²³ The start of LoanGo raising capital was in September
22 2011.²⁴ Initial investments were procured by Billingsley between September 2011 and
23 April 2012.²⁵ Considering Ayers role in LoanGo, it would not have been derelict to trust
24 that the CEO and Vice President were conducting business and finding investors

24 ²³ T.393:8-19; T.417:14-418:18; T.591:23-592:4.

25 ²⁴ Admitted by all parties Answers

²⁵ S-4; S-8; S-10; S-12; S-16

1 appropriately. Peterson specifically testified that it was his role to be “putting in place
2 certain policies and procedures.”²⁶

3 Consistent testimony across several witnesses, including Peterson himself,
4 prove that Peterson was very familiar with how security offerings work and are
5 conducted in the industry as Peterson has been a part of offerings in the past.²⁷ More
6 specifically, Peterson had worked in the securities industry since the 1990s and held
7 multiple security licenses at certain points in his life.²⁸ Ayers and Billingsley took
8 instruction from Peterson based on his experience in the industry.²⁹ Peterson’s
9 background suggested that he could be relied upon, as a business partner, to take on the
10 responsibilities of supervising the front end operations for investments and Ayers
11 appropriately relied on this expertise.³⁰

12 Furthermore, Ayers was under the impression that Peterson and Billingsley
13 had engaged Gilford Securities and a well known securities lawyer named Gary Agron,
14 as represented by Peterson.³¹ This is consistent with Peterson’s executive assistant, Mr.
15 Rosov’s, testimony that he believed due diligence was being done by Gilford
16 Securities.³² It was not until Ayers received a letter from Gilford Securities making
17 Ayers aware that Gilford was never retained that Ayers had any indication that a
18 securities firm was not involved.³³

19 When Ayers needed investment funds in order to engage in his role of
20 actually finding leads for loans to fund, and found that everything was out of order,

21 ²⁶ T.325:20-326:6

22 ²⁷ T.243:15-18; T.246:1-22; T.259:10-11; T.266

23 ²⁸ T.277:16-20; T.457:6-459:7; T.489:5-11

24 ²⁹ T.247:3-248:20; T.257:11-13; T.257:16-18.

25 ³⁰ T.551:14-18; T.591:3-8

³¹ T.266:1-268:9

³² T.390:4-13; T.387:19-21

³³ S-22; T.568:1-569:13

1 Ayers took control. Ayers testifies that when Peterson failed to provide the accounting
2 ledgers/books after stating he was hiring someone to do so,³⁴ Ayers had the LoanGo
3 general ledger recreated by an employee from his other company.³⁵ Moving forward,
4 Ayers did everything he could to supervise the happenings of LoanGo.³⁶

5 In fact, once Ayers took notice of these inconsistencies because it was
6 hindering his role in the company, which was to generating lead to generate loans, and
7 argument ensued, Peterson ceased communication with Ayers and LoanGo and Ayers
8 was left to pick up the pieces to see how he could save investors.³⁷ This is consistent
9 with Peterson's testimony that he knew he was the only signatory on the bank accounts
10 when he left and never tried to return any of the funds to investors.³⁸ With no access to
11 the bank accounts, Ayers used money from his company Leaplab to cover expenses for
12 appropriate staff for LoanGo so that it could operate enough to try to properly collect on
13 the loans that were made so that perhaps some money for investors could be realized.³⁹
14 These actions are far from those of a controlling person living in ignorant bliss.

15 When it was determined that the company needed to wind down, Ayers
16 reached out to Mr. Rosov to see how to properly wind down LoanGo. Mr. Rosov, the
17 other respondents own witness in their case and chief, testified that Mr. Ayers was the
18 only member speaking to him about how to properly wind down LoanGo⁴⁰ "smoothly
19 and make sure that, to the extent that it was possible through giving legal advice, not
20 engage in mismanagement of investor funds."⁴¹ When LoanGo was falling apart, "the

21 ³⁴ T.189:14-190:12

22 ³⁵ S-26; T.155:18-156:25; T.162:14-163:21; T.186:22-187:16

23 ³⁶ T.191:4-20

24 ³⁷ T.185:21-186:12; A-6

25 ³⁸ T.526:6-528:4

³⁹ T.596:3-598:13

⁴⁰ T.391:19-24; T.556:10-22; T.381:12-17

⁴¹ T.370:9-14.

1 only person most engaged in making sure that what money there was went back to the
2 people that it should go to and that everything was done as legally as possible.”⁴²

3 Ayers then hired a securities lawyer⁴³, Mr. John Nossiff, who directed Ayers
4 to meet with Billingsley and figure out the accounting of LoanGo. Ayers and Billingsley
5 met to discuss this books and based on this meeting, in October 2012, Mr. Nossiff
6 drafted a letter to Peterson asking for an explanation of what appeared to be
7 unauthorized transactions.⁴⁴ Ayers also called multiple board meetings, with Mr.
8 Nossiff present, which Peterson failed to attend.⁴⁵ One particular meeting was called so
9 that the unauthorized transactions could be explained⁴⁶ and to remove Peterson as
10 chairman so that Ayers could take over the bank accounts so that funds were not further
11 misappropriated.⁴⁷

12 Ayers took all of the proper measure to make sure that he stopped the
13 bleeding on the damage that had been done by Peterson’s oversight. Even Peterson
14 testified that Ayers was going to great lengths to hold Peterson responsible for the
15 misappropriation of funds.⁴⁸ This includes Ayers filing a temporary restraining order
16 (“TRO”) against Peterson because they were attempting to oust him from LoanGo and
17 Ayers wanted to stay onboard to protect the investors.⁴⁹ This is consistent with the
18 notice Ayer’s attorney, Dominica Minore, sent to the investors letting them know of the
19 litigation and that Ayers was filing a TRO because he thought it would protect their best
20 interest.⁵⁰ This is also consistent with Mr. Jordan’s testimony that Ayers was happy to

21 ⁴² T.381:3-7

22 ⁴³ T.607:4-608:10

23 ⁴⁴ A-2; T.606:13-607:3

24 ⁴⁵ S-23; A-1

25 ⁴⁶ A-2; S-23

⁴⁷ S-23

⁴⁸ T.521:22-23; T.520:17-19

⁴⁹ T.193:1-12

⁵⁰ A-4; T.193:15-194:2; T.566:6-14.

1 meet with him when he called concerned about his investment and that Ayers expressed
2 that there were some "legal things going on."⁵¹

3 Based on Peterson's background and his representation, and the appearance,
4 that a securities firm was engaged, it was reasonable for Ayers to rely on Peterson, as
5 CEO, to properly enforce investment procedures and diligence. Considering Ayers role,
6 it is appropriate timing that not until investments were secured would Ayers have
7 questioned certain aspects of the investment process and company spending. When
8 Ayers did, he took every reasonable step and precaution to make sure he was doing the
9 right thing and always looked out for the best interests of the investors. Therefore,
10 Ayers acted consistently with the intent of the statute - in good faith and so as not to
11 induce any violations of statute.

12 IV. CONCLUSION

13 Based on the evidence admitted at the hearing and the arguments presented
14 in this Response, Respondent Ayers respectfully requests that the Commission find that
15 Ayers were not controlling persons within the meaning of §44-1999 so that liability may
16 not be imputed to them personally to the same extent LoanGo is held liable. Even if the
17 Commission believes Ayers to be controlling persons, Ayers requests that the
18 Commission find that Ayers acted in good faith and did not induce and of the violating
19 acts.

20 Respectfully submitted this 16th day of December 2016.

21
22 By:  _____
23 Ashley Tuchman, Esq.
24 Attorney for Respondent Ayers

25 ⁵¹ T.121:2-13; T.122:20-21; T.614:14-24; T.123:1-3; T.123:9-11; T.615:4-616:3

1 ORIGINAL and eight copies of the foregoing filed this 16th day of December 2016 with:

2 Docket Control
3 Arizona Corporation Commission Filed
4 1200 West Washington Street
5 Phoenix, AZ 85007

6 COPY of the foregoing was emailed
7 to the following which have
8 **Consented to Service by Email**

9 Mr. Paul Kitchin Emailed
10 Securities Division
11 Arizona Corporation Commission
12 1300 West Washington, 3rd Floor
13 Phoenix, AZ 85007

14 Eric Jiede Emailed
15 JEIDE LAW, PLLC
16 5115 N. Dysart Rd., Suite 202-213
17 Litchfield Park, Arizona 85340
18 jeidelaw@gmail.com
19 Attorney for Respondents LoanGo
20 Corporation, Jeffrey Scott
21 Peterson, Justin C. Billingsley, and
22 Heather Billingsley

23
24
25
By: /s/ Ashley Tuchman