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**BEFORE THE ARIZONA CORPORATION COMMISSION**


COMMISSIONERS

SUSAN BITTER SMITH - Chairman  
BOB STUMP  
BOB BURNS  
DOUG LITTLE  
TOM FORESE

Arizona Corporation Commission

DOCKETED

OCT 27 2015

DOCKETED BY 

IN THE MATTER OF:

OUT OF THE BLUE PROCESSORS, LLC, an  
Arizona limited liability company, d/b/a Out of the  
Blue Processors II, LLC; and

MARK STEINER (CRD #1834102) and SHELLY  
STEINER, husband and wife,

Respondents.

DOCKET NO. S-20837A-12-0061

DECISION NO. 75314

**OPINION AND ORDER**

DATES OF PRE-HEARING CONFERENCES: May 16, 2012, July 19, 2012, January 29, 31,  
2013, and September 16, 2013

DATES OF HEARING: April 28, 29, 30, 2014 and May 1, 2014

DATES OF POST-HEARING CONFERENCES: August 22, 2014 and September 22, 2014

PLACE OF HEARING: Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE: Mark Preny<sup>1</sup>

APPEARANCES: Mr. Arthur P. Allsworth,<sup>2</sup> on behalf of  
Respondents Out of the Blue Processors, LLC  
and Mark Steiner and Shelly Steiner, husband  
and wife; and

Mr. Stephen Womack and Mr. Ryan J.  
Millecam, Staff Attorneys, Legal Division, on  
behalf of the Securities Division of the Arizona  
Corporation Commission.

**BY THE COMMISSION:**

On February 22, 2012, the Securities Division ("Division") of the Arizona Corporation

<sup>1</sup> The hearing and post-hearing conferences were held before Administrative Law Judge Mark Preny, who drafted the Recommended Opinion and Order. The pre-hearing conferences were presided over by Administrative Law Judge Marc E. Stern.

<sup>2</sup> Though Mr. Allsworth represented the Respondents at the hearing, the Respondents' Post-Hearing Brief was drafted by Respondent Mark Steiner following the death of Mr. Allsworth.

1 Commission ("Commission") filed a Temporary Order to Cease and Desist and a Notice of  
2 Opportunity for Hearing ("T.O.") against Out of the Blue Processors, LLC ("OBP"), an Arizona  
3 limited liability company dba Out of the Blue Processors II, LLC, and Mark Steiner and Shelly  
4 Steiner, husband and wife, (collectively "Respondents"), in which the Division alleged multiple  
5 violations of the Arizona Securities Act ("Act") in connection with the offer and sale of securities in  
6 the form of certificates of interest or investment contracts.

7 Respondent spouse, Shelly Steiner, was joined in the action for the purpose of determining the  
8 liability of the marital community pursuant to A.R.S. §44-2031(C).

9 The Respondents were duly served with copies of the T.O.

10 On March 14, 2012, Respondents filed a request for hearing in this matter.

11 On March 15, 2012, by Procedural Order, a pre-hearing conference was scheduled on April  
12 12, 2012.

13 On March 16, 2012, Respondents filed an Answer.

14 On April 10, 2012, Respondents' counsel filed a Motion to Continue the pre-hearing  
15 conference because his client was out of the country on business and was not expected to return until  
16 the end of the month. It was indicated that the Division did not oppose the motion.

17 On April 11, 2012, by Procedural Order, the pre-hearing conference was continued to May  
18 16, 2012.

19 On May 16, 2012, the Division and Respondents appeared with counsel. Counsel for the  
20 Division indicated that the parties were discussing the issues raised by the T.O., and requested that a  
21 status conference be scheduled in approximately 60 days. Respondents agreed with the Division's  
22 request to schedule a status conference. Subsequently, by Procedural Order, a status conference was  
23 scheduled on July 19, 2012.

24 On July 19, 2012, the Division and Respondents appeared through counsel at the status  
25 conference. Counsel for the Division indicated that the parties were continuing to discuss the issues  
26 raised by the T.O., and were attempting to reach a settlement in the proceeding. In the interim, the  
27 Division requested that another status conference be scheduled in approximately 60 days.  
28 Respondents agreed with the Division's request to schedule a status conference.

1 On July 20, 2012, by Procedural Order, a status conference was scheduled on October 4, 2012.

2 On October 1, 2012, Respondents filed a Motion to Vacate the status conference scheduled on  
3 October 4, 2012, until after October 24, 2012, because Respondent, Mark Steiner, had been out of the  
4 country and unable to meet with counsel. Additionally, a meeting had been scheduled between the  
5 parties. The Division had no objections to this request.

6 On October 4, 2012, by Procedural Order, the status conference was continued to November  
7 6, 2012.

8 On November 1, 2012, Respondents filed a Motion to Vacate the status conference scheduled  
9 on November 6, 2012, until after November 25, 2012, due to a number of conflicts on Respondents'  
10 counsel's schedule, which were beyond his control. Among the conflicts was the time required to  
11 respond to a subpoena from the Division for copies of his clients' records. The Division had no  
12 objections to Respondents' Motion to Vacate.

13 On November 6, 2012, by Procedural Order, the status conference was continued to  
14 November 20, 2012.

15 On November 16, 2012, Respondents filed another Motion to Vacate the status conference  
16 scheduled on November 20, 2012, citing additional conflicts and requiring more time to comply with  
17 the Division's subpoena. The Division had no objections to this request.

18 On November 19, 2012, by Procedural Order, the status conference was continued to January  
19 10, 2013.

20 On January 3, 2013, Respondents filed another Motion to Vacate the status conference  
21 scheduled on January 10, 2013, citing more conflicts and scheduling problems.

22 On January 8, 2013, the Division filed a response arguing that the Respondents' request  
23 should be denied.

24 On January 9, 2013, by Procedural Order, the status conference was continued to January 29, 2013.

25 On January 28, 2013, Respondents filed a Motion to Dismiss and, Alternatively, Motion to Further  
26 Continue Pre-hearing Conference and Reply to Security Division's Response to Respondent's Motion to  
27 Vacate January 10, 2013 Pre-Hearing Conference ("Motion to Dismiss").

28 On January 29, 2013, at the status conference, the Division and Respondents appeared with

1 counsel and agreed that a hearing be scheduled to commence on July 8, 2013. Subsequently, counsel  
2 for the Division requested that a teleconference be scheduled to reschedule the proceeding due to a  
3 conflict with his trial schedule. Regarding the Respondents' Motion to Dismiss, the Administrative  
4 Law Judge stated that he could not make a recommendation to the Commission without first holding  
5 an evidentiary hearing.

6 On January 31, 2013, during a teleconference, the Division and Respondents appeared  
7 through counsel to resolve the scheduling conflict with respect to the hearing. After a brief  
8 discussion, the parties agreed that the proceeding be scheduled to commence on September 16, 2013,  
9 if they were unable to resolve the issues raised by the T.O. Regarding the Respondents' Motion to  
10 Dismiss, the Administrative Law Judge clarified that an evidentiary hearing would address both the  
11 motion to dismiss and the merits of the Division's case.

12 On February 4, 2013, by Procedural Order, the hearing was continued to September 16, 2013.

13 On February 12, 2013, the Division filed a Response to Respondent's Motion to Dismiss,  
14 Alternatively Motion to Continue Pre-hearing Conference, and Reply to Security Division's Response to  
15 Respondent's Motion to Vacate January 10, 2013 Pre-Hearing Conference ("Response to Motion to  
16 Dismiss").

17 On August 9, 2013, the Division filed a Motion for Leave to Amend Notice.  
18 Contemporaneously therewith, the parties filed a Joint Motion for Continuance of the hearing and the  
19 deadline to exchange copies of witness and exhibit lists. The joint motion also proposed that a status  
20 conference be held on September 16, 2013, to establish new dates for exchanging copies of witness  
21 and exhibit lists and for the hearing. Respondents did not file any objections to the Division's  
22 Motion for Leave to Amend Notice.

23 On August 21, 2013, by Procedural Order, the Motion for Leave to Amend Notice was  
24 granted as was the Joint Motion for Continuance of the hearing.

25 On September 6, 2013, the Division filed the Amended Notice of Opportunity for Hearing  
26 Regarding Proposed Order to Cease and Desist, Order for Restitution, Order for Administrative  
27 Penalties, Order of Revocation, and Order for Other Affirmative Action ("Amended Notice").

28 On September 16, 2013, at the status conference, the Division and Respondents appeared with

1 counsel. Respondents also filed a request for hearing with respect to the Amended Notice.  
2 Subsequently, the parties agreed that a hearing to last approximately one week should be scheduled to  
3 commence on April 28, 2014, with documents to be exchanged approximately one month earlier.

4 On September 17, 2013, by Procedural Order, a hearing was scheduled to commence on April  
5 28, 2014.

6 On October 10, 2013, Respondents filed an Answer to Amended Notice of Opportunity for  
7 Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order for  
8 Administrative Penalties, Order of Revocation and Order for Other Affirmative Action (“Amended  
9 Answer”).

10 On March 25, 2014, a Joint Stipulation to Extend Deadline for Exchanging Witness Lists and  
11 Exhibit Lists (“Joint Stipulation”) was filed by Respondents and the Division.

12 On March 26, 2014, by Procedural Order, the Joint Stipulation was granted.

13 On April 4, 2014, the Division filed a Motion to Allow Telephonic Testimony during the  
14 proceeding. Respondents did not file any objections to the Division’s motion.

15 On April 17, 2014, by Procedural Order, the Division’s Motion to Allow Telephonic  
16 Testimony was granted.

17 On April 18, 2014, Respondents filed a Motion to Vacate the hearing scheduled to commence  
18 on April 28, 2014, arguing that a large number of Respondents’ investors are satisfied with their  
19 investments and that the Commission’s action may interfere with transactions involving the  
20 Respondents’ ongoing business opportunities and may inhibit the prospective return expected to be  
21 earned by investors.

22 On April 22, 2014, the Division filed a response opposing the Respondents’ Motion to  
23 Vacate. In its response, the Division argued that Respondents had ignored the T.O. and continued to  
24 illegally offer and sell securities. The Division further argued that Respondents’ ability to close  
25 transactions was not dispositive of the issues raised by the Notice, but the Respondents’ violations of  
26 the Act were the controlling factors.

27 On April 24, 2014, by Procedural Order, Respondents’ Motion to Vacate was denied.

28 On April 28, 2014, the parties filed Joint Fact Stipulations.

1 Also on April 28, 2014, a full public hearing was commenced before a duly authorized  
2 Administrative Law Judge of the Commission at its offices in Phoenix, Arizona. The Division and  
3 the Respondents were represented by counsel. Additional days of hearing were held on April 29, 30,  
4 and May 1, 2014. At the conclusion of the hearing, a schedule for the filing of post-hearing briefs  
5 was established whereby the Division would file an initial brief by June 23, 2014, the Respondents  
6 would file a response by July 21, 2014, and the Division would file a reply by August 8, 2014.

7 On June 23, 2014, the Securities Division filed their Post-Hearing Opening Brief.

8 On July 21, 2014, Respondents filed a Motion Requesting Extension of Time to File  
9 Respondent's [sic] Post-Hearing Brief. Respondents requested an extension of time to file their post-  
10 hearing brief by August 12, 2014. The need for the extension of time was attributed to health issues  
11 incurred by Respondents' counsel that were unforeseen at the time the briefing schedule was set. The  
12 Division did not file an objection to the Respondents' Motion.

13 On August 1, 2014, by Procedural Order, the Respondents' Motion Requesting Extension of  
14 Time to File Respondent's [sic] Post-Hearing Brief was granted. Respondents were ordered to file  
15 their Post-Hearing brief on or before August 12, 2014. A corresponding extension of time was  
16 allowed for the Division to file its reply brief.

17 On August 12, 2014, Respondents filed a Motion Requesting Further Extension of Time to  
18 File Respondent's [sic] Post-Hearing Brief. Once again, the necessity of the extension was attributed  
19 to health issues suffered by Respondents' counsel. Respondents requested a further extension to  
20 submit the Post-Hearing brief by August 18, 2014.

21 On August 13, 2014, the Securities Division filed a Response to Motion Requesting Further  
22 Extension of Time to File Respondent's [sic] Post-Hearing Brief. The Division stated that it did not  
23 oppose the Respondents' motion for a six-day extension, but the Division would oppose any future  
24 requests for extension.

25 On August 14, 2014, by Procedural Order, Respondents' Motion Requesting Further  
26 Extension of Time to File Respondent's [sic] Post-Hearing Brief was granted. Respondents were  
27 ordered to file their Post-Hearing brief on or before August 22, 2014. A corresponding extension of  
28 time was allowed for the Division to file its reply brief.

1 On August 18, 2014, the Commission received a telephone call from Respondent Mark  
2 Steiner, informing the Commission that counsel for the Respondents had passed away.

3 On August 19, 2014, by Procedural Order, a telephonic procedural conference was scheduled  
4 for August 22, 2014, to discuss any requested accommodation for the filing of the Respondents' Post-  
5 Hearing Brief and the Respondents' plans for continued representation in this matter.

6 On August 22, 2014, a telephonic procedural conference was held. Respondent Mark Steiner  
7 appeared on his own behalf and the Division appeared through counsel. The parties provided  
8 information regarding the death of Respondents' counsel. Respondent Mark Steiner stated his desire  
9 to obtain new counsel and requested additional time to do so, as well as time for new counsel to  
10 adequately prepare the Respondents' Post-Hearing Brief. The parties agreed to an extension of  
11 approximately thirty days for Respondent Mark Steiner to obtain new counsel, after which a  
12 telephonic procedural conference would be held to set a date by when newly obtained counsel will  
13 file the Post-Hearing Brief. Mr. Steiner was advised that while deceased counsel represented all  
14 Respondents, Mr. Steiner cannot personally represent Respondent spouse, and whether new counsel  
15 will represent all Respondents should be addressed when obtaining counsel.

16 On August 22, 2014, by Procedural Order, a telephonic procedural conference was scheduled  
17 for September 22, 2014, to discuss scheduling submission of the Respondents' Post-Hearing Brief.

18 On September 22, 2014, a telephonic procedural conference was held. Respondent Mark  
19 Steiner appeared on his own behalf and the Division appeared through counsel. Mr. Steiner advised  
20 that he was still attempting to obtain counsel and requested additional time to do so. The Division  
21 requested dates be set for the filing of briefs. A briefing schedule was discussed.

22 On September 22, 2014, by Procedural Order, the Respondents were ordered to file their Post-  
23 Hearing brief on or before December 1, 2014. The Division was ordered to file its reply brief by  
24 December 19, 2014.

25 On December 1, 2014, Respondent Steiner filed a Post-Hearing Brief.

26 On December 19, 2014, the Division filed a Reply to Respondents' Post-Hearing Brief.

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**DISCUSSION**

**I. Brief Summary**

This is an enforcement action brought against Respondents Out of the Blue Processors, LLC, Mark Steiner, and Shelly Steiner for alleged violations of the Arizona Securities Act. The Division alleges that by selling membership interests in OBP since 2008, OBP and Mr. Steiner sold unregistered securities while not registered as dealers or salesmen, in violation of A.R.S. §§ 44-1841 and 44-1842. The Division asserts a total of seventy-five violations of the registration provisions, including: offers and sales to thirty-five investors, offers and sales to two investors who received a return of their investment, and an offer made to an undercover Division investigator. The Division further alleges that the Respondents committed fraud by failing to disclose: 1) Mr. Steiner would use investor funds for personal expenses, and 2) the existence of the T.O. to subsequent investors. Respondent Steiner is further alleged to be a control person of OBP, while Respondent Spouse is included in this action solely for the purpose of determining liability of the marital community. The Division requests that the Respondents be ordered to pay an administrative penalty of \$50,000 and restitution in a total amount of \$2,495,400.

The Respondents admit that the membership interests in OBP were securities in the form of investment contracts and these securities were not registered. The Respondents further admit they were not registered as dealers or salesmen with the Commission during the relevant period. However, the Respondents contend that the securities were exempt from registration requirements under federal law. The Respondents deny having committed fraud. The Respondents allege that the Division violated Arizona criminal law in conducting the undercover investigation and further violated their constitutional rights in issuing the T.O. The Respondents assert these alleged violations justify dismissal of charges or the exclusion of evidence.

**II. Testimony**

Annalisa Weiss

Annalisa Weiss testified that she is a special investigator employed by the Arizona



1 Corporation Commission Securities Division.<sup>3</sup> Ms. Weiss participated in the Division's investigation  
 2 of the Respondents.<sup>4</sup> Ms. Weiss's investigation included research regarding the entities OBP,  
 3 Lunsford Consulting, LLC ("Lunsford Consulting"),<sup>5</sup> Out of the Blue Processors II, LLC ("OBP II"),  
 4 and Second Opinion Solutions, LLC ("Second Opinion").<sup>6</sup> Ms. Weiss discovered that OBP had filed  
 5 Articles of Organization with the Commission on December 18, 2000, wherein Mr. and Mrs. Steiner  
 6 were listed as managers of OBP.<sup>7</sup> Ms. Weiss could not find any filings for OBP II.<sup>8</sup> Ms. Weiss  
 7 discovered Articles of Organization for Lunsford Consulting filed with the Commission on July 30,  
 8 2010, which listed the managers as being Mr. Steiner and William B. Lunsford.<sup>9</sup> Ms. Weiss testified  
 9 that Second Opinion originally filed Articles of Organization with the Commission on December 18,  
 10 2000, under the name Out of the Blue Financial Services, LLC, before being renamed pursuant to an  
 11 October 2005 filing with the Commission.<sup>10</sup> Ms. Weiss further testified that Lunsford Consulting,  
 12 OBP, and Second Opinion, are all controlled by Mr. Steiner.<sup>11</sup> Ms. Weiss testified her research  
 13 revealed that OBP, Lunsford Consulting, and Second Opinion were not registered as securities  
 14 dealers and they had not registered securities with the Commission.<sup>12</sup> Ms. Weiss testified that Mark  
 15 Steiner had not registered as a securities salesman or dealer from January 1, 2008 through March 28,  
 16 2014.<sup>13</sup> Ms. Weiss testified that in the course of her investigation she discovered that Mr. Lunsford  
 17 was deceased.<sup>14</sup>

18 Ms. Weiss testified that following her preliminary investigation, she started an "undercover  
 19 pitch" wherein she identified herself using an alias, Margo Mallamo ("MM").<sup>15</sup> Based on the  
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21 <sup>3</sup> Tr. at 32.

22 <sup>4</sup> Tr. at 33.

23 <sup>5</sup> We note that Lunsford Consulting also operated under Lunsford Consulting, Unincorporated; Lunsford, Limited and  
 Lunsford, LLC. Exh. S-9 at 191. We refer to these multiple business iterations, individually and collectively, as  
 Lunsford Consulting.

24 <sup>6</sup> Tr. at 34.

25 <sup>7</sup> Tr. at 35; Exh. S-7.

26 <sup>8</sup> Tr. at 34.

27 <sup>9</sup> Tr. at 35-36; Exh. S-5.

28 <sup>10</sup> Tr. at 39-40; Exh. S-6. Mr. and Mrs. Steiner were listed as managers of Out of the Blue Financial Services, LLC. Tr.  
 at 39; Exh. S-6.

<sup>11</sup> Tr. at 64-65.

<sup>12</sup> Tr. at 37-40; Exhs. S-2-S-4.

<sup>13</sup> Tr. at 38; Exh. S-1.

<sup>14</sup> Tr. at 36-37.

<sup>15</sup> Tr. at 41.

1 Division's receipt of an e-mail tip regarding an investment, Ms. Weiss, as MM, e-mailed Rolf  
 2 Heartburg, who put her in touch with Mr. Steiner.<sup>16</sup> Ms. Weiss testified that, under the guise of MM,  
 3 she exchanged e-mails, text messages and a phone call with Mr. Steiner regarding her making an  
 4 investment.<sup>17</sup> Mr. Steiner e-mailed an Operating Agreement of OBP II and an Executive Summary  
 5 for Lunsford Consulting to MM.<sup>18</sup> The Operating Agreement had a signature purporting to be that of  
 6 Mr. Steiner and a space for MM to sign.<sup>19</sup> Ms. Weiss testified that, as MM, she did not communicate  
 7 to Mr. Steiner her qualifications as an investor, at no time did Mr. Steiner ask MM about her income  
 8 or net worth, and that Mr. Steiner would have had no basis for independent knowledge of that  
 9 information because MM was not a real person.<sup>20</sup> Ms. Weiss testified that, as MM, she told Mr.  
 10 Steiner she lived in Arizona and she believed he understood her to be an Arizona resident.<sup>21</sup> Ms.  
 11 Weiss testified that, as MM, she and Mr. Steiner agreed to meet at the Commission for the purpose of  
 12 his picking up an investment check from MM.<sup>22</sup> At this planned meeting, Division officers served  
 13 Mr. Steiner with a Temporary Order to Cease and Desist.<sup>23</sup>

14 Ms. Weiss continued her investigation and subpoenas seeking records were issued to banks,  
 15 Mr. Steiner, OBP, Lunsford Consulting, and Second Opinion.<sup>24</sup> When asked to provide records of  
 16 salaries and other compensation paid to Mr. Steiner by OBP, Mr. Steiner responded that "[n]o such  
 17 items exist other than bank statements."<sup>25</sup> Mr. Steiner provided the same response when asked to  
 18 provide records of all monetary transfers between Steiner and any third party related to OBP,  
 19 Lunsford Consulting or Second Opinion.<sup>26</sup> When asked for accounting records regarding all  
 20 expenses incurred by Mr. Steiner for or on behalf of OBP, Lunsford Consulting or Second Opinion,  
 21 Mr. Steiner responded that he does not maintain accounting books and records.<sup>27</sup> Ms. Weiss testified  
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23 <sup>16</sup> Tr. at 42; Exh. S-37.

24 <sup>17</sup> Tr. at 43-44; Exhs. S-36, S-37.

25 <sup>18</sup> Tr. at 43, 77, 101; Exhs. S-11, S-12.

26 <sup>19</sup> Tr. at 101-102; Exh. S-11 at ACC001095.

27 <sup>20</sup> Tr. at 43, 91, 102-103.

28 <sup>21</sup> Tr. at 45.

<sup>22</sup> Tr. at 44.

<sup>23</sup> Tr. at 44-46.

<sup>24</sup> Tr. at 46-48; Exhs. S-22-S-25.

<sup>25</sup> Tr. at 49; Exhs. S-25, S-40.

<sup>26</sup> Tr. at 49-50; Exhs. S-25, S-40.

<sup>27</sup> Tr. at 50; Exhs. S-25, S-40.

1 that a subpoena sent to OBP requesting records of salaries and other compensation paid by OBP was  
 2 responded to by Mr. Steiner, as custodian of records, stating that “[n]o such items exist, except that  
 3 all monies disbursed by Out of the Blue Processors LLC were payments of Out of the Blue  
 4 Processors LLC’s expenses of carrying on its business development business.”<sup>28</sup> Similarly, a  
 5 subpoena for Lunsford Consulting requesting records of all salaries and other compensation paid  
 6 received a response that “[n]o such items exist.”<sup>29</sup> A subpoena sent to Second Opinion also  
 7 requesting records of all salaries and other compensation paid received a response stating that:

8           No monies have been paid to any person from Second Opinion since  
 9           February 21, 2006 as salary, bonus or other compensation. Monies  
 10           paid from Second Opinion to Mark Steiner or for his benefit have been  
 11           treated as loans, to be repaid at a future date.<sup>30</sup>

12 Ms. Weiss testified that she did not recall seeing any documentation for any such loans during the  
 13 course of her investigation.<sup>31</sup>

14           Ms. Weiss testified that the Division received investor lists pursuant to the subpoenas.<sup>32</sup> Ms.  
 15 Weiss testified that other documents received included certificates of membership given to investors  
 16 in OBP which indicated that the funds were raised in two waves.<sup>33</sup> Ms. Weiss also testified that her  
 17 investigation included contacting investors.<sup>34</sup> Ms. Weiss testified that she spoke with and reviewed  
 18 records from investor Henry Clay, who invested \$35,000 with OBP on November 6, 2013.<sup>35</sup> Ms.  
 19 Weiss also testified to speaking with Rebecca Flowers who, along with her father, Raymond Flores,  
 20 each invested \$50,000 with OBP in 2012, after the T.O. was served.<sup>36</sup>

21           Ricardo Luis Gonzales

22           Mr. Gonzales testified that he is a senior forensic accountant for the Division, in which  
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24 <sup>28</sup> Tr. at 50-51; Exhs. S-24, S-41.

25 <sup>29</sup> Tr. at 52; Exhs. S-23, S-42.

26 <sup>30</sup> Tr. at 52-54; Exhs. S-22, S-43.

27 <sup>31</sup> Tr. at 54.

28 <sup>32</sup> Tr. at 59; Exhs. S-13, S-19.

<sup>33</sup> Tr. at 68-70; Exhs. S-38, S-39.

<sup>34</sup> Tr. at 54.

<sup>35</sup> Tr. at 54-55; Exh. S-29. A subsequent transaction of \$31,000 was erroneously made on November 25, 2013. *Id.* Both transactions were made out to OBP II. Exh. S-29.

<sup>36</sup> Tr. at 55-59, 73-74; Exhs. S-69, S-70.

1 capacity he reviews bank, financial and other documents in the investigation and research of possible  
 2 violations of the Act.<sup>37</sup> Mr. Gonzales participated in the investigation of the Respondents, reviewed  
 3 documents from financial institutions submitted by the Respondents in response to the Division's  
 4 subpoenas, and participated in examinations under oath of Mr. Steiner.<sup>38</sup> Mr. Gonzales testified that  
 5 bank records showed Mr. Steiner as the lone signatory controlling accounts for OBP and Second  
 6 Opinion.<sup>39</sup> Mr. Gonzales also reviewed records for personal bank accounts for which the signatories  
 7 were Mr. and Mrs. Steiner.<sup>40</sup> Mr. Gonzales further testified that Mr. Steiner confirmed the signatory  
 8 status of these accounts during an examination under oath.<sup>41</sup>

9 Mr. Gonzales testified that in his review of bank records, he was able to trace most of the  
 10 \$1,773,000 listed as coming into OBP from an initial block of investors according to a document  
 11 created by Mr. Steiner.<sup>42</sup> Not listed among the investors was Tracy Wooten, whom Mr. Gonzales  
 12 testified was issued a \$20,000 cashier's check from OBP after she requested the return of her funds.<sup>43</sup>  
 13 Mr. Gonzales also testified that \$15,000 was wired from a Robert Zischa Living Trust to an account  
 14 in the name of Mark G. Steiner and Shelly R. Steiner on April 13, 2010.<sup>44</sup> Mr. Gonzales testified that  
 15 on October 19, 2010, a cashier's check in the amount of \$18,750 was paid to the Robert Zischa  
 16 Living Trust from an OBP bank account.<sup>45</sup> Mr. Gonzales testified that, according to Mr. Steiner, the  
 17 \$15,000 was a personal loan to Mr. Steiner and the \$18,750 was the repayment of that loan.<sup>46</sup> Mr.  
 18 Zischa was not an investor in OBP.<sup>47</sup>

19 Mr. Gonzales also testified that a \$5,000 check, written from OBP to Thomas Gleason and  
 20 dated December 8, 2010, was a repayment of an investment made by Mr. Gleason.<sup>48</sup> Mr. Gleason  
 21

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22 <sup>37</sup> Tr. at 107, 109.

23 <sup>38</sup> Tr. at 110-114.

24 <sup>39</sup> Tr. at 114-116; Exhs. S-14-S-16.

25 <sup>40</sup> Tr. at 116-117; Exhs. S-17, S-18.

26 <sup>41</sup> Tr. at 114-118; Exhs. S-8 at 91-92, S-9 at 111-116, 119-121.

27 <sup>42</sup> Tr. at 118-120; Exhs. S-9 at 123, S-19. A total of \$2,495,500 of investor funds was identified in Mr. Steiner's  
 28 document. S-19.

<sup>43</sup> Tr. at 120-121, 137, 146-148; Exh. S-35.

<sup>44</sup> Tr. at 121-123; Exh. S-33.

<sup>45</sup> Tr. at 122-124; Exhs. S-34, S-54a.

<sup>46</sup> Tr. at 122.

<sup>47</sup> Tr. at 123.

<sup>48</sup> Tr. at 124-125, 137, 147-149; Exh. S-62.

1 was not identified on the investor list provided by Mr. Steiner.<sup>49</sup> Also on December 8, 2010, Mr.  
2 Steiner made a \$25,000 withdrawal from the OBP account.<sup>50</sup>

3 Mr. Gonzales testified that OBP's bank account received a wire transfer on March 1, 2012, in  
4 the amount of \$49,980 from Vantage Retirement Plans, LLC, in the name of Robert L. Kocks, whom  
5 Mr. Steiner identified to the Division as an investor of \$50,000 in OBP.<sup>51</sup> Mr. Gonzales further  
6 testified that a \$15,000 cashier's check was paid to OBP II on March 1, 2012, which represented the  
7 investment made by James Gmelich.<sup>52</sup> Mr. Gonzales testified that also on March 1, 2012, a \$50,000  
8 check was written to OBP from another investor, Lee Edward Weiss.<sup>53</sup>

9 Mr. Gonzales also testified that a \$35,000 transaction to OBP II dated March 18, 2013,  
10 appearing in an account statement for Henry H. Clay, represented Mr. Clay's investment in OBP.<sup>54</sup>  
11 Raymond Flores and Rebecca Flowers each invested \$50,000 in OBP with checks dated May 1,  
12 2012, issued from annuity contracts.<sup>55</sup>

13 Mr. Gonzales testified that his investigation uncovered approximately \$1,709,990.75 in  
14 documented OBP investor deposits prior to the issuance of the T.O. on February 23, 2012.<sup>56</sup> Mr.  
15 Gonzales also noted \$20,000 in undocumented investor deposits where Mr. Gonzales could not find a  
16 corresponding deposit matching the amount identified by Mr. Steiner as being invested by an  
17 individual.<sup>57</sup> Mr. Gonzales also testified that, following the T.O. being served on February 23, 2012,  
18 he identified an additional \$275,000 in documented investor deposits.<sup>58</sup> Further, an additional  
19 \$492,500 was identified as undocumented investor deposits received after the T.O. was served.<sup>59</sup>

20 Mr. Gonzales testified that the approximate \$1.7 million of investor funds initially received by  
21

22 <sup>49</sup> Tr. at 125; Exh. S-19.

<sup>50</sup> Tr. at 125; Exh. S-62.

23 <sup>51</sup> Tr. at 126-127; Exhs. S-19, S-26. Mr. Gonzales testified that the difference between \$49,980 and \$50,000 was  
attributable to a wire transfer fee. Tr. at 127.

24 <sup>52</sup> Tr. at 127-128; Exhs. S-19, S-27.

25 <sup>53</sup> Tr. at 128; Exhs. S-19, S-28. Documents provided by Mr. Steiner listed Mr. Weiss as having invested \$100,000,  
calculated from an initial investment of \$100,000 that was split between him and his ex-wife Kim Marie Weiss and  
including this additional investment of \$50,000. Tr. at 129; Exh. S-19.

26 <sup>54</sup> Tr. at 129-130; Exhs. S-19, S-29.

27 <sup>55</sup> Tr. at 131; Exhs. S-19, S-69, S-70.

<sup>56</sup> Tr. at 132-133, 191; Exh. S-60b.

<sup>57</sup> Tr. at 133; Exh. S-60b.

28 <sup>58</sup> Tr. at 133-134; Exh. S-60b.

<sup>59</sup> Tr. at 134, 191; Exhs. S-19, S-60b.

1 OBP was generally used for account withdrawals, payments to credit cards in the name of Mr.  
 2 Steiner, payments to Mr. Steiner (including his and his wife's personal account and payments to a  
 3 credit card), payments to entities, payments to Mr. Lunsford (including wire transfers and checks to  
 4 Mr. Lunsford and payments to Lunsford Consulting), the return of some investment and loan monies  
 5 (to Mr. Gleason, the Zischa trust and Ms. Wooten), and other transactions.<sup>60</sup> Mr. Gonzales testified  
 6 that monies coming in from investors also flowed from the OBP account into a Second Opinion  
 7 account, over which Mr. Steiner was the signatory.<sup>61</sup> These funds in the Second Opinion account  
 8 were generally traced to payments on a USAA credit card in the name of Mr. Steiner, transfers to Mr.  
 9 Steiner's personal account, and cash withdrawals.<sup>62</sup> The funds used toward payments of the USAA  
 10 credit card were acknowledged by Mr. Steiner to include both work and personal expenses.<sup>63</sup> Mr.  
 11 Gonzales testified that he was not able to trace "several hundred thousand dollars" that went to cash  
 12 withdrawals between January 2008 through approximately March 2012 when the T.O. was issued.<sup>64</sup>  
 13 Mr. Gonzales testified that Mr. Steiner asserted all the cash withdrawals were used for the benefit of  
 14 Lunsford Consulting, however Mr. Steiner could provide no records or documentation to support this  
 15 assertion.<sup>65</sup> Mr. Gonzales further testified that a \$30,000 withdrawal from the Second Opinion  
 16 account was used by Mr. Steiner to fund a \$29,500 lease payment to the owner of the house where  
 17 Steiner resides.<sup>66</sup> Mr. Gonzales testified that the monies used to repay the investments of Ms.  
 18 Wooten and Mr. Gleason were not the original funds of those investors, but rather the monies came  
 19 from the investments made by Cachaca Holdings and Florin Capital.<sup>67</sup>

20 Mr. Gonzales testified that on August 25, 2010, \$100,000 of investor funds were deposited  
 21 into a zero balance bank account in the name of OBP, over which Mr. Steiner was the only  
 22 signatory.<sup>68</sup> In early September 2010, \$17,500 was transferred from the OBP account to Mr.

23

24 <sup>60</sup> Tr. at 136-138.

<sup>61</sup> Tr. at 138-139.

25 <sup>62</sup> Tr. at 139-140.

<sup>63</sup> Tr. at 140-142, 178-179; Exhs. S-9 at 192-211, S-21. Mr. Steiner acknowledged that he was uncertain whether some charges were work or personal. Exhs. S-9 at 193, S-21.

26 <sup>64</sup> Tr. at 140, 142, 171, 190; Exhs. S-32a-1, S-32a-2, S-32a-3, S-60b.

27 <sup>65</sup> Tr. at 143, 170, 190; Exh. S-32.

<sup>66</sup> Tr. at 144-146, 179-180; Exhs. S-56, S-57.

28 <sup>67</sup> Tr. at 146-149; Exhs. S-35, S-62.

<sup>68</sup> Tr. at 172-175; Exhs. S-46 at ACC000470, S-48.

1 Steiner's personal bank account.<sup>69</sup> Mr. Gonzales further testified that an additional \$15,000 was  
 2 transferred from the OBP account to an account in the name of Second Opinion, over which Mr.  
 3 Steiner was the only signatory.<sup>70</sup> Mr. Gonzales testified that another \$49,543 in investor funds was  
 4 deposited in the OBP bank account in October 2010.<sup>71</sup> Between August 2010 through the end of  
 5 November 2010, a total of \$67,150 in cash was withdrawn from the OBP bank account, in addition to  
 6 transfers to Mr. Steiner's personal bank account and transfers to Second Opinion.<sup>72</sup> Mr. Gonzales  
 7 testified that these transfers included monies used for paying Mr. Steiner's USAA credit card charges  
 8 which, according to Mr. Steiner, contained a mix of business and personal expenses.<sup>73</sup> Mr. Gonzales  
 9 testified that at the end of November 2010, the OBP account contained a balance of \$922.03 after  
 10 nearly \$150,000 of investor funds had been spent for which Mr. Steiner could provide no  
 11 documentation as to its use other than his assertions.<sup>74</sup>

12 Section 4.1 of the OBP Operating Agreement given to investors read, in pertinent part:

13 Books. The manager shall maintain complete and accurate books of  
 14 account of the Company's affairs at the office described above, which  
 15 books shall be open to inspection and copying by any Member or by its  
 16 authorized representative at any time during ordinary business hours.<sup>75</sup>

17 Mr. Gonzales testified that the Division subpoenaed the books of OBP, but received no books or  
 18 accounting records.<sup>76</sup> Mr. Steiner replied to the Division's request by stating that OBP "does not at  
 19 this time maintain complicated accounting records. Its bank statements are its records of receipts and  
 20 disbursements."<sup>77</sup>

21 Section 3.6 of the OBP Operating Agreement given to investors read:

22 Compensation of Managers. Initially, there will be no compensation of

23 <sup>69</sup> Tr. at 173-175; Exh. S-46 at ACC000467.

24 <sup>70</sup> Tr. at 175; Exh. S-46 at ACC000467.

25 <sup>71</sup> Tr. at 176; Exhs. S-46 at ACC000465, S-49, S-51.

26 <sup>72</sup> Tr. at 178; Exh. S-46.

27 <sup>73</sup> Tr. at 178-179; Exh. S-21.

28 <sup>74</sup> Tr. at 180.

<sup>75</sup> Tr. at 181; Exh. S-71 at ACC005023. (Underscore in original). An identical provision was contained in the Operating Agreement of Out of the Blue Processors II, LLC. Tr. at 182; Exhs. S-11 at ACC001087, S-72.

<sup>76</sup> Tr. at 181, 185, 189; Exh. S-24. Mr. Gonzales also testified that the Division did not receive any books for Out of the Blue Processors II, LLC. Tr. at 182.

<sup>77</sup> Tr. at 185; Exh. S-41.

1 the managers due to the limited managerial requirements of the  
 2 Company. In the event responsibilities increase such that regular time  
 3 commitments must be made to the Company to efficiently manage the  
 4 Company, the Manager will receive compensation to be paid out of  
 5 gross revenues, commensurate with industry standards for the role of a  
 6 Manager.<sup>78</sup>

7 Mr. Gonzales testified that Mr. Steiner is the manager of OBP.<sup>79</sup> Mr. Gonzales testified that the  
 8 Division issued a subpoena to Mr. Steiner requesting records of salaries, loans and other  
 9 compensation paid to Mr. Steiner, but Mr. Steiner replied that no such documents exist other than  
 10 bank statements.<sup>80</sup> The Division's subpoena also requested records regarding monetary transfers  
 11 between Mr. Steiner and Second Opinion, Lunsford Consulting, and OBP, to which Mr. Steiner also  
 12 responded that no such documents exist other than bank statements.<sup>81</sup> The Division subpoenaed OBP  
 13 to produce records regarding all salaries, loans and other compensation, to which Mr. Steiner replied  
 14 that "No such items exist, except that all monies disbursed by Out of the Blue Processors LLC were  
 15 payments of Out of the Blue Processors LLC's expenses of carrying on its business development  
 16 business."<sup>82</sup> Mr. Gonzales testified that for Lunsford Consulting, the Division subpoenaed  
 17 documents regarding salaries and compensation, which Mr. Steiner reported do not exist, as well as  
 18 books and accounting records, which Mr. Steiner reported are not maintained other than bank account  
 19 records.<sup>83</sup> Mr. Gonzales testified that Second Opinion was also subpoenaed to produce records.<sup>84</sup>  
 20 Mr. Steiner, as custodian of records for Second Opinion, responded "No monies have been paid to  
 21 any person from Second Opinion since February 21, 2006 as salary, bonus or other compensation.  
 22 Monies paid from Second Opinion to Mark Steiner or for his benefit have been treated as loans, to be  
 23 repaid at a future date."<sup>85</sup> Mr. Gonzales testified that the Division received no documentation of any

24 <sup>78</sup> Tr. at 182-183; Exh. S-71 at ACC005022. (Underscore in original). An identical provision was contained in the  
 25 Operating Agreement of Out of the Blue Processors II, LLC. Tr. at 183; Exhs. S-11 at ACC001086, S-72.

26 <sup>79</sup> Tr. at 189.

27 <sup>80</sup> Tr. at 184; Exhs. S-25, S-40.

28 <sup>81</sup> Tr. at 184-185; Exhs. S-25, S-40.

<sup>82</sup> Tr. at 185-186; Exhs. S-24, S-41.

<sup>83</sup> Tr. at 187; Exhs. S-23, S-42.

<sup>84</sup> Tr. at 187-188; Exh. S-22.

<sup>85</sup> Tr. at 188; Exh. S-43.



1 loans, except possibly the transactions themselves as shown on bank statements produced by the  
2 banks.<sup>86</sup> The bank statements are also the only record of transfers of monies flowing to Mr. Steiner.<sup>87</sup>

3 Rebecca Flowers

4 Ms. Flowers is an Arizona resident, not presently employed, with a Master's degree in  
5 administration and leadership.<sup>88</sup> Ms. Flowers testified that her financial advisor told her of OBP as a  
6 no-risk investment.<sup>89</sup> Ms. Flowers testified she met Mr. Steiner through her financial adviser for the  
7 purpose of investing in OBP.<sup>90</sup> After February 2012, Ms. Flowers met with Mr. Steiner, who told her  
8 that OBP, through Lunsford Consulting, was working with the Chinese government to invest in  
9 providing electricity in Nigeria.<sup>91</sup> Ms. Flowers testified that, as explained to her by Mr. Steiner, OBP  
10 investors would eventually receive payments as they flowed from returns on electricity sold by the  
11 Nigerian government, first to the Chinese companies involved, then to Lunsford Consulting and then  
12 to OBP.<sup>92</sup> It was also explained to Ms. Flowers that OBP's managers would be paid by Lunsford  
13 Consulting through money received as a result of contracts with Chinese companies.<sup>93</sup> Ms. Flowers  
14 testified that in September 2012, she invested \$50,000 in OBP.<sup>94</sup> Ms. Flowers testified that her  
15 father, Raymond Flores, also invested \$50,000 in OBP in September 2012.<sup>95</sup> Ms. Flowers testified  
16 that she believed their investment funds would be used for travel and other company expenses.<sup>96</sup> She  
17 was not told that her investment principal would be used to pay Mr. Steiner's personal expenses.<sup>97</sup>  
18 Ms. Flowers testified that she probably would not have invested in OBP had she known that her  
19 investment principal would be used to pay Mr. Steiner's personal expenses.<sup>98</sup>

20 Ms. Flowers testified that, at the time of making their investment, they received an "Operating  
21 Agreement of Out of the Blue Processors, LLC" ("Operating Agreement") which indicated their

22 <sup>86</sup> Tr. at 188-189.

23 <sup>87</sup> Tr. at 189-190.

24 <sup>88</sup> Tr. at 195-196.

25 <sup>89</sup> Tr. at 221-222.

26 <sup>90</sup> Tr. at 196-197.

27 <sup>91</sup> Tr. at 197-198.

28 <sup>92</sup> Tr. at 198.

<sup>93</sup> Tr. at 199.

<sup>94</sup> Tr. at 199-201; Exh. S-69.

<sup>95</sup> Tr. at 201-202, 204; Exh. S-70.

<sup>96</sup> Tr. at 207.

<sup>97</sup> Tr. at 207-208.

<sup>98</sup> Tr. at 212.

1 percentage interest in OBP.<sup>99</sup> Among the terms of the Operating Agreement, the manager of OBP  
 2 was required to maintain complete and accurate books of account.<sup>100</sup> Ms. Flowers testified that she  
 3 expected OBP to keep books or records of its use of investor monies, and that if she knew records of  
 4 expenses were not being kept she would have been less likely to invest.<sup>101</sup> Ms. Flowers also testified  
 5 that, prior to her investment, Mr. Steiner did not mention the T.O. entered against the Respondents, or  
 6 the claims asserted by the Division against the Respondents.<sup>102</sup> Ms. Flowers testified that she would  
 7 have wanted to know about the Commission's actions regarding the Respondents prior to investing  
 8 and, if she had known, she would not have made the investment.<sup>103</sup>

9 Ms. Flowers testified that her net worth, excluding her home, never exceeded \$1 million, and  
 10 that her individual income had not exceeded, nor did she anticipate it to exceed, \$200,000 when she  
 11 invested in OBP.<sup>104</sup> Ms. Flowers testified that Mr. Steiner did not ask about her net worth prior to her  
 12 investing in OBP.<sup>105</sup> Mr. Steiner did not ask Mr. Flores about his income or net worth.<sup>106</sup> Mr. Flores  
 13 had no other investments besides an annuity from which he withdrew the \$50,000 he invested with  
 14 OBP.<sup>107</sup>

15 Henry Howard Clay

16 Mr. Clay is a retired railroad employee with a high school education residing in New  
 17 Mexico.<sup>108</sup> Mr. Clay testified that he met Mr. Steiner through Boyd Lunsford, whom he had known  
 18 for nearly forty years.<sup>109</sup> Mr. Clay testified that he understood an investment with OBP would fund  
 19 Lunsford's business ventures with China.<sup>110</sup> Mr. Clay also understood that monies received from  
 20 Boyd Lunsford's Chinese ventures would go through Lunsford Consulting with ten percent of those  
 21 funds being paid to OBP.<sup>111</sup> On or about November 6, 2013, Mr. Clay invested \$35,000 in OBP.<sup>112</sup>

22 <sup>99</sup> Tr. at 206-207; Exh. S-71.

23 <sup>100</sup> Tr. at 208; Exh. S-71 at ACC005023.

24 <sup>101</sup> Tr. at 209.

25 <sup>102</sup> Tr. at 212-213.

26 <sup>103</sup> Tr. at 213-214.

27 <sup>104</sup> Tr. at 210-211.

28 <sup>105</sup> Tr. at 211-212. Ms. Flowers could not recall whether Mr. Steiner asked about her income. Tr. at 212.

<sup>106</sup> Tr. at 212.

<sup>107</sup> Tr. at 203-204, 215-217; Exh. S-70.

<sup>108</sup> Tr. at 228-230.

<sup>109</sup> Tr. at 230-232.

<sup>110</sup> Tr. at 231.

<sup>111</sup> Tr. at 242.

1 Regarding his financial situation, Mr. Clay testified: his net worth, excluding the value of his home,  
 2 never exceeded \$1 million; his personal income never exceeded \$200,000 a year; when he was  
 3 married,<sup>113</sup> his combined income with his spouse never exceeded \$300,000 a year; and having just  
 4 retired in February 2013, he had no anticipation of an increase in his income as of November 2013.<sup>114</sup>  
 5 Mr. Clay testified that while Mr. Steiner knew he was retired at the time he made the investment, Mr.  
 6 Steiner did not ask about Mr. Clay's income and he could not remember Mr. Steiner asking about his  
 7 net worth.<sup>115</sup> At the time he invested, Mr. Clay was unaware of the Division's claims against the  
 8 Respondents and Mr. Steiner made no mention of the claims or the T.O.<sup>116</sup> Mr. Clay testified that he  
 9 would have wanted to know this information prior to deciding to invest in OBP.<sup>117</sup> Mr. Clay testified  
 10 that once he discovered the Division's investigation of the Respondents, he discussed the matter with  
 11 Mr. Steiner and was satisfied that the expenses were necessary for the business.<sup>118</sup>

12 Don Roy Gilman

13 Mr. Gilman is an Oregon resident who spends several months each year in Arizona.<sup>119</sup> Mr.  
 14 Gilman testified that he had known Boyd Lunsford for almost 20 years.<sup>120</sup> On or about May 1, 2011,  
 15 Mr. Gilman, through a family trust, invested \$22,500 in OBP with the understanding that those funds  
 16 would go to Lunsford Consulting for the payment of expenses.<sup>121</sup> Mr. Gilman further testified that he  
 17 understood any return on investment would come through projects paying Lunsford Consulting,  
 18 which would then distribute ten percent to OBP for the investors.<sup>122</sup> Mr. Gilman testified that other  
 19 than his investment, he had no influence over the business activities of OBP, Lunsford Consulting or  
 20 Boyd Lunsford.<sup>123</sup> Mr. Gilman testified he did not have a lot of information as to how investment  
 21

22 <sup>112</sup> Tr. at 237; Exh. S-29.

23 <sup>113</sup> At the hearing, Mr. Clay testified he was married for about a year in 2011, unmarried for a year and a half, and then  
 married again for about a year. Tr. at 229-230.

24 <sup>114</sup> Tr. at 238-239.

25 <sup>115</sup> Tr. at 239.

26 <sup>116</sup> Tr. at 239-240.

27 <sup>117</sup> Tr. at 240.

28 <sup>118</sup> Tr. at 242-243.

<sup>119</sup> Tr. at 257-258.

<sup>120</sup> Tr. at 258.

<sup>121</sup> Tr. at 258-259, 264-265, 267, 273; Exh. S-39 at ACC004948. Mr. Gilman's investment was part of the second wave  
 of sales of OBP memberships, OBP II. Exh. S-39 at ACC004948.

<sup>122</sup> Tr. at 259-260.

<sup>123</sup> Tr. at 262.

1 money was spent, though he received an operating agreement and he expected funds would pay for  
 2 travel and household expenses as well as compensation for Mr. Steiner and Boyd Lunsford.<sup>124</sup> Mr.  
 3 Gilman testified that he would have expected OBP and Lunsford Consulting to keep a record of  
 4 expenses but “[w]hether they did it or did not do it doesn’t trouble me that much.”<sup>125</sup> Mr. Gilman  
 5 testified that he didn’t consider his payment to OBP so much an investment but “more like a  
 6 contribution” to his friend Boyd Lunsford and then Mr. Steiner.<sup>126</sup> Mr. Gilman likened his  
 7 investment in OBP to purchasing a lottery ticket and testified that he was hopeful of seeing a return  
 8 on his investment.<sup>127</sup>

9 Businge Katenta

10 Mr. Katenta testified that he was born in Uganda and came to the United States as the son of a  
 11 Ugandan Ambassador.<sup>128</sup> Mr. Katenta met with Mr. Steiner in late 2010 and became aware of Mr.  
 12 Steiner’s work with China, which he discussed with his father.<sup>129</sup> Mr. Katenta’s father met with Mr.  
 13 Steiner and Boyd Lunsford regarding potential ventures between Uganda and China.<sup>130</sup> Boyd  
 14 Lunsford, Mr. Steiner, Mr. Katenta and his father, and others from Uganda met with representatives  
 15 of the Chinese company Sinosteel, to discuss funding and technology for development in Uganda.<sup>131</sup>  
 16 These discussions resulted in a Memorandum of Understanding wherein Sinosteel agreed to provide  
 17 technical and financial expertise for the development of an iron ore mine and steel plant in Uganda.<sup>132</sup>  
 18 Mr. Katenta testified that further meetings were conducted in Uganda between Sinosteel and the  
 19 Ugandan government regarding this and other projects.<sup>133</sup> These meetings were also attended by Mr.  
 20 Steiner and Boyd Lunsford.<sup>134</sup> Mr. Katenta testified that he is not an investor in OBP and that he had  
 21 no expectation of receiving financial compensation when and if any of the projects discussed with the  
 22

23 \_\_\_\_\_  
 124 Tr. at 266-269.

125 Tr. at 269.

126 Tr. at 271.

127 Tr. at 261, 266, 271-272.

128 Tr. at 297.

129 Tr. at 298.

130 Tr. at 298-299; Exh. FF.

131 Tr. at 299-301, 303-306; Exhs. BB, SS, PPP, AA.

132 Tr. at 306-307; Exh. DD.

133 Tr. at 308-309; Exhs. EE, II.

134 Tr. at 308.

1 Chinese became funded.<sup>135</sup>

2 Lyman Sid Shreeve

3 Mr. Shreeve testified that he works as a consultant helping companies conduct business in  
4 Latin America.<sup>136</sup> Mr. Shreeve has known Mr. Steiner for approximately fifteen years.<sup>137</sup> Mr.  
5 Shreeve is not an investor in OBP.<sup>138</sup> Mr. Shreeve testified to having met with Mr. Steiner and  
6 Chinese businessmen regarding projects planned for Ecuador.<sup>139</sup> These projects included  
7 hydroelectric facilities along the Apaqui, El Tigre, and Jondachi rivers.<sup>140</sup> Mr. Shreeve testified that  
8 Mr. Steiner was heavily involved in these endeavors and made multiple trips to Ecuador regarding  
9 them.<sup>141</sup>

10 Sean Patrick McLaughlin

11 Mr. McLaughlin testified that he is an Arizona resident who has previously owned several  
12 companies and worked as a senior banker in mortgage lending.<sup>142</sup> Mr. McLaughlin testified that he  
13 has known Mr. Steiner for years as a friend and former work colleague.<sup>143</sup> Mr. McLaughlin testified  
14 that he understood OBP to be an investment opportunity that would fund costs incurred by Lunsford  
15 Consulting in working projects between China and other countries.<sup>144</sup> Mr. McLaughlin testified that  
16 he understood that a percentage of Lunsford Consulting's profits would go to OBP, which would then  
17 pay a percentage to the investors.<sup>145</sup> Prior to investing, Mr. McLaughlin discussed the investment  
18 with Mr. Steiner multiple times and he received a full operating agreement.<sup>146</sup> Mr. McLaughlin  
19 invested \$100,000 in OBP pursuant to an operating agreement.<sup>147</sup> The terms of the OBP operating  
20 agreement included the following provision:

21 4.1 Books. The manager shall maintain complete and accurate books

22 <sup>135</sup> Tr. at 310.

23 <sup>136</sup> Tr. at 314.

24 <sup>137</sup> *Id.*

25 <sup>138</sup> Tr. at 315.

26 <sup>139</sup> Tr. at 319-321.

27 <sup>140</sup> Tr. at 321-343.

28 <sup>141</sup> Tr. at 322, 325, 332, 341.

<sup>142</sup> Tr. at 351, 355.

<sup>143</sup> Tr. at 351-352.

<sup>144</sup> Tr. at 352-354.

<sup>145</sup> Tr. at 354, 373.

<sup>146</sup> Tr. at 354-355.

<sup>147</sup> Tr. at 356-358, 369; Exh. S-71.

1 of account of the Company's affairs at the office described above,  
 2 which books shall be open to inspection and copying by any Member  
 3 or by its authorized representative at any time during ordinary business  
 4 hours. ...<sup>148</sup>

5 Mr. McLaughlin testified that he would be surprised if OBP was not maintaining books of its  
 6 expenses, though he would have expected Mr. Steiner and others involved to receive some form of  
 7 salary or income.<sup>149</sup> Prior to investing, Mr. McLaughlin was told by Mr. Steiner that his investment  
 8 principal would be used toward the operating costs of Lunsford Consulting.<sup>150</sup> Mr. McLaughlin  
 9 testified he invested in OBP because he believed in Mr. Steiner and the projects being pursued by  
 10 Lunsford Consulting, and that he still believes in them.<sup>151</sup> Mr. McLaughlin testified that he is  
 11 currently still invested in OBP and has never requested a return of his investment.<sup>152</sup> Mr.  
 12 McLaughlin testified he received regular reports on the status of projects from Mr. Steiner.<sup>153</sup> Mr.  
 13 McLaughlin testified that prior to investing, Mr. Steiner never asked him questions about his income  
 14 or his net worth, but Mr. McLaughlin believed that Mr. Steiner had an idea of his worth based upon  
 15 their prior association and business conversations.<sup>154</sup>

16 Michael James Laney

17 Mr. Laney testified that he is an Arizona resident and that he has known Mr. Steiner since  
 18 2000.<sup>155</sup> Mr. Laney testified that he does "various things" for a living including trading securities and  
 19 working in sales.<sup>156</sup> Mr. Laney learned about OBP from Mr. Steiner in 2008.<sup>157</sup> Mr. Laney  
 20 understood that OBP investor funds would be paid to cover Lunsford Consulting expenses and that  
 21 once those projects produced income, a percentage would be paid back to investors.<sup>158</sup> Mr. Laney  
 22

23 <sup>148</sup> Tr. at 359; Exh. S-71 at ACC005023. (Underscore in original).

24 <sup>149</sup> Tr. at 360-362, 364-365.

<sup>150</sup> Tr. at 363-364, 372.

25 <sup>151</sup> Tr. at 367.

<sup>152</sup> Tr. at 369.

26 <sup>153</sup> *Id.*

<sup>154</sup> Tr. at 371.

27 <sup>155</sup> Tr. at 376.

<sup>156</sup> Tr. at 376.

28 <sup>157</sup> Tr. at 377.

<sup>158</sup> Tr. at 378-379.

1 invested \$85,000 in OBP.<sup>159</sup> Mr. Laney understood that Mr. Steiner worked full-time on Lunsford  
 2 Consulting's projects.<sup>160</sup> Mr. Laney testified he hoped he would receive a return on his investment,  
 3 but he understood that there was no guarantee.<sup>161</sup> Mr. Laney received an operating agreement when  
 4 he purchased his investment with OBP.<sup>162</sup> The terms of the operating agreement included the  
 5 following provision:

6           3.6 Compensation of Managers. Initially, there will be no  
 7 compensation of the managers due to the limited managerial  
 8 requirements of the Company. In the event responsibilities increase  
 9 such that regular time commitments must be made to the Company to  
 10 efficiently manage the Company, the Manager will receive  
 11 compensation to be paid out of gross revenues, commensurate with  
 12 Industry standards for the role of a Manager.<sup>163</sup>

13 Mr. Laney testified he could not recall discussing the payment of managers with Mr. Steiner, or Mr.  
 14 Steiner's salary from OBP.<sup>164</sup> Mr. Laney assumed that the funds invested in OBP would go towards  
 15 putting together the deals "in whatever manner [Mr. Steiner] chose to do."<sup>165</sup>

16           Mr. Laney testified that he is currently invested with OBP and he has not asked for a return of  
 17 his investment.<sup>166</sup> Mr. Laney testified that he receives regular updates from Mr. Steiner regarding the  
 18 investment.<sup>167</sup> Mr. Laney testified that at the time of his investment he was an accredited investor.<sup>168</sup>  
 19 While Mr. Steiner had not asked Mr. Laney about his net worth or income, Mr. Laney believed Mr.  
 20 Steiner had an understanding of Mr. Laney's income based upon discussions in which he told Mr.  
 21 Steiner about his trading ventures.<sup>169</sup>

22  
 23 <sup>159</sup> Tr. at 378-379, 381-382, 393. Mr. Laney subsequently made gifts totaling \$15,000 of his investment. Tr. at 393.

24 <sup>160</sup> Tr. at 379, 381.

25 <sup>161</sup> Tr. at 380.

26 <sup>162</sup> Tr. at 385.

27 <sup>163</sup> Exh. S-71 at ACC005022. (Underscore in original).

28 <sup>164</sup> Tr. at 388.

<sup>165</sup> Tr. at 388-390.

<sup>166</sup> Tr. at 390-391.

<sup>167</sup> Tr. at 381, 391.

<sup>168</sup> Tr. at 392, 394. Mr. Laney testified that he was an accredited investor because he had over one million dollars in liquid assets. Tr. at 396.

<sup>169</sup> Tr. at 392.

1           Suzanne Painter

2           Ms. Painter testified that she is an Arizona resident who worked professionally as a  
3 bookkeeper.<sup>170</sup> Ms. Painter invested approximately \$111,000 in OBP in 2011 or early 2012.<sup>171</sup> Ms.  
4 Painter testified that she received investment advice from multiple people and that she first heard of  
5 Mr. Steiner through Rolf Heartburg.<sup>172</sup> Ms. Painter testified that she met with Mr. Steiner regarding  
6 making an investment.<sup>173</sup> Ms. Painter received an operating agreement pursuant to her investment.<sup>174</sup>  
7 Ms. Painter testified that, prior to her investment with OBP, Mr. Steiner made no mention of how he  
8 would be compensated.<sup>175</sup> Prior to investing, Mr. Steiner did not ask Ms. Painter about her net worth,  
9 her income, or whether she was an accredited investor.<sup>176</sup> Ms. Painter testified that she expected  
10 OBP's funds to be transferred to Lunsford Consulting for Lunsford Consulting's expenses, though if  
11 OBP paid some of those expenses directly she would not consider that to be uncommon based upon  
12 her bookkeeping experience.<sup>177</sup> Ms. Painter testified that she receives regular reports from Mr.  
13 Steiner "a couple times a month" and that she expects to receive a return on her investment sometime  
14 in three to four years.<sup>178</sup>

15           Ms. Painter's operating agreement contained a provision requiring the manager to maintain  
16 complete and accurate books of account of the company's affairs.<sup>179</sup> Ms. Painter testified that she  
17 expected OBP to have maintained complete and accurate bookkeeping when she invested.<sup>180</sup> Ms.  
18 Painter testified that in her experience of maintaining books, relying upon bank statements would not  
19 suffice as complete books of a company, though different bookkeepers might maintain books  
20 differently.<sup>181</sup> Ms. Painter testified that she has never requested to have her investment returned to  
21

22 <sup>170</sup> Tr. at 398-400.

23 <sup>171</sup> Tr. at 398, 402-404, 409.

24 <sup>172</sup> Tr. at 398-399, 406, 419.

25 <sup>173</sup> Tr. at 399, 419-420.

26 <sup>174</sup> Tr. at 408.

27 <sup>175</sup> Tr. at 413. Ms. Painter's operating agreement contained the same section 3.6 found in the operating agreement  
received by Mr. Laney. Exhs. S-71 at ACC005022, S-72.

28 <sup>176</sup> Tr. at 406, 407, 422.

<sup>177</sup> Tr. at 400, 406.

<sup>178</sup> Tr. at 401, 420-421.

<sup>179</sup> Tr. at 414; Exh. S-72. This provision was identical to that found in section 4.1 of the operating agreement received by  
Mr. McLaughlin. Exhs. S-71 at ACC005023, S-72.

<sup>180</sup> Tr. at 414-415.

<sup>181</sup> Tr. at 415-418.



1 her, nor does she desire that outcome.<sup>182</sup>

2 Mark Steiner

3 Mr. Steiner testified that he has a bachelor's degree in finance and he has worked in  
4 securities, investment banking, marketing, and banking and mortgage services.<sup>183</sup> Mr. Steiner set up  
5 OBP to help process loans for a home mortgage business, which lasted briefly, ending in 2005.<sup>184</sup>  
6 Mr. Steiner continued to work in banking until the end of 2008.<sup>185</sup> Mr. Steiner testified that he met  
7 Boyd Lunsford in 2007, and he learned about the relationships Mr. Lunsford had cultivated with  
8 several high ranking Chinese officials from his many travels to China over nearly twenty years.<sup>186</sup>  
9 The Chinese sought business opportunities to build infrastructure in developing nations which would  
10 benefit China by providing employment for its citizens and growth of its economy.<sup>187</sup> Mr. Steiner  
11 testified that Mr. Lunsford needed to generate capital and develop relationships with other nations to  
12 work with the Chinese, tasks Mr. Steiner believed he could accomplish.<sup>188</sup> In return, Mr. Steiner  
13 would share equally in the profits of Lunsford Consulting with Mr. Lunsford.<sup>189</sup>

14 Mr. Steiner testified that he and Mr. Lunsford decided that they needed to establish an  
15 investment entity for the purpose of bringing in investors, who could share in the revenue from  
16 Lunsford Consulting, but without raising concerns from the Chinese who wanted to limit the people  
17 associated with Lunsford Consulting.<sup>190</sup> Mr. Steiner testified that they decided to use OBP, which  
18 was a dormant LLC at the time, to raise funds to cover the expenses associated with Lunsford  
19 Consulting.<sup>191</sup> Ten percent of the gross revenue of Lunsford Consulting would be allocated to OBP  
20 as the only opportunity for revenue for OBP.<sup>192</sup> Second Opinion, an LLC controlled by Mr. Steiner,  
21 was used to hold the membership interests not yet purchased.<sup>193</sup> After \$1.5 million was raised and

22 \_\_\_\_\_  
<sup>182</sup> Tr. at 421.

23 <sup>183</sup> Tr. at 450-452.

24 <sup>184</sup> Tr. at 453.

25 <sup>185</sup> Tr. at 454-455.

26 <sup>186</sup> Tr. at 456, 459.

27 <sup>187</sup> Tr. at 462.

28 <sup>188</sup> Tr. at 463, 468-469.

<sup>189</sup> Tr. at 526, 528-529.

<sup>190</sup> Tr. at 472, 525.

<sup>191</sup> Tr. at 472-473, 525.

<sup>192</sup> Tr. at 526.

<sup>193</sup> Tr. at 527-528. This was done to prevent both overcompensation of early investors and potential dilution as other investors were added. Tr. at 528.

1 additional funds were needed, a second group of investors was sought to fund an additional \$750,000  
2 in the same fashion through OBP II.<sup>194</sup>

3 Working together, Mr. Steiner and Mr. Lunsford facilitated meetings to discuss potential  
4 projects between China and Nigeria.<sup>195</sup> Mr. Steiner went about raising \$1.5 million in investor  
5 capital for OBP from contacts he had through church, former business associates and his social  
6 circle.<sup>196</sup> Mr. Steiner testified that the people he contacted were of close enough relationship that he  
7 knew their employment and their general lifestyle.<sup>197</sup> Mr. Steiner testified that the Private Placement  
8 Agreement between Lunsford Consulting and OBP provided that in the event that the initial \$1.5  
9 million was insufficient, a second batch of investments could be sought.<sup>198</sup> Other people interested in  
10 investing were referred to Mr. Steiner.<sup>199</sup> Mr. Steiner provided the following testimony regarding his  
11 knowledge of the investors in OBP:<sup>200</sup>

12 Derek and Sandy Howard. The Howards live near Mr. Steiner and their sons have been  
13 friends for a number of years.<sup>201</sup> Mr. Steiner was aware that Mr. Howard has been an IT executive  
14 for many years and he travels internationally.<sup>202</sup> Based on Mr. Howard's employment, his home and  
15 cars, and his assertion of owning multiple properties, Mr. Steiner believed Mr. Howard to be an  
16 accredited investor.<sup>203</sup>

17 SNL Associates (Sean McLaughlin). Mr. Steiner was Mr. McLaughlin's manager when they  
18 both worked in mortgage banking.<sup>204</sup> Mr. Steiner was aware that Mr. McLaughlin had previously  
19 managed some branches and he had owned some rental properties.<sup>205</sup> Mr. Steiner did not believe that  
20 Mr. McLaughlin was an accredited investor.<sup>206</sup>

21  
22  
23 <sup>194</sup> Tr. at 529, 531-532.

<sup>195</sup> Tr. at 475-477.

<sup>196</sup> Tr. at 478-479.

<sup>197</sup> Tr. at 479.

<sup>198</sup> Tr. at 480; Exh. S-20.

<sup>199</sup> Tr. at 481.

<sup>200</sup> The investors are listed in Exh. S-19.

<sup>201</sup> Tr. at 485.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> Tr. at 486.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

1 Michael and Andi Laney. Mr. Steiner met the Laney through church.<sup>207</sup> Mr. Steiner learned  
2 that Mr. Laney was a day trader in the stock market and that he owned rental properties.<sup>208</sup> Mr.  
3 Steiner felt “comfortable in knowing [Mr. Laney’s] circumstance.”<sup>209</sup> Mr. Laney also paid for  
4 investments in OBP on behalf of Rock Living Trust and Shane Laney.<sup>210</sup>

5 Bryce and Laurel Petersen. Mr. Steiner met the Petersens through church and he played golf  
6 with Mr. Petersen.<sup>211</sup> Mr. Steiner understood Mr. Petersen to have been an early employee of UPS  
7 who received a substantial return on stock when the company went public.<sup>212</sup> Mr. Steiner knew Mr.  
8 Petersen was retired and owned properties.<sup>213</sup> Mr. Steiner considered Mr. Petersen to be an  
9 accredited investor.<sup>214</sup>

10 Jack and Jeanne Shell. Mr. Steiner knew Jack Shell through his friend, Dave Lund, Mr.  
11 Shell’s son-in-law.<sup>215</sup> Mr. Steiner knew Mr. Shell worked at the administration level in education.<sup>216</sup>  
12 Mr. Steiner was aware of Mr. Shell’s investments through discussions with Mr. Shell, Mr. Lund, and  
13 other members of Mr. Shell’s family.<sup>217</sup> Based on this knowledge, Mr. Steiner believed Mr. Shell  
14 was qualified as an investor, if not an accredited investor.<sup>218</sup>

15 Overall Plumbing and Southridge Investments. This out-of-state investor was referred by Mr.  
16 McLaughlin.<sup>219</sup> Mr. Steiner met with him and spoke with him over the phone, from which Mr.  
17 Steiner concluded that he was a suitable investor.<sup>220</sup>

18 Vantage FBO Robert L. Kocks IRA. Mr. Kocks financial advisor introduced him to Mr.  
19 Steiner.<sup>221</sup> Mr. Kocks questioned Mr. Steiner about investing in OBP.<sup>222</sup> Mr. Steiner learned that  
20

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21 <sup>207</sup> *Id.*  
22 <sup>208</sup> *Id.*  
23 <sup>209</sup> *Id.*  
24 <sup>210</sup> Tr. at 491-492.  
25 <sup>211</sup> Tr. at 487.  
26 <sup>212</sup> *Id.*  
27 <sup>213</sup> *Id.*  
28 <sup>214</sup> *Id.*  
<sup>215</sup> Tr. at 487-488.  
<sup>216</sup> Tr. at 488.  
<sup>217</sup> *Id.*  
<sup>218</sup> *Id.*  
<sup>219</sup> Tr. at 488-489.  
<sup>220</sup> Tr. at 489.  
<sup>221</sup> Tr. at 489-490.  
<sup>222</sup> *Id.*

1 Mr. Kocks was retired, that he had an engineering background, and that he has been successful in his  
 2 business.<sup>223</sup> Based on what Mr. Steiner knew of Mr. Kocks' background, and because a financial  
 3 advisor referred Mr. Kocks to him, Mr. Steiner assumed Mr. Kocks to have been qualified and an  
 4 accredited investor.<sup>224</sup>

5 Mitchell and Natalie Layton. Mr. Layton served as a regional executive for World Savings  
 6 and he was a business acquaintance of Mr. Steiner's.<sup>225</sup> Mr. Steiner spoke with Mr. Layton several  
 7 times about the investment.<sup>226</sup> Mr. Steiner believed Mr. Layton was an accredited investor because  
 8 of the latter's executive level position and his stock holdings in World Savings which paid out well  
 9 when the bank was purchased by Wachovia.<sup>227</sup>

10 Lee and Kim Marie Weiss. Mr. Steiner met Dr. Weiss when they both served as chaperones  
 11 on a school field trip with their children.<sup>228</sup> Mr. Steiner learned that Dr. Weiss is an  
 12 anesthesiologist.<sup>229</sup> Mr. Steiner talked with him about OBP and they met a few more times regarding  
 13 Dr. Weiss making an investment before both Dr. and Mrs. Weiss invested.<sup>230</sup> Mr. Steiner assumed  
 14 Dr. Weiss to be an accredited investor based upon the latter having worked as an anesthesiologist for  
 15 many years, his living in a nice home, and discussion about the activities he enjoys.<sup>231</sup>

16 David Antestenis. Mr. Steiner met Mr. Antestenis as the two maintained office space in close  
 17 proximity and they had worked together on a previous endeavor.<sup>232</sup> Mr. Steiner understood Mr.  
 18 Antestenis traded in real estate and had run large marketing companies.<sup>233</sup> Based on discussions he  
 19 had with Mr. Antestenis about his prior work, Mr. Steiner believed him to be an accredited  
 20 investor.<sup>234</sup>

21 Lucky Dog Investment Group (Rocky Nelson). Mr. Steiner has known Dr. Nelson for ten  
 22

23 <sup>223</sup> Tr. at 490.

<sup>224</sup> Tr. at 490-491.

24 <sup>225</sup> Tr. at 490.

<sup>226</sup> *Id.*

25 <sup>227</sup> Tr. at 491.

<sup>228</sup> Tr. at 492.

26 <sup>229</sup> *Id.*

<sup>230</sup> *Id.*

27 <sup>231</sup> *Id.*

<sup>232</sup> *Id.*

28 <sup>233</sup> Tr. at 492-493.

<sup>234</sup> Tr. at 493.

1 years, having met him through their church.<sup>235</sup> Their wives and children are friends.<sup>236</sup> Dr. Nelson is  
 2 a practicing urologist who also owns medical facilities and various other properties.<sup>237</sup>

3 The Kincaid Group (Ty Borum). Mr. Borum attends the same church as Mr. Steiner and the  
 4 two men have known each other approximately six or seven years.<sup>238</sup> Mr. Steiner knew that Mr.  
 5 Borum is the second generation head of a construction company that does large projects.<sup>239</sup> Mr.  
 6 Steiner believed Mr. Borum to be an accredited investor.<sup>240</sup>

7 Jamey Vercelli. Mr. Steiner knew Mr. Vercelli through a work association as the latter was a  
 8 top producing representative at World Savings, where he managed offices and conducted training.<sup>241</sup>  
 9 Mr. Steiner knew Mr. Vercelli had nice homes, was involved in real estate and paid cash for his  
 10 home.<sup>242</sup> Mr. Steiner assumed Mr. Vercelli was an accredited investor.<sup>243</sup>

11 Rolle Hogan (Cachaca Holdings). Mr. Steiner met Mr. Hogan through a referral.<sup>244</sup> He  
 12 learned that Mr. Hogan worked in international infrastructure development as an analyst living  
 13 outside the United States.<sup>245</sup> Mr. Steiner believed Mr. Hogan “does very well” in base salary plus  
 14 bonuses.<sup>246</sup> Mr. Hogan invested a total of \$378,000 spread out over more than one occasion.<sup>247</sup> Mr.  
 15 Steiner believed Mr. Hogan was an accredited investor.<sup>248</sup>

16 Patricia Riddle and Sylvia Anderson. Ms. Riddle and Ms. Anderson were referred to Mr.  
 17 Steiner by their financial advisor.<sup>249</sup> Mr. Steiner understood that they are retired after having worked  
 18 in education, that they have substantial net worth through investments, and that they are accredited  
 19 investors.<sup>250</sup>

21 <sup>235</sup> Tr. at 493-494.

22 <sup>236</sup> Tr. at 493.

23 <sup>237</sup> Tr. at 494.

24 <sup>238</sup> *Id.*

25 <sup>239</sup> *Id.*

26 <sup>240</sup> *Id.*

27 <sup>241</sup> *Id.*

28 <sup>242</sup> Tr. at 495.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Tr. at 495; Exh. S-19.

<sup>248</sup> Tr. at 495.

<sup>249</sup> Tr. at 495-496.

<sup>250</sup> Tr. at 496.

1        Will Law. Mr. Law was referred to Mr. Steiner.<sup>251</sup> Mr. Law is retired from work “in the  
2 corporate environment,” he receives regular payouts from something similar to a pension, he has “a  
3 significant amount of liquid cash,” and his wife is a corporate executive.<sup>252</sup> Mr. Steiner assumed Mr.  
4 Law to be an accredited investor.<sup>253</sup>

5        Florin Capital Solutions, LLC (Brian Tolman). Mr. Steiner met Mr. Tolman as a result of  
6 their proximate office space.<sup>254</sup> Through conversation, Mr. Steiner learned that Mr. Tolman had been  
7 involved in a number of business development projects and was working on one that was energy  
8 related.<sup>255</sup> Mr. Steiner believed Mr. Tolman to be an accredited investor.<sup>256</sup>

9        Sue Painter. Mr. Steiner met Ms. Painter through her investment advisor.<sup>257</sup> Mr. Steiner met  
10 with Ms. Painter on two or three occasions and also had phone conversations with her before she  
11 decided to invest.<sup>258</sup> Regardless of whether Ms. Painter was an accredited investor, Mr. Steiner  
12 considered her knowledgeable and sophisticated enough to invest based upon their conversations and  
13 her stating that she had consulted a number of people before deciding to make an investment.<sup>259</sup>

14        David Steiner. Dr. David Steiner is Mr. Steiner’s father.<sup>260</sup> Dr. Steiner is an orthopedic  
15 surgeon who has practiced for a number of years.<sup>261</sup> Mr. Steiner believed Dr. Steiner to be an  
16 accredited investor.<sup>262</sup>

17        Zackarilly (Daryl Ramsayer). Mr. Ramsayer is retired, collects from more than one pension,  
18 “has reasonable cash” and his wife “has income.”<sup>263</sup> Mr. Steiner considered Mr. Ramsayer to be a  
19 qualified investor.<sup>264</sup> As Mr. Ramsayer had several hundred thousand in cash and was debt free on  
20 his home, Mr. Steiner assumed Mr. Ramsayer could be an accredited investor.<sup>265</sup>

21 \_\_\_\_\_  
<sup>251</sup> *Id.*

22 <sup>252</sup> *Id.*

23 <sup>253</sup> *Id.*

24 <sup>254</sup> *Id.*

25 <sup>255</sup> *Id.*

26 <sup>256</sup> Tr. at 497.

27 <sup>257</sup> *Id.*

28 <sup>258</sup> *Id.*

<sup>259</sup> Tr. at 497-498.

<sup>260</sup> Tr. at 498.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> Tr. at 498-499.

<sup>264</sup> Tr. at 499.

<sup>265</sup> *Id.*

1 Ronald Kocks. Mr. Ronald Kocks is the brother of OBP investor Mr. Robert Kocks.<sup>266</sup> Mr.  
2 Ronald Kocks learned much about the investment from Mr. Robert Kocks and, as a result, he had  
3 fewer discussions with Mr. Steiner.<sup>267</sup> Mr. Steiner was uncertain as to Mr. Ronald Kocks' net worth  
4 and he could not address whether Mr. Ronald Kocks was an accredited investor.<sup>268</sup>

5 Gmelich Family Trust. The Gmelich Family Trust was also referred by Mr. Robert Kocks  
6 and they attended meetings with Mr. Robert Kocks and Mr. Steiner, in addition to having  
7 conversations with Mr. Steiner.<sup>269</sup> Mr. Steiner assumed the Gmelich Family Trust would be an  
8 accredited investor since they had "money structured in trusts and different things" and based on their  
9 relationship with Mr. Robert Kocks.<sup>270</sup>

10 Raymond Flores and Rebecca Flowers. Mr. Steiner met Mr. Flores and Ms. Flowers through  
11 their investment advisor, Mr. Wahl.<sup>271</sup> Mr. Steiner met with all three at several meetings.<sup>272</sup> Mr.  
12 Flores spoke the most at these meetings and Mr. Steiner believed that he sounded sophisticated and  
13 successful in business.<sup>273</sup>

14 Cary Steiner. Mr. Cary Steiner is Mr. Mark Steiner's younger brother.<sup>274</sup> Mr. Cary Steiner is  
15 a pilot and also deals in real estate.<sup>275</sup>

16 Duke Cowley. Mr. Cowley was referred to Mr. Steiner.<sup>276</sup> Mr. Cowley "has some experience  
17 in Latin America" and has friends who have been successful on infrastructure development in Latin  
18 America.<sup>277</sup> Mr. Steiner believed Mr. Cowley was an accredited investor.<sup>278</sup>

19 Trend (Ray Pine). Mr. Steiner met Mr. Pine through their church affiliation.<sup>279</sup> Mr. Pine  
20 owned and sold car dealerships in Canada.<sup>280</sup> Mr. Steiner considered Mr. Pine to be an accredited

21 \_\_\_\_\_  
22 <sup>266</sup> *Id.*  
<sup>267</sup> Tr. at 499-500.  
23 <sup>268</sup> Tr. at 500.  
<sup>269</sup> *Id.*  
24 <sup>270</sup> *Id.*  
<sup>271</sup> Tr. at 501.  
25 <sup>272</sup> *Id.*  
<sup>273</sup> Tr. at 502.  
26 <sup>274</sup> *Id.*  
<sup>275</sup> *Id.*  
<sup>276</sup> Tr. at 503.  
27 <sup>277</sup> *Id.*  
<sup>278</sup> *Id.*  
28 <sup>279</sup> *Id.*  
<sup>280</sup> *Id.*

1 investor as Mr. Pine “has a yacht and two or three big homes and travels the world and doesn’t mind  
2 talking about it.”<sup>281</sup>

3 Barbara Moore. Ms. Moore was referred to Mr. Steiner and meets with him frequently.<sup>282</sup>  
4 Mr. Steiner believed that she is an accredited investor.<sup>283</sup>

5 Other Testimony by Mr. Steiner

6 Mr. Steiner also testified about the projects with which he and Mr. Lunsford were involved.  
7 The Kogi State project in Nigeria is a 1200 megawatt coal-fired power project owned by a Nigerian  
8 resident, Dr. Innocent Ezuma, who controls 97 percent of the known coal reserves in Nigeria.<sup>284</sup> Mr.  
9 Steiner’s contact in Nigeria introduced Dr. Ezuma to him, Mr. Lunsford and the Chinese officials  
10 with whom they worked, which resulted in the execution of an agreement for the Chinese to design  
11 and build the power project.<sup>285</sup> After a lengthy process, the project was designed, and the design  
12 approved.<sup>286</sup> Financing issues arose when the Nigerian government divested itself of ownership of  
13 the power generation sector and sold projects to private investors.<sup>287</sup> Final funding is still being  
14 sought from private equity companies.<sup>288</sup> Estimates of the total cost of the project, which is to be  
15 completed in phases, have ranged from \$1.5 billion to \$3 billion.<sup>289</sup>

16 Other projects planned in Nigeria involving Dr. Ezuma include a 400 megawatt natural gas  
17 project and a project to distribute family-sized coal stoves to impoverished persons to heat their  
18 homes.<sup>290</sup> Further projects in Nigeria include a 1900 megawatt project, a transmission facility  
19 project, and a solar project.<sup>291</sup> None of these Nigerian projects are as advanced as the Kogi State  
20 project.<sup>292</sup> Active projects in Uganda include two hydro projects and a mining project.<sup>293</sup> Mr. Steiner  
21 testified that there has been no disruption to the projects following the death of Mr. Lunsford in April

22 \_\_\_\_\_  
<sup>281</sup> Tr. at 504.

23 <sup>282</sup> *Id.*

24 <sup>283</sup> *Id.*

25 <sup>284</sup> Tr. at 505.

26 <sup>285</sup> Tr. at 505-506.

27 <sup>286</sup> Tr. at 506.

28 <sup>287</sup> Tr. at 507.

<sup>288</sup> Tr. at 508.

<sup>289</sup> Tr. at 513-514.

<sup>290</sup> Tr. at 514.

<sup>291</sup> Tr. at 514-515.

<sup>292</sup> Tr. at 515.

<sup>293</sup> *Id.*



1 2013.<sup>294</sup>

2 Mr. Steiner testified that OBP was established to identify operating capital for Lunsford  
3 Consulting, and OBP conducts no other business activity.<sup>295</sup> The only other role of OBP would be to  
4 distribute profits, which could only come from Lunsford Consulting.<sup>296</sup> Mr. Steiner testified that  
5 there are no expenses associated with OBP, other than accounting fees that would be incurred if gross  
6 revenues are received.<sup>297</sup> Mr. Steiner testified that Lunsford Consulting incurs the expenses of the  
7 business associated with generating revenue from China.<sup>298</sup> Mr. Steiner testified this is why Section  
8 6.3 of the OBP operating agreement indicates there are no expenses.<sup>299</sup> But for the Chinese objecting  
9 to Lunsford Consulting having additional partners, money could have been raised directly by  
10 Lunsford Consulting.<sup>300</sup>

11 Mr. Steiner testified that he is the manager of OBP, and in that role he has responsibility over  
12 expenditures.<sup>301</sup> OBP provided living expenses for Mr. Steiner and Mr. Lunsford as well as their  
13 travel expenses.<sup>302</sup> Mr. Steiner managed those expenses and transferred cash withdrawals from OBP  
14 accounts into Mr. Lunsford's account for his expenses.<sup>303</sup>

15 Mr. Steiner testified that on January 9, 2012, he received an e-mail from a person identifying  
16 herself as Margo Mallamo seeking information about an investment opportunity in China.<sup>304</sup> Mr.  
17 Steiner testified that the e-mail indicated Ms. Mallamo was looking to invest profits from a business  
18 sale, and that she would be available to meet when she returned to Arizona from Seattle in a couple  
19 weeks.<sup>305</sup> Mr. Steiner testified that he responded to the e-mail by giving a summary of the investment  
20 structure and the international business relationship he and Mr. Lunsford had developed.<sup>306</sup> After Ms.  
21 Mallamo requested more information, Mr. Steiner provided a Lunsford Consulting overview and

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22 <sup>294</sup> Tr. at 565-566.

23 <sup>295</sup> Tr. at 516.

24 <sup>296</sup> *Id.*

25 <sup>297</sup> Tr. at 516-517.

26 <sup>298</sup> Tr. at 518.

27 <sup>299</sup> Tr. at 519.

28 <sup>300</sup> *Id.*

<sup>301</sup> Tr. at 520.

<sup>302</sup> *Id.*

<sup>303</sup> Tr. at 520-521.

<sup>304</sup> Tr. at 535-536; Exh. S-37.

<sup>305</sup> Tr. at 536.

<sup>306</sup> Tr. at 536-537.

1 inquired as to timeframe and structure for her investment.<sup>307</sup> In an e-mail to Mr. Steiner, Ms.  
2 Mallamo stated that she was looking to invest \$200,000 to \$250,000.<sup>308</sup>

3 On January 19, 2012, Mr. Steiner received a phone call from Ms. Weiss, who identified  
4 herself as Margo Mallamo, seeking additional information regarding the investment opportunity.<sup>309</sup>  
5 Mr. Steiner provided her with more information regarding Mr. Lunsford's work and contacts in  
6 China, as well as the power plant project in Nigeria.<sup>310</sup>

7 Mr. Steiner testified that the operating agreement for the initial OBP offering provided for a  
8 return of 10% of Lunsford Consulting's gross revenue until the \$1.5 million investment was returned,  
9 and then 5% of the gross revenue thereafter.<sup>311</sup> Similarly, the second operating agreement, for OBP  
10 II, provided for a return of 5% of Lunsford Consulting's gross revenue until the \$750,000 investment  
11 was returned, and then 2.5% of the gross revenue thereafter.<sup>312</sup> Mr. Steiner testified that OBP raised  
12 nearly \$2.5 million in investment funds, and that those investors beyond the initial \$2.25 million  
13 would be treated in the same manner as those referenced in OBP II.<sup>313</sup> Mr. Steiner testified that  
14 neither Second Opinion nor any of the persons listed as Members in the operating agreements have  
15 ever been identified as members in OBP's LLC filings or organizational filings with the  
16 Commission.<sup>314</sup> Mr. Steiner testified that OBP has had no revenue to date and has made no  
17 distributions to Second Opinion or any other member.<sup>315</sup> Prior to being served with the temporary  
18 cease and desist order, Mr. Steiner provided a copy of the operating agreement to Margo Mallamo  
19 identifying her as a Member holding 33.3333% based upon her stating that she wanted to invest  
20 \$250,000.<sup>316</sup> Mr. Steiner had not received any money from Ms. Mallamo nor had he received a  
21 signed copy of the agreement from her.<sup>317</sup>

22 ...

23 <sup>307</sup> Tr. at 537-538.

24 <sup>308</sup> Tr. at 540; Exh. S-37 at ACC000327.

<sup>309</sup> Tr. at 532-534, 538-539. Exh. S-36.

25 <sup>310</sup> Tr. at 543-546; Exh. S-36 at 4-11.

<sup>311</sup> Tr. at 555-556; Exh. S-71 at ACC005026.

26 <sup>312</sup> Tr. at 556; Exh. S-11 at ACC001090.

<sup>313</sup> Tr. at 556-557.

27 <sup>314</sup> Tr. at 558-559.

<sup>315</sup> Tr. at 560, 564-565.

28 <sup>316</sup> Tr. at 560-561; Exh. S-11 at ACC001083.

<sup>317</sup> Tr. at 562-563.

1 **III. Respondents' Motions**

2 A. Respondents' Motion to Dismiss

3 On January 28, 2013, the Respondents filed a motion asking that the Division's case be  
4 dismissed. The Respondents asserted that dismissal was appropriate because there was no allegation  
5 of fraudulent conduct, Lunsford Consulting was actively engaged in legitimate business, and OBP  
6 could soon expect to see a portion of the substantial fees that Lunsford Consulting anticipated  
7 receiving. The Respondents further contended that there had been no wrongdoing as the  
8 Respondents' offers and sales were exempt under federal law. Though generally citing Section 18 of  
9 the Securities Act, the Respondents failed to cite a specific statute, rule, or code provision as the basis  
10 for the claimed exemption.

11 The Division filed a response on February 12, 2013. The Division contended that the Motion  
12 to Dismiss is untimely filed because the Respondents failed to comply with A.A.C. R14-3-106(H),  
13 and therefore, the Motion to Dismiss should be denied.<sup>318</sup> The Division asserted that under A.A.C.  
14 R14-3-106(H), the Respondents were required to file a motion to dismiss within twenty days or with  
15 their Answer. If not denied as untimely, the Division contended that the Motion to Dismiss be  
16 considered an attack on the sufficiency of the Division's February 22, 2012 Notice. The Division  
17 argued that the Notice met the requirements of the Arizona Administrative Procedure Act, as set forth  
18 in A.R.S. § 41-1061(B)(4).<sup>319</sup> Lastly, the Division requested that if denial of the Motion to Dismiss  
19 was not granted, then the matter should be held in abeyance pending a full evidentiary hearing and a  
20 more detailed filing by the Respondents setting forth applicable law to support the motion.

21 At the status conferences held on January 29 and 31, 2013, the Administrative Law Judge  
22 essentially adopted the Division's request to hold the motion in abeyance by stating that he could not

23 <sup>318</sup> A.A.C. R14-3-106(H) provides:

24 Answers. Answers to complaints are required and must be filed within 20 days after the date on which the complaint is  
25 served by the Commission, unless otherwise ordered by the Commission. All answers shall be full and complete and shall  
26 admit or deny specifically and in detail each allegation of the complaint to which such answer is directed. The answer  
27 shall include a motion to dismiss if a party desires to challenge the sufficiency of the complaint.

28 <sup>319</sup> A.R.S. § 41-1061 provides, in pertinent part:

B. The notice shall include:

\* \* \*

4. A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail  
at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon  
application a more definite and detailed statement shall be furnished.

1 make a recommendation to the Commission until after an evidentiary hearing on the merits of the  
 2 Division's case. Subsequent to the filing of the Motion to Dismiss, the Division filed its Amended  
 3 Notice on September 6, 2013, which set forth additional factual allegations and a fraud claim alleging  
 4 improper use of investor funds. The addition of a fraud allegation rendered moot the Respondents'  
 5 request for dismissal based on a lack of fraudulent activity. As to the question of exemption, the  
 6 Respondents set forth their legal argument in far greater detail following the hearing, relying upon  
 7 facts adduced at the hearing. Accordingly, we find the exemption argument to be more appropriately  
 8 addressed as an asserted defense to the Division's allegations in the Amended Notice. As we  
 9 consider the Respondents' exemption argument as a defense, *infra*, the Respondents' Motion to  
 10 Dismiss is denied.<sup>320</sup>

11 B. Respondents' Motion for Exclusion of Evidence

12 At hearing, Respondents' counsel stated that he "intend[s] to move to dismiss every piece of  
 13 evidence obtained after February 22, 2012, on the basis of Mapp against Ohio in the Supreme Court  
 14 and other later cases that fall under that general aegis of excluding as evidence, evidence obtained  
 15 through the commission of a crime."<sup>321</sup> The crime allegedly committed was a violation of A.R.S. 13-  
 16 2008(A) by the Division's special investigator, Annalisa Weiss, through her use of the alias MM.<sup>322</sup>  
 17 The Respondents contend that Ms. Weiss knowingly "took on a fictitious identity of [MM] with the  
 18 intent to obtain information to cause loss to the Respondents."<sup>323</sup>

19 The Division raises three arguments in opposition to these allegations. First, the Division  
 20 contends that the Respondents waived these defenses by failing to state them as affirmative defenses  
 21 in either the Answer or the Amended Answer. Second, the Division asserts that the defenses do not  
 22 apply to administrative proceedings in Arizona. Third, the Division contends that the Respondents

23 \_\_\_\_\_  
 24 <sup>320</sup> There is no waiver issue as to the Respondents' exemption arguments. The Respondents cited federal preemption in  
 both the original Answer and the Answer to the Amended Notice. Answer at ¶ 1; Amended Answer at ¶ 1.

25 <sup>321</sup> Tr. at 79.

26 <sup>322</sup> Tr. at 79. A.R.S. § 13-2008 provides, in pertinent part:

27 A. A person commits taking the identity of another person or entity if the person knowingly takes, purchases,  
 28 manufactures, records, possesses or uses any personal identifying information or entity identifying information of another  
 person or entity, including a real or fictitious person or entity, without the consent of that other person or entity, with the  
 intent to obtain or use the other person's or entity's identity for any unlawful purpose or to cause loss to a person or entity  
 whether or not the person or entity actually suffers any economic loss as a result of the offense, or with the intent to  
 obtain or continue employment.

<sup>323</sup> Respondents' Post-Hearing Brief at 40.

1 failed to set forth the elements necessary to establish the defenses.

2 1. Waiver

3 The Division cites A.A.C. R14-4-305(F) as a basis for finding that the Respondents have  
4 waived their argument for the exclusion of evidence. Under A.A.C. R14-4-305(F), a “respondent  
5 waives any affirmative defense not raised in the answer.” The Division’s argument presumes that a  
6 motion to exclude evidence constitutes an affirmative defense. We disagree.

7 Title 14, Chapter 4, Article 3 of the Arizona Administrative Code sets forth rules for  
8 administrative proceedings under the Securities Act.<sup>324</sup> When not in conflict with these securities  
9 specific rules, the Commission’s Rules of Practice and Procedure, contained in Title 14, Chapter 3 of  
10 the Arizona Administrative Code, govern actions that are within the jurisdiction of the  
11 Commission.<sup>325</sup> Neither set of rules specifically set forth the procedure for addressing a motion  
12 regarding the exclusion of evidence. Pursuant to A.A.C. R14-3-101(A), “[i]n all cases in which  
13 procedure is set forth neither by law, nor by these rules, nor by regulations or orders of the  
14 Commission,” the Arizona Rules of Civil Procedure shall apply. Further, A.A.C. R14-3-106(K)  
15 requires that motions “conform insofar as practicable” to the Arizona Rules of Civil Procedure.  
16 Therefore, we consider the Respondents’ motion under the Arizona Rules of Civil Procedure.

17 Like A.A.C. R14-4-305(F), the Arizona Rules of Civil Procedure require affirmative defenses  
18 to be set forth in the responsive pleading.<sup>326</sup> However, the Arizona Rules of Civil Procedure allow  
19 for evidentiary matters to be addressed later by motions *in limine*, if pretrial rulings are desired, or by  
20 objection to evidence at trial.<sup>327</sup> Clearly, the Rules of Civil Procedure do not consider a motion to  
21 exclude evidence an affirmative defense that must be disclosed in a responsive pleading. We find it  
22 appropriate to apply the same procedure to administrative hearings before the Commission. It would  
23 be premature to require a respondent to move for the exclusion of evidence at the time of filing an  
24 answer, which could occur months before the parties exchange exhibits and witness lists. The  
25 Respondents did not waive their argument to exclude evidence by not asserting it in the Answer or

26 \_\_\_\_\_  
27 <sup>324</sup> A.A.C. R14-4-301.

<sup>325</sup> *Id.*

<sup>326</sup> Ariz. R. Civ. P. Rule 8(c).

<sup>327</sup> Ariz. R. Civ. P. Rule 7.2.

1 the Amended Answer.

2 2. Applicability to Administrative Proceedings

3 In *Mapp v. Ohio*, the United States Supreme Court held that “evidence obtained by searches  
4 and seizures in violation of the Constitution is, by that same authority, inadmissible in a state  
5 court.”<sup>328</sup> The Division argues the inapplicability of *Mapp*, noting that *Mapp* involved a criminal  
6 proceeding and that the Respondents have failed to present any legal basis by which *Mapp* would  
7 apply to an administrative hearing.<sup>329</sup>

8 As noted by the Arizona Court of Appeals, “[n]either the United States Supreme Court nor  
9 any Arizona court has applied the exclusionary rule in a purely civil proceeding as a remedy for  
10 violation of the Fourth Amendment.”<sup>330</sup> In considering whether the exclusionary rule would apply in  
11 a particular case, it is necessary to “weigh the likely social benefits of excluding unlawfully seized  
12 evidence against the likely costs.”<sup>331</sup> A key consideration is the deterrent effect of application of the  
13 exclusionary rule as opposed to other forms of deterrent.<sup>332</sup> In *Tornabene*, the Arizona Court of  
14 Appeals concluded that since evidence obtained in violation of the Fourth Amendment would be  
15 inadmissible in a criminal DUI proceeding, further excluding evidence from a driver’s license  
16 suspension hearing would have little deterrent value upon police action.<sup>333</sup> Unlike the situation in  
17 *Tornabene*, in securities matters before the Commission, while a referral for criminal prosecution is  
18 possible, the primary zone of interest for a Division investigator generally involves administrative  
19 remedies. On the other hand, exclusion of otherwise reliable evidence would create a less robust  
20 record from which the Commission must render its decision. Moreover, applying the exclusionary  
21 rule to securities matters before the Commission can result in the heavy social costs of preventing the

22 <sup>328</sup> *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691, 6 L. Ed. 2d 1081 (1961).

23 <sup>329</sup> Division’s Reply Brief at 9-10.

24 <sup>330</sup> *Tornabene v. Bonine ex rel. Arizona Highway Dep’t*, 203 Ariz. 326, 335, 54 P.3d 355, 364 (Ct. App. 2002) citing  
25 *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363–64, 118 S.Ct. 2014, 2019–20, 141 L.Ed.2d 344,  
26 351–52 (1998) (parole boards not required by federal law to exclude evidence obtained in violation of Fourth  
27 Amendment); *Immigration & Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032, 1040–42, 104 S.Ct. 3479, 3484–  
28 85, 82 L.Ed.2d 778, 787–88 (1984) (in civil immigration deportation hearing, exclusionary rule does not preclude  
evidence derived from peaceful but allegedly unlawful arrest); *Nystrom v. Massachusetts Cas. Ins. Co.*, 148 Ariz. 208,  
211, 713 P.2d 1266, 1269 (App.1986) (“[A]bsent evidence of egregious and repetitious abuse of state power, the  
exclusionary rule is inapplicable to civil cases.”).

<sup>331</sup> *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1041, 104 S. Ct. 3479, 3484, 82 L. Ed. 2d 778 (1984).

<sup>332</sup> *State v. Bolt*, 142 Ariz. 260, 267, 689 P.2d 519, 526 (1984).

<sup>333</sup> *Tornabene*, 203 Ariz. at 335-336, 54 P.3d at 364-365.

1 Commission from taking action when the public is threatened by ongoing unlicensed and fraudulent  
 2 sales of securities. The United States Supreme Court has noted that it has never accepted the costs of  
 3 ongoing violations of law when applying the exclusionary rule.<sup>334</sup> In weighing the costs of applying  
 4 the exclusionary rule, we conclude that the exclusionary rule generally will not be found to apply in  
 5 securities matters before the Commission.

6 However, a cost-benefit analysis requires an examination of the misconduct at issue.<sup>335</sup>  
 7 Egregious violations of the Fourth Amendment “or other liberties that might transgress notions of  
 8 fundamental fairness and undermine the probative value of the evidence obtained” may require  
 9 reaching a different conclusion.<sup>336</sup> In this instance, the Respondents have alleged not just a violation  
 10 of their constitutional rights, but they assert the actions of the Division’s investigator constitute a  
 11 felony under A.R.S. § 13-2008. Accordingly, we find it appropriate to address the specific  
 12 allegations raised by the Respondents.

### 13 3. Exclusion of Evidence

14 A search occurs when an expectation of privacy that society is prepared to consider  
 15 reasonable is infringed.<sup>337</sup> A seizure of property occurs when there is some meaningful interference  
 16 with an individual's possessory interests in that property.<sup>338</sup> The Division contends that the  
 17 Respondents have failed to set forth either a search or a seizure to which *Mapp* may apply. Indeed,  
 18 the Respondents fail to state with specificity what they believe constituted an improper search or  
 19 seizure. Based upon the arguments raised by the Respondents at hearing and in their post-hearing  
 20 brief, we infer two theories by which the Respondents seek to apply *Mapp*: 1) that the February 22,  
 21 2012 T.O. constituted an improper seizure of property as it prevented the Respondents from  
 22 continuing to sell investment contracts in OBP and 2) the Division investigator’s acquisition of  
 23 copies of the Respondents’ documents through the use of the alias MM constituted an improper  
 24 search.

25 \_\_\_\_\_  
 26 <sup>334</sup> *Lopez-Mendoza*, 468 U.S. at 1046, 104 S. Ct. at 3487.

<sup>335</sup> *Davis v. United States*, 131 S. Ct. 2419, 2427, 180 L. Ed. 2d 285 (2011).

<sup>336</sup> *Lopez-Mendoza*, 468 U.S. at 1050-1051. See also *Nystrom v. Massachusetts Cas. Ins. Co.*, 148 Ariz. 208, 211, 713 P.2d 1266, 1269.

<sup>337</sup> *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85 (1984).

<sup>338</sup> *Id.*

1 a. The Seizure Contention

2 We have inferred that the Respondents seek exclusion of all documents acquired after  
3 February 22, 2012 because the T.O. constituted an unlawful seizure affecting the Respondents'  
4 ability to sell investment contracts in OBP.<sup>339</sup>

5 Under A.R.S. § 44-2032, the Commission has authority to issue an order to cease and desist  
6 when it appears that a person is engaging in any act, practice or transaction in violation of the  
7 Securities Act. Generally, before entering an order to cease and desist, the Commission must serve  
8 on each respondent a notice of hearing or a notice of opportunity for hearing.<sup>340</sup> However, the  
9 Commission may issue a temporary cease and desist order when it determines that the public welfare  
10 requires immediate action.<sup>341</sup> After being served with a temporary cease and desist order, a  
11 respondent may request a hearing.<sup>342</sup> Following a hearing, the Commission may, by written findings  
12 of fact and conclusions of law, vacate, modify or make permanent the temporary cease and desist  
13 order.<sup>343</sup>

14 The Division sets forth its basis for taking immediate action in the T.O. The Division had  
15 determined that the Respondents were selling membership interests in OBP.<sup>344</sup> The Respondents  
16 were not registered as dealers or salesmen with the Commission.<sup>345</sup> The securities being sold were  
17 not registered with the Commission.<sup>346</sup> The Division received an e-mail stating that the Respondents  
18 were planning to move forward with sales to other individuals who had expressed interest.<sup>347</sup>

19 The facts, as set forth in the T.O., do not constitute an unreasonable seizure under the Fourth  
20 Amendment. The Division was aware that the Respondents, unregistered salesmen, were actively  
21

22 <sup>339</sup> We note the Respondents' assertion that issuance of the T.O. violated their constitutional due process rights and that  
23 the Division's attorneys and investigator should be ordered to pay administrative penalties, punitive damages and  
24 "restitution to the taxpayers and citizens of Arizona." Respondents' Post-Hearing Brief at 36, 54-55. Such remedies for  
alleged constitutional violations are beyond the authority of the Commission. Accordingly, we consider the Respondents'  
due process argument as an extension of their motion for the exclusion of evidence.

25 <sup>340</sup> A.R.S. § 44-1972(C).

26 <sup>341</sup> A.R.S. § 44-1972(C), A.A.C. R14-4-307(A). Authority to issue a temporary cease and desist order may be delegated  
to the Director of Securities. A.A.C. R14-4-307(A).

27 <sup>342</sup> A.A.C. R14-4-307(C).

28 <sup>343</sup> A.A.C. R14-4-307(D).

<sup>344</sup> T.O. at ¶¶ 10-15.

<sup>345</sup> T.O. at ¶ 21.

<sup>346</sup> T.O. at ¶ 22.

<sup>347</sup> T.O. at ¶ 19.



1 engaged in selling unregistered securities and that the Respondents had identified interested potential  
2 investors. Issuance of the T.O. was necessary to prevent further illegal sales to the public.

3 The Respondents contend that they did not have to comply with registration requirements as  
4 the securities were being sold under the federal safe harbor of Rule 506 of Regulation D. However,  
5 the Respondents had failed to comply with state notice requirements for federal covered securities.<sup>348</sup>  
6 The burden of proof to establish an exemption from registration is borne by the party raising the  
7 defense.<sup>349</sup> Under the circumstances, it was not unreasonable for the Division to issue a cease and  
8 desist order to prevent ongoing sales of securities in violation of registration requirements and then  
9 allow the Respondents to argue the applicability of an exemption at a hearing. The T.O. did not  
10 constitute an improper seizure that would require the exclusion of subsequently obtained evidence.

11 **b. The Search Contention**

12 We have also inferred that the Respondents contend *Mapp* requires the exclusion of evidence  
13 because the Division Investigator's use of the alias MM constituted an improper search. Fourth  
14 Amendment protection applies to the "compulsory production of a man's private papers."<sup>350</sup> Such  
15 private papers may include business documents.<sup>351</sup> During the course of Ms. Weiss' undercover  
16 investigation, the Respondents forwarded a Lunsford Consulting Executive Summary and an OBP  
17 Operating Agreement to MM.<sup>352</sup> We infer the Respondents contend that they would not have  
18 consented to turn over these documents to Ms. Weiss but for her use of the alias MM.

19 There is nothing inherently unreasonable in obtaining evidence through undercover work.  
20 "An undercover officer does not violate the Fourth Amendment merely by accepting an offer to do  
21 business that is freely made to the public."<sup>353</sup> Gathering evidence through the use of undercover  
22

23 <sup>348</sup> 15 U.S.C. § 77r(c); A.R.S. § 44-1843.02(C).

24 <sup>349</sup> **A.R.S. § 44-2033. Burden of proof of exemptions**

25 In any action, civil or criminal, when a defense is based upon any exemption provided for in this chapter, the burden of  
26 proving the existence of the exemption shall be upon the party raising the defense, and it shall not be necessary to  
27 negative the exemption in any petition, complaint, information or indictment, laid or brought in any proceeding under this  
28 chapter.

<sup>350</sup> See *United States v. Miller*, 425 U.S. 435, 440, 96 S. Ct. 1619, 1622, 48 L. Ed. 2d 71 (1976) citing *Boyd v. United States*, 116 U.S. 616, 622, 6 S.Ct. 524, 528, 29 L.Ed. 746, 748 (1886).

<sup>351</sup> See *United States v. Cotterman*, 709 F.3d 952, 964 (9th Cir. 2013) cert. denied, 134 S. Ct. 899, 187 L. Ed. 2d 833 (2014) reh'g denied, 134 S. Ct. 1512, 188 L. Ed. 2d 390 (2014).

<sup>352</sup> Tr. at 43, 77, 101; Exh. S-37 at ACC000325, ACC000333.

<sup>353</sup> *Maryland v. Macon*, 472 U.S. 463, 470, 105 S. Ct. 2778, 2782, 86 L. Ed. 2d 370 (1985).

1 work is not limited to police agencies, but rather “[u]ndercover work is a legitimate method of  
2 discovering violations of civil as well as criminal law.”<sup>354</sup> As such, evidence obtained by the  
3 Division through undercover work is not required to be excluded at hearing.

4 The Respondents cite neither case law nor legislative history to support their contention that  
5 A.R.S. § 13-2008(A) would act to limit the otherwise proper undercover work of an investigator in  
6 either civil or criminal law proceedings. The Respondents argue that Ms. Weiss violated A.R.S. §  
7 13-2008(A) because she adopted the identity of MM with the intent to “obtain information to cause  
8 loss to the Respondents.”<sup>355</sup> The Respondents raise no allegation, and the record does not suggest,  
9 that Ms. Weiss acted independently of her position with the Division. Ms. Weiss testified that she  
10 received information about OBP from her supervisor.<sup>356</sup> Ms. Weiss testified that her duty is to bring  
11 back facts to the Commission and that she does not determine whether those facts are sufficient to  
12 find a securities law violation.<sup>357</sup> Ms. Weiss has no authority to issue a temporary cease and desist  
13 order.<sup>358</sup> Ms. Weiss, in her role as an investigator for the Division, was not capable of causing loss to  
14 the Respondents. The record does not establish that Ms. Weiss conducted undercover work in this  
15 case with an intent to cause loss to the Respondents. Accordingly, we find no violation of A.R.S. §  
16 13-2008(A) by Ms. Weiss.

17 In the alternative, we infer the Respondents contend that the alleged violation of A.R.S. § 13-  
18 2008(A) was not committed by Ms. Weiss alone, but was an act by the Division as a whole.<sup>359</sup> The  
19 Respondents assert that the Division “has certainly not been unbiased in its pursuit of Respondents”  
20 and that the Division failed to “take special care” to determine the accuracy of its assertions prior to  
21 issuing the T.O., which caused “irreparable damage to Respondents’ financial status, reputation, and  
22 ability to perform their duties effectively ... .”<sup>360</sup> There is a legal presumption that an administrative

23 <sup>354</sup> *United States v. Centennial Builders, Inc.*, 747 F.2d 678, 683 (11th Cir. 1984).

24 <sup>355</sup> Respondents’ Post-Hearing Brief at 40. We note that this is a slight misstatement of the intent element under A.R.S. §  
25 13-2008(A), which states “the intent to obtain or use the other person’s or entity’s identity ... to cause loss to a person or  
entity ... .” We do not consider the alternate elements of intent under A.R.S. § 13-2008(A) as they have not been raised  
by the Respondents.

26 <sup>356</sup> Tr. at 86.

26 <sup>357</sup> Tr. at 92.

27 <sup>358</sup> See A.A.C. R14-4-307(A).

27 <sup>359</sup> For the purposes of A.R.S. § 13-2008(A), a “person” can include a government or a governmental authority. A.R.S.  
13-105(30).

28 <sup>360</sup> Respondents’ Post-Hearing Brief at 40.

1 decision maker acts with honesty and integrity.<sup>361</sup> Rebutting this presumption requires a showing of  
 2 actual bias.<sup>362</sup> As noted above, the Division had set forth sufficient facts in the T.O. to determine that  
 3 the public health and welfare required immediate action in the form of issuing a temporary cease and  
 4 desist order. The Respondents have failed to establish that the issuance of the T.O. by the Division  
 5 was motivated by a reason other than protection of the public, or that the Division was somehow  
 6 biased against the Respondents in reaching its conclusion. Accordingly, we find no violation of  
 7 A.R.S. § 13-2008(A) by the Division.

#### 8 4. Conclusion

9 We find that the exclusionary rule will not generally apply in securities matters before the  
 10 Commission. The Respondents have asserted that evidence should be excluded in the present case as  
 11 the Division and its investigator violated both their Fourth Amendment rights under *Mapp* and  
 12 criminal law. However, the record does not establish that the actions of the Division and its  
 13 investigator constituted an improper search or seizure, or a violation of A.R.S. § 13-2008(A).  
 14 Accordingly, the Respondents' Motion for the Exclusion of Evidence is denied.

#### 15 IV. Legal Argument

##### 16 A. Do the Membership Interests in OBP and OBP II Constitute Securities?

17 The parties have stipulated that the membership interests constitute securities in the form of  
 18 investment contracts.<sup>363</sup> The Division contends that this stipulation is in accord with Arizona law,  
 19 citing *Nutek Info. Sys., Inc. v. Arizona Corp. Comm'n*, 194 Ariz. 104, 977 P.2d 826 (App. 1998)  
 20 wherein sold membership interests in an LLC were held to be investment contracts, and thus  
 21 securities, under the facts of that case. The elements of what constitutes an investment contract have  
 22 been set forth in *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946),  
 23 adopted as law in Arizona in *Rose v. Dobras*, 128 Ariz. 209, 624 P.2d 887 (App. 1981). Under  
 24 *Howey* and *Rose*, an investment contract will be found in "any situation where (1) individuals are led  
 25 to invest money (2) in a common enterprise (3) with the expectation that they will earn a profit solely  
 26 \_\_\_\_\_

27 <sup>361</sup> See *Emmett McLoughlin Realty, Inc. v. Pima Cnty.*, 212 Ariz. 351, 357, 132 P.3d 290, 296 (App. 2006), as corrected  
 (Mar. 9, 2006).

28 <sup>362</sup> *Id.*

<sup>363</sup> Joint Fact Stipulations at ¶ 11. By definition, "security" includes an investment contract. A.R.S. § 44-1801(26).

1 through the efforts of others.”<sup>364</sup> We find nothing in the evidence of record that would suggest  
 2 membership interests in OBP fail to satisfy the test of an investment contract, as set forth in *Howey*  
 3 and *Rose*, and we adopt the parties’ stipulation that the membership interests constitute securities in  
 4 the form of investment contracts.

5 **B. Did the Respondents Violate Registration Provisions of the Arizona Securities Act?**

6 The Division contends that the Respondents violated A.R.S. § 44-1841 by selling and offering  
 7 for sale unregistered securities.<sup>365</sup> The Division further contends that the Respondents violated  
 8 A.R.S. § 44-1842 by selling securities without being registered to sell securities.<sup>366</sup>

9 Section 18 of the federal Securities Act of 1933 provides for preemption of state registration  
 10 requirements for certain securities transactions that are exempt from SEC registration.<sup>367</sup> Federal  
 11 preemption of state law will only apply if the securities in question actually qualify as covered  
 12 securities under federal law.<sup>368</sup> Under A.R.S. § 44-2033, the burden of proof to establish an  
 13 exemption from registration is borne by the party raising the defense.

14 The Respondents contend that their sales of membership interests in OBP are exempt from  
 15 registration pursuant to federal Rule 506<sup>369</sup> of Regulation D, which provides a safe harbor for private  
 16 offerings.<sup>370</sup> An exemption under Rule 506 is conditioned upon the satisfaction of general conditions  
 17 regarding integration of sales, information requirements, limitations on the manner of offering, and  
 18 limitations on resale.<sup>371</sup> Rule 506 further imposes a limit of thirty-five purchasers who are not

19  
 20 <sup>364</sup> *Rose*, 128 Ariz. at 211, 624 P.2d at 889.

21 <sup>365</sup> **A.R.S. § 44-1841. Sale of unregistered securities prohibited; classification**

22 A. It is unlawful to sell or offer for sale within or from this state any securities unless the securities have been registered  
 pursuant to article 6 or 7 of this chapter or are federal covered securities if the securities comply with section 44-1843.02  
 or chapter 13, article 12 of this title.

23 B. A person violating this section is guilty of a class 4 felony.

24 <sup>366</sup> **A.R.S. § 44-1842. Transactions by unregistered dealers and salesmen prohibited; classification**

25 A. It is unlawful for any dealer to sell or purchase or offer to sell or buy any securities, or for any salesman to sell or offer  
 for sale any securities within or from this state unless the dealer or salesman is registered as such pursuant to the  
 provisions of article 9 of this chapter.

26 B. A person violating this section is guilty of a class 4 felony.

27 <sup>367</sup> 15 U.S.C. § 77r(b)(4).

28 <sup>368</sup> *Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 912 (6th Cir. 2007).

<sup>369</sup> 17 C.F.R. § 230.506.

<sup>370</sup> We note the Division contends that the preemption provisions of Section 18 of the Securities Act of 1933 do not apply  
 to the registration requirements for dealers or salesmen under A.R.S. § 44-1842. However, we need only consider this  
 argument if the Respondents can establish that they met the requirements of Rule 506.

<sup>371</sup> 17 C.F.R. §§ 230.502, 230.506(b)(1).

1 accredited investors, or reasonably believed by the issuer to be accredited investors.<sup>372</sup> Each  
 2 purchaser who is not an accredited investor must, individually or with his representative, have  
 3 knowledge and experience in financial and business matters making him capable of evaluating the  
 4 merits and risks of the prospective investment, or the issuer must reasonably believe prior to any sale  
 5 that the purchaser meets this description.<sup>373</sup> The issuer of the security has a duty to make a  
 6 reasonable inquiry into a buyer's background to qualify for the private offering exemption.<sup>374</sup>

7 The Respondents' arguments fail to set forth with specificity how they believe that their  
 8 offering of securities satisfies all the requirements of a Rule 506 exemption. We discern three main  
 9 areas of contention upon which the Division asserts the Respondents' argument of federal preemption  
 10 must fail: (1) the Respondents failed to comply with notice requirements, (2) the Respondents failed  
 11 to sell only to qualified purchasers, and (3) the Respondents failed to comply with information  
 12 disclosure requirements. Accordingly, we focus our consideration of the applicability of a federal  
 13 exemption under Rule 506 by looking at these three areas.

#### 14 1. Notice

15 Issuers offering or selling securities under Rule 506 are required to file a Form D notice of  
 16 sales with the SEC.<sup>375</sup> A copy of the Form D notice is also required to be filed with the  
 17 Commission.<sup>376</sup> The record contains no evidence that a Form D was ever filed by the Respondents.  
 18 The Division contends that the Respondents cannot avail themselves of the Rule 506 exemption  
 19 because they failed to comply with federal and state notice filing requirements.<sup>377</sup> The Division cites  
 20 the Arizona Supreme Court for having held that "[b]ecause of the vital public policy underlying the  
 21 registration requirement, there must be strict compliance with all the requirements of the exemption  
 22 statute."<sup>378</sup> The Respondents have set forth no assertions regarding the notice requirement.

23 While the Division has cited Arizona case law requiring strict compliance for an exemption,  
 24 the Division cites no cases, in Arizona or any other jurisdiction, that specifically address the notice

25 <sup>372</sup> 17 C.F.R. §§ 230.501(e)(1)(iv), 230.506(b)(2)(i).

26 <sup>373</sup> 17 C.F.R. § 230.506(b)(2)(ii).

27 <sup>374</sup> *Anastasi v. Am. Petroleum, Inc.*, 579 F. Supp. 273, 275 (D. Colo. 1984).

28 <sup>375</sup> 17 C.F.R. §§ 230.503(a)(1), 239.500(a)(1).

<sup>376</sup> 15 U.S.C. § 77r(c); A.R.S. § 44-1843.02(C).

<sup>377</sup> Division's Reply Brief at 5.

<sup>378</sup> Division's Reply Brief at 3-4, citing *State v. Baumann*, 125 Ariz. 404, 411, 610 P.2d 38, 45 (1980).

1 requirement. While federal law requires the filing of a Form D, following an amendment to  
 2 Regulation D in 1989, the SEC does not require compliance with the notice requirements to qualify  
 3 for an exemption under Regulation D.<sup>379</sup> Accordingly, federal courts have held that the failure to file  
 4 a Form D will not preclude a Rule 506 exemption.<sup>380</sup> Assuming that all other requirements for a Rule  
 5 506 exemption are met, federal preemption of state law will not fail for the lack of a notice filing.  
 6 Though the Respondents failed to comply with federal and state notice filing requirements, this factor  
 7 does not prove determinative of whether their sale of securities qualifies for exemption under Rule  
 8 506.

## 9 2. The Purchasers

10 In order to come within the Rule 506 safe harbor, the Respondents must present evidence of  
 11 their reasonable belief as to the nature of each purchaser.<sup>381</sup> The Respondents contend that the  
 12 “purchasers acknowledged their ability to participate via their receipt and acceptance of the Operating  
 13 Agreement, which specifies investor qualifications.”<sup>382</sup> The Division counters that the Respondents  
 14 failed to submit so much as a single, signed Operating Agreement into evidence, and that the  
 15 Respondents provided no evidence of having received and reviewed representations from each  
 16 investor.

17 It is a well-recognized legal principle that the nonproduction of evidence creates an inference  
 18

19 \_\_\_\_\_  
 20 <sup>379</sup> “The Rule 503 requirement to file a Form D within 15 days of the first sale of securities remains, but will no longer be  
 a condition to the establishment of any exemption under Regulation D.” Regulation D, 54 Fed.Reg. 11369, 11370 (Mar.  
 20, 1989).

21 <sup>380</sup> *Hamby v. Clearwater Consulting Concepts, LLLP*, 428 F. Supp. 2d 915, 920 (E.D. Ark. 2006); see also *Chanana's*  
*Corp. v. Gilmore*, 539 F. Supp. 2d 1299, 1303-04 (W.D. Wash. 2003).

22 <sup>381</sup> *Mark v. FSC Sec. Corp.*, 870 F.2d 331, 335 (6th Cir. 1989).

23 <sup>382</sup> Respondents’ Post-Hearing Brief at 9. The Operating Agreement provides, in pertinent part:

23 5.5.1 Each Member represents and warrants to the other Members and to the Company that such Member:

\* \* \*

24 5.5.1.5 Is capable of evaluating the relative merits and risks presented by an investment in the Company, and to the  
 extent the Member has desired to do so, the Member has consulted with his own independent legal, tax and investment  
 25 advisers, and terms of its investment objectives, and in terms of its financial situation.

\* \* \*

26 5.5.1.7 The Company has reasonable grounds to believe that the Member has such knowledge and experience in financial  
 and business matters that he is capable of evaluating the merits and risks of the prospective participation, or the Member  
 27 and his purchaser representatives (as defined in Rule 501 under the Securities Act of 1933) together have such knowledge  
 and experience in financial and business matters that they are capable of evaluating the merits and risks of the prospective  
 participation and that such Member is able to bear the economic risk of the participation, ...

28 Exhs. S-11 at ACC001089, S-71 at ACC005025, S-72.

1 that the evidence, if produced, would have been adverse to the party who could have presented it.<sup>383</sup>  
 2 Here, the Respondents failed to submit into evidence any investor signed Operating Agreements.  
 3 The Respondents have given no reason why these signed Operating Agreements, which they have  
 4 asserted reliance upon, could not be produced at the hearing. Even if signed Operating Agreements  
 5 had been presented, at least one investor acknowledged having paid little attention to the  
 6 document,<sup>384</sup> minimizing the value of any representation made therein. As such, we find the record  
 7 does not support the Respondents' contention that they relied upon the investor representations  
 8 contained in the Operating Agreements to form a reasonable belief as to whether any individual  
 9 investor had the requisite sophistication required for a Rule 506 exemption.

10 At the hearing, Mr. Steiner provided testimony as to his basis for believing that individual  
 11 investors were accredited<sup>385</sup> or sophisticated.<sup>386</sup> The Respondents contend that they believed twenty-  
 12 five of thirty-seven purchasers were accredited investors.<sup>387</sup> By the evidence of record, only one  
 13 investor was established to be an accredited investor at the time of purchase.<sup>388</sup> Assuming *arguendo*  
 14 that the Respondents had a reasonable belief that the other twenty-four investors were accredited as  
 15 they claim, a Rule 506 exemption requires the Respondents prove they had a reasonable belief the  
 16 remaining investors, admitted as not being accredited, met the requisite level of sophistication.

17 As noted above, the sophistication requirement of Rule 506 sets forth that each purchaser  
 18 must, individually or with his representative, have knowledge and experience in financial and  
 19 business matters making him capable of evaluating the merits and risks of the prospective investment,  
 20 or the issuer must reasonably believe prior to any sale that the purchaser meets this description.<sup>389</sup>  
 21 The Respondents quote Rule 506, but they make no assertions as to what evidence is necessary to

22 <sup>383</sup> See *State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987).

23 <sup>384</sup> Tr. at 263, 266-267.

24 <sup>385</sup> A natural person is an accredited investor if that individual has a net worth, or joint net worth with that person's  
 25 spouse, exceeding \$1,000,000 at the time of the purchase. 17 C.F.R. § 230.501(a)(5). A natural person is also an  
 26 accredited investor if that individual in each of the past two years has income exceeding \$200,000, or \$300,000 joint  
 27 income with spouse, with a reasonable expectation of reaching the same income level in the current year. 17 C.F.R. §  
 28 230.501(a)(6).

26 <sup>386</sup> Tr. at 484-504.

27 <sup>387</sup> Respondents' Post-Hearing Brief at 9-12. We note that this assertion implies that a dozen other investors are not  
 28 accredited. However, the list of 37 includes some investors who are listed more than once as they made multiple  
 investments.

<sup>388</sup> Tr. at 392, 394-396.

<sup>389</sup> 17 C.F.R. § 230.506(b)(2)(ii).

1 demonstrate investor sophistication. The Division contends that investor sophistication requires  
 2 experience in the particular industry involved, and that the Respondents have presented, at most,  
 3 general business experience for some of the investors.<sup>390</sup> In considering whether individual investors  
 4 met the requirements of Rule 506, we are mindful the Arizona Supreme Court has indicated blue sky  
 5 laws act to protect the public “[s]ince much of the public lacks the knowledge and sophistication of  
 6 those who trade regularly in the securities marketplace.”<sup>391</sup>

7 The Respondents’ Post-Hearing Brief makes no assertion as to the status of investor SNL  
 8 Associates (Sean McLaughlin). Through his testimony, Mr. Steiner conceded that he did not believe  
 9 Mr. McLaughlin to be an accredited investor.<sup>392</sup> Therefore, to qualify for an exemption under Rule  
 10 506, the Respondents must establish that they had a reasonable belief that Mr. McLaughlin was a  
 11 sophisticated investor. Mr. McLaughlin had known Mr. Steiner for years and had discussed the  
 12 investment with Mr. Steiner multiple times prior to investing.<sup>393</sup> However, Mr. McLaughlin’s  
 13 background was in mortgage banking and the only testimony from Mr. Steiner as to his knowledge of  
 14 Mr. McLaughlin’s investments went to the ownership of rental properties.<sup>394</sup> Mr. McLaughlin  
 15 testified that he had owned several companies and previously invested in real estate and business, but  
 16 he gave no specific testimony regarding the nature of these holdings.<sup>395</sup> The record does not establish  
 17 a reasonable basis by which Mr. Steiner could conclude that Mr. McLaughlin met the requisite level  
 18 of sophistication under Rule 506 to evaluate the merits and risks of the multinational business  
 19 ventures pursued by OBP and Lunsford Consulting.

20 The Respondents’ Post-Hearing Brief makes no assertion as to the status of investor Ronald  
 21 Kocks. At the hearing, Mr. Steiner testified that he could not speak as to Mr. Kocks’ net worth in  
 22 determining whether he would be an accredited investor.<sup>396</sup> Mr. Steiner testified that Mr. Kocks was  
 23 “well informed” about the investment from his brother, investor Robert Kocks, and he “felt like he  
 24

25 <sup>390</sup> Division’s Reply Brief at 6-7.

26 <sup>391</sup> *State v. Baumann*, 125 Ariz. 404, 411, 610 P.2d 38, 45 (1980).

27 <sup>392</sup> Tr. at 486.

28 <sup>393</sup> Tr. at 351, 354.

<sup>394</sup> Tr. at 486.

<sup>395</sup> Tr. at 355.

<sup>396</sup> Tr. at 500.



1 had a pretty good understanding, liked what his brother was doing, and took a small position.”<sup>397</sup>  
 2 While Mr. Steiner testified he believed that Ronald Kocks had a good understanding of the OBP  
 3 investment opportunity, the record contains no information as to how the Respondents could  
 4 determine whether Mr. Kocks had the requisite knowledge and experience in business matters as to  
 5 be capable of evaluating the merits and risks of an investment in OBP. The record does not establish  
 6 a reasonable basis by which Mr. Steiner could conclude Mr. Ronald Kocks to be a sophisticated  
 7 investor under Rule 506.

8 The Respondents’ Post-Hearing Brief asserts that some of the persons listed as investors in  
 9 OBP were not actual purchasers of member interests in OBP, but rather they received their interests  
 10 as a gift from an accredited investor.<sup>398</sup> At the hearing, Mr. Steiner testified that while the Rock  
 11 Living Trust and Shane Laney owned percentage investments in OBP, their interests were purchased  
 12 by Michael Laney.<sup>399</sup> The Rule 506 sophistication requirement applies to purchasers.<sup>400</sup> Since the  
 13 evidence of record established that the Rock Living Trust and Shane Laney were not themselves  
 14 purchasers, their status as either accredited or sophisticated investors need not be considered.

15 The Respondents raise a similar argument for Rebecca Flowers.<sup>401</sup> The Respondents contend  
 16 that “Mr. Steiner understood from their investment advisor that Rebecca Flowers’ annuity had been  
 17 purchased with money provided by her father, Raymond Flores.”<sup>402</sup> However, the record contains no  
 18 evidence to support this assertion. Documentary evidence reflects that Mr. Flores and Ms. Flowers  
 19 each removed \$50,000 from annuity contracts in their respective names that was used to purchase  
 20 their respective interests in OBP, which is consistent with Ms. Flowers’ testimony that they each  
 21 invested \$50,000.<sup>403</sup> Regardless of how Ms. Flowers obtained the investment funds, she was clearly  
 22 the purchaser of her interest in OBP. The record contains no evidence as to whether Mr. Steiner

23 <sup>397</sup> Tr. at 499-500.

24 <sup>398</sup> Respondents’ Post-Hearing Brief at 13-14.

25 <sup>399</sup> Tr. at 491-492. Mr. Michael Laney’s testimony, though at times contradictory, appears to support the contention that  
 the Rock Living Trust and Shane Laney investments were gifts made by Michael Laney. Tr. at 382-385, 393.

26 <sup>400</sup> 17 C.F.R. § 230.506(b)(2)(ii).

27 <sup>401</sup> Respondents’ Post Hearing Brief at 14. The Respondents also list “Raymond Flores and Rebecca Flowers” under the  
 list of persons believed to be accredited investors. Respondents’ Post Hearing Brief at 11-12.

28 <sup>402</sup> Respondents’ Post-Hearing Brief at 14.

<sup>403</sup> Tr. at 199-202, 204; Exhs. S-69, S-70. Their membership interests were under the names “RAYMOND J FLORES  
 and/or REBECCA FLOWERS” and “REBECCA FLOWERS and/or RAYMOND J FLORES.” Exhs. S-38 at  
 ACC004936, ACC004938, S-71 at ACC 005020 (Emphasis in original).

1 believed Ms. Flowers to be an accredited investor or to possess the requisite sophistication required  
 2 under Rule 506. Under Rule 506, an unsophisticated purchaser may still be qualified as an investor if  
 3 assisted by a purchaser representative.<sup>404</sup> At the hearing, Mr. Steiner testified that during meetings  
 4 with Ms. Flowers, her father and their investment advisor were always present.<sup>405</sup> However, for a  
 5 person to be considered a purchaser representative for an investor under Rule 506, that investor needs  
 6 to have made a written acknowledgement, during the course of the transaction, stating the person is  
 7 her purchaser representative in connection with evaluating the merits and risks of the prospective  
 8 investment.<sup>406</sup> The record contains no evidence to suggest that such a written acknowledgment was  
 9 made by Ms. Flowers or that the Respondents could have formed a reasonable belief she had made  
 10 one. The record does not establish a reasonable basis by which Mr. Steiner could conclude Ms.  
 11 Flowers was an accredited investor or a qualified purchaser under Rule 506.

12 The Respondents contend that Henry Clay and Donald Gilman were long-time friends of  
 13 Boyd Lunsford who had invested in prior enterprises with Mr. Lunsford.<sup>407</sup> Respondents further  
 14 contend that after meeting with Mr. Clay and Mr. Gilman on more than one occasion, Mr. Steiner  
 15 concluded “they were sufficiently knowledgeable about what Boyd Lunsford had been doing and that  
 16 each of them could accept the risks involved and, accordingly, qualified as investors” under Rule  
 17 506.<sup>408</sup>

18 Mr. Clay is a retired railroad worker with a high school education.<sup>409</sup> Mr. Clay testified that  
 19 he had known Boyd Lunsford for nearly forty years and that “when we talked business, I was not so  
 20 much looking at the name of the company.”<sup>410</sup> Mr. Clay testified that he made an investment in OBP  
 21 using money he received at his retirement to help Boyd Lunsford and to make money.<sup>411</sup> After  
 22 speaking initially with Mr. Lunsford, Mr. Clay spoke with Mr. Steiner who explained the returns on  
 23

24 <sup>404</sup> 17 C.F.R. § 230.506(b)(ii).

<sup>405</sup> Tr. at 501.

25 <sup>406</sup> 17 C.F.R. § 230.501(i)

<sup>407</sup> Respondents’ Post-Hearing Brief at 14.

26 <sup>408</sup> Respondents’ Post-Hearing Brief at 14.

<sup>409</sup> Tr. at 228-230.

<sup>410</sup> Tr. at 232.

27 <sup>411</sup> Tr. at 232-233, 241, 244. Though Mr. Clay actually purchased his investment in OBP after the death of Boyd  
 28 Lunsford, Mr. Clay had decided to invest while Mr. Lunsford was still alive. Tr. at 233-234, 245-246; Exh. S-10 at 257-  
 258.

1 his investment, which Mr. Clay understood would be “better than anything I could find in any other  
 2 retirement plan.”<sup>412</sup> Though the record indicates that Mr. Clay engaged in prior business ventures  
 3 with Mr. Lunsford, we can glean no specific information about investments or any return they may  
 4 have produced.<sup>413</sup> The record does not establish whether Mr. Clay made any decisions regarding the  
 5 investment of the funds in his retirement account and we have not been presented with any other  
 6 evidence regarding Mr. Clay’s investment background. The record establishes that Mr. Clay was a  
 7 friend of Boyd Lunsford who believed in and wanted to see his friend’s business ventures succeed.  
 8 However, the record does not establish a reasonable basis by which the Respondents could conclude  
 9 that Mr. Clay was a sophisticated investor under Rule 506.

10 Though Mr. Gilman testified that he has been retired for twenty years, the record contains no  
 11 information regarding Mr. Gilman’s education or employment history.<sup>414</sup> Nor was any evidence  
 12 presented regarding Mr. Gilman’s investment background. Mr. Gilman likened his investment in  
 13 OBP to purchasing a lottery ticket and testified that he believed with Boyd Lunsford’s “commitment  
 14 and the friendships that he had established over the last 30 some years in China ... my feeling was  
 15 that some day he would hit upon the right project and it would pay off for Boyd.”<sup>415</sup> Mr. Gilman  
 16 testified that he had received an Operating Agreement when he invested, but he “didn’t spend a lot of  
 17 time looking at it in detail” and would have paid as much attention to it as the numbers on a lottery  
 18 ticket.<sup>416</sup> Mr. Gilman saw his investment as a contribution to his friend, Boyd Lunsford.<sup>417</sup> The  
 19 record does not establish a reasonable basis by which the Respondents could consider Mr. Gilman to  
 20 have been a sophisticated investor under Rule 506.

21 The record established that two other investors, Tracy Wooten and Thomas Gleason,  
 22 purchased interests in OBP but were subsequently given refunds.<sup>418</sup> The Respondents make no  
 23 assertions regarding the status of these two investors in their post-hearing brief. Mr. Steiner gave no  
 24 testimony at the hearing as to whether he had a belief that these two investors were either accredited

25 <sup>412</sup> Tr. 244-245.

26 <sup>413</sup> Mr. Clay did testify to having purchased a franchise in Mr. Lunsford’s fire retardant business. Tr. at 232.

27 <sup>414</sup> Tr. at 268.

28 <sup>415</sup> Tr. at 261.

<sup>416</sup> Tr. at 263, 266-267.

<sup>417</sup> Tr. at 271.

<sup>418</sup> Tr. at 120-121, 124-125, 137, 146-149; Exhs. S-10 at 325-337, S-35, S-62.

1 or sophisticated under Rule 506. At an Examination Under Oath on March 20, 2014, Mr. Steiner  
 2 gave sworn testimony that Mr. Gleason had been involved with Lunsford Consulting and attempted  
 3 to bring in relationships with his contacts in Nigeria and in the oil business.<sup>419</sup> Mr. Steiner provided  
 4 no further information regarding Mr. Gleason's background. The record does not establish a  
 5 reasonable basis by which the Respondents could consider Ms. Wooten or Mr. Gleason to have been  
 6 accredited investors or sophisticated investors under Rule 506.

### 7 3. Information Requirements

8 Rule 502 sets forth general conditions to be met for offers and sales under Regulation D.<sup>420</sup>  
 9 When an issuer sells securities under Rule 506 to any purchaser who is not an accredited investor, the  
 10 issuer is required to provide certain information to the purchaser prior to the sale.<sup>421</sup> All information  
 11 provided must be to the extent material to an understanding of the issuer, its business and the  
 12 securities being offered.<sup>422</sup> The SEC has determined that when an issuer is required to provide  
 13 specific disclosure, that disclosure must be in written form.<sup>423</sup>

14 Here, the Respondents were required to provide non-financial information of the same kind as  
 15 would be required in Part II of SEC Form 1-A.<sup>424</sup> Among other things, this information should  
 16 include: a list of factors the company considers to be the most substantial risks to an investor in the  
 17 offering; a detailed description of what business the company does and proposes to do; a summary of  
 18 the material events in the development of the company; events or milestones that the company must  
 19 reach to become profitable including the expected method by which such milestones will be  
 20 achieved; and information regarding the use of net proceeds from the securities offering to be stated  
 21 with "a high degree of specificity."<sup>425</sup>

22 Rule 502 also sets forth financial disclosure requirements.<sup>426</sup> The Respondents contend that  
 23

24 <sup>419</sup> Exh. S-10 at 332-333.

<sup>420</sup> 17 C.F.R. § 230.502.

25 <sup>421</sup> 17 C.F.R. § 230.502(b).

<sup>422</sup> 17 C.F.R. § 230.502(b)(2)(i).

26 <sup>423</sup> Interpretive Release on Regulation D, Securities Act Release No. 6455 (Mar. 3, 1983), 1983 WL 409415, at Question (42).

<sup>424</sup> 17 C.F.R. § 230.502(b)(2)(i)(A).

27 <sup>425</sup> See Form 1-A, Regulation A Offering Statement under the Securities Act of 1933, pp. 7, 9, 11-12,  
 28 <http://www.sec.gov/about/forms/form1-a.pdf>.

<sup>426</sup> 17 C.F.R. § 230.502(b)(2)(i)(B).

1 “SEC Rule 506 does not require financial information to be provided when doing so would be an  
2 unreasonable burden.”<sup>427</sup> The Respondents cite no authority to support this premise. On the  
3 contrary, for securities offerings up to \$7,500,000, Rule 502 provides that if obtaining audited  
4 financial statements would cause unreasonable effort or expense, the issuer need only have the  
5 balance sheet audited.<sup>428</sup> While the burden of independent auditing may be mostly waived, the  
6 obligation to provide financial statements remains.

7 The Respondents further argue that providing financial information would not have been  
8 useful to OBP investors as OBP had neither profit nor loss because OBP had no expenses and  
9 received no income except for a percentage of Lunsford Consulting’s gross revenue, which was zero  
10 to date.<sup>429</sup> Respondents contend, therefore, that they did not need to provide any OBP financial  
11 statement information as it would not have been material to a purchaser’s understanding of the issuer,  
12 its business and the securities being offered. However, this argument only serves to make the  
13 financial statements of Lunsford Consulting of material interest to the OBP investors as Lunsford  
14 Consulting was the only potential source of income from which the investors could hope to see any  
15 return on their investment.

16 Respondents offer two rationales for not disclosing financial information of Lunsford  
17 Consulting. First, the Respondents assert that OBP investors have no interest in the financial  
18 information of Lunsford Consulting since OBP is to receive a percentage of Lunsford Consulting’s  
19 gross revenue, as opposed to net revenue, therefore, Lunsford Consulting’s expenses would be  
20 meaningless to investors.<sup>430</sup> We disagree. The likelihood of Lunsford Consulting eventually  
21 obtaining gross revenue would be severely diminished if investor funds raised for business expenses  
22 were instead mismanaged or subject to malfeasance. Furthermore, some OBP investors were  
23 provided with a packet on Lunsford Consulting which stated, not once but twice, that “[a]ll capital  
24 invested will be collateralized and secured by assets of Lunsford Consulting or its principals.”<sup>431</sup> As  
25 such, the financial information of Lunsford Consulting is clearly material to OBP investors.

26 <sup>427</sup> Respondents’ Post-Hearing Brief at 15.

27 <sup>428</sup> 17 C.F.R. § 230.502(b)(2)(i)(B)(2).

28 <sup>429</sup> Respondents’ Post-Hearing Brief at 15-16.

<sup>430</sup> Respondents’ Post-Hearing Brief at 15, 18.

<sup>431</sup> Exh. S-31 at ACC001776, ACC001778; see also Exh. S-10 at 273-274.

1           The second basis the Respondents assert for not disclosing Lunsford Consulting financial  
2 information is that Lunsford Consulting is a separate entity and the Private Placement Agreement  
3 provides no contractual obligation for the disclosure of Lunsford Consulting financial information.  
4 These arguments are without merit. Lunsford Consulting was separate in name only as Respondent  
5 Steiner was the signer for the Lunsford Consulting bank account and, therefore, he controlled the  
6 OBP investor funds after they were transferred to Lunsford Consulting.<sup>432</sup> The Private Placement  
7 Agreement contains no provision for disclosure of Lunsford Consulting's financial information  
8 because the parties to the contract, including the Respondents, failed to include such a clause. The  
9 Respondents had a duty to provide non-accredited OBP investors with information material to an  
10 understanding of the issuer, its business and the securities being offered. The Respondents' contract  
11 with Lunsford Consulting did not excuse the Respondents of this responsibility.

12           Having determined the necessity of disclosure under Rule 502, we consider the information  
13 that was provided to the investors. Here, the Respondents provided a copy of the Operating  
14 Agreement to every investor.<sup>433</sup> The Operating Agreement included the following description of  
15 OBP's business:

16                     1.4 Character of Business. The initial business and purposes of the  
17 Company shall be to engage in a business relationship(s) for any lawful  
18 purpose, specifically, to provide aspects of business development  
19 services and engage in the marketing of various products, both  
20 nationally and internationally for and between companies. The  
21 Company shall be authorized to engage in such other activities as may  
22 be necessary or appropriate in furtherance of the foregoing purposes.  
23 The Company shall not engage in any other business without approval  
24 of all Members.<sup>434</sup>

25           The Operating Agreement also provided the following information regarding the financial  
26 arrangement between OBP and Lunsford Consulting:

27 <sup>432</sup> Exh. S-8 at 91-92.

28 <sup>433</sup> Exh. S-8 at 54.

<sup>434</sup> Exhs. S-11 at ACC001083, S-71 at ACC005018, S-72.

1           6.2 Division of Profits and Losses. Per the “Private Placement  
2           Agreement” between Lunsford Consulting, Ltd. and the Company, the  
3           Company agreed to raised [sic] one million five hundred thousand  
4           dollars (\$1,500,000.00) for operating capital for Lunsford Consulting,  
5           Ltd, [sic] in exchange for ten percent (10%) of Lunsford Consulting,  
6           Ltd.’s gross revenue until investment is returned, then five percent  
7           (5%) of gross revenues in perpetuity. In the event the Company raises  
8           less than \$1,500,000.00, the percentage of Lunsford Consulting, Ltd.’s  
9           [sic] revenue will be prorated in accordance with the percentage of  
10          monies raised. Members’ percentage interest will be proportionate to  
11          the total investment dollars invested in the Company, and therefore will  
12          not be diluted.<sup>435</sup>

13           The Operating Agreement contains no more specific information regarding the business being  
14          conducted by OBP and Lunsford Consulting. The Operating Agreement is also devoid of financial  
15          statement information. We find the information provided to investors in the OBP Operating  
16          Agreement to be insufficient to meet the disclosure requirements set forth in Rule 502.

17           Additional documentation regarding Lunsford Consulting was provided by the Respondents  
18          to at least some of the investors prior to making their investment.<sup>436</sup> Different versions of this  
19          documentation were used by the Respondents at different times.<sup>437</sup> The Respondents failed to  
20          establish which version, if any, was provided prior to investing to those investors that they concede as  
21          being unaccredited. Therefore, we cannot consider these documents in our Rule 502 analysis. The  
22          Respondents have failed to meet their burden of proof to establish that they met the information  
23          requirements under Rule 502.

#### 24           4. Conclusion

25           By failing to file a Form D at both the federal and state level, the Respondents failed to

26           <sup>435</sup> Exh. S-71 at ACC005026. The OBP II Operating Agreement contained a substantially similar section 6.2 with the  
27          only differences being the investment total was half that stated in the original OBP Operating Agreement (\$750,000) and  
28          the percentages of return were correspondingly halved. Exhs. S-11 at ACC001090, S-72.

<sup>436</sup> Exhs. S-8 at 53-55, S-10 at 273-274, 277-279.

<sup>437</sup> Exhs. S-10 at 273-274, 277-279, S-12, S-30, S-31.

1 comply with notice requirements. However, the lack of notice does not defeat the Respondents'  
2 contention that they qualify for a Rule 506 exemption. An exemption could still be found if the  
3 Respondents complied with all other requirements of Rule 506.

4 When considering the requirements of Rule 506, we find that the Respondents sold securities  
5 to at least seven purchasers who were neither accredited nor otherwise qualified as purchasers under  
6 Rule 506. The Respondents further failed to comply with the information requirements set forth in  
7 Rule 502. Since the Respondents did not meet the requirements of Rule 506, the Respondents' sale  
8 of securities does not qualify for an exemption from registration and federal preemption does not  
9 apply. The Respondents' offer and sale of unregistered securities without being registered to sell  
10 securities constituted violations of A.R.S. §§ 44-1841 and 44-1842.

11 C. Did the Respondents Make an Offer to Sell Securities to Margo Mallamo?

12 The Division contends that the Respondents offered to sell securities to MM, in violation of  
13 the Securities Act. Having concluded that the Respondents' sale of securities was not exempt from  
14 registration requirements, if the Respondents made an offer to sell to MM, this would constitute a  
15 further violation.

16 1. The Undercover Investigation Communications

17 Division Investigator Annalisa Weiss, using the alias MM, initiated contact with Mr. Steiner  
18 via email on January 9, 2012, inquiring about an investment opportunity in China, after having been  
19 directed to Mr. Steiner by Rolf Heartburg.<sup>438</sup> Mr. Steiner responded by email that day, providing a  
20 copy of the Lunsford Consulting executive summary and inquiring whether MM would be investing  
21 personally or through an entity, the amount she was considering investing, and her "window of  
22 execution."<sup>439</sup> After not receiving a response, Mr. Steiner followed up with another email, on  
23 January 16, 2012, confirming that MM received the prior information and requesting that MM let him  
24 know when she planned to return to Phoenix to schedule a meeting.<sup>440</sup> MM responded by email the  
25 next day that she was considering an investment of \$200,000 to \$250,000 and she wanted additional  
26

27 <sup>438</sup> Exh. S-37 at ACC000322-ACC000324.

28 <sup>439</sup> Exh. S-37 at ACC000325.

<sup>440</sup> Exh. S-37 at ACC000326.



1 information.<sup>441</sup> Mr. Steiner emailed the same day stating that he could send more information after  
 2 they spoke by phone, that “this is an extraordinary opportunity due to the culmination of 25 years of  
 3 relationships and timing coming together,” and that he would await MM’s call.<sup>442</sup> Rather than  
 4 awaiting a call, Mr. Steiner followed up on January 18, 2012, with both a text message and a voice  
 5 mail seeking a discussion with MM.<sup>443</sup> On January 19, 2012, Mr. Steiner again text messaged MM  
 6 asking if she were available for a discussion that day.<sup>444</sup>

7 On January 19, 2012, Ms. Weiss, under the alias of MM, phoned Mr. Steiner.<sup>445</sup> MM stated  
 8 that she had moved to Phoenix but was in Seattle for some court matters pertaining to a divorce.<sup>446</sup>  
 9 MM mentioned that she heard about the investment opportunity through her hairdresser and that she  
 10 was looking for an investment as she is selling a business.<sup>447</sup> Mr. Steiner gave MM a background of  
 11 his and Mr. Lunsford’s contacts with China and discussed a power plant project in Nigeria among  
 12 other projects.<sup>448</sup> MM inquired about minimum investment amounts and stated she was looking to  
 13 invest \$200,000 to \$250,000.<sup>449</sup> Mr. Steiner stated that this amount would be “right in where we are”  
 14 as he already had investors above, at, and below that level.<sup>450</sup> Mr. Steiner described that MM’s return  
 15 on investment would come from gross revenue.<sup>451</sup> Mr. Steiner suggested that he could assist MM in  
 16 setting up an LLC if she wanted to switch her investment from her personally to a business.<sup>452</sup> Mr.  
 17 Steiner said he had an operating agreement that he would send to MM for her to sign and return.<sup>453</sup>  
 18 He also told MM he would provide her with wiring instructions after she stated she would prefer to  
 19 pay in that manner.<sup>454</sup> Mr. Steiner told MM she could ask him questions by email or text message  
 20 and that “we’ll try to get this wrapped up here in the next day or two.”<sup>455</sup>

21 <sup>441</sup> Exh. S-37 at ACC000327.

22 <sup>442</sup> Exh. S-37 at ACC000328.

23 <sup>443</sup> Exh. S-37 at ACC000330-ACC000331.

24 <sup>444</sup> Exhs. I, S-37 at ACC000332, ACC000334.

25 <sup>445</sup> Exh. S-36.

26 <sup>446</sup> Exh. S-36 at 2.

27 <sup>447</sup> Exh. S-36 at 3.

28 <sup>448</sup> Exh. S-36 at 4-28.

<sup>449</sup> Exh. S-36 at 20-21.

<sup>450</sup> Exh. S-36 at 21.

<sup>451</sup> Exh. S-36 at 31-32.

<sup>452</sup> Exh. S-36 at 36-38.

<sup>453</sup> Exh. S-36 at 34, 38-39.

<sup>454</sup> Exh. S-36 at 39-40.

<sup>455</sup> Exh. S-36 at 41-42.

1 After the call, Mr. Steiner emailed MM with a copy of the OBP operating agreement and  
 2 wiring instructions.<sup>456</sup> The Operating Agreement identified MM as having a membership interest of  
 3 33.3333% in OBP II and had signature pages for MM to sign as a member.<sup>457</sup> Mr. Steiner had  
 4 already signed the Operating Agreement.<sup>458</sup> When MM asked, via text message later that day, how to  
 5 return the operating agreement, Mr. Steiner answered that she could scan and then email it to him or  
 6 send it by fax.<sup>459</sup> On January 21, 2012, Mr. Steiner sent a text message to MM inquiring if she had  
 7 been able to locate a scanner.<sup>460</sup> Having not received a response, on January 23, 2012, Mr. Steiner  
 8 sent another text message to MM requesting follow-up.<sup>461</sup> MM responded that day stating she would  
 9 not be investing because her attorney discovered Mr. Heartburg, who had put MM in touch with Mr.  
 10 Steiner, had prior arrests including a recent one for fraud.<sup>462</sup> Mr. Steiner sent two text messages that  
 11 day asking for an opportunity to explain the situation to MM.<sup>463</sup> On January 24, 2015, Mr. Steiner  
 12 sent another text message to MM asking if she would reconsider based upon additional  
 13 information.<sup>464</sup> MM responded that her attorney was still reviewing the information and she could  
 14 discuss the matter with Mr. Steiner when she returned to Phoenix after a brief vacation.<sup>465</sup>

15 On February 1, 2012, MM was copied on an email from Mr. Heartburg to Mr. Steiner  
 16 advising they move on with other investors as Mr. Heartburg had not heard from MM.<sup>466</sup> On  
 17 February 2 and 9, 2012, Mr. Heartburg blind copied MM with emails sent to other potential  
 18 investors.<sup>467</sup> On February 14, 2012, Mr. Steiner sent a text message to MM saying he wanted to meet  
 19 with her to give her more information to “help [her] make an informed decision.”<sup>468</sup> When MM  
 20 responded that she wanted to know why Mr. Heartburg was arrested for fraud, Mr. Steiner replied  
 21

22 <sup>456</sup> Tr. at 561; Exh. S-37 at ACC000333.

23 <sup>457</sup> Tr. at 560-561; Exh. S-11 at ACC001083, ACC001094-ACC001095.

24 <sup>458</sup> Tr. at 561; Exh. S-11 at ACC001095.

25 <sup>459</sup> Exhs. I, S-37 at ACC000334.

26 <sup>460</sup> Exhs. I, S-37 at ACC000335, ACC000349.

27 <sup>461</sup> Exhs. I, S-37 at ACC000349.

28 <sup>462</sup> *Id.*

<sup>463</sup> *Id.*

<sup>464</sup> Exhs. I, S-37 at ACC000336.

<sup>465</sup> Exhs. I, S-37 at ACC000350.

<sup>466</sup> Exh. S-37 at ACC000340.

<sup>467</sup> Exh. S-37 at ACC000341, ACC000344.

<sup>468</sup> Exhs. I, S-37 at ACC000351.

1 asking they meet to “discuss that and the opportunity.”<sup>469</sup> The following day, Mr. Steiner texted MM  
 2 again asking for an opportunity to discuss her fraud concern.<sup>470</sup> MM responded by agreeing to meet  
 3 with Mr. Steiner after she returned from Seattle, where she was currently packing for her move.<sup>471</sup>  
 4 On February 21, 2012, Mr. Steiner sent a text message to MM asking how she was progressing with  
 5 her moving and sending her an internet link to an article regarding the project in Nigeria.<sup>472</sup> On  
 6 February 22, 2012, MM and Mr. Steiner agreed by text message to meet the following day.<sup>473</sup>  
 7 Through text messages on February 23, 2012, MM and Mr. Steiner agreed to a meeting that afternoon  
 8 with MM stating that she would bring a cashier’s check to give him.<sup>474</sup>

## 9 2. Analysis

10 The Securities Act defines “offer to sell” or “offer for sale” as “an attempt or offer to dispose  
 11 of, or solicitation of an order or offer to buy, a security or interest in a security for value.”<sup>475</sup> The  
 12 federal Securities Act provides an identical definition for these terms.<sup>476</sup> Federal courts may provide  
 13 guidance in interpreting the Arizona Securities Act unless there is good reason to depart from federal  
 14 authority.<sup>477</sup> The definition of an offer under federal securities law has been considered to be much  
 15 broader than that in common law contracts.<sup>478</sup>

16 The Respondents contend that the testimony of Ms. Weiss is not credible and that she  
 17 committed perjury. First, the Respondents assert that Ms. Weiss identified three conflicting sources  
 18 for receiving an email which prompted the Division’s investigation: from a hairdresser, from an  
 19 Arizona attorney, and from her supervisor.<sup>479</sup> Ms. Weiss, as MM, told Mr. Steiner in their January  
 20 19, 2012 phone conversation that she had received an email referral from her hairdresser.<sup>480</sup> At the  
 21 hearing, Ms. Weiss testified that the undercover investigation started “because we were tipped off by  
 22

23 <sup>469</sup> *Id.*

24 <sup>470</sup> Exhs. I, S-37 at ACC000352.

25 <sup>471</sup> *Id.*

26 <sup>472</sup> Exhs. I, S-37 at ACC000354.

27 <sup>473</sup> Exhs. I, S-37 at ACC000355.

28 <sup>474</sup> *Id.*

<sup>475</sup> A.R.S. § 44-1801(15).

<sup>476</sup> 15 U.S.C.A. § 77b(a)(3).

<sup>477</sup> *Sell v. Gama*, 231 Ariz. 323, 327, 295 P.3d 421, 425 (2013).

<sup>478</sup> *McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1092 (9th Cir. 2003).

<sup>479</sup> Respondents’ Post-Hearing Brief at 37.

<sup>480</sup> Exh. 36 at 3.

1 an attorney from Arizona who had received an e-mail.”<sup>481</sup> On cross-examination, Ms. Weiss testified  
2 that “no attorney contacted me” and that she received her information from her supervisor.<sup>482</sup>

3 We find no “conflict” in these statements. Ms. Weiss was not testifying under oath during her  
4 phone call with Mr. Steiner, but rather she was acting in an undercover capacity. Revealing the true  
5 nature of the referral would not only have been potentially damaging to her investigation, but it  
6 would have violated a statutory requirement to keep such information confidential.<sup>483</sup> Nor do we see  
7 any conflict in Ms. Weiss’ hearing testimony. Ms. Weiss testified that “we” received a tip from an  
8 Arizona attorney, implying that the information was received by the Division, not her personally.  
9 Her later testimony is consistent as she states that she was not personally contacted but rather she  
10 received information from her supervisor.

11 The Respondents claim that Ms. Weiss “perjured herself again” when she testified about the  
12 income of MM.<sup>484</sup> When asked if Mr. Steiner would have had any reason to know of MM’s net  
13 worth or income, Ms. Weiss testified “No. Margo doesn’t exist, so she wouldn’t really have any  
14 income.”<sup>485</sup> The Respondents argue that MM had stated she was receiving profits from the sale of a  
15 business and was looking to invest \$200,000 to \$250,000. The evidence of record establishes that  
16 this information was conveyed by MM in her communications with Mr. Steiner. However, this  
17 information alone does not establish amounts of net worth or income for MM. Further, Ms. Weiss’  
18 testimony is logically correct: since MM did not exist, she could have no income. Ms. Weiss’  
19 testimony on this point does not make her a less credible witness.

20 Furthermore, we need not determine the question of whether an offer was made to MM based  
21 upon her testimony. The evidence of record includes the actual verbal and written communications

22 \_\_\_\_\_  
<sup>481</sup> Tr. at 33.

23 <sup>482</sup> Tr. at 86.

24 <sup>483</sup> A.R.S. § 44-2042 provides, in pertinent part:

25 A. The names of complainants and all information or documents obtained by any officer, employee or agent of the  
26 commission, including the shorthand reporter or stenographer transcribing the reporter's notes, in the course of any  
27 examination or investigation are confidential unless the names, information or documents are made a matter of public  
28 record. An officer, employee or agent of the commission shall not make the confidential names, information or  
documents available to anyone other than a member of the commission, another officer or employee of the commission,  
an agent who is designated by the commission or director, the attorney general or law enforcement or regulatory officials,  
except pursuant to any rule of the commission or unless the commission or the director authorizes the disclosure of the  
names, information or documents as not contrary to the public interest.

<sup>484</sup> Respondents’ Post-Hearing Brief at 39.

<sup>485</sup> Tr. at 43.

1 between MM and Mr. Steiner. The Respondents have not challenged the authenticity of the  
 2 Division's exhibits and they have provided copies of some of these communications themselves.  
 3 While MM initiated contact with Mr. Steiner, Mr. Steiner sought to speak with her by phone and in  
 4 person. Mr. Steiner provided MM with wiring instructions and an Operating Agreement, signed by  
 5 him, identifying MM as a percentage member in OBP II. On multiple occasions when MM did not  
 6 promptly respond to Mr. Steiner, he sought to reinitiate contact. When MM expressly stated she  
 7 would not be investing, Mr. Steiner asked first for an opportunity to explain and later that she  
 8 reconsider based upon additional information. The record establishes that Mr. Steiner made an offer  
 9 to sell to MM.

### 10 3. Entrapment

11 The Respondents argue that the Division's undercover operation was conducted "with the  
 12 intent to entrap them."<sup>486</sup> The Division asserts three arguments in opposition to the entrapment  
 13 claim: 1) the Respondents waived this defense by failing to state it in the Answer or the Amended  
 14 Answer, 2) entrapment does not apply to administrative proceedings in Arizona, and 3) the  
 15 Respondents failed to meet the elements of this defense.

16 The Division correctly states that the Respondents failed to assert the defense of entrapment  
 17 in either the Answer or the Amended Answer. As noted above, a respondent waives any affirmative  
 18 defenses not raised in the answer.<sup>487</sup> However, good cause may relieve a respondent of the  
 19 requirement of asserting an affirmative defense in the answer.<sup>488</sup>

20 In the T.O., the Division identified MM as "an Arizona resident."<sup>489</sup> The Division again  
 21 identified MM only as "an Arizona resident" in the Amended Notice.<sup>490</sup> An answer must be filed  
 22 within thirty days of service of a notice of opportunity for a hearing.<sup>491</sup> However, neither the T.O.  
 23 nor the Amended Notice would have given the Respondents a reason to believe that the "Arizona  
 24 resident" was in fact an alias assumed by an undercover Division investigator. Without such  
 25

26 <sup>486</sup> Respondents' Post-Hearing Brief at 31.

27 <sup>487</sup> A.A.C. R14-4-305(F).

28 <sup>488</sup> A.A.C. R14-4-305(G).

<sup>489</sup> T.O. at ¶¶ 10-15, 18-20.

<sup>490</sup> Amended Notice at ¶¶ 24-30, 33-35.

<sup>491</sup> A.A.C. R14-4-305(A).

1 knowledge, the Respondents were unable to make any determination regarding the potential  
 2 applicability of an entrapment defense. The record is unclear as to when the Respondents discovered  
 3 the involvement of an undercover investigator. At the October 17, 2012 Examination Under Oath of  
 4 Mr. Steiner, counsel for the Respondents restated his concern to Division counsel regarding MM “as  
 5 to whether anyone by that name actually exists and ever talked to you.”<sup>492</sup> Had the Division elected  
 6 to state in the T.O. or Amended Notice that the Arizona resident was an undercover investigator, the  
 7 Respondents would have been put on notice of the potential applicability of an entrapment defense.<sup>493</sup>  
 8 Without such notice having been given, we find good cause exists to allow consideration of the  
 9 Respondents’ entrapment argument.

10 Next the Division argues that the entrapment defense does not apply to an Arizona  
 11 administrative proceeding. The Division correctly notes that the Respondents cite no authority for  
 12 applying the defense to an Arizona administrative case. We are unaware of any Arizona authority  
 13 regarding the applicability of the defense in administrative proceedings in Arizona.<sup>494</sup>

14 In Arizona, the defense of entrapment is codified in A.R.S. § 13-206. Prior to the enactment  
 15 of A.R.S. § 13-206, Arizona’s entrapment defense, like that in the federal system, was a judicial  
 16 creation.<sup>495</sup> The entrapment defense “is based on the public policy notion that legislatures ‘could not  
 17 have intended criminal punishment for a defendant who has committed all the elements of a  
 18 proscribed offense but was induced to commit them by the Government.’”<sup>496</sup> A.R.S. § 13-206  
 19 provides:

20 A. It is an affirmative defense to a criminal charge that the person was  
 21 entrapped. To claim entrapment, the person must admit by the  
 22 person’s testimony or other evidence the substantial elements of the  
 23

24 <sup>492</sup> Exh. S-8 at 35.

25 <sup>493</sup> We are mindful of the confidentiality requirements imposed on the Division under A.R.S 44-2042, however, the fact  
 that the Arizona resident was an undercover investigator could have been disclosed without providing names or other  
 confidential information.

26 <sup>494</sup> We note that the Arizona Court of Appeals held that the defense of entrapment was available in an administrative  
 proceeding involving the loss of one’s professional or business license. *Fumusa v. Arizona State Bd. of Pharmacy*, 25  
 27 Ariz. App. 584, 586, 545 P.2d 432, 434 (App. 1976). However, the Arizona Supreme Court disapproved of the *Fumusa*  
 decision in *Sarwark v. Thorneycroft*, 123 Ariz. 23, 597 P.2d 9 (1979).

28 <sup>495</sup> *State v. Preston*, 197 Ariz. 461, 464, 4 P.3d 1004, 1007 (App. 2000).

<sup>496</sup> *Id.* citing *United States v. Russell*, 411 U.S. 423, 435, 93 S.Ct. 1637, 1644, 36 L.Ed.2d 366, 375 (1973).

1 offense charged.

2 B. A person who asserts an entrapment defense has the burden of  
3 proving the following by clear and convincing evidence:

- 4 1. The idea of committing the offense started with law  
5 enforcement officers or their agents rather than with  
6 the person.
- 7 2. The law enforcement officers or their agents urged  
8 and induced the person to commit the offense.
- 9 3. The person was not predisposed to commit the type  
10 of offense charged before the law enforcement  
11 officers or their agents urged and induced the person  
12 to commit the offense.

13 C. A person does not establish entrapment if the person was  
14 predisposed to commit the offense and the law enforcement officers  
15 or their agents merely provided the person with an opportunity to  
16 commit the offense. It is not entrapment for law enforcement  
17 officers or their agents merely to use a ruse or to conceal their  
18 identity. The conduct of law enforcement officers and their agents  
19 may be considered in determining if a person has proven  
20 entrapment.

21 The clearest indication of legislative intent is a statute's language.<sup>497</sup> Under A.R.S. § 13-  
22 206(A), the defense of entrapment is expressly limited to a criminal charge. Had the legislature  
23 intended to extend the defense of entrapment to administrative proceedings, A.R.S. § 13-206 could  
24 have so stated, or a parallel statute could have been adopted in the Administrative Procedure Act.  
25 Without such legislative action, we conclude the entrapment defense does not apply to violations of  
26 the Securities Act brought before the Commission.<sup>498</sup> Accordingly, Mr. Steiner cannot rely upon

27 <sup>497</sup> *Lowing v. Allstate Ins. Co.*, 176 Ariz. 101, 859 P.2d 724 (1993).

28 <sup>498</sup> We note that even if the defense of entrapment was found applicable to administrative proceedings, the Respondents would be unable to avail themselves of the defense. The Respondents' numerous sales of unregistered securities before

1 entrapment as a defense to the Securities Act violations arising from his offer to sell to MM.

2 D. Did the Respondents Violate the Antifraud Provisions of the Arizona Securities Act?

3 The Division raises two allegations of fraud under A.R.S. § 44-1991(A)(2): 1) the  
4 Respondents failed to use funds in the manner represented to investors, and 2) the Respondents failed  
5 to disclose the T.O. to subsequent investors.<sup>499</sup> Under A.R.S. § 44-1991(A)(2), materiality will be  
6 found by showing a substantial likelihood that, under all circumstances, the misstated or omitted fact  
7 would have assumed actual significance in the deliberations of a reasonable buyer.<sup>500</sup> The test is an  
8 objective one, not subject to the actual significance of an omission or misstatement to any particular  
9 buyer.<sup>501</sup>

10 1. Misuse of Investors' Funds

11 The Division contends that the Respondents committed fraud in connection with the offer or  
12 sale of the OBP investments by misusing investor funds.

13 The Respondents contend that an A.R.S. § 44-1991(A)(2) claim must fail because how OBP  
14 investor funds were used by Lunsford Consulting is not material information to investors. The  
15 Respondents argue the use of funds is immaterial because OBP investors do not bear the burden of  
16 Lunsford Consulting's expenses as investors are to receive a percentage of Lunsford Consulting's  
17 gross revenue and OBP was structured to prevent dilution of investor funds. The Respondents argued

18  
19 and after the offer to MM demonstrate a predisposition to commit the offense. Further, we cannot say that the Division's  
investigator "urged and induced" the offer to sell when MM specifically texted Mr. Steiner that she would not make an  
investment only for him to pursue further discussion of the matter.

20 <sup>499</sup> **A.R.S. § 44-1991. Fraud in purchase or sale of securities**

21 A. It is a fraudulent practice and unlawful for a person, in connection with a transaction or transactions within or from this  
state involving an offer to sell or buy securities, or a sale or purchase of securities, including securities exempted under  
section 44-1843 or 44-1843.01 and including transactions exempted under section 44-1844, 44-1845 or 44-1850, directly  
22 or indirectly to do any of the following:

23 1. Employ any device, scheme or artifice to defraud.

24 2. Make any untrue statement of material fact, or omit to state any material fact necessary in order to make the statements  
made, in the light of the circumstances under which they were made, not misleading.

25 3. Engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit.

26 B. In a private action brought pursuant to subsection A, paragraph 2 of this section or section 44-1992, if the person who  
offered or sold the security proves that any portion or all of the amount recoverable under subsection A, paragraph 2 of  
this section or section 44-1992 represents an amount other than the depreciation in value of the subject security resulting  
from the part of the prospectus or oral communication, with respect to which the liability of the person is asserted, not  
being true or omitting to state a material fact required to be stated or necessary to make the statement not misleading, then  
the amount shall not be recoverable. This subsection does not apply to any actions based on allegations of activities  
constituting dishonest or unethical practices in the securities industry.

27 <sup>500</sup> *Trimble v. Am. Sav. Life Ins. Co.*, 152 Ariz. 548, 553, 733 P.2d 1131, 1136 (App. 1986).

28 <sup>501</sup> *Id.*



1 similarly as to why financial records need not have been disclosed to investors. We rejected this  
2 argument, *supra*, because the likelihood of Lunsford Consulting obtaining gross revenue, the only  
3 potential source of a return of investment for purchasers, would be greatly diminished if investor  
4 funds were mismanaged or subject to malfeasance. Accordingly, we find that untrue statements or  
5 omissions regarding the use of investor funds would be considered material facts under A.R.S. § 44-  
6 1991(A)(2).

7 The Respondents further contend that monies paid to Mr. Steiner are properly considered as  
8 business expenses of Lunsford Consulting. Respondents argue that since the investors were told their  
9 monies would be used for Lunsford Consulting's business expenses, no misinformation was given to  
10 investors. The Respondents cite the Internal Revenue Code which considers deductible ordinary and  
11 necessary business expenses to include "a reasonable allowance for salaries or other compensation  
12 for personal services actually rendered."<sup>502</sup> The Respondents argue that this is a logical conclusion,  
13 contending that "[n]o person, sophisticated or otherwise, should expect others to work (render  
14 services) for free in a business context."<sup>503</sup>

15 The Respondents contend that they should be able to rely upon the Internal Revenue Code's  
16 definition of deductible business expenses when considering what constitutes appropriate use of  
17 investor funds. This argument implies that the tax code should also put OBP investors on notice of  
18 what would be included as appropriate business expenses. We note that the Division neither directly  
19 argues against applying the tax code definition of business expenses, nor provides an alternate  
20 definition for business expenses under securities law. If we adopt the Internal Revenue Code's  
21 definition of business expenses, the monies in question would need to meet the two-prong test under  
22 section 162(a)(1): 1) the amount of compensation must be reasonable and 2) the payments must in  
23 fact be purely for services.<sup>504</sup> The record does not establish that Mr. Steiner's personal use of OBP  
24 investors' funds satisfies either of these two prongs.

25 The first prong requires that the amount of compensation be reasonable. However, from the  
26 record, it is impossible to identify the exact amount of compensation received by Mr. Steiner. Mr.

27 <sup>502</sup> 26 U.S.C. § 162(a)(1).

28 <sup>503</sup> Respondents' Post-Hearing Brief at 20.

<sup>504</sup> *Elliotts, Inc. v. C.I.R.*, 716 F.2d 1241, 1243 (9th Cir. 1983).

1 Steiner did not collect a set amount of salary.<sup>505</sup> Though required by the terms of the Operating  
 2 Agreement given to investors, OBP did not keep books or accounting records.<sup>506</sup> Monies were  
 3 transferred to Lunsford Consulting and Second Opinion, which also did not maintain books and  
 4 accounting records.<sup>507</sup> No records were kept of compensation paid to Mr. Steiner.<sup>508</sup> Hundreds of  
 5 thousands of dollars of cash withdrawals, claimed to be used for the benefit of Lunsford Consulting,  
 6 could not be substantiated by the Respondents.<sup>509</sup> Without a showing of the amount of compensation  
 7 received by Mr. Steiner, we cannot find that the compensation received was reasonable under section  
 8 162(a)(1).

9 As to the second prong, the record fails to establish that payments made to Mr. Steiner were  
 10 purely for services. As already noted, Mr. Steiner did not receive any set salary. The record shows  
 11 no correlation between actual services rendered and the payments made to Mr. Steiner. Rather, the  
 12 record suggests payments were made strictly based on Mr. Steiner's personal needs, including  
 13 \$29,500 for the lease of his home, and thousands of dollars in monthly personal credit card  
 14 charges.<sup>510</sup> Based on the evidence of record, we cannot find that Mr. Steiner received payment of  
 15 investor funds purely for his services. Contrary to the Respondents' assertions, the record does not  
 16 establish that investor funds used by Mr. Steiner for his personal expenses constituted ordinary and  
 17 necessary business expenses.

18 This conclusion does not mean, as the Respondents argue, that investors should expect work  
 19 to be performed for free. Indeed, some investors testified that they would expect Mr. Steiner to have  
 20 received compensation from investor funds.<sup>511</sup> However, these witnesses also testified that they  
 21 would have expected OBP and Lunsford to have kept records of their expenses.<sup>512</sup> Other investors  
 22 could not recall having discussions as to how Mr. Steiner would be compensated.<sup>513</sup> Ms. Flowers  
 23 testified that she expected OBP's managers to be paid through Lunsford Consulting from revenue

24 <sup>505</sup> Exh. S-8 at 70.

25 <sup>506</sup> Tr. at 185; Exhs. S-11, S-24, S-41, S-71, S-72.

26 <sup>507</sup> Tr. at 136-139; Exhs. S-22, S-23, S-42, S-43

27 <sup>508</sup> Tr. at 184; Exhs. S-25, S-49.

28 <sup>509</sup> Tr. at 171, 190; Exhs. S-32a-1, S-32a-2, S-32a-3.

<sup>510</sup> Tr. at 140-146, 178-180; Exhs. S-9 at 192-211, S-21, S-56, S-57.

<sup>511</sup> Tr. at 268-269, 361, 364-365.

<sup>512</sup> Tr. at 269, 360, 362-363.

<sup>513</sup> Tr. at 388, 413.

1 through contracts with Chinese companies.<sup>514</sup> Ms. Flowers' understanding was consistent with  
 2 section 3.6 of the Operating Agreement, given to all investors, which stated that OBP managers  
 3 would not initially receive compensation, and that future compensation would be paid out of gross  
 4 revenues.<sup>515</sup> Regardless of the subjective understanding of any individual investor, Mr. Steiner's  
 5 conversion of investor funds for his personal use rendered false this section of the Operating  
 6 Agreement. Accordingly, we find that the Respondents violated A.R.S. § 44-1991(A)(2) by making  
 7 an untrue statement of material fact to the investors in OBP.

8                   2. Failure to Disclose the T.O.

9           The Division contends that Ms. Flowers, Mr. Flores and Mr. Clay invested after the Division  
 10 had filed the T.O. The Division asserts that Mr. Steiner's failure to disclose the existence of the T.O.  
 11 to these investors constitutes fraud under A.R.S. § 44-1991(A)(2). In support of this argument, the  
 12 Division cites *State ex rel. Corbin v. Goodrich*, wherein the Court of Appeals held that certain  
 13 background information of a company's corporate officers, including prior administrative orders, a  
 14 cease and desist order, and a conviction, constituted material and relevant information that the  
 15 investors were entitled to know.<sup>516</sup> The Respondents fail to address this allegation in their post-  
 16 hearing brief.

17           We find that we cannot consider the merits of the Division's allegation as the Respondents did  
 18 not receive notice of this charge. The T.O. made no allegations of fraud against the Respondents.  
 19 The Division's Motion for Leave to Amend Notice of Opportunity for Hearing requested an  
 20 opportunity "to amend the Original Notice to include additional factual allegations and a fraud  
 21 claim."<sup>517</sup> This fraud claim read that "Respondents' conduct includes, but is not limited to,  
 22 misrepresenting to certain investors that their monies were only to be used for business expenses to  
 23 travel and entertain certain influential Chinese individuals related to the investment; however, on  
 24 multiple occasions investor funds were diverted for other, non-business-related uses."<sup>518</sup> The  
 25 Amended Notice did not mention the T.O., did not identify any specific sales made after issuance of

26 <sup>514</sup> Tr. at 199.

27 <sup>515</sup> Exhs. S-11 at ACC001086, S-71 at ACC005022, S-72.

28 <sup>516</sup> *State ex rel. Corbin v. Goodrich*, 151 Ariz. 118, 124, 726 P.2d 215, 221 (App. 1986).

<sup>517</sup> *Motion for Leave to Amend Notice of Opportunity for Hearing* (filed August 9, 2013) at 2.

<sup>518</sup> Amended Notice at ¶ 48.

1 the T.O., and did not allege fraud arising from a failure to disclose the T.O. to any purchasers.

2 The Administrative Procedure Act sets forth the notice requirements in a contested case.<sup>519</sup>

3 A.R.S. § 41-1061 provides, in pertinent part:

4 A. In a contested case, all parties shall be afforded an opportunity for  
5 hearing after reasonable notice. Unless otherwise provided by law,  
6 the notice shall be given at least twenty days prior to the date set for  
7 the hearing.

8 B. The notice shall include:

- 9 1. A statement of the time, place and nature of the hearing.  
10 2. A statement of the legal authority and jurisdiction  
11 under which the hearing is to be held.  
12 3. A reference to the particular sections of the statutes  
13 and rules involved.  
14 4. A short and plain statement of the matters asserted.  
15 If the agency or other party is unable to state the  
16 matters in detail at the time the notice is served, the  
17 initial notice may be limited to a statement of the  
18 issues involved. Thereafter upon application a more  
19 definite and detailed statement shall be furnished.

20 C. Opportunity shall be afforded all parties to respond and present  
21 evidence and argument on all issues involved.

22 Under A.R.S. § 41-1061(B)(4), notice in a contested case requires “[a] short and plain  
23 statement of the matters asserted.” This standard is akin to notice pleading. Arizona is a notice

24 <sup>519</sup> At the time of the filing of the Notice, A.R.S. § 41-1001(4) provided:

25 "Contested case" means any proceeding, including rate making, price fixing and licensing, in which the legal rights,  
26 duties or privileges of a party are required or permitted by law, other than this chapter, to be determined by an agency  
after an opportunity for an administrative hearing.

27 Effective July 24, 2014, the definition of contested case was amended pursuant to Laws 2014, Ch. 204 § 1. A.R.S. § 41-  
1001(5) provides:

28 "Contested case" means any proceeding, including rate making, except rate making pursuant to article XV, Constitution  
of Arizona, price fixing and licensing, in which the legal rights, duties or privileges of a party are required or permitted by  
law, other than this chapter, to be determined by an agency after an opportunity for an administrative hearing.

1 pleading state, therefore extensive fact pleading is not required.<sup>520</sup> The purpose of the notice pleading  
 2 standard “is to ‘give the opponent fair notice of the nature and basis of the claim and indicate  
 3 generally the type of litigation involved.’”<sup>521</sup> We find the Amended Notice fails to provide adequate  
 4 notice of a charge of fraud against the Respondents for failure to disclose the T.O. to subsequent  
 5 investors.

6 We note that the Commission’s rules allow for the amendment or correction of formal  
 7 documents and provide that “[f]ormal documents will be liberally construed and defects which do not  
 8 affect substantial rights of the parties will be disregarded.”<sup>522</sup> However, the Division at no time  
 9 requested leave to further amend the notice to include this second fraud allegation.<sup>523</sup> We note that  
 10 the Arizona Rules of Civil Procedure allow for the amendment of pleadings to conform to the  
 11 evidence admitted when issues not raised by the parties are tried by express or implied consent of the  
 12 parties.<sup>524</sup> However, the record does not establish the parties consented to expand the allegations in  
 13 the Amended Notice. On the contrary, Division’s counsel repeatedly relied upon the specific  
 14 allegations in the Amended Notice when objecting to the admissibility of evidence. Prior to the  
 15 testimony of Mr. Katenta, Division counsel objected to the relevance of his testimony, arguing:

16 [T]he Securities Division isn’t alleging that everything that Out of the  
 17 Blue did was illegal. The allegations are fairly specific in the notice  
 18 and the amended notice. Testimony beyond those allegations and  
 19 defenses of those allegations are irrelevant.<sup>525</sup>

20 Division counsel further argued the objection to Mr. Katenta’s testimony:

22 <sup>520</sup> *Rosenberg v. Rosenberg*, 123 Ariz. 589, 592-93, 601 P.2d 589, 592-93 (1979).

23 <sup>521</sup> *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. at 419, 189 P.3d at 346, quoting *Mackey v. Spangler*, 81 Ariz. 113, 115, 301  
 P.2d 1026, 1027-28 (1956).

24 <sup>522</sup> A.A.C. R14-3-106(E).

25 <sup>523</sup> We note that the Division, in its Response to Respondent’s [sic] Motion to Vacate Evidentiary Hearing Scheduled to  
 Begin on April 28, 2014, opposed the Respondents’ attempt to delay the hearing in part because the Respondents were  
 violating the T.O. and the Act by “continuing to illegally market and sell the securities,” which the Division intended to  
 show at hearing. *Response to Respondent’s [sic] Motion to Vacate Evidentiary Hearing Scheduled to Begin on April 28,*  
 26 *2014* (filed April 22, 2014) at 1. However, the Division’s response asserted no new allegation of fraud arising from these  
 sales, stating only that the Division would “show at hearing that Respondents fraudulently misrepresented to potential  
 27 investors how investor principal would be used to induce investment and then improperly diverted investor monies for  
 personal benefit.” *Id.* at 2.

28 <sup>524</sup> Ariz. R. Civ. P. Rule 15(b).

<sup>525</sup> Tr. at 295.

1 [T]he pleadings are specific. The original notice that [Respondent's  
2 counsel] identifies does not allege fraud at all. The amended notice  
3 does, and it details the type of fraud. ... The bases for the fraud down to  
4 some dollars and cents are detailed in the amended notice, and that is  
5 the improper use of monies as personal expenses...<sup>526</sup>

6 Counsel for the Division again objected to the relevance of the Respondents' next witness,  
7 Mr. Shreeve, "much on the same grounds as the previous witness."<sup>527</sup> Mr. Shreeve was allowed to  
8 testify over the Division's objection.<sup>528</sup> During Mr. Shreeve's testimony, Division counsel renewed  
9 his objection to the relevance of the testimony, stating that "[t]his action is brought against Mark  
10 Steiner and Out of the Blue regarding registration violations of Out of the Blue securities and the  
11 monies diverted by Out of the Blue."<sup>529</sup>

12 During the testimony of Mr. Steiner, counsel for the Division again relied upon the Amended  
13 Notice in objecting "to this line of questioning regarding the current projects of Lunsford as irrelevant  
14 to the claims of the Division or the defenses of the Respondents."<sup>530</sup> In arguing this objection,  
15 Division counsel further stated:

16 [T]he Division filed three claims against the Respondents. The first  
17 two are registration. They regard the nature of the offering. The issues  
18 related to those two claims end upon the investment. The third claim is  
19 a fraud claim under the Securities statute. It's not like a common law  
20 fraud claim. It's a fraud claim under the Securities statute, and it goes  
21 to the uses and diversions of investor monies by Mr. Steiner and Out of  
22 the Blue. What Lunsford Consulting did, whether or not the Peoples  
23 Republic of China, the country of Nigeria, Sinosteel, et cetera, conduct  
24 business around the world is a nonissue as to these three claims.<sup>531</sup>

25  
26 <sup>526</sup> Tr. at 296.

<sup>527</sup> Tr. at 312.

<sup>528</sup> Tr. at 313.

<sup>529</sup> Tr. at 315.

<sup>530</sup> Tr. at 509.

<sup>531</sup> Tr. at 511-512.

1 The Division states that it discovered the Respondents' continuing offer and sale of  
2 membership interests in violation of the T.O. after the Amended Notice was filed.<sup>532</sup> However, the  
3 Division could have sought leave to file a second amended notice of opportunity for hearing. Not  
4 only was no notice given of this allegation prior to the hearing, but at the hearing the Division  
5 repeatedly argued that the only fraud allegation against the Respondents involved the use of investor  
6 monies. Accordingly, we dismiss the Division's allegation of fraud for the Respondents' failure to  
7 disclose the T.O. to subsequent purchasers.

8 E. Was Mr. Steiner a Control Person for OBP?

9 The Division contends that Mr. Steiner was a controlling person of OBP pursuant to A.R.S. §  
10 44-1999(B). Under A.R.S. § 44-1999(B), "Every person who, directly or indirectly, controls any  
11 person liable for a violation of section 44-1991 or 44-1992 is liable jointly and severally with and to  
12 the same extent as the controlled person to any person to whom the controlled person is liable unless  
13 the controlling person acted in good faith and did not directly or indirectly induce the act underlying  
14 the action." For the purposes of A.R.S. § 44-1999(B), a person may include an individual,  
15 corporation or limited liability company.<sup>533</sup> A.R.S. § 44-1999(B) imposes "presumptive control  
16 liability on those persons who have the power to directly or indirectly control the activities of those  
17 persons or entities liable as primary violators of §§ 44-1991 or -1992."<sup>534</sup>

18 The Division argues that Mr. Steiner is a manager of OBP and he directly induced all acts of  
19 OBP. The Division contends that Mr. Steiner "performed all managerial functions for OBP,  
20 including: (1) locating and communicating with potential investors; (2) exercising sole control over  
21 OBP's bank accounts; (3) exercising control over investor funds; (4) signing investors' investment  
22 documents on behalf of OBP; (5) giving updates to investors; and (6) negotiating and entering  
23 agreements on OBP's behalf, including the [Private Placement Agreement] with Lunsford  
24 Consulting."<sup>535</sup> The Respondents fail to address the allegation of control person liability in their  
25 post-hearing brief.

26  
27 <sup>532</sup> Division's Post-Hearing Opening Brief at 3.

<sup>533</sup> A.R.S. § 44-1801(16).

<sup>534</sup> *Eastern Vanguard Forex, Ltd. v. Arizona Corp. Comm'n*, 206 Ariz. 399, 412, 79 P.3d 86, 99 (App. 2003).

<sup>535</sup> Division's Post-Hearing Opening Brief at 20.

1 The Division's recitation of facts evidencing control person liability is supported by the  
 2 record. The record establishes that not only did Mr. Steiner have the power to control and manage  
 3 OBP, but he actively exercised his control in OBP's conduct of business and sale of securities.  
 4 Accordingly, Mr. Steiner is jointly and severally liable with OBP for the violations of A.R.S. § 44-  
 5 1991.

6 **F. Is the Steiner Marital Community Subject to Liability?**

7 The Division contends that the marital community of Steiner and Respondent Spouse are  
 8 liable for any restitution and administrative penalties ordered. The Respondents make no specific  
 9 assertions regarding liability of the marital community.

10 The Commission has the authority to join a spouse in an action to determine the liability of  
 11 the marital community.<sup>536</sup> With limited exceptions, all property acquired by either the husband or the  
 12 wife during marriage is the community property of both husband and wife.<sup>537</sup> The Arizona Supreme  
 13 Court has found that "the presumption of law is, in the absence of the contrary showing, that all  
 14 property acquired and all business done and transacted during coverture, by either spouse, is for the

15 \_\_\_\_\_  
 16 <sup>536</sup> **A.R.S. § 44-2031. Jurisdiction and venue of offenses and actions; joinder of spouse**

17 A. The superior court in this state shall have jurisdiction over violations of this chapter, the rules and orders of the  
 18 commission under this chapter and all actions brought to enforce any liability or duty created under this chapter, except  
 19 actions or proceedings brought under section 44-2032, paragraph 2, 3 or 4 or appeals filed under article 12 of this chapter,  
 20 over which the superior court in Maricopa county shall have exclusive jurisdiction.

21 B. Any action authorized by this chapter may be brought in the county in which the defendant is found, is an inhabitant or  
 22 transacts business, or in the county where the transaction took place, and in such cases, process may be served in any  
 23 other county in which the defendant is an inhabitant or in which the defendant is found.

24 C. The commission may join the spouse in any action authorized by this chapter to determine the liability of the marital  
 25 community.

26 A.R.S. § 44-2031(C) was amended effective July 24, 2014, pursuant to Laws 2014, Ch. 87 § 1, to include the following  
 27 sentence: This subsection does not authorize the commission to join any individual who is divorced from the defendant at  
 28 the time an action authorized by this chapter is filed.

<sup>537</sup> **A.R.S. § 25-211. Property acquired during marriage as community property; exceptions; effect of service of a  
 petition**

A. All property acquired by either husband or wife during the marriage is the community property of the husband and  
 wife except for property that is:

1. Acquired by gift, devise or descent.

2. Acquired after service of a petition for dissolution of marriage, legal separation or annulment if the petition results in a  
 decree of dissolution of marriage, legal separation or annulment.

B. Notwithstanding subsection A, paragraph 2, service of a petition for dissolution of marriage, legal separation or  
 annulment does not:

1. Alter the status of preexisting community property.

2. Change the status of community property used to acquire new property or the status of that new property as community  
 property.

3. Alter the duties and rights of either spouse with respect to the management of community property except as prescribed  
 pursuant to section 25-315, subsection A, paragraph 1, subdivision (a).



1 community.”<sup>538</sup>

2 Under A.R.S. § 25-214(B), the spouses have “equal management, control and disposition  
3 rights over their community property and have equal power to bind the community.”<sup>539</sup> Either spouse  
4 may contract debts and otherwise act for the benefit of the community except as prohibited under  
5 A.R.S. § 25-214.<sup>540</sup> “[A] debt is incurred at the time of the actions that give rise to the debt.”<sup>541</sup> “In  
6 an action on such a debt or obligation the spouses shall be sued jointly and the debt or obligation shall  
7 be satisfied: first, from the community property, and second, from the separate property of the spouse  
8 contracting the debt or obligation.”<sup>542</sup> “A debt incurred by a spouse during marriage is presumed to  
9 be a community obligation; a party contesting the community nature of a debt bears the burden of  
10 overcoming that presumption by clear and convincing evidence.”<sup>543</sup>

11 Mr. Steiner and Respondent Spouse have been married since 1987.<sup>544</sup> Mr. Steiner and  
12 Respondent Spouse have been residents of Arizona since July 1997.<sup>545</sup> The securities law violations

13  
14 <sup>538</sup> *Johnson v. Johnson*, 131 Ariz. 38, 45, 638 P.2d 705, 712 (1981), citing *Benson v. Hunter*, 23 Ariz. 132, 134-35, 202 P. 233, 233-34 (1921).

15 <sup>539</sup> **A.R.S. § 25-214. Management and control**

- 16 A. Each spouse has the sole management, control and disposition rights of each spouse's separate property.  
17 B. The spouses have equal management, control and disposition rights over their community property and have equal  
18 power to bind the community.  
19 C. Either spouse separately may acquire, manage, control or dispose of community property or bind the community,  
20 except that joinder of both spouses is required in any of the following cases:  
21 1. Any transaction for the acquisition, disposition or encumbrance of an interest in real property other than an unpatented  
22 mining claim or a lease of less than one year.  
23 2. Any transaction of guaranty, indemnity or suretyship.  
24 3. To bind the community, irrespective of any person's intent with respect to that binder, after service of a petition for  
25 dissolution of marriage, legal separation or annulment if the petition results in a decree of dissolution of marriage, legal  
26 separation or annulment.

27 <sup>540</sup> **A.R.S. § 25-215. Liability of community property and separate property for community and separate debts**

- 28 A. The separate property of a spouse shall not be liable for the separate debts or obligations of the other spouse, absent  
agreement of the property owner to the contrary.  
B. The community property is liable for the premarital separate debts or other liabilities of a spouse, incurred after  
September 1, 1973 but only to the extent of the value of that spouse's contribution to the community property which  
would have been such spouse's separate property if single.  
C. The community property is liable for a spouse's debts incurred outside of this state during the marriage which would  
have been community debts if incurred in this state.  
D. Except as prohibited in section 25-214, either spouse may contract debts and otherwise act for the benefit of the  
community. In an action on such a debt or obligation the spouses shall be sued jointly and the debt or obligation shall be  
satisfied: first, from the community property, and second, from the separate property of the spouse contracting the debt or  
obligation.

<sup>541</sup> *Arab Monetary Fund v. Hashim*, 219 Ariz. 108, 111, 193 P.3d 802, 805 (Ct. App. 2008).

<sup>542</sup> A.R.S. § 25-215(D).

<sup>543</sup> *Hrudka v. Hrudka*, 186 Ariz. 84, 91-92, 919 P.2d 179, 186-87 (Ct. App. 1995).

<sup>544</sup> Tr. at 449; Exh. S-8 at 7.

<sup>545</sup> Exh. S-8 at 7.

1 committed by Mr. Steiner occurred while he and Respondent Spouse were married. Any debt created  
 2 by an order for restitution and administrative penalties arising from those violations would be  
 3 considered as having been incurred at the time of the violation. The Respondents have presented no  
 4 evidence to rebut the legal presumption that such debt would be a liability of the marital community.

5 G. Are the Respondents Liable for Restitution and Administrative Penalties?

6 The Division contends that the Respondents should be ordered to pay restitution and  
 7 administrative penalties for violations of the Arizona Securities Act.

8 1. Restitution

9 The Division contends that the Commission should order the Respondents to pay restitution in  
 10 the amount of \$2,495,500. This amount represents the monies invested by thirty-five investors who  
 11 have not received a return of any of their principal. In their post-hearing brief, the Respondents do  
 12 not address the amount of restitution recommended by the Division.

13 The Commission has the authority to order restitution pursuant to A.R.S. § 44-2032.<sup>546</sup> The  
 14 evidence of record established that approximately between June 2008 and May 2011, an initial wave  
 15 of OBP membership interests was sold for \$1,773,000 to twenty-eight investors, two of whom  
 16 received their membership interests as a gift from another purchaser.<sup>547</sup> Three of these purchasers  
 17 subsequently contributed an additional \$90,000 total.<sup>548</sup> Beginning approximately May 2011 through  
 18 2013, a second wave of OBP membership sales generated \$577,500 in investments from nine  
 19 purchasers.<sup>549</sup> Two of these nine purchasers contributed an additional \$55,000 total.<sup>550</sup> From these  
 20 investments, totaling \$2,495,500, the Respondents have returned no money to any of the investors.

21  
 22 <sup>546</sup> A.R.S. § 44-2032 provides, in pertinent part:

23 If it appears to the commission, either on complaint or otherwise, that any person has engaged in, is engaging in or is  
 24 about to engage in any act, practice or transaction that constitutes a violation of this chapter, or any rule or order of the  
 25 commission under this chapter, the commission, in its discretion may:

26 1. Issue an order directing such person to cease and desist from engaging in the act, practice or transaction, or doing any  
 27 other act in furtherance of the act, practice or transaction, and to take appropriate affirmative action within a reasonable  
 28 period of time, as prescribed by the commission, to correct the conditions resulting from the act, practice or transaction  
 including, without limitation, a requirement to provide restitution as prescribed by rules of the commission. ...

<sup>547</sup> Tr. at 382-385, 393, 491-492; Exhs. S-13, S-19, S-38, S-60-b. Not included among these twenty-eight investors are  
 two other purchasers whose principal was refunded. Tr. at 120-121, 124-125, 137, 146-149; Exhs. S-10 at 325-337, S-35,  
 S-62.

<sup>548</sup> Exh. S-19.

<sup>549</sup> Exhs. S-19, S-39.

<sup>550</sup> Exh. S-19.

1 Accordingly, the Respondents should be liable for restitution in the amount of \$2,495,500, plus  
2 interest.

3                   2. Administrative Penalties

4           The Division recommends that the Respondents be ordered to pay an administrative penalty in  
5 the amount of \$50,000. The Division alleges that the Respondents committed a total of seventy-five  
6 violations of registration requirements of the Securities Act. The Division contends that the  
7 Respondents, without being registered, offered and sold unregistered securities to thirty-five  
8 investors, for a total of seventy violations of the registration provisions of the Securities Act. The  
9 Division alleges another four violations arising from the offer and sale to two additional investors  
10 who received a return of their principal. The Division alleges a further registration violation arising  
11 from the offer of securities to MM. Additionally, the Division contends that each offer and sale  
12 involved fraud, thereby resulting in seventy-five violations of A.R.S. § 44-1991. In their Post-  
13 Hearing Brief, the Respondents do not address the amount of the administrative penalties  
14 recommended by the Division.

15           Under A.R.S. § 44-2036(A), the Commission has authority to assess an administrative penalty  
16 of no more than \$5,000 for each violation committed.<sup>551</sup> The record established that OBP and Mr.  
17 Steiner acted as unregistered dealers or salesmen in the offer and sale of unregistered securities to  
18 thirty-seven investors with one additional offer not resulting in a sale. Accordingly, we find the  
19 Respondents committed seventy-five total violations of A.R.S. §§ 44-1841 and 44-1842. We have  
20 dismissed the allegation of fraud arising from the Respondents' failure to disclose the T.O. However,  
21 without considering this accusation, all seventy-five offers and sales still involved fraud under A.R.S  
22 § 44-1991, based upon the misuse of investor funds in violation of terms of the Operating Agreement  
23 given to investors. In light of the maximum penalties allowed, we consider the Division's  
24 recommendation to be appropriate. Accordingly, an administrative penalty of \$50,000 shall be  
25 assessed against the Respondents.

26 \_\_\_\_\_  
27 <sup>551</sup> A.R.S. § 44-2036 provides, in pertinent part:

28 A. A person who, in an administrative action, is found to have violated any provision of this chapter or any rule or order of the commission may be assessed an administrative penalty by the commission, after a hearing, in an amount of not to exceed five thousand dollars for each violation.

\* \* \* \* \*

1  
2 Having considered the entire record herein and being fully advised in the premises, the  
3 Commission finds, concludes, and orders that:

4 **FINDINGS OF FACT**

5 1. At all times relevant, Mark Steiner, CRD# 1834102, has been an Arizona resident.<sup>552</sup>

6 2. Shelly Steiner was at all relevant times the spouse of Mark Steiner and an Arizona  
7 resident.<sup>553</sup>

8 3. Out of the Blue Processors, LLC, is an Arizona limited liability company organized on  
9 December 18, 2000.<sup>554</sup>

10 4. Out of the Blue Processors, LLC, also uses the name "Out of the Blue Processors II,  
11 LLC," an unorganized business.<sup>555</sup> Out of the Blue Processors, LLC, directly and using the name Out  
12 of the Blue Processors II, LLC, is referred to below as "OBP."

13 5. Mr. Steiner is a managing member of OBP.<sup>556</sup>

14 6. Mr. Steiner has not been a registered securities salesman with the Commission since  
15 April 13, 2005.<sup>557</sup>

16 7. Lunsford Consulting is an Arizona limited liability company organized on July 30,  
17 2010.<sup>558</sup>

18 8. Mr. Steiner is a managing member of Lunsford Consulting.<sup>559</sup>

19 9. At all relevant times, the Respondents were not registered as dealers or salesmen with  
20 the Commission.<sup>560</sup>

21 10. The interests offered and sold through the "Operating Agreement of Out of the Blue  
22 Processors, LLC" dated June 1, 2008, and the Operating Agreement of Out of the Blue Processors, II,  
23

24 <sup>552</sup> Joint Fact Stipulations at ¶ 1.

25 <sup>553</sup> Exh. S-8 at ACC000987.

26 <sup>554</sup> Joint Fact Stipulations at ¶ 2; Amended Notice at ¶ 3; Amended Answer at ¶ 3.

27 <sup>555</sup> Joint Fact Stipulations at ¶ 3; Amended Notice at ¶ 4; Amended Answer at ¶ 4.

28 <sup>556</sup> Joint Fact Stipulations at ¶ 4.

<sup>557</sup> Joint Fact Stipulations at ¶ 5; Amended Notice at ¶ 6; Amended Answer at ¶ 6.

<sup>558</sup> Joint Fact Stipulations at ¶ 7; Amended Notice at ¶ 31; Amended Answer at ¶ 31.

<sup>559</sup> Joint Fact Stipulations at ¶ 8; Amended Notice at ¶ 32; Amended Answer at ¶ 32.

<sup>560</sup> Joint Fact Stipulations at ¶ 9; Amended Notice at ¶¶ 6, 41; Amended Answer at ¶¶ 6, 41.

1 LLC, dated May 1, 2011, are not registered with the Commission.<sup>561</sup>

2 11. From about 2008, the Respondents have been offering or selling securities in the form  
3 of investment contracts, within or from Arizona.<sup>562</sup>

4 12. The securities referred to above are not registered pursuant to Articles 6 or 7 of the  
5 Securities Act.<sup>563</sup>

6 13. The Respondents are offering or selling securities within or from Arizona while not  
7 registered as dealers or salesmen pursuant to Article 9 of the Securities Act.<sup>564</sup>

8 14. On March 25, 2008, OBP and Lunsford Consulting executed a Private Placement  
9 Agreement.<sup>565</sup> Within the recitals of the Private Placement Agreement, Lunsford Consulting  
10 identifies its business as “acting as intermediary for various Chinese interests (“the Clients”) for the  
11 purpose of identifying, documenting, and securing funding for Client controlled projects” and OBP  
12 states it has access to requisite capital for Lunsford Consulting’s operations.<sup>566</sup> Under the terms of  
13 the Private Placement Agreement, OBP would provide Lunsford Consulting with \$1,500,000 in  
14 exchange for 10% of Lunsford Consulting’s gross revenues, less any commissions or fees, until the  
15 principal is returned, then 5% in perpetuity thereafter.<sup>567</sup> If Lunsford Consulting required additional  
16 capital, another \$750,000 could be provided in exchange for 5% of Lunsford Consulting’s gross  
17 revenues, less any commissions or fees, until the principal is returned, then 2.5% in perpetuity  
18 thereafter.<sup>568</sup>

19 15. Approximately between June 2008 and May 2011, the Respondents sold an initial  
20 wave of \$1,773,000 in OBP membership interests to twenty-eight investors, two of whom received  
21 their membership interests as a gift from another purchaser.<sup>569</sup> An additional \$90,000 total was  
22 contributed from three of these investors.<sup>570</sup> Another two investors purchased membership interests  
23

24 <sup>561</sup> Joint Fact Stipulations at ¶ 10; Amended Notice at ¶ 42; Amended Answer at ¶ 42.

25 <sup>562</sup> Joint Fact Stipulations at ¶ 11; Amended Notice at ¶ 43; Amended Answer at ¶ 43.

26 <sup>563</sup> Joint Fact Stipulations at ¶ 12; Amended Notice at ¶ 44; Amended Answer at ¶ 44.

27 <sup>564</sup> Joint Fact Stipulations at ¶ 13; Amended Notice at ¶ 46; Amended Answer at ¶ 46.

28 <sup>565</sup> Exh. S-20.

<sup>566</sup> Exh. S-20 at ACC000932.

<sup>567</sup> Exh. S-20 at ACC000932-ACC000933.

<sup>568</sup> Exhs. S-20 at ACC000933.

<sup>569</sup> Tr. at 382-385, 393, 491-492; Exhs. S-13, S-19, S-38, S-60-b.

<sup>570</sup> Exh. S-19.

1 but requested and received a return of their principal from the Respondents.<sup>571</sup>

2 16. Approximately between May 2011 through 2013, the Respondents sold a second wave  
3 of \$577,500 in OBP membership interests to nine investors.<sup>572</sup> An additional \$55,000 total was  
4 contributed from two of these investors.<sup>573</sup>

5 17. OBP investors were given an Operating Agreement.<sup>574</sup> The Operating Agreement  
6 explained that OBP would distribute revenues received from Lunsford Consulting to investors  
7 according to each investor's percentage ownership.<sup>575</sup>

8 18. OBP investors were informed by the Respondents that their investment funds would  
9 be used for Lunsford Consulting's business expenses.<sup>576</sup> The Operating Agreement stated that OBP's  
10 manager would initially receive no compensation due to OBP's limited managerial requirements.<sup>577</sup>  
11 The Operating Agreement further stated that if OBP's managerial requirements were to increase, the  
12 manager would be paid from gross revenues.<sup>578</sup>

13 19. Contrary to the statements made to investors and the terms of the Operating  
14 Agreement, Mr. Steiner used investors' monies for personal expenses, including \$29,500 for the lease  
15 of his home and thousands of dollars in personal monthly credit card charges.<sup>579</sup>

16 20. In January 2012, a Division investigator, under the alias MM, contacted Mr. Steiner  
17 via email inquiring about an investment opportunity.<sup>580</sup>

18 21. Through emails, text messages and a phone conversation, Mr. Steiner and MM  
19 discussed her investing in OBP.<sup>581</sup> Mr. Steiner emailed MM with wiring instructions for her  
20 investment monies and provided a copy of the OBP Operating Agreement, signed by Mr. Steiner,  
21 identifying MM as having a 33.3333% interest in OBP II.<sup>582</sup>

22  
23 <sup>571</sup> Tr. at 120-121, 124-125, 137, 146-149; Exhs. S-10 at 325-337, S-35, S-62.

24 <sup>572</sup> Exhs. S-19, S-39.

25 <sup>573</sup> Exh. S-19.

26 <sup>574</sup> Tr. at 206-207, 263, 355, 385, 408; Exhs. S-8 at 54, S-11, S-71, S-72.

27 <sup>575</sup> Exhs. S-11 at ACC001090, S-71 at ACC005026, S-72.

28 <sup>576</sup> Tr. at 207, 231, 363-364, 372, 378-379; 400.

<sup>577</sup> Exhs. S-11 at ACC001086, S-71 at ACC005022, S-72.

<sup>578</sup> *Id.*

<sup>579</sup> Tr. at 140-146, 178-180; Exhs. S-9 at 192-211, S-21, S-56, S-57.

<sup>580</sup> Tr. at 41-41; Exh. S-37 at ACC000324.

<sup>581</sup> Exhs. S-36, S-37.

<sup>582</sup> Tr. at 561; Exh. S-11, Exh. S-37 at ACC0003333.



**ORDER**

1  
2 IT IS THEREFORE ORDERED that pursuant to the authority granted to the Commission  
3 under A.R.S. § 44-2032, Respondents Out of the Blue Processors, LLC, and Mark Steiner, shall cease  
4 and desist from their actions, as described above, in violation of A.R.S. §§ 44-1841, 44-1842 and 44-  
5 1991.

6 IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under  
7 A.R.S. § 44-2032, Respondents Out of the Blue Processors, LLC, Mark Steiner, individually, and, to  
8 the extent allowable pursuant to A.R.S. § 25-215, the marital community of Mark Steiner and Shelly  
9 Steiner, jointly and severally, shall make restitution in the amount of \$2,495,500, payable to the  
10 Arizona Corporation Commission within 90 days of the effective date of this Decision. Such  
11 restitution shall be made pursuant to A.A.C. R14-4-308 subject to legal setoffs by the Respondents  
12 and confirmed by the Director of Securities.

13 IT IS FURTHER ORDERED that all ordered restitution payments shall be deposited into an  
14 interest-bearing account(s), if appropriate, until distributions are made.

15 IT IS FURTHER ORDERED that the ordered restitution shall bear interest at the rate of the  
16 lesser of 10 percent *per annum*, or at a rate *per annum* that is equal to one percent plus the prime rate  
17 as published by the Board of Governors of the Federal Reserve System of Statistical Release H.15, or  
18 any publication that may supersede it on the date that the judgment is entered.

19 IT IS FURTHER ORDERED that the Commission shall disburse the restitution funds on a  
20 *pro rata* basis to the investors shown on the records of the Commission. Any restitution funds that  
21 the Commission cannot disburse because an investor refuses to accept such payment, or any  
22 restitution funds that cannot be disbursed to an investor because the investor is deceased and the  
23 Commission cannot reasonably identify and locate the deceased investor's spouse or natural children  
24 surviving at the time of distribution, shall be disbursed on a *pro rata* basis to the remaining investors  
25 shown on the records of the Commission. Any funds that the Commission determines it is unable to  
26 or cannot feasibly disburse shall be transferred to the general fund of the State of Arizona.

27 IT IS FURTHER ORDERED that Respondents Out of the Blue Processors, LLC, Mark  
28 Steiner, individually, and the marital community of Mark Steiner and Shelly Steiner, jointly and



1 severally, shall pay to the State of Arizona administrative penalties in the amount of \$50,000 for Out  
2 of the Blue Processors, LLC's and Mr. Steiner's multiple violations of the registration and antifraud  
3 provisions of the Securities Act, pursuant to A.R.S. §§ 44-2036 and 25-215. Said administrative  
4 penalties shall be payable by either cashier's check or money order payable to "the State of Arizona"  
5 and presented to the Arizona Corporation Commission for deposit in the general fund for the State of  
6 Arizona.

7 IT IS FURTHER ORDERED that the payment obligations for these administrative penalties  
8 shall be subordinate to the restitution obligations ordered herein and shall become immediately due  
9 and payable only after restitution payments have been paid in full or upon Respondents' default with  
10 respect to Respondents' restitution obligations.

11 IT IS FURTHER ORDERED that if Respondents fail to pay the administrative penalties  
12 ordered hereinabove, any outstanding balance plus interest, at the rate of the lesser of ten percent *per*  
13 *annum* or at a rate *per annum* that is equal to one percent plus the prime rate as published by the  
14 Board of Governors of the Federal Reserve System in Statistical Release H.15 or any publication that  
15 may supersede it on the date that the judgment is entered, may be deemed in default and shall be  
16 immediately due and payable, without further notice.

17 IT IS FURTHER ORDERED that if any of the Respondents fail to comply with this Order,  
18 any outstanding balance shall be in default and shall be immediately due and payable without notice  
19 or demand. The acceptance of any partial or late payment by the Commission is not a waiver of  
20 default by the Commission.

21 IT IS FURTHER ORDERED that default shall render Respondents liable to the Commission  
22 for its cost of collection and interest at the maximum legal rate.

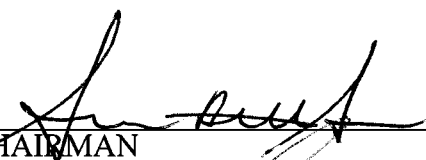
23 IT IS FURTHER ORDERED that if any of the Respondents fail to comply with this Order,  
24 the Commission may bring further legal proceedings against the Respondent(s) including application  
25 to the Superior Court for an order of contempt.

26 ...  
27 ...  
28 ...

1 IT IS FURTHER ORDERED that pursuant to A.R.S. § 44-1974, upon application the  
2 Commission may grant a rehearing of this Order. The application must be received by the  
3 Commission at its offices within twenty (20) calendar days after entry of this Order. Unless otherwise  
4 ordered, filing an application for rehearing does not stay this Order. If the Commission does not grant  
5 a rehearing within twenty (20) calendar days after filing the application, the application is considered  
6 to be denied. No additional notice will be given of such denial.

7 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

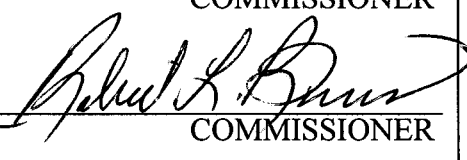
8 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

9  
10   
11 CHAIRMAN


  
11 COMMISSIONER

12   
13 COMMISSIONER

  
13 COMMISSIONER

  
13 COMMISSIONER

14  
15 IN WITNESS WHEREOF, I, JODI JERICH, Executive  
16 Director of the Arizona Corporation Commission, have  
17 hereunto set my hand and caused the official seal of the  
Commission to be affixed at the Capitol, in the City of Phoenix,  
this 27<sup>th</sup> day of October 2015.

18   
19 JODI JERICH  
20 EXECUTIVE DIRECTOR

21 DISSENT \_\_\_\_\_

22  
23 DISSENT \_\_\_\_\_  
24 MP:tv(ru)

1 SERVICE LIST FOR: OUT OF THE BLUE PROCESSORS, LLC, MARK  
2 STEINER and SHELLY STEINER

3 DOCKET NO.: S-20837A-12-0061

4 Mark Steiner  
5 Shelly Steiner  
6 OUT OF THE BLUE PROCESSORS, LLC  
7 7877 E. Hanover Way  
8 Scottsdale, AZ 85225

9 Matt Neubert, Director  
10 Securities Division  
11 ARIZONA CORPORATION COMMISSION  
12 1300 West Washington Street  
13 Phoenix, AZ 85007

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