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8 Attorneys for the Receiver

9 FOR THE SUPERIOR COURT OF THE STATE OF ARIZONA

10 IN AND FOR THE COUNTY OF MARICOPA

11 Lynne H. Anthony Revocable Trust )  
12 dated 11/30/2001, Lynne H. Anthony as )  
13 Trustee; Robert Sonnenschein, as an )  
14 individual; Gerald R. Hale, as an )  
15 individual; C. Scott Anthony, as an )  
16 individual; Janie B. Hale, individually )  
17 and as Trustee of Janie B. Hale )  
18 Revocable Trust dated 11/4/1994; )  
19 Carolyn Sue McMillon, as an individual; )  
20 Larry McMillon, as an individual; James )  
21 Stanley Powers, as an individual; and )  
Patricia Ann Powers Trust, Patricia Ann )  
Powers as Trustee, )

Plaintiffs, )

v. )

16 Palo Verde Capital, L.L.C., an Arizona )  
17 limited liability company; PVPE, L.L.C., )  
18 an Arizona limited liability company; )  
19 Palo Verde Fund, L.P., a Delaware )  
20 limited partnership; Palo Verde Private )  
21 Equity Fund, L.P., a Delaware limited )  
partnership; and Anthony R. Stacy, a )  
married man, )

Defendants. )

Cause No. CV2013-012420

RECEIVER'S REPLY TO  
BRIGHTERGY, LLC'S RESPONSE TO  
THE RECEIVER'S MOTION FOR  
ORDER TO COMPEL SUPPLY SIDE 1,  
LLC AND BRIGHTERGY, LLC TO  
TURNOVER TO THE RECEIVER  
ASSETS OF PALO VERDE FUND L.P.  
AND REQUEST FOR ATTORNEY FEES

(Assigned to the Honorable Daniel Kiley)

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1 Peter S. Davis, as the Court appointed Receiver of the Palo Verde Fund, LP, the Palo  
2 Verde Private Equity Fund, LP and PVPE, LLC (“Receiver”) hereby replies to Brightergy,  
3 LLC’s *Motion in Response to the Receiver’s Motion for Order to Compel Supply Side 1, LLC*  
4 *to Turnover to the Receiver Assets of Palo Verde Fund, LP and Request for Attorney Fees* as  
5 follows:

6 On June 9, 2016, the Receiver filed the *Receiver’s Motion for Order to Compel Supply*  
7 *Side 1, LLC and Brightergy, LLC to Turnover to the Receiver Assets of Palo Verde Fund L.P.*  
8 *and Request for Attorney Fees* (“Receiver’s Turnover Motion”), in which the Receiver sought  
9 to enforce the payment to Palo Verde Fund L.P. (“Palo Verde Fund”) amounts to which Palo  
10 Verde Fund was entitled as the senior secured creditor of party. After the respondents failed  
11 to respond to the Receiver’s Motion, the Court on July 28, 2016, entered its *Order Approving*  
12 *Receiver’s Motion to Compel Supply Side 1, LLC and Brightergy, LLC to Turnover to the*  
13 *Receiver Assets of Palo Verde Fund, L.P. and Request for Attorney Fees* which ordered that  
14 Brightergy, among other things, to turn over to the Receiver fifty (50%) of the retail  
15 commission in excess of \$600,000.00 that have been recovered under an asset purchase  
16 agreement between Brightergy and Acumen Energy Solutions, Inc. (“Acumen”)<sup>1</sup>.

17 In response to this order Brightergy filed a motion to set aside the order on the grounds  
18 that “[m]ore investigation will be required in order to come to a definitive determination” of  
19 the amounts owed under the APA and that Brightergy may have a claim by way of offset

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21 <sup>1</sup> There is not dispute that Acumen is a wholly owned subsidiary of Palo Verde Private Equity Fund,  
LP and that Palo Verde Fund is a secured creditor of Acumen.

1 against the amounts owed to Palo Verde Fund. With the expectation that Brightergy would  
2 provide an updated accounting, complete the “definitive determination”, and provide a  
3 substantive response to the Receiver’s Turnover Motion, the Receiver did not object.  
4 Accordingly, on October 13, 2016, the Court entered its minute entry granting Supply Side 1,  
5 LLC and Brightergy, LLC until November 10, 2016, to file a response to the Receiver’s  
6 Turnover Motion. On November 10, 2016, Supply Side 1, LLC and Brightergy, LLC filed a  
7 response to the Receiver’s Turnover Motion in which Brightergy admits that it owes money  
8 to Acumen under the APA and commits to paying to the Receiver amounts owed on a “going-  
9 forward basis”, based on its reconciliation of the amounts calculated, pursuant to the  
10 Agreement.” Brightergy then disputes the Receiver’s position that Brightergy is not entitled  
11 to an offset to those amounts. Brightergy failed in its response to provide an updated  
12 accounting or any legal support for its claimed right of offset.

### 13 **Amounts Owed Under the APA**

14 It is undisputed that Palo Verde Fund has a perfected security interest in all payments  
15 owed by Brightergy to Acumen under the APA. Incredibly, even after being granted leave to  
16 file an untimely response to the Receiver’s Turnover Motion, Brightergy continues to refuse  
17 to address the issue of how much it has collected under the APA. It claims that there is  
18 uncertainty as to which amounts were generated from contracts purchased under the APA and  
19 which amounts were generated under other contracts. Brightergy provides no up to date  
20 accounting, nor details as to what other contracts it is referring to. The amounts collected by  
21 Brightergy under the Acumen contracts and the mysterious “other contracts” is information in

1 the possession of Brightergy, no one else. However, Brightergy provides no explanation as to  
2 why it has not provided the Receiver and the Court a detailed report of the amounts that have  
3 been recovered under the contracts purchased under the APA. Obviously Brightergy's  
4 strategy is to delay the resolution of this issue as long as it can. Brightergy's strategy should  
5 not be rewarded any further and the Receiver therefore requests that the Court order  
6 Brightergy to promptly days to pay to the Receiver the sum of \$72,000, which is the 50% of  
7 the amount which Brightergy has previously admitted was collected in excess of \$600,000 as  
8 of January, 2016<sup>2</sup>. See the accounting provided by Brightergy in February 2016 attached  
9 hereto as Exhibit "A" and page 5 of the Receiver's Turnover Motion. Furthermore the  
10 Receiver requests that the Court order Brightergy to deliver to the Receiver on or before the  
11 tenth of each month a detailed and cumulative accounting of all amounts collected under  
12 contracts purchased under the APA through the end of the prior month and pay together with  
13 payment of 50% of the amounts collected over \$600,000 not previously paid to the Receiver.

14 **Brightergy cannot rely on a claim of offset to defeat the security interest of Palo Verde**  
15 **Fund as a secured creditor of Acumen**

16 A party asserting an offset has the burden of proving the existence of the offset.

17 *Consolidated Roofing & Supply Co., Inc. v. Grimm*, 140 Ariz. 452, 457,682 P.2d 457, 462  
18 (Ariz. App. 1984). Not only must Brightergy prove existence of the legal basis for an offset  
19 (here the judgment obtained by assignment), but it must also establish the existence of

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21 <sup>2</sup> Although the last column in the last accounting from Brightergy indicates January 2015, it appears  
that it was intended to cover January 2016.

1 mutuality of time, and of the identity and capacity of the parties. *See, Urias v. PCS Health*  
2 *Systems, Inc.* 211 Ariz. 81, 118 P.3d 29 (Ariz. App. 2005).

3 Assuming arguendo that Brightergy has a claim that can be offset against its obligation  
4 to Acumen, Brightergy has provided no legal authority whatsoever to support its claim that  
5 it's claimed offset against Acumen can be used to defeat the security interest of a secured  
6 creditor of Acumen whose security interest was perfected before the claimed offset arose.  
7 Indeed, it has long been the settled law in Arizona that a claimed offset is subordinate to a  
8 security interest perfected prior in time. *Valley Natl. Bank of Arizona v. Cotton Growers Hail*  
9 *Insurance Inc.*, 155 Ariz. 526, 530, 747 P.2d 1225, 1229 (Ariz. App. 1987).

10 Palo Verde Fund has for some time and continues to be the single largest creditor of  
11 Acumen, which debt is secured by UCC financing statements recorded in Arizona, Kansas  
12 and Missouri. *See* pages 2-3 of the Receiver's Turnover Motion. The secured debt owed by  
13 Acumen to Palo Verde Fund as of July 31, 2014, was \$3,304,752. Brightergy does not  
14 dispute that Palo Verde Fund is a secured creditor for an amount far in excess of the amounts  
15 owed by Brightergy to Acumen under the APA. Brightergy also does not dispute that the  
16 judgment it acquired was acquired long after Palo Verde Fund perfected its security interest.  
17 Accordingly, under the UCC Palo Verde Fund is secured creditor whose claim is superior to  
18 any claimed offset by Brightergy.

19 WHEREFORE, the Receiver respectfully requests that the Court enter an order as  
20 follows:

- 21 1. Any claim of offset that Brightergy may have against Acumen Energy

1 Solutions, Inc. (“Acumen”) arising from that certain Judgment entered on or about October  
2 23, 2015, and assigned to Brightergy, cannot be used to reduce the amounts payable under the  
3 Asset Purchase Agreement dated August 27, 2014 (the “APA”) to Palo Verde Fund as the  
4 secured creditor of Acumen.

5 2. Within ten days of the entry of an order, Brightergy shall pay to the Receiver  
6 the sum of \$74,000;

7 3. On or before the tenth day of each month, Brightergy shall deliver to the  
8 Receiver an accounting of all sums received as retail commissions collected under the APA  
9 through the end of the prior month and shall pay to the Receiver all funds representing fifty  
10 (50%) of the retail commission in excess of \$600,000, not previously remitted to the  
11 Receiver; and

12 4. Awarding the Receiver his reasonable attorney’s fees and costs incurred in the  
13 Receiver’s efforts to enforce the rights of Palo Verde Fund as the secured creditor of Acumen  
14 and directing the Receiver to file with the Court within thirty days a motion setting forth the  
15 amount of such attorney fees and costs.

16 Respectfully submitted this 22<sup>nd</sup> day of November, 2016.

17 GUTTILLA MURPHY ANDERSON, P.C.

18 /s/Ryan W. Anderson  
19 Ryan W. Anderson  
20 Attorneys for the Receiver  
21

1 Original of the foregoing e-filed  
This 22<sup>nd</sup> day of November, 2016, with:

2 Clerk of the Court  
3 Maricopa County Superior Court  
201 West Jefferson, Fourth Floor  
4 Phoenix, AZ 85003

5 Copy of the foregoing emailed or  
mailed this 22<sup>nd</sup> day of November, 2016, to:

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13 By: /s/Cynthia Ambrozic

14 1844-001(266592)

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Brightergy  
Profit & Loss  
August 2014 through July 2015

Retail Electric Commission Earnings

Aug 14	Sep 14	Oct 14	Nov 14	Dec 14	Jan 15	Feb 15	Mar 15	Apr 15	May 15	Jun 15	Jul 15	Aug 15	Sept 15	Oct 15	Nov 15	Dec 15	Jan 15	TOTAL
27,447.80	30,680.43	34,814.10	69,917.75	41,948.74	77,476.07	41,215.87	41,439.99	40,401.37	46,046.23	43,344.30	37,105.44	41,209.05	41,108.92	40,238.21	40,353.37	19,505.57	30,188.95	744,442.16