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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS:
MARC SPITZER, Chairman
JIM IRVIN
WILLIAM A. MUNDELL
JEFF MATCH-MILLER
MIKE GLEASON

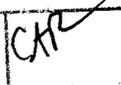
Arizona Corporation Commission

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AZ CORP COMMISSION
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In the matter of:

MUTUAL BENEFITS CORPORATION,

Respondent.

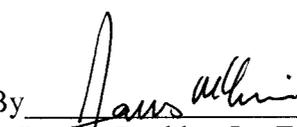
DOCKET NO. S-03464A-03-0000

**RESPONDENT'S REPLY BRIEF IN
SUPPORT OF ITS MOTION TO
DISMISS, OR IN THE ALTERNATIVE,
MOTION FOR MORE DEFINITE
STATEMENT**

Respondent Mutual Benefits Corporation ("MBC") hereby submits its Reply in Support of Its Motion to Dismiss, or in the Alternative, Motion for More Definite Statement (the "Reply"). This Reply is supported by (i) the attached Memorandum of Points and Authorities and (ii) the Commission's entire file in this matter.

RESPECTFULLY SUBMITTED this 20th day of June, 2003.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Rules 9(b) and 12(e) of the Arizona Rules of Civil Procedure Apply to This Administrative Proceeding

The Motion to Dismiss (“MTD”) details why Rules 9(b) and 12(e) apply to the Division’s Notice of Opportunity for Hearing (the “Notice”). The Division concedes that the Rules of Civil Procedure are applicable to administrative proceedings such as this one. [Opposition at 3] Nevertheless, the Division offers two arguments in an effort to prevent the Rules’ application. [Id.] Neither has merit.

As the Division correctly notes, the Commission’s Rules of Practice and Procedure generally govern cases before the Corporation Commission. A.A.C. R14-3-101(A). The Rules of Civil Procedure apply when the procedures are not otherwise set forth by law, the Commission’s Rules or by the regulations or orders of the Commission. Id. The Division advances two arguments why the Rules of Civil Procedure should not apply here, (i) because the Commission’s Rules provide the appropriate procedure, or in the alternative, (ii) the Arizona Administrative Procedure Act (“AAPA”) governs. [Opposition at 3]

The issue with respect to the application of Rules 9(b) and 12(e), is whether a procedure exists under the Commission’s rules for remedying a pleading which is deficient. The Division does not identify any provision of the Commission’s Rules addressing this point. [Id.] This is because no such provision exists. Had there been a procedure contained in the Commission’s Rules for remedying a deficient pleading there would be no need to look any further. Since no Commission Rule addresses either the standard for pleading fraud in an administrative proceeding, or the method for remedying a pleading that is as vague and incomplete as the Notice, resort to the Arizona Rules of Civil Procedure is not only appropriate, it is necessary. A.A.C. R14-3-101(A).

1 The Division attempts to seek refuge in A.R.S. § 41-1061(B)(4) of the AAPA¹. While the
2 Administrative Law Judge may look to this section for guidance, it lacks the support the Division
3 seeks for its position that it should not be required to provide a more definite statement. In fact,
4 the opposite is true, as noted in Section III, *infra*. Furthermore, neither the AAPA nor the
5 Commission's Rules discuss the standard for pleading fraud. As a result, the Arizona Rules of
6 Civil Procedure apply.

7 **II. The Notice of Opportunity for Hearing Must Be Dismissed Because It Fails to Plead**
8 **Fraud with the Requisite Particularity**

9 As noted in Section I, *supra*, Rule 9(b) must be applied to the Notice. Against this
10 heightened pleading standard, the Notice falls short and must be dismissed. The Division is
11 correct in its observation that the case law concerning pleading standards in averments of fraud in
12 administrative proceedings is scarce. [Opposition at 3-4] MBC is unaware of any precedents
13 directly on point. As noted in the Motion, however, the application of Rule 9(b) is consistent with
14 the law of this circuit, and is required by A.A.C. R14-3-101(A).

15 The Division's arguments to the contrary are irrelevant. The Division first argues that it is
16 not required to establish the presence of the nine elements of common law fraud. [Opposition at
17 4] MBC does not argue that the Division is required to so plead. [Motion at 7-8] This argument
18 attacks a straw man. The Division is not required to establish the elements of common law fraud,
19 and MBC has never argued that it is. This argument, and the cases cited in support of it, are
20 irrelevant.

21 The Division's arguments regarding A.R.S. §§ 44-2082 and 44-1991 are unclear.
22 [Opposition at 4:12-17] The Division argues that, "[t]he legislation intentionally did not extend
23 the particularity pleading requirements to allegations of fraud under A.R.S. § 44-1991." [Id.]

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27 ¹ Though footnote 1 of the Opposition states that the notice pleading procedure exists under A.R.S. § 41-1061(A)(4), it appears that the appropriate citation is § 41-1061(B)(4). [Opposition at 3 n.1]

1 This assertion conflicts with the plain language of A.R.S. § 44-2082(A). This argument is
2 irrelevant, and has no merit.

3 The Division makes no attempt to attack the standard under Rule 9(b) argued in the
4 Motion. Rather, the Division attempts to address the analysis in a footnote in its Opposition.
5 [Opposition at 4 n.2] The Division argues the cases are irrelevant because they invoke either the
6 state or federal Rule 9(b). The application of Rule 9(b) is appropriate and the cases cited in the
7 Motion are all relevant to determine the particularity with which the Division must plead fraud.
8 The Division does not argue otherwise, relying instead on its position that Rule 9(b) is
9 inapplicable in its entirety. [Opposition at 3-4]

11 **III. The Motion for a More Definite Statement Should be Granted**

12 As noted in Section I, *supra*, there is no Commission Rule addressing the procedure for
13 remedying a pleading as defective as the Notice in this case. Resort to other authority is
14 necessary under the circumstances. A.A.C. R14-3-101(A). Whether that authority is A.R.S.
15 § 41-1061(B)(4) of the AAPA or Rule 12(e), the result is the same: the Division must provide a
16 more definite statement.

17 The Division suggests that A.R.S. § 41-1061 requires only a “short and plain statement of
18 the matters asserted.” [Opposition at 5 (quoting A.R.S. § 41-1061)] This is an accurate quote. It
19 is not, however, complete. The sentence immediately following the one quoted by the Division
20 states:

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

24 A.R.S. § 41-1061(B)(4) (emphasis added). The Division’s own authority provides for the
25 provision of a more definite statement upon request. This is consistent with Rule 12(e).
26 Regardless of the authority relied upon, it is clear that MBC is entitled to ask for a more definite
27

1 statement, and as outlined more fully in the Motion, the Division is required to provide the
2 information necessary for MBC to properly respond to the Notice.

3 The fundamental purpose of pleadings under the Rules of Civil Procedure is to give the
4 opposing party fair notice of the claims asserted against him and the grounds upon which those
5 claims rest. See Coleman v. Quaker Oats Co., 232 F.3d 1271, 1291-93 (9th Cir. 2000) (“[a]
6 complaint guides the parties’ discovery, putting the defendant on notice of the evidence it needs
7 to adduce in order to defend against the plaintiff’s allegations.”). As the First Circuit aptly noted
8 in Rodriguez v. Doral Mortgage Corp., 57 F.3d 1168, 1171-72 (1st Cir. 1995):
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10 [W]hile courts should construe pleadings generously, . . . they must
11 always exhibit awareness of the defendant’s inalienable right to
12 know in advance the nature of the cause of action being asserted
13 against him

14

15 . . . Under the Civil Rules, notice of a claim is a defendant’s
16 entitlement, not a defendant’s burden. The truth-seeking function of
17 our adversarial system of justice is disserved when the boundaries of
18 a suit remain ill-defined and litigants are exposed to the vicissitudes
19 of trial by ambush.

20 At a bare minimum, even in this age of notice pleading, a
21 defendant must be afforded both adequate notice of any claims
22 asserted against him and a meaningful opportunity to mount a
23 defense.²

24 It is not MBC’s obligation to define the Division’s causes of action. See id. Rather, it is
25 the Division’s obligation to serve an Amended Notice that is definite and certain and sufficient to
26 put MBC on notice of the “precise nature of the charge” or charges against which MBC must
27 defend. See Shill v. Jones, 21 Ariz. 465, 468, 190 P. 77, 78-79 (1920). As set forth more fully in
the Motion, the allegations of the Notice are so indefinite and uncertain that MBC cannot

² Arizona law is clear that federal decisions interpreting the federal rules are entitled to “great weight” in interpreting the analogous Arizona Rules of Civil Procedure. Edwards v. Young, 107 Ariz. 283, 284, 486 P.2d 181, 182 (1971).

1 comprehend the precise nature of the charges being made against it. *See id.* In accordance with
2 Rule 12(e), or A.R.S. § 41-1061(B)(4) the Division should be ordered to provide a more definite
3 statement.

4 The Division also argues that two additional Commission Rules are relevant to this issue.³
5 While these rules may indeed be helpful, they do not support the Division's position. For
6 example, A.A.C. R14-3-101(B) provides that the Commission's Rules "shall be liberally
7 construed to secure just and speedy determination of all matters presented to the Commission."
8 *Id.* The Division takes the position that requiring it to provide a more complete Notice with
9 reference to actual individuals, events, documents, and transactions, would somehow slow the
10 resolution of this matter. This assertion is absolutely unsupported. It is obvious that a more
11 detailed Notice would increase the efficiency of this proceeding.

12 The Division then quotes the following rule, ostensibly in further support of its
13 wrongheaded position, "formal documents will be liberally construed and defects which do not
14 affect substantial rights of the parties will be disregarded." [Opposition at 5 (quoting A.A.C.
15 R14-3-106(E))] The Division's reliance on this passage implicitly acknowledges that the Notice
16 is in fact defective. The Division then asks the Administrative Law Judge to disregard these
17 defects since they do not affect a "substantial right" of MBC. While MBC agrees that the Notice
18 is defective, it disagrees that disregarding the defects would not affect the rights of MBC.
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21 MBC has the right to know the basis of the Division's allegations. As outlined more fully
22 in the Motion, the Notice is clearly deficient. The Division should be ordered to provide a more
23 definite statement.
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³ Specifically, A.A.C. R14-3-101(B) and A.A.C. R14-3-106(E).

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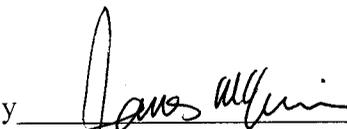
I. Conclusion

Despite the fact that the Division has been aware of MBC for approximately eight years, and the fact that it apparently has conducted and continues to conduct a sweeping investigation into MBC's practices, the Division is unable or unwilling to provide the information requested in the Motion. The Notice, as written, is of no use in determining the particulars of the conduct which the Division alleges is violative of Arizona's securities laws. The Division's position that the Arizona Rules of Civil Procedure do not apply to this administrative proceeding is wrong. The Commission's Rules clearly authorize resort to the Rules of Civil Procedure in cases such as this. The Notice is so deficient that it should be dismissed for failure to plead fraud with particularity. In the alternative, the Division must be required to file a more definite statement providing the information requested in the Motion.

For the foregoing reasons, MBC respectfully requests that is Motion to Dismiss or in the Alternative, Motion for a More Definite Statement be granted.

RESPECTFULLY SUBMITTED this 20th day of June, 2003.

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ORIGINAL and thirteen copies of the foregoing
hand-delivered this 20th day of June, 2003 to:

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COPY of the foregoing hand-delivered
this 20th day of June, 2003 to:

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