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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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COMMISSIONERS

MARC SPITZER, Chairman
JIM IRVIN
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON

DOCKETED BY

In the matter of:)
)
MUTUAL BENEFITS CORPORATION,)
)
Respondent.)

DOCKET NO. S-03464A-03-0000

**PLAINTIFF SECURITIES DIVISION'S OPPOSITION
TO MUTUAL BENEFITS CORPORATION'S
MOTION TO DISMISS, MOTION FOR MORE DEFINITE STATEMENT**

Plaintiff, the Securities Division (Division) of the Arizona Corporation Commission ("Commission") responds to Mutual Benefits Corporation's ("MBC") Motion to Dismiss and Motion for More Definite Statement ("Motion") and requests that MBC's Motion be denied. The Division supports this motion with the attached memorandum of points and authorities.

DATED this 9th day of June, 2003.

MARK SENDROW, Director of Securities

By:

Phillip A. Hofling
Attorney for the Securities Division of
the Arizona Corporation Commission

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SECURITIES DIVISION
MEMORANDUM OF POINTS AND AUTHORITIES

Mutual Benefits Corporation's ("MBC") Motion to Dismiss or in the alternative Motion for More Definite Statement ("Motion") addresses "only the allegation that MBC violated A.R.S. §44-1991...." MBC's Motion at P.5. Accordingly, the Division's response is principally directed to that issue. However, because MBC's Motion contains statements separate and apart from its central argument, the Division is compelled to address these statements to dispel the confusion MBC's Motion creates.

I. STANDARD OF REVIEW

A. Motion to Dismiss

MBC seeks dismissal of the Division's Notice of Opportunity for Hearing ("Notice"). Motions to dismiss are not favored by the courts and should be denied unless it appears that the plaintiff would not be entitled to relief under any state of facts susceptible of proof under the claim presented. *State ex. rel. Corbin v. Pickrell*, 136 Ariz. 589, 594, 667 P.2d 1304, 1309 (1983) citing *Maldonado v. Southern Pacific Transportation Company*, 129 Ariz. 165, 167, 629 P.2d 1001, 1003 (App.1981), and *Sun World Corp. v. Pennysaver, Inc.*, 130 Ariz. 585, 586, 637 P.2d 1088, 1089

1 (App.1981). In deciding the motion, the court must presume that all facts alleged in the Complaint
2 are true and must resolve all inferences in favor of the plaintiff. *Southwestern Paint & Varnish Co.*
3 *v. Arizona Dept. of Environmental Quality*, 191 Ariz. 40, 951 P.2d 1232, (App. 1997) *aff'd in part*
4 194 Ariz. 22, 976 P.2d 872 (1999). In other words, the Court may only grant MBC's motion if the
5 Court has no doubt the Division cannot prove the facts it alleged in its Notice thereby entitling the
6 Division to relief.

7 **B. Motion for More Definite Statement**

8 As an alternative to dismissal, MBC asks that the Division be ordered to file an amended
9 Notice setting forth additional information. Motions for a more definite statement are not favored.
10 *A.G. Edwards & Sons, Inc. v. Gregory Udall Smith, et.al.* 736 F. Supp. 1030, 1032 (1989). A more
11 definite statement is not required when the "court can see the meaning of the different allegations,
12 and the cause of action or the defense intended to be set forth by them." *Stansfield v. Dunne*, 16
13 Ariz. 153, 157 (1914).

14 **II. LAW AND ARGUMENT**

15 **A. Rules 9(b) and 12(e) of the Arizona Rules of Civil Procedure do not apply to an**
16 **administrative case because the Arizona Administrative Code, Rules of**
17 **Practice and Procedure before the Corporation Commission, the Arizona**
18 **Administrative Procedure Act and case law govern the content of the**
19 **Division's Notice.**

20 MBC argues the Arizona Rules of Civil Procedure apply to the current case and in
21 particular that the Notice must be dismissed for failure to plead fraud with particularity pursuant to
22 Rule 9(b) of the Arizona Rules of Civil Procedure ("ARCP Rule 9(b)") or in the alternative, that
23 the Division must provide a more definite statement pursuant to ARCP Rule 12(e). MBC is simply
24 wrong in applying the Arizona Rules of Civil Procedure to this administrative case.
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1. The Rules of Practice and Procedure before the Corporation Commission govern this action.

Rule R14-3-101A of the Arizona Administrative Code states the Commission's Rules of Practice and Procedure (hereafter referred to as the "Commission's Rules") govern in all cases before the Corporation Commission including cases arising out of Title 44. Commission Rule R14-3-101A goes on to state the Arizona Rules of Civil Procedure apply *only if* procedures are not otherwise set forth by law, the Commission's rules or by regulations or orders of the Commission.

Even if the Commission's Rules were silent about Division administrative proceedings, which they are not, the Arizona Rules of Civil Procedure would still not apply. If another law addresses the procedure at issue, then it must, according to the Commission Rule R14-3-101A, be followed before the Arizona Rules of Civil Procedure. In other words, the Arizona Rules of Civil Procedure are rules of last resort.

Clearly the Commission's Rules apply to this proceeding. This is an administrative case filed before the Commission alleging violations of Title 44. Procedures governing the Division's investigations, examinations and administrative proceedings are found under Article 3 of the Commission's Rules. Commission Rule R14-4-306 is a specific procedure applying to Division notices regarding hearings. Thus, there is absolutely no reason to look to the Arizona Rules of Civil Procedure.¹

2. Arizona Rule of Civil Procedure 9(b) has no application to this case.

MBC is wrong in claiming the Division must comply with ARCP Rule 9(b). Notwithstanding that the Arizona Rules of Civil Procedure do not apply for the reasons set forth above, MBC ignores case law directly addressing this issue and fails to cite to a single case where

¹ If Article 3 of the Commission's Rules were for some reason deemed insufficient, Article 1 of the Commission's Rules also contains procedures regarding administrative proceedings before the Commission. And even if the Commission's Rules did not have a procedure regarding pleadings, the Arizona Rules of Civil Procedure would still not apply. This proceeding involves a contested case as that term is defined under §41-1001(4) of the Arizona Administrative Procedure Act ("AAPA"). A procedure governing a notice pleading exists under the §41-1061(A) (4) of the AAPA.

1 a regulator alleging fraud under its relevant securities laws in an administrative forum was held to
2 an ARCP Rule 9(b) standard.

3 In cases such as this in which the complaint alleges violations of the antifraud provisions of
4 the Securities Act, the plaintiff need not establish the presence of the nine elements of common
5 law fraud. *Rose v. Dobras*, 128 Ariz. 209, 214, 624 P.2d 887, 892 (App. 1981), citing *State v.*
6 *Superior Court of Maricopa County*, 123 Ariz. 423, 559 P.2d 777 (1979). No case holds to the
7 contrary and MBC's reliance on its cited cases is misplaced as they are not relevant. Each case
8 cited by MBC involved a civil suit alleging common law fraud and/or fraud under the federal
9 securities laws thereby invoking either state civil or federal civil rules of procedure.² Not one case
10 involved an administrative action brought by a regulator in an administrative forum alleging fraud
11 under a state securities law.

12 In addition, shortly after Congress enacted the Private Securities Litigation Reform Act of
13 1995 requiring that fraud alleged under the federal securities laws be plead in private actions with
14 particularity, the Arizona legislature amended the Securities Act to incorporate similar particularity
15 pleading requirements. However, it amended only A.R.S. §44-2082 under Article 18 of the
16 Securities Act which pertains to private securities litigation. The legislature intentionally did not
17 extend the particularity pleading requirements to allegations of fraud under A.R.S. §44-1991.

18 ...

19 ...

21 ² For example, *Hall v. Romero*, 141 Ariz. 120, 685 P.2d 757 (Ct. App. 1984), involved a private **civil action** brought by
22 real estate purchasers against a Hollywood personality who assisted in promoting a real estate venture. Plaintiff's
23 **allegations of fraud** were not brought under any securities law. *Vess v. CIBA-GEIGY Corp. USA*, 317 F.3d 1097 (9th
24 Cir. 2003), involved a diversity civil class action brought in federal court against psychiatric associations and
25 pharmaceutical manufactures alleging violations of the California Consumer Legal Remedies Act and California
26 Unfair Business practice laws. Again, this was a **federal civil action** clearly governed by the Federal Rules of Civil
Procedure which have no applicability to the instant case. *In re Stac Elec. Sec. Litig.*, 89 F.3d 1399 (9th Cir. 1996)
involved IPO investors bringing a securities fraud action against the company and its officers. Again, this was a
federal civil action alleging violations of the federal securities laws thereby invoking the **federal rules of civil
procedure**. *A.G. Edwards & Sons, Inc. v. Gregory Udall Smith, et.al.*, 736 F.Supp. 1030 (D. Ariz. 1989), concerned a
private civil suit brought by a brokerage firm against its customers alleging fraud under the federal securities laws.
Again, this case invoked the **Federal Rules of Civil Procedure**.

1 **3. Notwithstanding the inapplicability of ARCP Rule 12(e) the Division has met**
2 **its burden under Article 3 of the Commission's Rules.**

3 Simply stated, ARCP Rule 12(e) does not apply to this case because as discussed above the
4 Arizona Rules of Civil Procedure do not apply. Furthermore, the Division has met its pleading
5 burden. The Division's complaint against MBC is styled as a Notice of Opportunity for Hearing.
6 The applicable rule governing Division Notices is Commission Rule R14-4-306 which is a notice
7 pleading rule. Commission Rule R14-4-306 does not require that the Division identify each and
8 every specific instance of misconduct by specific perpetrator, victim, date, time and location. As a
9 notice pleading rule, all that is required is that the Division notify the opposing party of the nature
10 of the claim. This is entirely consistent with §41-1061(A)(4) of the AAPA which states that the
11 notice to be given requires "[a] short and plain statement of the matters asserted." It is also
12 consistent with the Arizona Rules of Civil Procedure and Federal Rules of Civil Procedure, even
13 though they have no application to the instant case.³ In addition, two Commission Rules provide
14 additional guidance. Commission Rule R14-3-101B states the Commission's Rules "shall be
15 liberally construed to secure the just and speedy determination of all matters presented to the
16 Commission." Commission Rule R14-3-106(E) states "formal documents will be liberally
17 construed and defects which do not affect substantial rights of the parties will be disregarded." To
18 require the Division to detail each and every instance of misconduct would be beyond the clear
19 requirement of the Commission's Rules and would not contribute to the just and speedy
20 determination of the matters presented to the Commission. MBC's substantial rights are not
21 affected as the Notice more than adequately informs MBC of the conduct at issue.

22 There appears to be no reported Arizona case specifically defining the content of a Notice
23 under Commission Rule R14-4-306. However, a sampling of court opinions regarding ARCP Rule
24 12(e), even though it does not apply to this case, is instructive on the propriety of a Motion for
25 more Definite Statement. "The province of the motion to make a more definite and certain is

26 ³ "Rule 8 of the Federal Rules of Civil Procedure requires merely a short and plain statement of the claim, rather than
specific facts detailing every allegation." *A.G. Edwards & Sons, Inc. v. Gregory Udall Smith, et.al.* 736 F. Supp. 1030,
1032 (1989).

1 not...to require the pleader to set forth his evidence....” *Stansfield v. Dunne*, 16 Ariz. 153, 157
2 (1914). “Rule 12(e) is designed to strike at unintelligibility rather than want of detail.” *Resolution*
3 *Trust Corp. v. Clayton J. Dean, et. al.*, 854 F.Supp. 626, 649 (D. Ariz. 1994).

4 In a case such as this where over 349 investors purchased hundreds of viatical policies
5 worth \$11,400,000 over eight years, the attempt by MBC to require the Division to articulate each
6 and every instance of misconduct does not comport with the Commission’s pleading standards and
7 the liberal interpretation of the Commission’s rules.⁴ The Division clearly identifies that between
8 1995 and 2003 MBC and its agents sold unregistered securities, and that MBC engaged in
9 misconduct by making misleading statements or failing to disclose the risks associated with
10 viatical investments. The Notice provides examples of the types of disclosures that were omitted
11 regarding the investment risks. The Notice provides examples of misleading statements made to
12 investors. MBC will have ample opportunity to obtain witness and exhibit information prior to trial
13 and in sufficient time for it to prepare its defense.⁵ However, the fact that MBC does not know
14 every scintilla of evidence or information known to the Division does not preclude it from being
15 able to file a response. Furthermore, MBC’s complaint that the Notice is vague, ambiguous and
16 incomplete is unavailing as it is from MBC’s own documents that most of the Division’s
17 allegations arise and of which MBC has cognizance.

18
19 **B. MBC’s Motion attempts to create confusion and obscure facts.**

20 There is no dispute that, effective July 18, 2000, viatical and life settlements were
21 expressly defined as securities under the Securities Act.⁶ MBC claims it effectively ceased doing

22 ⁴ Even if ARCP Rule 9(b) applied, the degree of specificity sought by MBC is not required. *See Sunbird Air Services,*
23 *Inc. v. Beech Aircraft Corporation*, 789 F.Supp. 364 (D. Kan. 1992) (“Where allegations of fraudulent conduct are
24 numerous or take place over an extended period of time, less specificity is required to meet the requirements of Rule
25 9(b)”).

26 ⁵ MBC complains the Division does not identify MBC agents. MBC is already on notice as to the agents the Division
has examined as either the agents have directly contacted MBC about the Division’s investigation and/or MBC has
been involved in securing counsel to represent these agents before the Division.

⁶ Under no circumstance is this statement meant to imply that prior to July 18, 2000, viaticals and life settlements were
not securities. As set forth in the Notice the Division takes the position that viaticals and life settlements sold by MBC
prior to July 18, 2000 were investment contracts and therefore securities under the Securities Act.

1 business in Arizona immediately after this date. MBC's Motion at P.4. MBC gives new meaning to
2 the term "effectively ceased doing business". In MBC's vernacular, "effectively ceased doing
3 business" apparently means slowing down but not stopping. MBC then goes on to make the
4 unsupportable claim that its post July 2000 sales were inadvertent. It has the further audacity to
5 minimize its conduct by suggesting that its sales were few and isolated. These statements are
6 clearly misleading. No reasonable person could believe that approximately 152 viatical sales
7 involving at least 40 investors investing \$2.2 million dollars over a two and one-half year period
8 were inadvertent. In fact, sales made after July 18, 2000 constitute almost 20% of all sales effected
9 to Arizona residents identified by the Division. Incredibly, MBC attempts to cast itself as the good
10 corporate citizen because it recently commenced a voluntary offer of rescission to post July 2000
11 Arizona viatical investors. MBC was well aware long before it made its rescission offer that the
12 Division was preparing to bring an action against MBC for violations of the Securities Act. It was
13 clear to the Division that when MBC initially floated the idea of a rescission offer that MBC was
14 doing so with the hope that it would resolve the Division's concerns and no further action would
15 be taken by the Division. Now, through tortured logic, MBC maintains that the Division has no
16 cause of action against MBC for these unregistered sales because they were inadvertent and
17 because they have made an offer of rescission. MBC conveniently forgets that it still bears liability
18 for its unregistered sales regardless of its intent or remedial actions.⁷

19 MBC claims the Division's Notice is confusing with respect to the volume of viatical and
20 life settlement sales in Arizona. In footnote 5 of its Motion, MBC states

21 "[p]aragraph 5 of the Notice alleges that from 1995 to 2002, MBC sold
22 \$11,400,000 viatical and life settlements through approximately 55 individuals
23 and corporate agents to approximately 349 Arizonians. Which agent or agents,
24 which transactions and which Arizonians are referred to in the Notice is, at
present, anyone's guess. The \$11,400,000 figure contradicts the \$9,200,000
figure contained in Paragraph No. 7 of the Notice, adding to the confusion."

25 _____
26 ⁷ MBC's argument is analogous a person defending a bank robbery charge stating "I robbed the bank and took the
money but since I gave it back so there is nothing to prosecute."

1 The only confusion that exists is MBC's feigned confusion. No contradiction exists. The
2 Notice states MBC effected approximately \$11,400,000 in total sales. The Division's Notice
3 makes clear \$9,200,000 of those sales occurred between 1995 and July 17, 2000 and \$2,200,000
4 occurred from July 18, 2000 through January 2003 for a total of \$11,400,000.⁸ Furthermore,
5 MBC's claim that "which transactions are referred to in the Notice is anyone's guess" is absurd as
6 sales information in the Notice comes directly from MBC's submissions, including extensive
7 spreadsheets detailing its sales to Arizona residents. Unless MBC is now suggesting that its
8 submissions were false, then for MBC to claim that it has no idea which transactions are referred
9 to in the Notice is disingenuous.

10 In sum, the Commission's Rules apply to this proceeding, not the Arizona Rules of Civil
11 Procedure. The procedures governing this case are clear, there is no requirement that the
12 Division's allegations of fraud under the Securities Act need be plead with particularity and the
13 Division's Notice provides MBC with sufficient detail to apprise MBC of the allegations and cause
14 of action.

15 III. CONCLUSION

16 For the foregoing reasons, the Division respectfully requests that MBC's Motion to
17 Dismiss or in the alternative Motion for More Definite Statement be denied.

18 Dated the 9th day of June, 2003

19 MARK SENDROW, Director of Securities

20
21 By: 

22 Phillip A. Hofling
23 Attorney for the Securities Division of
24 the Arizona Corporation Commission

25 ⁸ While it is unfortunate that the date January 2002 in paragraph 5 of the Division's Notice should be January 2003,
26 nevertheless, MBC is fully cognizant of its volume of sales since it is from MBC's submissions to the Division that this
sales information was principally derived.

1 ORIGINAL AND THIRTEEN (13) COPIES
2 of the foregoing filed this 9th day of June, 2003 with:

3 Docket Control
4 Arizona Corporation Commission
5 1200 West Washington
6 Phoenix, Arizona 85007

7 Copy of the foregoing hand-delivered this 9th day
8 of June, 2003, to:

9 Mr. Marc Stern
10 Administrative Law Judge
11 Arizona Corporation Commission
12 Hearing Division
13 1200 West Washington
14 Phoenix, Arizona 85007

15 Copy of the foregoing mailed this 9th day
16 of June, 2003, to:

17 Paul J. Roshka, Jr. Esq.
18 Alan S. Baskin, Esq.
19 James M. McQuire, Esq.
20 One Arizona Center
21 400 East Van Buren Street, Suite 800
22 Phoenix, Arizona 85004

23 By: Shay W. Aky

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