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BEFORE THE ARIZONA CORPORATION COMMISSION

AZ CORP COMMISSION
DOCKET CONTROL

COMMISSIONERS

MIKE GLEASON, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

In the matter of:)
 MARK W. BOSWORTH and LISA A.)
 BOSWORTH, husband and wife;)
 STEPHEN G. VAN CAMPEN and DIANE)
 V. VAN CAMPEN, husband and wife;)
 MICHAEL J. SARGENT and PEGGY L.)
 SARGENT, husband and wife;)
 ROBERT BORNHOLDT and JANE DOE)
 BORNHOLDT, husband and wife;)
 MARK BOSWORTH & ASSOCIATES,)
 L.L.C., an Arizona limited liability company;)
 3 GRINGOS MEXICAN INVESTMENTS,)
 L.L.C., an Arizona limited liability company;)
 Respondents.)

DOCKET NO. S-20600A-08-0340

RESPONSE TO RESPONDENTS MICHAEL J. AND PEGGY L. SARGENT'S 12(b)(6) MOTION TO DISMISS THE ALLEGED VIOLATIONS OF A.R.S. § 44-1991

(Assigned to the Honorable Marc E. Stern)

Arizona Corporation Commission

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The Securities Division ("the Division") of the Arizona Corporation Commission ("the Commission") hereby responds to Respondents Michael J. and Peggy L. Sargent's ("Sargent") 12(b)(6) Motion to Dismiss the Alleged Violations of A.R.S. § 44-1991 ("the Motion") and requests that it be denied. This Response is supported by the following Memorandum of Points and Authorities.

1
2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. Standard of Review of Motion to Dismiss**

4 The Motion seeks dismissal of the A.R.S. § 44-1991 securities-fraud claims (“the Claims”) in the Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, for Restitution, for Administrative Penalties, and for Other Affirmative Action (“the 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 (App.1981). In deciding such motions, courts must view the complaint as a whole, presume that all facts alleged therein are true, and resolve all inferences in favor of the plaintiff. *Albers v. Edelson Tech. Partners L.P.*, 201 Ariz. 47, 51-52 ¶¶14-15, 31 P.3d 821, 825-26 ¶¶14-15 (App. 2001) (reversing dismissal of securities-fraud claim and stating, “[w]e are required to view the complaint as a whole to determine whether a claim for fraud has been stated.”); *Southwestern Paint & Varnish Co. v. Arizona Dept. of Environmental Quality*, 191 Ariz. 40, 951 P.2d 1232, (App. 1997) *aff’d in part* 194 Ariz. 22, 976 P.2d 872 (1999).

19 In deciding the Motion, the Administrative Law Judge must presume that all of the following facts are true: 1) Sargent is a member of 3 Gringos Mexican Investments, L.L.C. (“3GMI”) and he represented himself as president of The Mark Bosworth Companies, Inc.; 2) Sargent offered and/or sold investment contracts and promissory notes as documents entitled “Investment Agreement, “Promissory Note,” or “Receipt of Investment Funds” (collectively the “Investments”) on behalf of/issued by Mark Bosworth & Associates, L.L.C. (“MBA”) and 3GMI to at least 31 investors who paid Sargent at least \$5,600,000; 3) Sargent solicited investors through Arizona newspaper advertisements, websites, Arizona seminars, and van trips to Puerto

1 Peñasco, Mexico ("Rocky Point"); 4) Sargent represented the Investments to offerees and
2 investors as follows: investor money would be pooled and used by Sargent to purchase (or, at
3 least, as a down payment in conjunction with the eventual purchase of) commercial buildings
4 under construction, including a condominium development project in Rocky Point ("Rocky Point
5 condos"), and that the buildings would be leased by Sargent to future tenants then sold by
6 Sargent, along with the Rocky Point condos, when completed, for substantial gains; 5) Sargent
7 represented that the Investments would return to investors 100% of their initial investment plus a
8 30-100% return, but he did not disclose financial information regarding the Investments,
9 including the assets and liabilities of MBA and 3GMI and the additional, lender financing needed
10 by MBA and 3GMI to purchase the buildings and Rocky Point condos; 6) Sargent did not
11 purchase (and later sell) the buildings or Rocky Point condos and the investors received neither
12 the 30-100% return nor their initial investment, despite having requested same from Sargent; 7)
13 Sargent represented that the Investments were safe and not risky, but he did not disclose any risks
14 associated with the Investments, including: a) that the Investments were not secured by real
15 estate; b) the complexities and lack of true ownership of real estate in Rocky Point; and, c) the
16 illiquid nature of real estate investments; and, 8) even though Sargent represented to investors
17 that their money would be used solely for a specific Investment, investor money was transferred
18 from 3GMI to MBA for other purposes.

19 In summary, the Claims stated with particularity in Paragraphs 24(a), (b), and (c) of the
20 Notice are that 1) Sargent failed to disclose financial information regarding the Investments,
21 including the assets and liabilities of MBA and 3GMI and the additional, lender financing needed
22 by MBA and 3GMI to purchase the buildings and Rocky Point condos; 2) Sargent
23 misrepresented to offerees and investors that their money would be used solely for a specific
24 Investment when it was in fact transferred from 3GMI to MBA for other purposes; and, 3)
25 Sargent misrepresented to offerees and investors that the Investments were safe and not risky
26 while failing to disclose any risks associated with the Investments, including that the Investments

1 were not secured by real estate; the complexities and lack of true ownership of real estate in
2 Rocky Point; and, the illiquid nature of real estate investments.

3 **II. Argument**

4 **A. Ariz.R.Civ.P. 9(b), the legal basis for the Motion, does not apply to this case.**

5 The Motion must be denied because its legal basis, Ariz.R.Civ.P. 9(b), does not apply to
6 this case. This case and the content of the Notice are governed by the Arizona Administrative
7 Code (especially Title 14, Chapter 3, Article 1 thereof entitled "Rules of Practice and Procedure
8 Before the Corporation Commission" and Title 14, Chapter 4, Article 3 entitled "Rules of
9 Procedure for Investigations, Examinations, and Administrative Proceedings") (hereinafter
10 referred to collectively as "the Commission's Rules") and the Arizona Administrative Procedure
11 Act. Rule R14-3-101(A) of the Commission's Rules states that the Commission's Rules govern in
12 all cases before the Commission, including cases arising out of Title 44. It goes on to state that the
13 Arizona Rules of Civil Procedure apply *only if* procedures are not otherwise set forth by law, by
14 the Commission's Rules, or by regulations or orders of the Commission.

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

20 Clearly, the Commission's Rules apply to this proceeding. This is an administrative case
21 filed before the Commission alleging violations of Title 44 and Rule R14-4-306 is a specific
22 procedure applying to Division notices regarding hearings. Thus, there is absolutely no reason to
23 look to the Arizona Rules of Civil Procedure.¹

24
25 ¹Even if the Commission's Rules did not have a procedure regarding this issue, the Arizona Rules of Civil
26 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 can be found at
§41-1061(A)(4) of the AAPA.

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2 **B. There is no authority for the proposition that the Claims must be stated with**
3 **any more particularity than they are in the Notice.**

4 Notwithstanding that the Arizona Rules of Civil Procedure do not apply for the reasons set
5 forth above, Sargent ignores case law directly addressing this issue and fails to cite to a single case
6 where a regulator alleging fraud under its relevant securities laws in an administrative forum was
7 held to a “particularity standard” like that required by Ariz.R.Civ.P. 9(b) in civil actions.

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

17 In addition, shortly after Congress enacted the Private Securities Litigation Reform Act of
18 1995 requiring that fraud alleged under the federal securities laws be pled in private actions with
19 particularity, the Arizona legislature amended the Securities Act to incorporate similar
20 particularity pleading requirements. However, it amended only A.R.S. § 44-2082 under Article
21 18 of the Securities Act that pertains to private securities litigation. The legislature intentionally
22 did not extend the particularity pleading requirements to allegations of fraud under A.R.S. § 44-
23 1991.

1
2 **C. The Notice is legally sufficient and contains facts that state a claim under**
3 **A.R.S. § 44-1991.**

4 The Division's complaint against Sargent is styled as a Notice of Opportunity for Hearing.
5 Rule R14-4-306 of the Commission's Rules, a notice pleading rule, governs Division Notices.
6 Rule R14-4-306 does not require that the Division identify each and every specific instance of
7 misconduct by specific perpetrator, victim, date, time, and location. As a notice pleading rule, all
8 that is required is that the Division notify the opposing party of the nature of the claim. This is
9 entirely consistent with § 41-1061(A)(4) of the AAPA that states that the notice to be given
10 requires "[a] short and plain statement of the matters asserted." It is also consistent with the
11 Arizona Rules of Civil Procedure and Federal Rules of Civil Procedure, even though they have no
12 application to the instant case.²

13 Two of the Commission's Rules provide additional guidance. Rule R14-3-101(B) states
14 that the Commission's Rules "shall be liberally construed to secure the just and speedy
15 determination of all matters presented to the Commission" and Rule R14-3-106(E) states "formal
16 documents will be liberally construed and defects which do not affect substantial rights of the
17 parties will be disregarded." To require the Division to detail each and every instance of
18 misconduct would be beyond the clear requirement of the Commission's Rules and would not
19 contribute to the just and speedy determination of the matters presented to the Commission. Also,
20 Sargent's substantial rights are not affected as the Notice more than adequately informs Sargent of
21 the conduct at issue.

22 The Division should not be required to allege to which offeree or investor each untrue
23 statement was made, as these are not elements of the Division's statutory claim. Sargent is liable
24
25

26 ² "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 if **any** untrue statements were made and whether or not a specific investor made an investment
2 decision based on the statement or was harmed by the statement is not relevant to that liability.

3 To establish liability under A.R.S. § 44-1991, the Division does not have to prove which
4 untrue statements were made by each respondent. Liability for fraudulent conduct under A.R.S.
5 § 44-1991 is imposed on any person who commits the offense directly or indirectly. Additionally,
6 any person who makes, participates in, or induces the unlawful sale or purchase is jointly and
7 severally liable for the violation of A.R.S. § 44-1991. *See* A.R.S. § 44-2003(A). Any person who
8 controls any person who violates § 44-1991 is jointly and severally liable. *See* A.R.S. § 44-
9 1999(B). *See also Eastern Vanguard v. Arizona Corp. Com'n*, 206 Ariz. 399, 410, 79 P3d 86, 97
10 (Ct. App. 2003) (liability attaches to controlling persons to same extent as it does to a person or
11 entity that commits a primary violation of § 44-1991; § 44-1999 imposes presumptive control
12 liability on those persons who have the power to directly or indirectly control a primary violator).

13 The Division does not have to prove which investors were told what. Everyone is jointly
14 and severally liable for **any** untrue statement or omission that would have been significant to the
15 investment deliberations of **any** reasonable buyer. *See, e.g., Trimble*, 152 Ariz. at 553, 733 P.2d
16 at 1136. All the Division must allege and ultimately prove is that respondents made, participated
17 in, induced, or controlled persons who made, participated in, or induced, directly or indirectly, any
18 untrue statement of material fact in connection with the offer or sale of securities.

19 There appears to be no reported Arizona case specifically defining the content of a Notice
20 under Rule R14-4-306. However, a sampling of court opinions regarding ARCP Rule 12(e)
21 governing motions for more definite statements, even though it does not apply to this case, is
22 instructive. "The province of the motion is to make a statement more definite and certain...[it] is
23 not...to require the pleader to set forth his evidence...." *Stansfield v. Dunne*, 16 Ariz. 153, 157
24 (1914). "[It] is designed to strike at unintelligibility rather than want of detail." *Resolution Trust*
25 *Corp. v. Clayton J. Dean, et. al.*, 854 F.Supp. 626, 649 (D. Ariz. 1994).

26

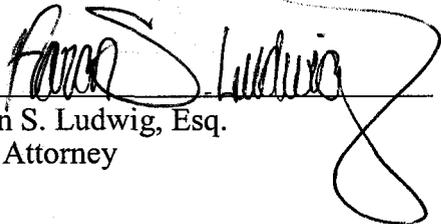
1 In a case such as this where dozens of investors purchased millions of dollars worth of
2 securities in many transactions, the attempt by Sargent to require the Division to articulate each
3 and every instance of misconduct does not comport with the Commission's pleading standards
4 and the liberal interpretation of the Commission's Rules.³ The Division clearly identifies that
5 Sargent and co-respondents sold unregistered securities and that Sargent engaged in misconduct
6 by making misleading statements or failing to disclose the risks associated with the sales. The
7 Notice provides examples of the types of disclosures that were omitted regarding the investment
8 risks and it provides examples of misleading statements made to investors. Sargent will have
9 ample opportunity to obtain witness and exhibit information prior to trial and sufficient time to
10 prepare a defense. The fact that Sargent does not know every scintilla of evidence or information
11 known to the Division affects Sargent's rights in no way whatsoever.

12 III. Conclusion

13 The Division respectfully requests that the Motion be denied because 1) Ariz.R.Civ.P.
14 9(b), the legal basis for the Motion, does not apply to this case; 2) there is no authority for the
15 proposition that the Claims must be stated with any more particularity than they are in the Notice;
16 and, 3) the Notice is legally sufficient and contains facts that state a claim under A.R.S. § 44-
17 1991.

18 RESPECTFULLY SUBMITTED this 5th day of September 2008.

19
20 **SECURITIES DIVISION of the**
ARIZONA CORPORATION COMMISSION

21
22 
23 _____
24 Aaron S. Ludwig, Esq.
25 Staff Attorney

26 ³ Even if Ariz.R.Civ.P. 9(b) applied, the degree of specificity sought by Sargent is not required. See *Sunbird Air Services, Inc. v. Beech Aircraft Corporation*, 789 F.Supp. 364 (D. Kan. 1992) ("Where allegations of fraudulent conduct are numerous..., less specificity is required to meet the requirements of Rule 9(b)").

1 **ORIGINAL** and **13 COPIES** of the foregoing filed
this 5th day of September 2008 with:

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5 **COPY** of the foregoing mailed/delivered
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