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BEFORE THE ARIZONA CORPORATION COMMISSION

CARL J. KUNASEK

Chairman

JIM IRVIN

Commissioner

WILLIAM A. MUNDELL

Commissioner

Arizona Corporation Commission

DOCKETED

NOV 17 1999

AZ CORP COMMISSION  
DOCUMENT CONTROL

In the matter of

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CARRINGTON ESTATE PLANNING SERVICES, et al.,

DOCKET NO. S-03215A-99-0000

) RESPONSE TO MOTION FOR ORDER  
) QUASHING SECURITIES DIVISION'S  
) SUBPOENA AND TERMINATING ITS  
) INVESTIGATION

The Securities Division respectfully requests that the hearing officer deny

Carrington Estate Planning Service's ("Carrington's") Motion for Order Quashing Securities

Division's Subpoena and Terminating Its Investigation for reasons that Carrington (1) requests

extraordinary and unprecedented interference with a properly authorized Commission

investigation; (2) relies on unresolved questions of law to prevent the Commission's review of

Carrington's business; and (3) attempts to shield Carrington by seeking to prevent information

sharing between the Commission and the Attorney General's Office.

I.

BACKGROUND

On October 5, 1999 the Securities Division ("Division") served a subpoena on Carrington for the production of books and records on October 19, 1999.

Carrington did not respond on the due date. Instead, Carrington's attorney requested a meeting with Division officials to discuss the investigation. The Division met with Carrington on October 14, 1999, at which time Carrington requested that the Division terminate its investigation. The Division was unwilling to do so having not seen one document produced under the subpoena.

1 On October 29, 1999, Carrington filed the present Motion seeking not only to terminate the  
2 investigation, but to prevent the Division from sharing information with another state agency, the  
3 Attorney General's Office.

4 **II.**

5 **THE DIVISION'S INVESTIGATION IS AUTHORIZED AND PROPER**

6 Carrington seeks to terminate the investigation because Carrington claims the investigation  
7 is "not authorized by the Securities Act of Arizona." The apparent basis for this claim is that there  
8 is no security involved, therefore "no power to investigate."

9 Carrington cites no statute or rule, which provides the mechanism to challenge a  
10 Commission investigation, before any information has been produced. Under A.R.S. § 44-1822,  
11 the Commission may investigate "any person" as the Commission "deems necessary." That  
12 investigation may commence upon the mere "belief" that a person "may be issuing" securities.  
13 Subpoenas may be issued where the Commission deems them "necessary and proper," in the  
14 Commission's opinion. A.R.S. § 44-1823.

15 Obviously, the decision to prevent even a first review of an ongoing business in Arizona  
16 would be extraordinary and unprecedented. This is especially true when the products sold by the  
17 business are characterized by the business itself as "viatical settlement investments."

18 In *S.E.C. v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047 (N.Y., 1973), the S.E.C.  
19 sought to enforce its subpoena, while Brigadoon claimed that the warehouse receipts it sold were  
20 not securities, thus not subject to the subpoena. The Court disagreed with Brigadoon, stating:  
21

22 The Commission must be free without undue interference or  
23 delay to conduct an investigation which will adequately develop a  
24 factual basis for a determination as to whether particular activities  
25 come within the Commission's regulatory authority. . . . It is apparent  
26 . . . in this case that [the S.E.C.] investigation has the legitimate  
purpose of determining whether the whisky or warehouse receipts . . .

1 are securities covered by the securities acts, and, if so, of determining  
2 whether any securities violations have occurred. *Id.* At 1053-54.

3 **III.**

4 **THERE IS NO ARIZONA PRECEDENT ON WHETHER VIATICAL**  
5 **INVESTMENTS ARE SECURITIES**

6 Although the Division has a right to investigate to determine the character of investments  
7 offered or sold, Carrington requests that the Commission terminate its investigation because  
8 viatical settlement contracts are “not securities under state and federal law.” As a basis for such a  
9 claim, Carrington states that one Superior Court judge in a private action against Carrington has so  
10 ruled, based on a federal court decision from the District of Columbia. The Superior Court has a  
11 pending motion to reconsider the decision. The division has been informed that should Judge Dann  
12 rule against the plaintiff investors, the matter is likely to be appealed. The District of Columbia  
13 case has been soundly criticized and cannot by any stretch of the imagination be described as well-  
14 settled federal law. There is no existing precedent in Arizona on the question of viatical contracts  
15 as securities, and certainly no “mandate,” as counsel for Carrington would espouse.

17 The federal case Carrington relies on, *S.E.C. v. Life Partners, Inc.*, 87 F.3d 536 (DC Cir.  
18 1996), dealt with a viatical seller in Texas. The Division is unable to draw any factual comparisons  
19 between Carrington and *Life Partners*, because Carrington has provided no documentation that  
20 would enable the Division to know about Carrington’s business. Even assuming that *Life Partners*  
21 was correctly decided, the Division has a right to investigate to make its own determination  
22 whether that case fits the Carrington situation.

24 Ultimately, the Division has a right to disagree with *Life Partners*’ analysis that the viatical  
25 investments sold in that case were not securities. In fact, *Life Partners* has been soundly criticized  
26

1 by legal authorities.<sup>1</sup> For Carrington to propose that one case in a distant federal court should  
2 somehow control all initial inquiry in Arizona, is disingenuous at best. If such a position were  
3 followed, fraudulent securities sellers would only have to utilize the right “buzz words,” such as  
4 “viaticals,” to bring an investigation to a screeching halt before the first fact is uncovered.

5 Arizona courts have on several occasions declined to follow federal securities law, on the  
6 premise that Arizona’s statutory scheme or legislative history indicates a different intent than  
7 federal interpretations.<sup>2</sup> Arizona courts do not blindly follow federal case law, given the strong  
8 intent to interpret the Arizona Securities Act as first and foremost, an investor protection statute.

9 Until the Arizona Supreme Court has ruled on the issue of viatical settlements under the  
10 Arizona Securities Act, the Division and the Commission are not bound to follow the *Life Partners*  
11 decision.

#### 12 IV.

### 13 CARRINGTON HAS NO STANDING TO INTERFERE WITH STATE AGENCY 14 COOPERATION 15

16 In a second unauthorized and unprecedented request, Carrington requests that the hearing  
17 officer order a form of “Chinese wall” between an Attorney General’s consumer fraud  
18 investigation of Carrington and the Division’s own investigation. Carrington cites no authority,  
19 nor any basis for the Commission to thwart the pursuit of facts, which may lead to any number of  
20 claims for violations of state laws.  
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23 <sup>1</sup> Long, Joseph C., “The Anatomy of an Investment Contract”, *Enforcement Law Reporter*, 1997 (“It is here that the  
24 court of appeals in *Life Partners, Inc.*, has attempted to change the rules. . . Both the test [for investment contract] and  
25 the court’s reasoning appear to radically depart from the previously understood interpretation of the fourth element of  
26 *Howey* as modified by *Glenn Turner*.” Id. at p. 186

<sup>2</sup> See *Grubaugh v. DeCosta*, 1999 WL 137640 (Ariz. App. 1999) (where the court found important differences between  
the Arizona Securities Act and federal securities laws that warranted a different conclusion than a U.S. Supreme Court  
case on aiding and abetting); and *State v. Tober* (where notes were found to be securities under Arizona’s own statutory  
scheme, without need for federal “judicial gloss”).

1 The Consumer Fraud Act provides a cumulative remedy in addition to all other causes of  
2 action, remedies and penalties available under Arizona law. A.R.S. § 44-1501. To the extent that  
3 the Attorney General obtains documents that might impact on the jurisdiction of any other state  
4 agency, there is no rational basis for withholding those documents from review and analysis, other  
5 than that Carrington seeks to prevent the discovery of violations of law.

6 Further, it is very common for the Attorney General and the Corporation Commission to  
7 file joint securities and consumer fraud civil suits in Superior Court. Carrington's counsel is well  
8 aware of this, having defended such actions in the recent past. Carrington only seeks a self-serving  
9 control over the legitimate flow of information.

10  
11 **V.**

12 **LEGISLATIVE INACTION DOES NOT IMPACT THE STATE'S RIGHT TO**  
13 **INVESTIGATE**

14 Carrington states that the failure of a bill in the 1997 legislative session that would have  
15 added specific provisions on viaticals to the Arizona Securities Act, is indicative that viatical  
16 investments should not be regulated by the Division. Such a simplistic conclusion fails to take into  
17 consideration the myriad of reasons why a bill may not survive a particular legislative session. To  
18 make the jump from a legislative decision not to act, to a conclusion that the Division therefore  
19 cannot proceed under its constitutionally created authority to investigate, is a leap that stretches the  
20 bounds of reason, such that any further discussion might give the appearance that it has some  
21 semblance of logic.

22  
23 **VI.**

24 **CONCLUSION**

25 The Division respectfully requests that Carrington's Motion be summarily denied. There  
26 are no issues present that would appear to benefit from oral argument beyond the pleadings as

1 filed. The Division also respectfully requests that Carrington be ordered to comply with the  
2 October 5,1999 subpoena, within a specific time period as determined by the hearing officer.

3 RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of November, 1999.

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6   
7 SHARON FOX  
8 Special Assistant Attorney General  
9 ROBERT ZUMOFF  
10 Assistant Attorney General

11 Copy mailed this 17<sup>th</sup> day of November to:  
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