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BEFORE THE ARIZONA CORPORATION COMMISSION
Arizona Corporation Commission

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AZ CORP COMMISSION
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COMMISSIONERS

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

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In the matter of:

DOCKET NO. S-03489A-03-0000

KATHLEEN WHORLEY SOMMER
[CRD No. 2750036],
d/b/a Sommer & Associates
249 W. Waltann Lane
Phoenix, Arizona 85023

**DIVISION'S OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS,
AND CROSS-MOTION FOR AN ORDER
SCHEDULING A PRE-HEARING
CONFERENCE**

And JOHN DOE, husband and wife,

RESPONDENTS.

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") opposes the respondent's motion, styled "Application to Dismiss Allegations re: Respondent's Violations of A.R.S. § 44-1841 and § 44-1991," docketed March 25, 2003, on the ground that the Division, in this administrative proceeding, is exempt from the statute of limitations upon which respondent relies. In addition, the Division cross-moves for an order scheduling a pre-hearing conference at the earliest convenience of the Hearings Division. The memorandum of points and authorities for this cross-motion begins at page 3 of this document.

The Commission Should Deny the Motion to Dismiss

A.R.S. § 44-2004 forms the sole basis for respondent's argument in support of her motion to dismiss. An agency of the state of Arizona, when it pursues an action in the public interest as the Division has done here, is exempt from statutes of limitations, particularly including A.R.S. § 44-2004. *Trimble v. American Savings Life Ins. Co.*, 152 Ariz. 548, 554-556, 733 P.2d 1131, 1137-1139 (App., 1st Div., 1986).

1 *Trimble* was a case brought jointly by the Director of Insurance, the Arizona Corporation
2 Commission, and the Director of Securities. The statute of limitations the *Trimble* court construed
3 was A.R.S. § 44-2004. Section 44-2004 was re-written by the Legislature in 1996. See Laws 1996,
4 Ch. 197, § 7. The 1996 Legislature did not write anything into the statute to make it applicable to
5 public enforcement actions, despite the *Trimble* court's declaration in 1986 that "[s]tatutes of
6 limitation in public enforcement actions . . . do not run against the state 'unless the legislature has
7 expressly and definitely declared that they do.'" *Trimble*, 152 Ariz. at 556, 733 P.2d at 1139.
8 Accordingly, there can be no doubt that the decision of the Court of Appeals in *Trimble* is
9 controlling law in the present civil administrative proceeding, and that A.R.S. § 44-2004 does not
10 bar this administrative proceeding.

11 Anticipating that respondent may contend in reply that the Division's request for an order of
12 restitution converts this proceeding into an action for private benefit, the Division will address that
13 argument here.

14 The Court of Appeals of Arizona has considered and rejected the contention that an ancillary
15 benefit to private persons strips a public enforcement action of its public character. Among the
16 decisions discussed and relied upon in the *Trimble* opinion is *SEC v. Penn Central Co.*, 425 F.Supp.
17 593, 599 (E.D. Pa. 1976). There, the court held that the SEC's request for the remedy of
18 disgorgement did not convert the securities enforcement action into an action for private benefit, and
19 that the statute of limitations defense was inapplicable to SEC enforcement actions. In *Trimble*
20 itself, the Court of Appeals held: "The public interest is served by the cessation of illegal and
21 fraudulent acts. Requiring the [respondent] to make restitution to the victims has a deterrent effect,
22 which also serves the public interest." 152 Ariz. At 556, 733 P.2d at 1139.

23 The Securities Division has requested remedies including restitution in the present case;
24 nonetheless this is an enforcement action in the public interest. Pursuant to Securities Act Article 2
25 (Administrative Personnel), Article 3 (General Administrative Powers), Article 11 (Hearings), and
26

1 the delegation of power by the Commission, the Director of Securities, Mark Sendrow, possesses
2 authority to commence and to maintain this administrative proceeding against Kathleen Whorley
3 Sommer. Mr. Sendrow signed the Notice of Opportunity for Hearing in this case, authorizing and
4 directing Division personnel to commence the proceeding, and to pursue it to its conclusion.
5 “Actions taken by the commissioner in the discharge of his statutory responsibilities, while they
6 undoubtedly benefit some private parties, are taken primarily in the public interest” *Trimble*,
7 152 Ariz. at 555, 733 P.2d at 1138, quoting *Herrman v. Cissna*, 82 Wash.2d 1 at 6, 507 P.2d 144 at
8 147 (1973).

9 Respondent’s motion to dismiss should be denied, and respondent should be directed to file
10 her answer immediately.

11
12 **Memorandum in Support of Division’s
Cross-Motion for an Order Scheduling a Pre-Hearing Conference**

13 On February 26, 2003, the Division served the Notice of Opportunity for Hearing upon
14 respondent by certified mail, addressed to her at her last known dwelling, pursuant to A.A.C. R14-4-
15 303(D)(5). A.A.C. R14-4-303(G) provides that service is complete upon mailing. Therefore,
16 respondent’s answer is due 30 days after February 26 – that is, March 28, 2003. A.A.C. R14-4-305.
17 Instead, respondent filed an insupportable motion to dismiss on March 25. The facts call for the
18 inference that respondent filed this motion with the purpose to delay this proceeding.

19 The scheduling of a pre-hearing conference, to set a hearing date and to discuss all matters
20 regarding any pre-hearing motions or other proceedings, should not be delayed until respondent files
21 an answer. The Division has copies of checks that prove that respondent received more than
22 \$140,000 in commissions for selling Ponzi scheme investment contract securities, to dozens of
23 investors. These investors lost a total of approximately \$900,000 due to respondent’s illegal
24 activities. The Commission should not permit the public’s business to be delayed by respondent’s
25 insupportable motion to dismiss. Accordingly, the Division requests a pre-hearing conference at the
26

1 earliest convenience of the Hearing Officer, except for the dates April 7, 8, and 9, 2003, when
2 undersigned counsel is scheduled to be in a hearing in another case.

3 Dated this 26th day of March, 2003.

4
5 
6 Amy Leeson
Attorney for the Securities Division

7 Original and 13 Copies
8 filed with Docket Control
on March 26, 2003

9 Copy delivered by hand on
10 March 26, 2003, to:
Office of Marc Stern, Hearings Division

11 Copy mailed on March 26, 2003, to:
12 Harry N. Stone, Esq.
13 3030 N. 3rd Street
14 Phoenix, Arizona 85012
Attorney for Respondent

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