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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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1 WILLIAM A. MUNDELL
2 Chairman
3 JIM IRVIN
4 Commissioner
5 MARC SPITZER
6 Commissioner

6 In the matter of:

7 EASY MONEY AUTO LEASING, INC.)
8 10243 N. Scottsdale Rd., Suite 5)
9 Scottsdale, Arizona 85253)

9 SUPERIOR FINANCIAL SERVICES, INC.)
10 2102 E. Sharon Dr.)
11 Phoenix, Arizona 85022)

11 JAMES ANTHONY CICERELLI)
12 13027 N. Surrey Circle)
13 Phoenix, Arizona 85029)

13 DAVID PAUL FRENCH)
14 2102 E. Sharon Dr.)
15 Phoenix, Arizona 85022)

16 RESPONDENTS.

DOCKET NO. S-03415A-01-0000

POST HEARING MEMORANDUM BY
THE SECURITIES DIVISION

Arizona Corporation Commission
DOCKETED

JAN 31 2002

DOCKETED BY

17 The Securities Division ("Division") of the Arizona Corporation Commission ("Commission")
18 hereby submits the following Post Hearing Memorandum in this matter.

19 **STANDARD OF PROOF**

20 In administrative actions brought by the Commission, the well-recognized standard of proof
21 for violations of the Securities Act of Arizona, A.R.S. § 44-1801 *et seq.*, is the "preponderance of the
22 evidence." This standard has been uniformly applied in administrative proceedings both in this and
23 other jurisdictions. *See, e.g. Steadman v. S.E.C.*, 450 U.S. 91 (1981) (preponderance of evidence
24 standard applies in administrative adjudication of federal securities law fraud violations). *See also,*
25 *Geer v. Ordway*, 156 Ariz. 588, 589, 754 P.2d 315, 316 (App.1987) (preponderance of evidence
26

1 standard applicable in administrative adjudication of state motor vehicle operator licensing law). It
2 naturally follows that this standard is equally applicable in the administrative proceeding presently at
3 issue.

4 DISCUSSION

5 The Division submits that the evidence introduced in this hearing conclusively established
6 each of the allegations brought against RESPONDENTS EASY MONEY AUTO LEASING, INC.
7 ("EMAL"), SUPERIOR FINANCIAL SERVICES, INC. ("SFS"), JAMES A. CICERELLI
8 ("CICERELLI") and DAVID P. FRENCH ("FRENCH") (collectively "RESPONDENTS").

9 I.

10 JURISDICTION

11 A. Easy Money Auto Leasing

12 The EMAL investment products RESPONDENTS offered and sold to investors in this matter
13 consisted of promissory notes or "loan agreements." As will be discussed below, each of these
14 investment "opportunities" were in fact securities as defined under the Arizona Securities Act (the
15 "Securities Act"). As such, the Commission has jurisdiction to consider this matter and is empowered
16 to issue an order directing the RESPONDENTS to cease and desist from each of these acts,
17 transactions or practices and to correct the conditions resulting from such actions. A.R.S. §§ 44-1971;
18 44-2032.

19 1. The Promissory Notes

20 A.R.S. § 44-1801(26) states, in part, "Security means any note" The Supreme Court in
21 *State v. Tober*, 173 Ariz. 211, 841 P.2d 206 (1992), instructed that unless notes fit within an exemption
22 under A.R.S. § 44-1843 (exempt securities), A.R.S. § 44-1843.01 (exempt government securities) and
23 A.R.S. § 44-1844 (exempt transactions), they are securities for purposes of the registration statutes,
24 A.R.S. §§ 44-1841 and 44-1842. It is, of course, RESPONDENTS' burden of proof to prove the
25 existence of an exemption under the Securities Act. A.R.S. § 44-2033; *State v. Goodman*, 110 Ariz.
26

1 524, 526, 521 P.2d 611 (1974). RESPONDENTS in this action submitted no evidence regarding any
2 exemptions from registration.

3 The *Tober* court left open the issue of the appropriate test used to determine whether a note is a
4 security for purposes of the securities fraud statute. In *MacCollum v. Perkinson*, 185 Ariz. 179, 913
5 P.2d 1097 (App. 1996), the Court of Appeals announced a different test for that issue. As *MacCollum*
6 noted, "The securities fraud statute defines a security in even broader terms than do the registration
7 statutes." *Id.* at 186. Even securities that are exempted from the registration statutes still fall within
8 A.R.S. § 44-1991. The *MacCollum* court thus adopted the test announced by the United States
9 Supreme Court in *Reves v. Ernst & Young*, 494 U.S. 56 (1990), in order to determine whether a note is
10 a security for purposes of the securities fraud statute. Under the *Reves*' test, the court "begins with the
11 presumption that a note is a security." *MacCollum*, 185 Ariz. at 187. "This presumption can be
12 rebutted only by a showing that the note bears a strong resemblance to an item on the judicially crafted
13 list of instruments that were not intended to be regulated as a security." *Id.* Examples include
14 consumer-financing notes, home mortgages and notes reflecting a bank loan. *Id.* If the instrument in
15 question is not similar to those examples, then the court faces the issue of whether another category
16 should be added to the list of non-regulated instruments. To determine that, the court examines the four
17 *Reves*' factors. *Id.* The factors include:

- 18 1. The motivation of the parties;
- 19 2. The plan of distribution of the instrument;
- 20 3. The public's reasonable expectation; and
- 21 4. Whether there is any other risk-reducing factor, such as the existence of another
22 regulatory scheme.

23 In *MacCollum*, the court had no difficulty determining that the notes were securities for
24 purposes of the securities fraud statute. Here, the factors also show the same.

1 First, similarly to *MacCollum*, the parties entered into the investment to make money. Indeed,
2 one of EMAL's offering documents was designed to show how EMAL could pay such high returns.
3 *See* Ex. S-51.

4 Second, the distribution here was to general members of the public. By contrast, in *MacCollum*,
5 the note was just offered to a single person.

6 Third, the investors here believed they were investing their money for a return of income or
7 profits. That is what the EMAL literature told them. *See* Exs. S-50 and S-51.

8 Finally, there is no other regulatory or risk reduction scheme covering these offerings. Thus, the
9 Reves' factors show these notes are securities for purposes of A.R.S. § 44-1991.

10 2. Investment Contracts

11 At least a few of the EMAL transactions were not documented with promissory notes. *See* Ex.
12 S-15a, S-15b and S-58. These investments were all in Individual Retirement Accounts ("IRAs").
13 Nevertheless, these transactions are still securities as they are investment contracts. Investment
14 contracts, of course, are included in the definition of securities. A.R.S. § 44-1801(26) ("Security
15 means . . . investment contract . . .") The core definition of an investment contract was set forth in
16 *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946), and this definition is now universally recognized as
17 the starting point for assessing whether any particular offer or sale constituted the offer or sale of an
18 investment contract. Under the *Howey* test, an investment contract exists if it involves 1) an
19 investment of money; 2) in a common enterprise; 3) with the expectation of profits earned solely from
20 the efforts of others.¹ The basic framework of this definition has been repeatedly construed and
21 expanded, and each of these three elements has since developed its own line of judicial reasoning. In
22 Arizona, the *Howey* test remains the basis for investment contract analysis in many respects, although
23 more recent case law has served to expand the confines of this test considerably. Citing *Howey*,

24
25
26 ¹ Some authorities have sought to examine this third element in terms of two separate prongs, the
"expectation of profits" prong, and the "efforts of others" prong. This distinction is not important for purposes
of this memorandum.

1 Arizona courts agree that the definition of securities including investment contracts embody "a
2 flexible rather than static principle, one that is capable of adaptation to meet the countless and variable
3 schemes devised by those who seek to use the money of others on the promise of profits." *Nutek*
4 *Information Systems, Inc. v. Arizona Corporation Commission*, 194 Ariz. 104, 108, 977 P.2d 826
5 (App.1998); *Rose v. Dobras*, 128 Ariz. 209, 211, 624 P.2d 887 (App.1981). In accordance with this
6 view, Arizona courts have developed and adopted flexible interpretations for each of the three prongs
7 set forth in *Howey*.

8 **a. RESPONDENTS' Investment Program Involved the "Investment of**
9 **Money"**

10 In the context of examining the existence of investment contracts, the first prong of the *Howey*
11 test - the investment of money - has rarely been the subject of dispute. This point is amply illustrated
12 by the fact that Arizona courts have yet to have an occasion to meaningfully evaluate this particular
13 prong. *See, e.g., Foy v. Thorp*, 186 Ariz. 151, 158, 920 P.2d 31 (App.1996) ([respecting the first
14 prong] "there is no question [plaintiff] invested money"); *Vairo v. Clayden*, 153 Ariz. 13, 14, 734 P.2d
15 110 (App.1987) ("There is no question [plaintiff] invested money. Thus, the first prong of *Howey* is
16 met"); *Daggett v. Jackie Fine Arts*, 152 Ariz. 559, 565, 733 P.2d 1142 (App.1986) ("The first prong
17 of *Howey* is met in the instant case. Plaintiff made an investment of money"); *Rose v. Dobras*, 128
18 Ariz. at 211 ("In this case, there clearly has been an investment of money").

19 Like with the cases cited above, RESPONDENTS' investment program plainly involved the
20 investment of money. As seen through both witness testimony and through hearing exhibits, each
21 investment in this program was initiated through the investment of money into the program. *See e.g.,*
22 Exhibits S-15a, 15b and S-58.

23 **b. RESPONDENTS' Program Required Investments in a "Common**
24 **Enterprise"**

25 Different jurisdictions have adopted a range of definitions for the second "common enterprise"
26 or "commonality" prong of the *Howey* test. The Ninth Circuit traditionally employs a form of

1 commonality known as "strict vertical commonality." *S.E.C. v. Eurobond Exchange, Ltd.*, 13 F.3d
2 1334 (9th Cir.1994); *See also Hector v. Wiens*, 533 F.2d 429 (9th Cir.1976); *S.E.C. v. Glen W. Turner*
3 *Enterprises, Inc.*, 474 F.2d 476 (9th Cir.1973). Under this approach, the commonality required is
4 vertical (between the investor and the promoter) rather than horizontal (pooling among multiple
5 investors). *Id.*

6 In Arizona, however, courts have adopted the Ninth Circuit's interpretation of commonality
7 with some material modifications. In general, the fortunes of the investor must still be interwoven
8 with and dependent upon the efforts and success of those seeking the investment. *Vairo*, 153 Ariz. at
9 17, *citing Turner*, 474 F.2d at 482, n.7. For the vertical form of commonality to be established,
10 however, a positive correlation between the potential profits of the investor and the potential profits of
11 the promoter need only be demonstrated. *Daggett*, 152 Ariz. at 566; *Vairo*, 153 Ariz. at 17; *Foy*, 186
12 Ariz. at 158. Arizona courts have also held that commonality will be satisfied if either horizontal or
13 vertical commonality can be shown. *See Daggett*, 152 Ariz. at 566; *Vairo*, 153 Ariz. at 17; *Foy*, 186
14 Ariz. at 158.

15 It is evident that the program offered and sold by RESPONDENTS in this case easily satisfied
16 the commonality prong of the *Howey* test. In fact, both vertical and horizontal commonality can be
17 amply demonstrated with this program. In terms of the vertical commonality component, the program
18 brochure explicitly states that a "The above table will explain how we are able to pay our Investors an
19 excellent return on their investment and continue to function as a profitable business. . . . Every
20 \$100,000 loan to Easy Money generates a gross revenue of approximately \$200,000. You can easily
21 see how we can pay an above average return." Exhibit S-51.

22 The horizontal commonality component of this program is equally evident. As demonstrated
23 by the testimony of Division accountant Mark Klamrzynski, the monies invested into this program by
24 investors were pooled into a bank account from which purchases of automobiles were allegedly
25 purchased. Hearing Transcript ("Tr."), p. 279, ln. 21 – p. 280, ln. 13. In sum, the presence of both
26

1 vertical and horizontal commonality in this program serve to easily satisfy the second commonality
2 prong of the *Howey* investment contract test.

3
4 **c. Investors had an Expectation of Profit Through the Efforts of Others**

5 The third and final prong of the *Howey* test has evolved since it was first handed down over 50
6 years ago. The original definition of this third prong required that for an investment contract to be
7 present, the investors must have had an expectation of profits solely from the efforts of others.
8 *Howey*, 328 U.S. at 301. The rigidity of this prong was significantly lessened in *Turner*, where the
9 Ninth Circuit concluded that the "adherence to such an interpretation could result in a mechanical,
10 unduly restrictive view of what is and what is not an investment contract." *Id.* at 482. The *Turner*
11 court went on to adopt "a more realistic test," where the efforts made by those other than the investor
12 are only required to be the undeniably significant ones, those essential managerial efforts that
13 ultimately affect the failure or success of the enterprise.

14 Arizona courts have followed *Turner* in broadening this third prong. *See Nutek*, 194 Ariz. at
15 108. As such, in order to satisfy the third *Howey* prong in Arizona, one must only establish that the
16 efforts made by those other than the investors were the undeniably significant ones, and were those
17 essential managerial efforts that affected the failure or success of the enterprise. *Id.*

18 In view of the mechanics, terms and conditions of the program at issue, this investment
19 program readily satisfies the third prong of the *Howey* test. As explicitly included in the investment
20 literature, all material aspects of this program, including purchasing, marketing and administration,
21 and the generation of profits were to be conducted through the "expertise" of the Easy Money
22 business" *See* Exhibits S-50 and S-51. Through their "simplistic structure," "expert management and
23 training" and "extensive support and Marketing," "Easy Money Auto Leasing [was] positioned to
24 dominate" its field." Exhibit S-50. By contrast, the passive investors in this program had but one
25 requirement: to invest their money. *See e.g., Tr.*, p. 238, ln. 12 – p. 239, ln. 4. There were no other
26 functions falling upon the investors in this program other than to wait for their profits. Because of the

1 clearly delineated roles of the investor and promoter in this program, the investors in this program
2 plainly expected profits through the efforts of others, namely the Easy Money promoters themselves.
3 Accordingly, this investment unequivocally met the third prong of the *Howey* test.

4 Because the Easy Money investment easily met each prong of the *Howey* test, this program
5 once again fell well within the recognized definition of a security as prescribed under § 44-1801(26).
6 It follows that the offer and sale of this investment by RESPONDENTS from 1998 through 2000
7 constituted yet another offer and sale of securities, once again conferring jurisdiction to the
8 Commission to take such action that it deems appropriate in connection with the multiple offers and
9 sales of this investment.

10 **B. Automotive Transplant Facility**

11 In addition to the EMAL investments, CICERELLI and FRENCH also solicited investors for an
12 automotive transplant facility. The terms of that investment were recorded by Division Investigator
13 Ron Clark (using the undercover name of Ron Johnson) and memorialized in an investment agreement.
14 See Ex. S-39, S-40, S-41 and S-42. This investment readily meets the criteria of the investment
15 contract analysis described *supra*. That test again, finds an investment is a security if a person:

16 (1) invests money

17 (2) in a "common enterprise" and

18 (3) is led to expect profits solely from the efforts of the promoter or a third party.

19 Here, Mr. Johnson was solicited to invest \$100,000. Tr., p. 181, lns. 18 – 25; Ex. S-42, ¶ 2.3.
20 The first *Howey* criteria is met. As for commonality, it is evident that the program offered and sold by
21 CICERELLI and FRENCH in this case easily satisfied the commonality prong of the *Howey* test. In
22 terms of the vertical commonality component, the investment was to be paid from the profits of the
23 promoter. Tr., p. 182, ln. 22 – p. 183, ln. 9. Finally, profits were expected solely from the efforts of
24 the promoter. Tr., p. 181, ln. 18 – p. 182, ln. 8; Ex. S-42, ¶¶ 2.4 – 2.9. Thus the Automotive
25 Transplant investment is a security.

II.

REGISTRATION VIOLATIONS

A. Offer and Sale of Unregistered Securities

1. EMAL

The Securities Division alleged that from 1998 forward, RESPONDENTS repeatedly offered and sold securities within or from Arizona in violation of A.R.S. § 44-1841 of the Securities Act. These were investments in EMAL. A.R.S. § 44-1841 provides that it is unlawful for an individual to sell or offer for sale within or from this state any securities unless the securities have been duly registered or qualify as a specifically described subset of federally covered securities. A.R.S. § 44-1841(A). The unlawful offer or sale of unregistered securities within or from Arizona encompasses more than just face-to-face solicitation or sale by a seller. Under the recognized doctrine of participant liability, a person who is directly responsible for the distribution of unregistered securities by conduct that is both necessary to and a substantial factor in the unlawful transaction violates A.R.S. § 44-1841(A). *See S.E.C. v. Rogers*, 790 F.2d 1450, 1456 (9th Cir. 1986). To be a substantial factor in the transaction requires participation that is more than *de minimis*. *Rogers*, 790 F.2d at 1456. No showing of direct contact between the participant and the offerees is required to impose liability. *S.E.C. v. Holschuh*, 694 F.2d 130, 140 (7th Cir. 1982). The evidence produced at hearing established that RESPONDENTS were in violation of A.R.S. § 44-1841 with regard to multiple securities on repeated occasions over a several year period.² Indeed, the only true matter at issue respecting this charge relates to the actual number of violations that RESPONDENTS ultimately committed.

As previously addressed, RESPONDENTS' sale of promissory notes and investment contracts constituted the sale of securities. Equally clear is the fact that these securities were not registered with the Division in any capacity. *See Exhibits S-1 and S-2* (Certificates of non-registration for EMAL and

² The individual Respondents, CICERELLI and FRENCH, engaged in face-to-face selling, *see e.g.*, TR., p. 222, ln. 4 – p. 226, ln. 11, and are liable on that basis, as well as their participation as principals in EMAL.

1 SFS.) Despite this lack of registration, various business records reveal that RESPONDENTS sold at
 2 least 40 of these investments since 1998. *See Exhibits S-9 – S-35.* Each one of these sales constituted a
 3 separate violation of A.R.S. § 44-1841(A) for purposes of the Securities Act unless an exemption from
 4 such registration was applicable. No such exemption was applicable with this security under the
 5 Securities Act. Moreover, RESPONDENTS made no attempt to allege any particular registration
 6 exemption, much less meet their burden in proving that a particular registration exemption was indeed
 7 applicable. *See A.R.S. § 44-2033; see also State v. Barber, 133 Ariz. 572, 578, 653 P.2d 29, 35 (App.*
 8 *1982), aff'm, 133 Ariz. 549, 653 P.2d 6 (1982); State v. Baumann, 125 Ariz. 404, 610 P.2d 38 (1980).*
 9 The Court in *Barber* discussed the exemption burden as follows:

10 To begin our analysis of this issue, we first note that the state is not required to
 11 prove that the securities and transactions were not exempted by law. A.R.S. § 44-2033
 12 provides: In any action, civil or criminal, when a defense is based upon any exemption
 13 provided for in this chapter, the burden of proving the existence of the exemption shall be
 14 upon the party raising the defense, and it shall not be necessary to negative the exemption
 15 in any petition, complaint, information or indictment, laid or brought in any proceeding
 16 under this chapter. *This statute clearly places the burden upon the [defendant] to prove*
 17 *the existence of any exemption he deemed applicable to this case.*

18 133 Ariz. at 578 (Emphasis added).

19 During the hearing at issue, RESPONDENTS simply made no reference to the exemption
 20 provisions touching upon the registration requirements prescribed under the Securities Act. It is self-
 21 evident that through RESPONDENTS' silence on this issue, the necessary burden of proof to qualify
 22 for an exemption was not carried. It is equally evident, based on A.R.S. § 44-2033 and the cited case
 23 law interpreting this provision, that RESPONDENTS have waived any and all registration defenses
 24 predicated on exemptions provided under the Securities Act.

25 2. CICERELLI

26 a. EMAL

The evidence submitted at hearing clearly shows that CICERELLI offered and sold the securities
 at issue. He was both the organizer and a principal in the EMAL offering. CICERELLI signed all of

1 those notes and contracts as president. *See* Exs. S-6 through S-34. CICERELLI was a signator on the bank
 2 accounts that all the proceeds from the investors was deposited; he signed most of the checks written on
 3 the accounts. Tr., 276, ln. 13 – p. 277, ln. 11. Uncontested witness testimony at the hearing also
 4 established that CICERELLI offered and sold the securities at issue in face-to face contact with offerees.
 5 *See e.g.*, Tr., p. 29, ln. 12 – p. 30, ln. 25. The corporate records of EMAL listed him as president. *See*
 6 Exhibit S-5. Additionally, others testified about CICERELLI, “[Cicerell] was chief. He did everything.
 7 He was the president. He controlled the company.” Tr., p. 29, lns. 23 – 24.³

8 **b. Automotive Transplant Investment**

9 The evidence submitted at hearing clearly shows that CICERELLI offered and sold the security at
 10 issue. He met with the offeree of the securities and discussed the investment. Tr., p. 158, ln. 23 – p. 170,
 11 ln. 17. The entire conversation was tape-recorded. *See* Exhibits S-40a and S-40b. The record is
 12 complete with CICERELLI attempting to sell this unregistered security to Mr. Clark.

13 **3. FRENCH**

14 **a. EMAL**

15 The evidence submitted at hearing clearly shows that FRENCH offered and sold the securities at
 16 issue. He was both a salesperson and a principal in the EMAL offering. FRENCH was listed as the
 17 Secretary of EMAL. *See* Exhibit S-5. Uncontested witness testimony at the hearing also established that
 18 FRENCH offered and sold the securities at issue in face-to face contact with offerees. *See e.g.*, Tr., p. 77,
 19 ln. 9 – p. 79, ln. 22. CICERELLI described FRENCH as his “partner.” Tr., p. 216, lns. 7 – 9. David
 20 FRENCH described CICERELLI as his “partner” in EMAL. Tr., p. 152, ln. 24 – p. 153, ln. 17.

21 **b. Automotive Transplant Investment**

22
 23
 24 ³ Although three of the notes were issued in the name of SFS, EMAL and CICERELLI are still
 25 responsible for those notes. First, the investor, Margaret Peirson, had already purchased an EMAL note through
 26 FRENCH. When she was sold the SFS notes she thought, from what FRENCH told her, that this was a company related
 to EMAL. Tr., p. 94, ln. 10 – p. 95, ln. 22. Even more important, the funds from Ms. Peirson’s investments were traced
 to EMAL’s bank account. Tr., p. 281, ln. 18 – p. 285, ln. 2. EMAL and CICERELLI, in addition to SFS and FRENCH,
 are responsible for Ms. Peirson’s investments.

1 Again, the evidence submitted at hearing plainly demonstrates that FRENCH offered and sold the
2 security at issue. He met with the offeree of the securities twice to discuss the investment, in addition to
3 discussing it on the phone. Tr., p. 147, ln. 20 – p. 172, ln. 23. The three conversations were tape-
4 recorded. See Exhibits S-39a – S41b. The record is complete with FRENCH attempting to sell this
5 unregistered security to Mr. Clark.

6 4. SFS

7 Although EMAL and CICERELLI are responsible for the three SFS investments, *see supra*, the
8 inverse is not true. SFS participated in the sale of three notes, all to Margaret Peirson. See Ex. S-27. It is
9 responsible for the offer and sale of those securities.

10 **B. Offer and Sale of Securities by Unregistered Dealers or Salesmen**

11
12 The Division also alleges that RESPONDENTS violated A.R.S. § 44-1842 by acting as securities
13 dealers or salesmen within or from Arizona while not registered as required under the Securities Act.
14 Specifically, A.R.S. § 44-1842 states that it is unlawful for any dealer to sell or purchase or offer to sell or
15 buy any securities, or for any salesman to sell or offer for sale any securities within or from this state,
16 unless the dealer or salesman is registered as such pursuant to the registration provisions of the Securities
17 Act. Based largely on the same analysis propounded in the prior section, RESPONDENTS violated this
18 count on enumerable occasions.

19 As previously established above, the promissory notes and investment contracts offered and sold
20 by RESPONDENTS in this matter were a type of security recognized under the Securities Act. In light of
21 this fact, the issues relevant to this second alleged category of securities violations revolve around three
22 familiar issues: whether RESPONDENTS themselves were registered, whether an exemption to such
23 registration applied, and if neither of the prior two were applicable, whether, and to what extent, did
24 RESPONDENTS make such unregistered sales.

25 Respecting the initial issue of RESPONDENTS' registration status as dealers and/or salesmen in
26 Arizona, the record is once again clear: RESPONDENTS were not registered as dealers or salesmen under

1 the Securities Act during the majority of their selling activities. As established through the Certificate of
2 Non-registrations issued against RESPONDENTS EMAL, SFS, CICERELLI and FRENCH pursuant to
3 A.R.S. § 44-2034, none of them were registered as a dealer or salesman in Arizona. See Exhibits S-1
4 through S-4. The second issue pertaining to the Division's allegations against RESPONDENTS for
5 securities transactions by unregistered dealers or salesmen relates to the issue of exemptions. Quite
6 simply, RESPONDENTS made no attempt during the hearing to raise any exemption defenses to the
7 registration requirements prescribed under A.R.S. § 44-1842. As discussed *supra*, the burden is on the
8 respondent to raise and prove any exemption defenses, and a failure to do so prior to the close of hearing
9 acts as a waiver to any and all such defenses. See generally, A.R.S. § 44-2033; See also *State v. Barber*,
10 133 Ariz. 572, 578, 653 P.2d 29, 35 (App.1982), *aff'm*, 133 Ariz. 549, 653 P.2d 6 (1982); *State v.*
11 *Baumann*, 125 Ariz. 404, 610 P.2d 38 (1980). Because RESPONDENTS neither raised nor proved any
12 defenses premised on an exemption to the registration requirements of A.R.S. § 44-1842(A), no
13 exemption defenses are applicable in this matter.

14 The third and final issue pertaining to the Division's allegations against RESPONDENTS for
15 violations of A.R.S. § 44-1842 involves the extent to which RESPONDENTS made offers and sales of
16 promissory notes and investment contracts while unregistered as a dealer or salesman. Plainly, because
17 RESPONDENTS were each not registered as dealers or salesmen during the entire period, the number of
18 instances in which RESPONDENTS sold promissory notes and investment contracts to investors during
19 this period equates to the minimum number of times in which RESPONDENTS sold securities while not
20 registered as dealers or salesmen. Based on exhibits and witness testimony produced at hearing, this
21 figure calculates out to a minimum of 41 instances of unregistered transactions. See Exhibits S-6 through
22 S-35, for EMAL, CICERELLI and FRENCH. See also Tr., p. 142, ln. 7 – p. 143, ln. 5 (Regarding one
23 additional investment not listed on Ex. S-35.) As for SFS, it is responsible for three transactions. See
24 *supra*, n. 1.

25 Similarly, CICERELLI and FRENCH were unregistered at the time they attempted to sell the
26 automotive transplant investment to Mr. Clark. They are liable under A.R.S. § 44-1842 for that effort.

1 To summarize, RESPONDENTS, while unregistered with the Securities Division, functioned as
2 securities salesmen and/or dealers during the sale of at least 41 promissory notes and investment contracts,
3 plus the automotive transplant investment. Each instance of this conduct was an unlawful sale of
4 securities by an unregistered salesman or dealer as proscribed under § 44-1842(A) of the Securities Act.

5
6 **III.**

7 **SECURITIES FRAUD VIOLATIONS**

8 The Securities Division further alleged that RESPONDENTS violated A.R.S. § 44-1991 of
9 the Securities Act, fraud in the purchase or sale of securities. Specifically, the Division contends that
10 RESPONDENTS violated one or more provisions of this statute on multiple occasions and in
11 multiple fashions. As will be discussed, the evidence elicited at hearing repeatedly substantiated
12 these contentions.

13 Under A.R.S. § 44-1991, it is a fraudulent practice and unlawful for a person, in connection
14 with a transaction or transactions within or from this state involving an offer to sell or buy securities,
15 or a sale or purchase of securities, to directly or indirectly do either of the following:

16 Make untrue statements of material fact, or omit to state any material fact necessary in
17 order to make the statements made, in the light of the circumstances in which they
were made, not misleading; or

18 Engage in any transaction, practice or course of business which operates or would
19 operate as a fraud or deceit.

20 A.R.S. § 44-1991(A)(2) & (3). Securities fraud may be proven by either one of these acts. *Hernandez*
21 *v. Superior Court*, 179 Ariz. 515, 880 P.2d 735 (App.1994).

22 In the context of these provisions, the term "materiality" requires a showing of substantial
23 likelihood that, under all the circumstances, the misstated or omitted fact would have assumed *actual*
24 *significance* in the deliberations of a reasonable buyer. *Trimble v. American Sav. Life Ins. Co.*, 152 Ariz.
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1 548, 553, 733 P.2d 1131, 1136 (1986). Under this objective test, there is no need to investigate whether
2 an omission or misstatement was actually significant to a particular buyer.

3
4 Additionally, the affirmative duty not to mislead potential investors in any way places a heavy
5 burden on the offeror and removes the burden of investigation from the investor who is not required to
6 act with due diligence. *Trimble*, 152 Ariz. at 553, 733 P.2d at 1136. A misrepresentation or omission of
7 a material fact in the offer and sale of a security is actionable even though it may be unintended or the
8 falsity or misleading character of the statement may be unknown. In other words, scienter or guilty
9 knowledge is not an element of a violation of A.R.S. § 44-1991(2). *See e.g., State v. Gunnison*, 127
10 Ariz. 110, 113, 618 P.2d 604, 607 (1980). Stated differently, a seller of securities is strictly liable for
11 any of the misrepresentations or omissions he makes. *Rose v. Dobras*, 128 Ariz. at 214, 624 P.2d at
12 892. Additionally, there is no requirement to show that investors relied on the misrepresentations or
13 omissions, *Rose*, 128 Ariz. at 214, 624 P.2d at 892, or that the misrepresentations or omissions caused
14 injury to the investors, *Trimble*, 152 Ariz. at 553, 733 P.2d at 1136.

15 A primary violation of A.R.S. § 44-1991 can be either direct or indirect. It is now well-settled in
16 Arizona that *indirectly* violating A.R.S. § 44-1991 is not to be narrowly interpreted. *Barnes v. Vozack*,
17 113 Ariz. 269, 550 P.2d 1070 (1976)(Officers of company could be liable under A.R.S. § 44-1991 for the
18 fraudulent statements of a salesman of the security.) As discussed below, both CICERELLI and
19 FRENCH violated A.R.S. § 44-1991 by their direct misrepresentations as well as their indirect liability.

20 **A. Fraud in Connection with the Offer and Sale of Easy Money**

21 As proven at hearing, RESPONDENTS made a number of materials misrepresentations and
22 omissions in connection with their offers and sales of the Easy Money promissory notes and investment
23 contracts. This pattern of securities fraud took on several forms, and ultimately cost investors
24 substantial amounts of investment funds.

25 **1. RESPONDENTS Failed To Disclose The Criminal Record Of FRENCH.**

1 Division Investigator Clark testified that David FRENCH had a criminal record. That record
2 was for a felony conviction in 1995 for making false statements to the United States government. Tr., p.
3 175, lns. 1 – 13. FRENCH was an officer of EMAL who was described as CICERELLI's partner. See
4 Ex. S-5 and Tr., p. 216, lns. 7 – 9. He further testified that no investor told him that FRENCH's
5 criminal record was disclosed to the investor. Tr., p. 175, lns. 14 – 17. Investor Margaret Peirson also
6 testified that FRENCH never disclosed his criminal conviction to her. Tr., p. 85, lns. 11 – 16. She also
7 testified that not only would she have wanted to know, but also had she known, "It probably would have
8 kept me from investing." Tr., p. 85, lns. 17 – 21. Failure to disclose Mr. FRENCH's conviction
9 certainly fits within A.R.S. § 44-1991(A)(2) as a material omission. See *S.E.C. v. Enterprises Solutions,*
10 *Inc.*, 142 F. Supp. 3d 561 (S.D.N.Y. 2001)(Failure to disclose involvement in management of individual
11 with criminal record is violation of securities laws.) As FRENCH was involved in operations of EMAL,
12 all investors in EMAL should have been informed of FRENCH's record. None were. Thus,
13 RESPONDENTS violated A.R.S. 44-1991(2).

14 2. RESPONDENTS Misrepresented The Use Of Investor Funds.

15 The record is full of evidence that RESPONDENTS informed investors that their funds would
16 only be used to purchase or lease vehicles. The promissory notes and other investor documents
17 specifically stated that fact. See Exhibits S-6 through S-34. Exhibit S-6 states, "Lynn Andrews will
18 place up to \$40,000.00 into Company account for the purpose of leasing vehicles." Exhibit S-7 states,
19 "Ronald E. Bennick will place up to \$50,000.00 into Company account for the purpose of leasing
20 vehicles." The remaining promissory notes and loan agreements, Exhibits S-8 through S-34 all have
21 similar language, including the notes used by SFS. The offering documents contain similar information.
22 Exhibit S-51 explains how investors' funds will be used to purchase additional vehicles which will
23 general greater profits. The investors' testimony was similar. Mr. Hoffacker testified that his
24 understanding was that his investment would be placed in the Company account for the purpose of
25 buying, leasing and renting of vehicles. Tr., p. 39, lns. 16 – 23. He did not authorize the company to
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1 use the funds for any other purpose. Tr., p. 39, ln. 24 - Tr., p. 40, lns. 10. Ms. Peirson and Ms.
2 Andrews' testimony was similar. Tr., p. 89, lns. 2 - 18 (Peirson); Tr., p. 236, lns. 3 - 17 (Andrews).

3 After analyzing the bank records of EMAL, Division accountant Mark Klamrzynski testified that
4 the investors' money was used for almost everything but purchasing vehicles. Mr. Klamrzynski testified
5 that of the money raised from investors, at most \$313,164 was used by the auto-leasing program. Far
6 more was used to pay CICERELLI and FRENCH. Tr., p. 286, ln. 16 - p. 288, ln. 23. As Mr.
7 Klamrzynski testified:

8 "Was the \$1.3 million plus raised from investors only to purchase cars?"

9 A. No. It was not."

10 Tr., p. 288, lns. 4 - 6. In fact, on several transactions that Mr. Klamrzynski analyzed, CICERELLI and
11 FRENCH took cash out from the investor's check, prior to depositing the funds into the bank account.
12 Tr., p. 182, ln. 18 - p. 286, ln. 15. This was in direct contradiction of the representation made to investors
13 that their investments would be placed in the company account to purchase vehicles. Plainly violations of
14 both A.R.S. 44-1991(2) and (3) have been showed by all RESPONDENTS.

15 **3. RESPODENTS Misrepresented That EASY MONEY Had An Established And**
16 **Proven Track Record.**

17 Exhibit S-50, was a brochure on Easy Money. Investors Mr. Hoffacker, Ms. Peirson and Ms.
18 Andrews testified that they were given it prior to investing. Tr., p. 31 ln. 8 - p. 32, ln. 5 (Hoffacker);
19 Tr., p. 79, lns. 7 - 22 (Peirson); Tr., p. 230 ln. 15 - p. 231 ln. 8 (Andrews). The brochure plainly states,
20 "Advantages of Easy Money Auto Leasing . . . Established and proven track record." Ex. S-50.
21 EMAL, however, was only formed on November 23, 1998. Ex. S-5. Thus, Easy Money had been in
22 existence for one month before Lynn Andrews invested or sixteen months before Kathleen Boliek (the
23 last investor) made her initial investment. Ex. S-35. That is not sufficient time to create an established
24 and proven track record. One month, or sixteen months, is insufficient time to create an "established
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1 and proven track record.” The investor witnesses agreed. Tr. p. 32 lns. 12 – 18 (Hoffacker); Tr. p. 81,
 2 lns. 2 – 12 (Peirson); Tr. p. 220 ln. 22 – p. 221 ln. 3 (Andrews). As Andrews testified:

3 “Q. Now, going back to the established and proven track record. Would it have impacted your
 4 investment if you had known that Easy Money had only incorporated in November of 1999? Or excuse
 5 me. 1998 and started business about that time?

6
 7 A. Yes. It would have made quite a difference.”
 8
 9 Tr. p. 233, lns. 1 – 6.

10 **4. RESPONDENTS Misrepresented That EASY MONEY Had Virtually No
 11 Competition.**

12 Again, the brochure given to investors prior to their investment made other representations to
 13 prospective investors. It stated, “Advantages of Easy Money Auto Leasing . . . Virtually no
 14 competition.” Ex. S-50. That representation was false. For example, the Court of Appeals in *Sal*
 15 *Leasing, Inc. v. State*, 198 Ariz. 434, 10 P.3d 1221 (App. 2000), concerning another company involved
 16 in the same business as EMAL, referenced at least two other companies in the same business. But even
 17 more to the point, FRENCH stated that there were 12 other companies in the same business.” Tr., p.
 18 152, lns. 16 – 24. Once again, the investor witnesses testified that fact was misleading to them. Tr., p.
 19 33, lns. 5 – 21 (Hoffacker); Tr. p. 81, lns. 2 – 12 (Peirson); Tr. p. 232 lns. 5 – 25 (Andrews). Such a
 20 misrepresentation violated A.R.S. § 44-1991(2).

21 **5. RESPONDENTS Misrepresented That The Investments Were 100%
 22 Secured And Insured Against Loss.**

23 Once again, RESPONDENTS’ literature given to investors prior to their investment made other
 24 representations to prospective investors. It stated, “Liquidity. . . . Investment is 100% secured. . . .
 25 Insured against loss.” Ex. S-50. Investor Hoffacker testified that he thought it meant that he would not
 26 lose his money if anything went wrong. Tr., p. 34, lns. 4 – 9. He also testified that he did not receive

1 his investment back. Tr., p. 34, lns. 19 – 21. Investor Andrews testified that CICERELLI told her the
2 same thing, that “no matter happened I would always get my money back.” Tr., p. 233, lns. 19 – 20.

3 She also testified:

4 “Q. Did Mr. CICERELLI ever mention any risk involving in investing in this company?

5 A. He said there was no risk because it was insured.

6 Q. Do you know what he meant by that?

7 A. Well, I asked him about that. . . . And he said , well, you are completely 100% percent
8 insured with the company that he named.”
9

10 Tr., p. 216, ln. 22 – p. 217, ln. 6.

11 Ms. Andrews did not get her money back, Tr., p. 242, lns. 16 – 18, nor did most investors. Tr.
12 p. 302, ln. 8 – p. 303, ln. 15. Plainly their investment was not secured nor was there any insurance
13 behind the investment. In fact, the investment could not be secured because as the Division accountant
14 testified, much of the money raised by RESPONDENTS went into the pockets of CICERELLI and
15 FRENCH. Tr., p. 286, ln. 16 – p. 288, ln. 23.

16 Such a misrepresentation violated A.R.S. § 44-1991(2).

17
18 **6. RESPONDENTS Failed To Disclose The Risk In The Investment**

19 CICERELLI and FRENCH met or talked with the investors prior to their investing. At no time
20 did they disclose any risk in the investment. For example, the literature given to the investors stated that
21 the investment was secured and insured against lost. Ex. S-50. Mr. Hoffacker testified that in his meeting
22 with CICERELLI, there was no mention of risk. Tr., p. 30, lns. 13 – 18. FRENCH similarly said nothing
23 about risk to Ms. Peirson. Tr., p. 78, lns. 17 – 19. CICERELLI even told Ms. Andrews that there was no
24 risk. Tr., p. 216, ln. 22 – p. 217, ln. 6.

25 Ms. Andrews did not get her money back, Tr., p. 242, lns. 16 – 18, nor did most investors. Tr. p.
26 302, ln. 8 – p. 303, ln. 15. A misrepresentation by a seller of securities that concerns the amount of risk

1 associated with a particular investment is routinely recognized as a material misrepresentation. *See, e.g.,*
2 *Nutek*, 194 Ariz. at 113 (omission of investment's risk factors a clear material omission).

3 **7. Exhibit S-51 Plainly Misrepresented the Investment's Potential to Investors.**

4 Exhibit S-51 was given to investors prior to their investment. Tr., p. 83, ln. 1 – p. 84, ln. 11.
5 Exhibit S-51 alleges explains how Easy Money earns its profits. As it states, "The above table will
6 explain how we are able to pay our investors an excellent return on their investment and continue to
7 function as a profitable business." Ex. S-51. However, as Mr. Klamrzynski testified, the table did no such
8 thing as the table merely showed gross revenues, with no mention of expenses. Tr., p. 272, ln. 25 – p.
9 274, ln. 22. Thus, the statement is false. Tr., p. 273, lns. 12 – 13.

10 Similarly, the document does not explain how long Easy Money was in business. Failure to
11 mention that, or that the numbers were pro formas, is misleading. Tr., p. 274, ln. 23 – p. 275, ln. 19.

12 **8. RESPONDENTS Operated a Ponzi Scheme⁴**

13 A.R.S. § 1991(3) finds securities fraud if persons, "Engage in any transaction, practice or course
14 of business which operates or would operate as a fraud or deceit." In this case, RESPONDENTS stated
15 that they would be operating a sale lease-back automobile operation. *See* Exhibits S-50 and S-51. They
16 allegedly explained how the business would earn profits great enough to pay high interest rates to
17 investors. Exhibit S-51. No EMAL document disclosed any use of investor principal for distributions
18 to investors during the term of the contract. *See* Exhibits S-50 and S-51. In fact, the notes specifically
19 limited the investments to purchase or lease of vehicles. *See* Exhibits S-6 through S-34. Certainly the

21 ⁴ "A 'Ponzi' scheme is a term generally used to describe an investment scheme which is not really
22 supported by any underlying business venture. The investors are paid profits from the principal sums paid in by newly
23 attracted investors. Usually those who invest in the scheme are promised large returns on their principal investments.
24 The initial investors are indeed paid the sizable promised returns. This attracts additional investors. More and more
25 investors need to be attracted into the scheme so that the growing number of investors on top can get paid. The person
26 who runs this scheme typically uses some of the money invested for personal use. Usually, this pyramid collapses and
most investors not only do not get paid their profits, but also lose their principal investments." *Bald Eagle Area School
Dist. v. Keystone Financial, Inc.*, 189 F.3d 321, 329-30 (3rd Cir. 1999)(quoting Mark A. McDermott, *Ponzi Schemes and
the Law of Fraudulent and Preferential Transfers*, 72 Am. Bankr.L.J. 157, 158 (1998)).

1 investor witnesses agreed that was there intention. Tr., p. 39, ln. 24 - Tr., p. 40, lns. 10 (Hoffacker); Tr.,
2 p. 89, lns. 2 - 18 (Peirson); Tr., p. 236, lns. 3 - 17 (Andrews).

3 However, Division accountant Mark Klamrzynski testified:

4 "I show that there was \$316,000 received in connection with the auto leasing program. I showed
5 that there was approximately \$313,000 in disbursements in connection with the auto-leasing program.
6 That would leave net funds received of approximately \$3000.

7 Q. Okay. If the auto leasing program had net receipts of about \$3,000, what was the source of
8 funds used to pay the investors the interest they were promised."

9 A. Other investor money."

10 Tr., p. 288, lns. 15 - 23. Mr. Klamrzynski went on to testify:

11 "Q. Based upon your analysis of the Easy Money accounts, would Easy Money fit the
12 definition of a Ponzi scheme?"

13 A. Yes."

14 Tr., p. 289, lns. 15 -18.

15 RESPONDENTS thus violated A.R.S. § 44-1991(3).

16 **B. Fraud in Connection with the Offer and Sale of the Automotive Transplant**
17 **Investment**

18 In addition to EMAL, CICERELLI and FRENCH also attempted to solicit investors for a
19 transmission plant investment. Those sales efforts were recorded on tape, as they were made to
20 Division Investigator Clark acting in an undercover capacity.

21 **1. FRENCH Misrepresented that EASY MONEY was Successful**

22 In the recorded undercover pitch, David FRENCH told the investor:

23 "Um, the last one we just did was, um, Easy Money Auto Leasing, I had for two years, the
24 investors made on average of thirty percent of their money.
25

26 Ron Johnson: Really. Over what time frame?

1 David FRENCH: Um, they got paid, some got paid twenty-five percent, some got thirty,
2 some got paid thirty-two depending how much they put in.”

3 Tr, p. 151, ln. 23 – p. 152, ln. 7. Nowhere did FRENCH mention that EMAL had filed for bankruptcy or
4 that most of the investors had lost all their investment.

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1 light at a late date and was not listed in Exhibit S-35. Tr., p. 142, ln. 7 – p. 143, ln. 5. Additionally,
2 interest should be assessed on this restitution amount, in accordance with A.A.C. R14-4-308(C)(1), at the
3 statutory rate of ten percent per annum, see A.R.S. § 44-1201, retroactive to the date of investment until
4 paid in full. RESPONDENTS did make some payments to investors. They are entitled to be credited for
5 those amounts if those payments were for interest or return of principal. Mr. Klamrzynski testified as to
6 the information that the Division possessed regarding those payments. Tr., p. 302, ln. 10 – p. 303, ln. 20.

7
8 **C. Administrative Penalties**

9 Pursuant to A.R.S. § 44-2036(A), RESPONDENTS should be assessed administrative penalties
10 in an amount not to exceed five thousand dollars for *each* Securities Act violation. From the foregoing
11 review of evidence, it is clear that RESPONDENTS violated the antifraud and registration provisions of
12 the Securities Act with their investment sale program. According to S-35, and testimony, *see* Tr., p. 142,
13 ln. 7 – p. 143, ln. 5, they sold 41 notes or investment contracts, all in violation of A.R.S. § 44-1841.
14 None of the RESPONDENTS were licensed to sell the notes or investments contracts, in violation of
15 A.R.S. § 44-1842. Additionally, with respect to the EMAL investment, at least eight separate fraudulent
16 misrepresentations or omissions have been proven, often in sales literature given to all investors, all in
17 violation of A.R.S. § 44-1991, in addition to the automotive transplant investment violations.

18
19 Additionally, the Division requests the maximum penalty be imposed due to the nature of the
20 fraud that occurred, often from investors who could not afford the losses, much of which went into the
21 pockets of CICERELLI and FRENCH. For example, Margaret Peirson, a 77 year old clerical worker in
22 Washington D.C., invested \$50,000 through FRENCH, with the understanding the money was to be
23 used to purchase cars. That money was deposited into the SFS bank account, with FRENCH
24 immediately taking \$5000.00 out in cash for himself. He then wrote another check to himself for
25 \$2000.00 and paid another \$2000.00 out of Ms. Peirson's money to pay for a vacation to St. Thomas.
26

1 FRENCH then sent \$25,000 of Ms. Peirson's money to EMAL. CICERELLI then joined FRENCH in
2 looting Ms. Peirson, taking \$6000.00 out of the money sent to EMAL in cash, leaving only \$19,000 in
3 the EMAL account. Tr., p. 281, ln. 18 – p. 285, ln. 2. Of course, of the money that was put in that
4 EMAL, much still ended in the hands of CICERELLI and FRENCH. Tr., p. 287, lns. 2 – 7. This is
5 egregious behavior that should be severely punished.

6 Another reason to have strong remedies is that CICERELLI and FRENCH knew exactly what
7 they were doing. FRENCH told one investor that some of the companies in the sale-leaseback business
8 were Ponzi schemes. Tr., p. 152, lns. 10 – 15. At the same time, RESPONDENTS were operating a
9 Ponzi scheme. Tr., p. 288, ln. 24 – p. 289, ln. 18. The biggest use of funds that RESPONDENTS
10 undertook was to line their own pockets. Tr., p. 287, lns. 2 – 7. RESPONDENTS presented no
11 evidence excusing or explaining their conduct. They could not. They deserve the strongest penalty this
12 tribunal can impose.

14 Potentially RESPONDENTS EMAL, CICERELLI and FRENCH could be assessed a penalty of
15 \$450,000 for their 41 violations of A.R.S. § 44-1841, their 41 violations of A.R.S. § 44-1842 and their at-
16 least eight violations of A.R.S. § 44-1991. RESPONDENTS CICERELLI and FRENCH could be
17 assessed a penalty of \$25,000 for their violation of A.R.S. § 44-1841, their violation of A.R.S. § 44-1842
18 and their three violations of A.R.S. § 44-1991 with respect to the automotive transplant investment, while
19 SFS could be assessed \$54,000 for its three violations of A.R.S. § 44-1841, three violations of A.R.S. §
20 44-1842 and eight violations of A.R.S. § 44-1991.

22 The Securities Division recommends that RESPONDENTS EMAL, CICERELLI and FRENCH,
23 jointly and severally, be assessed a penalty of not less than \$145,000 for the EMAL investments. That
24 number is calculated by multiplying the 29 investors by \$5000.00. The Securities Division recommends
25 that RESPONDENTS CICERELLI and FRENCH, jointly and severally, be assessed a penalty of not less
26

1 than \$10,000.00 for their violations of A.R.S. § 44-1991 with respect to the automotive transplant
2 investment. The Securities Division recommended that SFS be assessed a penalty of not less than
3 \$10,000.00 for its involvement in the EMAL investments.

4 **D. Other Relief**

5
6 The Division further requests any other relief that the Commission in its discretion deems
7 appropriate and authorized by law.

8 RESPECTFULLY SUBMITTED this 31st day of January, 2002.

9
10 JANET NAPOLITANO
11 Attorney General
12 Consumer Protection & Advocacy Section

13 BY: 

14 Mark Dinell
15 Special Assistant Attorney General
16 Attorneys for the Securities Division
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1 ORIGINAL AND TEN (10) COPIES of the foregoing
2 filed this 31st day of January, 2001, with

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8 31st day of January, 2002, to:

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