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AZ CORP COMMISSION  
DOCKET CONTROL

7 **BEFORE THE ARIZONA CORPORATION COMMISSION**

8 In the Matter of:

9 MARK W. BOSWORTH and LISA A.  
10 BOSWORTH, husband and wife;  
11 STEVEN G. VAN CAMPEN and DIANE V.  
12 VAN CAMPEN, husband and wife;  
13 MICHAEL J. SARGENT and PEGGY L.  
14 SARGENT, husband and wife;  
15 ROBERT BORNHOLDT and JANE DOE  
16 BORNHOLDT, husband and wife;  
17 MARK BOSWORTH & ASSOCIATES,  
18 LLC, and Arizona limited liability company;  
19 3 GRINGOS MEXICAN INVESTMENTS,  
20 LLC, an Arizona limited liability company;

21 Respondents.

Docket No. S-20600-A-08-0340

**MOTION TO DISMISS**

**(Oral Argument Requested)**

**(Assigned to the Hon. Mark E. Stern)**

Arizona Corporation Commission

**DOCKETED**

OCT 12 2011

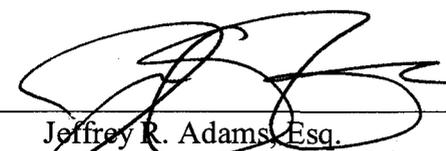
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22 Respondents Mark and Lisa Bosworth, husband and wife (collectively herein, "**Bosworths**"  
23 or "**Respondents**"), through their undersigned counsel, hereby move to dismiss this matter in its  
24 entirety and with prejudice as to the Bosworths pursuant to Rules 9(b) and 12(b)(6), Ariz. R. Civ.  
25 Proc., due to the State's failure to plead all the necessary elements of its claims against the  
26 Bosworths with particularity and for failing to state claims upon which relief may be granted.  
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28

1 Respondents understand and acknowledge that this issue was addressed previously by this tribunal  
2 in connection with the Sargent Respondents' August 18, 2008, Motion to Dismiss. However, the  
3 Bosworth Respondents believe that the issue is worth revisiting. This Motion is not being filed to  
4 delay matters but, rather, to ensure that they have brought all issues that relate to the claims being  
5 made against them are preserved should this matter become the subject of appellate review. This  
6 motion is supported by Rules 9(b) and 12(b)(6), Ariz. R. Civ. Proc., the record on file herein and the  
7 following Memorandum of Points and Authorities.  
8

9 RESPECTFULLY SUBMITTED this 10 day of October, 2011.

10 THE ADAMS LAW FIRM, PLLC

11  
12 By 

13 Jeffrey R. Adams, Esq.

14 *Attorneys for Respondents Bosworth*

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I. INTRODUCTION.**

17 A review of the State's July 3, 2008, Notice of Opportunity for Hearing Regarding Proposed  
18 Order to Cease and Desist, for Restitution, for Administrative Penalties, and for Other Affirmative  
19 Action ("Notice") reveals that all of the claims therein are premised upon allegations of fraud. Each  
20 claim is predicated on broad-sweeping and generalized allegations and legal conclusions that  
21 Respondents Bosworth, among others, acted fraudulently and intentionally engaged in the unlawful  
22 sale of securities without setting forth any specific facts, sources or circumstances to support such  
23 allegations.  
24

25 Furthermore, Respondents Bosworth are named in this action in their individual capacities  
26 without asserting any factual basis for "piercing the corporate veil" and imposing personal liability  
27 against them for their alleged acts and omissions on the part of corporate entities. In fact, in the  
28

1 Notice, the State makes the plain and unequivocal statement that the collective Respondents were  
2 acting on behalf of corporate entities while at the same time acting on their own behalf and their  
3 respective marital communities. However, the State has not asserted in the Notice any grounds upon  
4 which Respondents Bosworth are liable individually or why they owed any owed any duties, much  
5 less special or fiduciary duties, to the alleged “investors” to warrant or justify their inclusion as  
6 individual Respondents in this matter. The State, therefore, has failed to state a cause of action upon  
7 which relief may be granted against Respondents Bosworth under Rule 12(b)(6), Ariz. R. Civ. Proc.  
8

9 **II. LEGAL ARGUMENT.**

10 **A. The Law Requires The State To Plead Its Allegations With Particularity And**  
11 **Prohibits Lumping Individual Respondents Together.**

12 As set forth in detail below, Rule 9(b), Ariz. R. Civ. Proc., and the prevailing law requires  
13 three things from a claimant in alleging fraud-related claims: (1) plead the claims with particularity;  
14 (2) avoid merely pleading legal conclusions; and (3) avoid lumping individual defendants together  
15 in the allegations. If one avoids violating these three simple and well-established legal principles,  
16 one can survive a motion to dismiss.  
17

18 Rule 9(b), Ariz. R. Civ. Proc., provides as follows:

19 ***In all averments of fraud or mistake, the circumstances constituting fraud***  
20 ***or mistake shall be stated with particularity.*** malice, intent, knowledge and  
21 other condition of mind of the person may be averred generally. (Emphasis  
22 added).

23 This rule “‘is clearly an exception to the general rule’ that pleadings shall be simple, concise and  
24 direct, hence the bare allegation that something is ‘fraudulent’ is insufficient.” In re Cassidy’s  
25 Estate, 77 Ariz. 288, at 296, 270 P.2d 1079 (1954), citing Brazee v. Morris, 65 Ariz. 291, 292, 179  
26 P.2d 442, 443 (1947). To satisfy the foregoing rule, the law requires to things: (1) particularity; and  
27 (2) facts as opposed to legal conclusions. On this the law is clear.  
28

1 To satisfy Rule 9(b), allegations of fraud-related claims such as negligent misrepresentation,  
2 at a minimum, “must state the time, place and specific content of the fraudulent representations.”  
3 *Misc. Service Workers v. Philco-Ford Corp.*, 661 F.2d 624, 627 (7th Cir. 1990) (plaintiffs must  
4 “state ‘with particularity’ any ‘circumstances constituting fraud’ . . . This means the who, when,  
5 where and how; the first paragraph of any newspaper story.”), *cert. denied*, 498 U.S. 941 (1990); *see*  
6 *also Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).<sup>1</sup> Also,  
7 when pleading, the plaintiff must allege the nature of each separate defendant’s participation in the  
8 intentionally deceitful conduct. *See Hokama v. E.F Hutton & Co.*, 566 F. Supp. 636 (C.D. Cal.  
9 1983) (plaintiffs must identify the source of the fraud and distinguish among the different defendants  
10 with respect to their roles in the fraud alleged); *see also, Persky v. Turley*, 1991 WL 327434, 1 (D.  
11 Ariz. 1991) and *Blake v. Dierdorff*, 856 F.2d 1365, 1369 (9th Cir. 1988) (both holding that in cases  
12 of corporate fraud involving allegedly false or misleading information conveyed to another party,  
13 a plaintiff satisfies Rule 9(b) by pleading the misrepresentations with particularity and the roles of  
14 the individual defendants in the misrepresentations.) “Thus, plaintiffs must allege some facts  
15 describing each of the defendants involvement in the alleged misrepresentations.” *Persky* at 2, *citing*  
16 *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1440 (9th Cir. 1987).

20 While there is no “magic language” in pleading fraud-related claims, the complaint as a  
21 whole must contain all of the common law elements, in the nature of facts, required to plead fraud  
22 and/or negligent misrepresentation; bare allegations that a defendant’s actions are fraudulent, without  
23 supporting facts, are inadequate. *Hall v. Romero*, 141 Ariz. 120, 685 P.2d 757 (App. 1984).  
24 Moreover, properly pleading fraud requires more than blanket and generic statements that are in the  
25

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27 <sup>1</sup> Because Arizona has substantially adopted the Federal Rules of Civil Procedure, Arizona courts “give  
28 great weight to the federal interpretations of the rules.” *Edward v. Young*, 107 Ariz. 283, 284, 486 P.2d 181, 182  
(1971)(citations omitted)(emphasis added).

1 form of legal conclusions. The general rule is that “where legal conclusions are pleaded they are  
2 not facts which are admitted on a motion testing the legal sufficiency of the complaint, and they will  
3 be disregarded unless other facts which are alleged therein support such a conclusion.” *Scott v. Mt.*  
4 *Sinai Hosp. Corp.*, 1990 WL 279524, \*4 (Conn.Super. 1990) (emphasis added).<sup>2</sup> For this reason,  
5 pleadings which fail to set forth “facts” to support conclusions of law have been consistently found  
6 to be deficient.<sup>3</sup> Moreover, “[a] pleading which depends on conclusions of law, without stating the  
7 facts on which they are based, is fatally defective. In other words, a conclusion of law cannot obviate  
8 the necessity of setting out essential facts.” *Lamb v. Manning*, 145 Wis.2d 619, 625, 427 N.W.2d  
9 437, 440 ( Wisc. App. 1988) citing *Barrett v. Pepoon*, 19 Wis.2d 360, 362, 120 N.W.2d 149, 150  
10 (1963).<sup>4</sup>

11  
12  
13 Finally, it has routinely been held that the lumping together of a group of defendants fails to  
14 inform the individual defendants of the specific misconduct of which they are charged, which is  
15 precisely what Rule 9(b) is designed to prevent. See *Browning Ave. Realty Corp. v. Rosenshein*, 774  
16 F. Supp. 129, 138 (S.D.N.Y 1991) (dismissing fraud complaint and holding that “where . . . more  
17

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18  
19 <sup>2</sup> See also, *Verde Water & Power Company v. Sal River Valley Water Users’ Ass’n*, 22 Ariz. 305, 197  
20 P. 227 (1921), cert. denied 257 U.S. 643, 42 S.Ct. 53, 66 L.Ed. 412 (holding that facts must be pled in a pleading;  
conclusions of law are insufficient).

21 <sup>3</sup> See, e.g., *Kelley v. Provident Mut. Building & Loan, Ass’n*, 18 Ariz. 218, 157 P. 1018 (1916) (a  
22 complaint in an action to recover purchase money paid for land bought at a public sale, which merely alleged the legal  
23 conclusion that the defendants “[had] no lawful right to make such a sale,” and which set forth no “facts” on which the  
24 conclusion was based, did not allege a claim for fraud, duress, mistake or any other ground of recovery); *Grand Intern.  
Broth. of Locomotive Engineers v. Mills*, 43 Ariz. 379, 31 P.2d 971 (1934) (allegations that certain acts are “wrongful,  
arbitrary, fraudulent, [and] illegal” fail to state a basis for recovery and are meaningless, unless aided by specific  
statements of what constituted the fraud complained of).

25 <sup>4</sup> See also, *FPI Development, Inc. v. Nakashima*, 231 Cal.App.3d 367, 384, 282 Cal.Rptr. 508, 517 to  
26 231 Cal.App.3d 367, 384, 282 Cal.Rptr. 508, 518 (Cal. App. 1991) (stating “All of the allegations are proffered in the  
27 form of terse legal conclusions, rather than as facts ‘averred as carefully and with as much detail as the facts which  
28 constitute the cause of action and are alleged in the complaint.’ The only affirmative defenses that are mentioned in the  
summary judgment proceedings, fraud in the inducement and failure of consideration, are not well pled, consisting of  
legal conclusions, and would not have survived a demurrer.) (citation omitted); and *Fairfield Resources Management,  
Inc. v. City of Danbury*, 2001 WL 438952, \*1 (Conn.Super.2001) (holding “If a pleading alleges legal conclusions  
without supporting allegations of fact, it may be subject to being stricken) (citation omitted).

1 than one defendant is charged with fraud, the complaint must particularize *each* defendant's alleged  
2 participation in the fraud"); *Bruns v. Ledbetter*, 583 F. Supp. 1050, 1052 (S.D. Cal. 1984)(allegations  
3 of fraud must "enlighten each defendant as to his or her part in the alleged fraud.")  
4

5 **B. The State Has Violated The Rule 9(b) Pleading Requirements.**

6 As discussed in detail below, *infra*, a cursory review of the Notice reveals that the State has  
7 violated the foregoing rules. Specifically, the State has (i) failed to plead any "facts" in support of  
8 their allegations against the individual and collective Respondents; (ii) improperly and heavily relied  
9 upon legal conclusions; and (ii) improperly lumped the individual Respondents together. As a result  
10 of the foregoing errors, this matter should be dismissed as to Respondents Bosworth.  
11

12 **1. Plaintiffs Failed To Plead With The Requisite Particularity.**

13 In support of its allegations against Respondents Bosworth, the Notice presents the "facts"  
14 upon which the Notice is based at paragraphs 12-18. However, those allegations merely contain  
15 broad generalizations. As stated in the Motion to Dismiss filed by Respondents Sargent, the State  
16 was unable to provide any more particular with respect to the time period involved other than stating  
17 that the alleged conduct took place sometime between April 2006 and October 2007. Paragraphs  
18 fail 12-18 fail to contain the particularity necessary to satisfy Rule 9(b) and instead constitute mere  
19 legal conclusions that must be disregarded in ruling on this Motion to Dismiss.  
20

21 For example, paragraph 12-18 of the Notice contains broad generalizations when describing  
22 (i) the alleged victims of the Respondents' conduct as "investors", (ii) the alleged investment  
23 devices, (iii) the method of advertisements, (iv) the alleged investment assets, (v) the alleged return  
24 on the alleged investments and (vi) the alleged discussions of risk. In connection with the foregoing,  
25 no factual particularity of any kind is provided. In describing the alleged violation of A.R.S. § 44-  
26 1991, the State says the collective Respondents (i) engaged in a "device, scheme or artifice to  
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28

1 defraud” with no actual description of the specific device, scheme or artifice employed, (ii) made  
2 untrue or omitted statements of material fact without any description of the alleged untruthful or  
3 omitted statements that were allegedly material, who made untruthful, or omitted, those material  
4 statements, or when the alleged untruthful or omitted statements were made or withheld, and (iii)  
5 engaged in transactions, practices or courses of business that was fraudulent without, again, stating  
6 withy any degree of precision of the actual transactions, practices or courses of business were  
7 employed, who employed them, when they were employed and with which “investors” or why those  
8 transactions, practices or business practices were fraudulent. *See* Notice at ¶24. Rather, to support  
9 the foregoing allegations, the State points merely to more broad generalizations such as the failure  
10 to disclose financial information without describing what should have been disclosed, when it should  
11 have been disclosed, who should have disclosed it or to which of the alleged investors it should have  
12 been disclosed. *See* Notice at ¶24(a). The same problems exist with respect to paragraphs 24(b)-(c)  
13 with respect to the failure to state the who, what, where, when, why and how required to plead fraud  
14 allegations with particularity.  
15

16  
17         The fact is, the Notice does not set forth any facts or particularity describing: (i) the date and  
18 time either of any misconduct of Respondents Bosworth or any alleged misrepresentation or  
19 omission; (ii) what Respondents Bosworth specifically said or did or failed to do, (iii) Respondents  
20 Bosworth specific involvement in the alleged misconduct, (iv) the specific “investors” with whom  
21 Respondents Bosworth allegedly dealt improperly, (v) exactly how Defendants Bosworths’ conduct  
22 either was the same as or differed from that of the other Respondents or (vi) exactly when it was that  
23 Respondents Bosworth allegedly engaged in the subject conduct. Because the Notice lacks the  
24 foregoing particularity, paragraph 12-24 of the Notice constitute mere legal conclusions that must  
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26  
27  
28

1 be disregarded in evaluating whether the State has met its pleading burden and in doing so, the  
2 Notice is facially defective.

3 Based on the foregoing, it is clear that Plaintiffs have failed to comply with Rule 9(b).  
4 Plaintiffs' pleading failures are two-fold: (i) they have asserted fraud without pleading the requisite  
5 factual particularity and support; and (ii) have attempted to allege fraud using only legal conclusions.  
6 Both of these failures are fatal. Thus, this matter must be dismissed with prejudice with respect to  
7 Respondents Bosworth.  
8

9 **2. Plaintiffs Have Improperly Lumped All The "Respondents" Together.**

10 As noted above, *supra*, the Notice fails to identify which Respondents specifically engaged  
11 in the specific conduct alleged to be unlawful or their specific involvement in that conduct. Rather,  
12 the State has failed to distinguish between any of the individual Respondent. Based on the  
13 foregoing, the Notice does not apprise each individual Respondent of the specifics of their purported  
14 involvement in the alleged statutory violations. This clearly violates the rule that requires the State  
15 to apprise each individual Respondent of their specific involvement in the alleged conduct. The  
16 Therefore, the particularity requirements of Rule 9(b) have not been met and this matter must be  
17 dismissed as to Respondents Bosworth.  
18

19  
20 **C. Plaintiffs Have Failed To State Claim Upon Which Relief May Be Granted With**  
21 **Respect To Defendants Whited.**

22 Rule 12(b)(6) states:

23 Every defense, in law or fact, to a claim for relief in any pleading, whether a claim,  
24 counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive  
25 pleading thereto if one is required, except that the following defenses may at the option  
26 of the pleader be made by motion:

26 \* \* \*

27 6. Failure to state a claim upon which relief can be granted.  
28

1 The law in this area is clear. If it appears beyond doubt that a plaintiff can prove no set of facts  
2 in support of an alleged claim, said claim must be dismissed for failure to state a claim upon which  
3 relief may be granted. *See Newman v. Maricopa County*, 167 Ariz. 501, 503, 808 P.2d 1253 (App.  
4 1991).

6 Plaintiffs have attempted to pursue Respondents Bosworth in their individual and marital  
7 capacities and attempted to hold them individually liable for the State's claims. In doing so, the  
8 State has completely ignored Arizona law regarding the protection afforded to the officers and  
9 directors of corporations who are doing nothing more than acting for and on behalf of said  
10 corporations. The State has named Respondents Bosworth, husband and wife, in their individual  
11 capacities, without asserting any factual basis for "piercing the corporate veil" and imposing personal  
12 liability against them for their alleged acts and omissions on the part of corporate entities of which  
13 they were part owners.

15 It is axiomatic in Arizona that "a corporate structure is a separate legal entity which has the  
16 legitimate purpose of insulating individuals from personal liability for acts done on behalf of the  
17 corporation." *See Dietel v. Day*, 16 Ariz. App. 206, 208-209, 492 P.2d 455, at 457-458 (1972);  
18 *Standage v. Standage*, 147 Ariz. 473, 711 P.2d 612 (App. 1985). As such, where a corporation has  
19 been operated and maintained for the purpose for which it was incorporated and has not been used  
20 as a mere shield of the stockholders, officers, directors and employees, the corporate form may not  
21 be disregarded. More importantly, Arizona law requires that one must establish fraud, through  
22 compliance with the Rule 9(b), in order to pierce the corporate veil and pursue shareholders, officers,  
23 directors and employees individually. *See In re Sanner*, 218 B.R. 941 (Bankr. D. Ariz. 1998).

1 An article summarizing the law in Arizona on “*piercing the corporate veil*,” entitled  
2 “Arizona’s Eviscerated Alter Ego Doctrine,” published in the Arizona Attorney clearly and  
3 succinctly sets forth Arizona law on this subject. In the article, the author, Jerry C. Bonnett, states:

4  
5 Arizona courts have been extremely chary about permitting creditors to pierce the  
6 corporate veil. “[A] legitimate purpose of incorporation is to avoid personal liability  
7 and if the corporate fiction is too easily ignored and personal liability imposed, then  
8 incorporation is discouraged.” Accordingly, the Arizona Court of Appeals has embraced  
9 the noncontroversial principle that “[a] corporation is a legal entity doing business in its  
10 own right and on its own credit as distinct from the credit of its shareholders.”

11  
12 *To justify disregarding the corporate entity, therefore, the Arizona Supreme Court  
13 fashioned a two-part test, both parts of which must be met by a party asserting an alter  
14 ego claim.*

15  
16 The corporate fiction will ... be disregarded upon the concurrence of two circumstances;  
17 that is when the corporation is, in fact, the alter ego of one or a few individuals and  
18 when the observance of the corporation form would sanction a fraud or promote  
19 injustice.

20  
21 *These two tests, as recently applied, require proof that (1) the person whose personal  
22 liability is at stake treated the corporate fisc as his own, without accounting to the  
23 corporation for the personal use of the corporate funds, and (2) his use of the corporate  
24 form of business under the circumstances amount to actual fraud, not merely in equity.*

25  
26 \* \* \* \*

27  
28 Id. at pp. 23-24 (citations omitted) (emphasis added).

Based on the foregoing, to pierce the corporate veil under Arizona law the State must allege  
and establish that (1) Respondents Bosworth committed actual fraud, (2) the corporations at issue  
were or are undercapitalized, and (3) the corporations were merely the “alter ego” of its owners,  
directors and employees and its existence was a fiction. However, the Notice fails to contain all of  
the foregoing, be it generally or particularly as required under Rule 9(b), and it fails to establish a  
sufficient basis upon which to justify the State’s ignorance of the corporate veils of the corporate  
entities alleged to have engaged in the alleged unlawful sale of unregistered securities. Rather, the  
Notice is completely silent with respect to the basis for the inclusion of Respondents Bosworth as

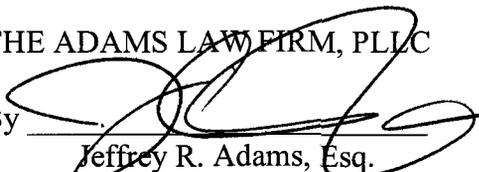
1 individuals in this matter and it lacks any facts, specific or otherwise, indicating that Respondents  
2 Bosworth ever acted in any manner that would expose them to personal liability in this case. Based  
3 on the foregoing, the State cannot clear the hurdles set by the Arizona courts for piercing the  
4 corporate veil and imposing personal liability upon Respondents Bosworth. Clearly, the State's  
5 allegations against Respondents Bosworth constitute a very thinly-veiled attempt to impose personal  
6 liability against them without meeting the well-established requirements for imposing such liability.  
7 Based on the foregoing, the State's claims against Respondents Bosworth as individuals must be  
8 dismissed under Rule 12(b)(6), Ariz. R. Civ. Proc.  
9

10 **III. CONCLUSION.**

11 For the foregoing reasons, Respondents Bosworth respectfully request that the claims against  
12 them be dismissed with prejudice on the grounds that the Notice fails to comply with the pleading  
13 requirements of Rule 9(b), Ariz. R. Civ. P., and fails to state a claim upon which relief may be  
14 granted pursuant to Rule 12(b)(6), Ariz. R. Civ. P.  
15

16 Respectfully submitted this 10 day of October, 2011.

17  
18 THE ADAMS LAW FIRM, PLLC

19 By 

Jeffrey R. Adams, Esq.

20 Attorney for Respondents Bosworth  
21

22  
23 Original of the foregoing sent via  
24 First Class Mail and electronic  
mail this 10 day of October, 2011 to:

25 Docket Control  
26 Arizona Corporation Commission  
27 1200 West Washington  
28 Phoenix, Arizona 85007

1 Copy of the foregoing sent via  
2 First Class Mail and electronic  
mail this 1<sup>o</sup> day of October, 2011 to:

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By 