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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

AZ CORP COMMISSION  
DOCKET CONTROL

- GARY PIERCE, Chairman
- BOB STUMP
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- BRENDA BURNS

In the matter of:

MARK W. BOSWORTH and LISA A. BOSWORTH, husband and wife;

STEPHEN G. VAN CAMPEN and DIANE V. VAN CAMPEN, husband and wife;

MICHAEL J. BOSWORTH and PEGGY L. BOSWORTH, husband and wife;

ROBERT BORNHOLDT and JANE DOE BORNHOLDT, husband and wife;

MARK BOSWORTH & ASSOCIATES, L.L.C., an Arizona limited liability company;

3 GRINGOS MEXICAN INVESTMENTS, L.L.C., an Arizona limited liability company;

Respondents.

DOCKET NO. S-20600A-08-0340

SECURITIES DIVISION'S RESPONSE TO BOSWORTHS' MOTION TO DISMISS

Arizona Corporation Commission  
**DOCKETED**  
OCT 26 2011

DOCKETED BY	<i>MM</i>
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The Securities Division ("the Division") of the Arizona Corporation Commission ("the Commission") hereby responds to Respondents Mark Bosworth and Lisa Bosworth's ("Bosworth") Motion to Dismiss and requests that it be denied because the Arizona Rules of Civil Procedure 9(b) and 12(b)(6) do not apply to administrative matters and the Division met its burden under the Arizona Administrative Code. This Response is supported by the following Memorandum of Points and Authorities.

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...

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Neither Arizona Rule of Civil Procedure 9(b) nor 12(b)(6) apply to this case.**

3 Bosworth argues the Arizona Rules of Civil Procedure (“ARCP”) apply to the current case  
4 and, in particular, that the Notice of Opportunity for Hearing (“Notice”) must be dismissed both  
5 for failure to plead common law fraud with particularity, pursuant to ARCP 9(b), and for failure to  
6 state a claim upon which relief may be granted pursuant to ARCP Rule 12(b)(6).

7 As outlined below, Bosworth’s Motion is not supported by the facts and law. Bosworth’s  
8 Motion does not include citation to nor is supported by any applicable authority and should be  
9 denied.

10 **A. The Rules Of Practice And Procedure Before The Corporation Commission  
11 Govern This Action.**

12 Rule R14-3-101(A) of the Arizona Administrative Code (“A.A.C.”) states the Commission  
13 Rules of Practice and Procedure govern in all cases before the Corporation Commission, including  
14 cases arising out of Title 44. Further, A.A.C. R14-3-101(A) goes on to state the ARCP apply *only*  
15 *if* procedures are not otherwise set forth by law, the A.A.C. or by regulations or orders of the  
16 Commission.

17 Chapters 3 and 4 of the Arizona Administrative Code apply to this proceeding. This is an  
18 administrative case filed before the Commission alleging violations of Title 44. Procedures  
19 governing the Division’s investigations, examinations and administrative proceedings are found  
20 under the A.A.C. Specifically, A.A.C. R14-4-306 applies to Division notices regarding hearings.  
21 Thus, there is absolutely no reason to look to the ARCP.<sup>1</sup>

22 ...  
23 ...  
24 ...

25 <sup>1</sup> If Title 14, Chapter 4 of the A.A.C. were for some reason deemed insufficient, Title 14, Chapter 3 of the A.A.C.  
26 also contains procedures regarding administrative proceedings before the Commission. Even if the A.A.C. did not  
have a procedure regarding pleadings, the ARCP would still not apply. This proceeding involves a contested case as  
that term is defined under §41-1001(4) of the Arizona Administrative Procedure Act (“AAPA”). A procedure  
governing a notice pleading exists under the §41-1061(A) (4) of the AAPA.

1                   **B.       The Division Has Met Its Burden Under the Arizona Administrative Code.**

2           The Division has met its pleading burden. The applicable rule governing Division Notices  
3 is A.A.C. R14-4-306 which is a notice pleading rule. As a notice pleading rule, all that is required  
4 is that the Division notify the opposing party of the nature of the claim. This is entirely consistent  
5 with §41-1061(B)(4) of the AAPA which states that the notice to be given requires “[a] short and  
6 plain statement of the matters asserted.” There is no requirement that the Notice identify each and  
7 every specific instance of misconduct by a specific perpetrator, victim, date, time and location  
8 under A.A.C. R14-4-306.

9           In addition, two A.A.C. Rules provide additional guidance. A.A.C. R14-3-101(B) states  
10 the A.A.C. “shall be liberally construed to secure the just and speedy determination of all matters  
11 presented to the Commission.” A.A.C. R14-3-106(E) states “formal documents will be liberally  
12 construed and defects which do not affect substantial rights of the parties will be disregarded.” To  
13 require the Division to detail each and every instance of misconduct would be beyond the clear  
14 requirement of the A.A.C. and would not contribute to the just and speedy determination of the  
15 matters presented to the Commission. Bosworth’s substantial rights are not affected as the Notice  
16 more than adequately informs Bosworth of what conduct the Division alleges violates the Arizona  
17 Securities Act (“Securities Act”).

18           In a case such as this where dozens of investors purchased millions of dollars worth of  
19 securities in many transactions, the attempt by Bosworth to require the Division to articulate each  
20 and every instance of misconduct does not comport with the Commission pleading standards and  
21 the liberal interpretation of the A.A.C.<sup>2</sup> The Division clearly identifies that Bosworth and co-  
22 respondents sold unregistered securities and that Bosworth engaged in misconduct by making  
23 misleading statements or failing to disclose the risks associated with the sales. The Notice  
24 provides examples of the types of disclosures that were omitted regarding the investment risks and

25 \_\_\_\_\_  
26 <sup>2</sup> Even if ARCP 9(b) applied, the degree of specificity sought by Bosworth is not required. *See Sunbird Air Services, Inc. v. Beech Aircraft Corporation*, 789 F.Supp. 364 (D. Kan. 1992) (“Where allegations of fraudulent conduct are numerous..., less specificity is required to meet the requirements of Rule 9(b)”).

1 it provides examples of misleading statements made to investors, directly or indirectly, by  
2 Bosworth. Securities fraud may be proven by any one of these acts. *See Hernandez v. Superior*  
3 *Court*, 179 Ariz. 515, 880 P.2d 735 (Ct.App. 1994).

4 **C. There Is No Authority Requiring The Division To Comply With ARCP Rule**  
5 **9(B).**

6 There is no authority to support Bosworth's contention that the Division need comply with  
7 ARCP Rule 9(b). Bosworth fails to cite to a single case where a regulator alleging fraud under its  
8 relevant securities laws in an administrative forum was held to the standard set forth in ARCP Rule  
9 9(b). There appears to be no reported Arizona case specifically interpreting the required content of  
10 a Notice under A.A.C. R14-4-306.

11 Bosworth states in his Motion that the Division in its "complaint" failed to include all the  
12 elements of "common law fraud." *See* Motion page 4, line 21. It is well established that when  
13 alleging violations of A.R.S. § 44-1991 the Division does not have to establish the presence of the  
14 elements of common law fraud. *See Aaron v. Fromkin*, 196 Ariz. 224, 994 P.2d 1039 (Ct.App.  
15 2000); *Rose v. Dobras*, 128 Ariz. 209, 214, 624 P.2d 887, 892 (Ct.App. 1981). The Court in  
16 *Fromkin* stated that the "elements of securities fraud are articulated within the statute itself."  
17 *Fromkin*, 196 Ariz. at 227.

18 Bosworth cited to no authority requiring the Division to establish the nine elements of  
19 common law fraud in its Notice. The cases cited by Bosworth are misplaced and not relevant  
20 because most involve a civil suit alleging common law fraud and/or fraud under the federal  
21 securities laws thereby invoking either state civil or federal civil rules of procedure.<sup>3</sup> Not one case

22 <sup>3</sup> For example, *In re Cassidy's Estate v. Dowd* 77 Ariz. 288 (1954), involved a **probate matter**. The case recognized  
23 that under Arizona Probate Code, the Arizona Rules of Civil Procedure apply. *Hokama v. E.F. Hutton & Co., Inc.*, 566  
24 F.Supp. 636 (C.D. California 1983), involved a **private securities action** under the California Securities Act. *Persky v.*  
25 *Turley*, 1991 WL 327434 (D. Ariz) an unreported case involved a **federal civil case** of corporate fraud. *Blake v.*  
26 *Dierdorff*, 856 F.2d. 1365 (1988), involving a **federal RICO civil action**. *Hall v. Romero*, 141 Ariz. 120, 685 P.2d 757  
(Ct. App. 1984), involved a **private civil action** brought by real estate purchasers against a Hollywood personality who  
assisted in promoting a real estate venture. Plaintiff's allegations of fraud were not brought under any securities law.  
*Scott v. Mount Sinai Hospital Corporation*, 1990 WL 279524 (an unpublished opinion), involving a **Connecticut civil**  
**wrongful termination case**. *Lamb v Manning*, 145 Wis.2d 619, 427 N.W.2d 437 (1988) involving a **Wisconsin civil**  
**case**. *Browning Avenue Realty Corp v. Rosenshein*, 774 F.Supp. 129 (S.D. New York 1991), involving a **federal civil**  
**RICO case**.

1 involved an administrative action brought by a regulator in an administrative forum alleging fraud  
2 under a state securities law.<sup>4</sup>

3 In addition, shortly after Congress enacted the Private Securities Litigation Reform Act of  
4 1995 requiring that fraud alleged under the federal securities laws be plead in private actions with  
5 particularity, the Arizona legislature amended the Securities Act to incorporate similar particularity  
6 pleading requirements. However, it amended only A.R.S. §44-2082 under Article 18 of the  
7 Securities Act which pertains to private securities litigation. The legislature intentionally did not  
8 extend the particularity pleading requirements to allegations of fraud under A.R.S. §44-1991 with  
9 respect to administrative actions.

10 **D. The Division's Notice States Claims For Which Relief May Be Granted.**

11 To state a claim for fraud, A.R.S. § 44-1991 requires the Commission to allege that:

- 12
- 13 • a person
  - 14 • in connection with a transaction within or from Arizona
  - 15 • involving an offer to sell or buy securities or a sale or purchase of securities
  - 16 • directly or indirectly
    - 17 • employed any device, scheme or artifice to defraud, or
    - 18 • made any untrue statement of material fact, or omitted to state any material fact  
19 necessary to make statements made not misleading, or
    - 20 • engaged in any transaction, practice, or course of business that operates or would  
21 operate as a fraud or deceit.

22 To establish liability under A.R.S. § 44-1991, the Commission does not have to prove  
23 which untrue statements were made by each Respondent. Liability for fraudulent conduct under  
24 A.R.S. § 44-1991 is imposed on any person who directly or indirectly violates any section of the  
25 anti-fraud provisions. *See Hernandez*, 179 Ariz. 515, 880 P.2d 735. Additionally, any person who  
26 makes, participates in, or induces the unlawful sale or purchase is jointly and severally liable for  
the violation of A.R.S. § 44-1991. *See A.R.S. § 44-2003(A)*. Any person who controls any  
person who violates § 44-1991 is jointly and severally liable. *See A.R.S. § 44-1999(B)*. *See also*

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<sup>4</sup> In at least one case relied upon by Bosworth, *Misc. Service Workers v. Philco-Ford Corp.* 661 R.2d 776 (9th Cir. 1981), the cite is incorrect as is the quote, the date of the case, the circuit of the case and that the U.S. Supreme Court denied cert.

1 *Eastern Vanguard v. Arizona Corp. Comm'n*, 206 Ariz. 399, 410, 79 P.3d 86, 97 (Ct.App. 2003)  
2 (liability attaches to controlling persons to same extent as it does to a person or entity that  
3 commits a primary violation of § 44-1991; § 44-1999 imposes presumptive control liability on  
4 those persons who have the power to directly or indirectly control a primary violator).

5 The Commission does not have to prove which investors were told what. Each identified  
6 Respondent is jointly and severally liable for **any** untrue statement or omission that would have  
7 been significant to the investment deliberations of **any** reasonable buyer. *See Trimble v. American*  
8 *Savings Life Insurance Company*, 152 Ariz. 548, 553, 733 P.2d 1131, 1136 (Ct.App. 1986).

9 The Commission must allege and ultimately prove that Respondents made, participated in,  
10 or induced, or controlled persons who made, participated in, or induced, directly or indirectly, any  
11 untrue statement of material fact in connection with the offer or sale of securities. The Division's  
12 Notice meets the pleading requirements under the Securities Act, the A.A.C. and the Arizona  
13 Administrative Procedure Act and contains sufficient facts that state a claim under A.R.S. § 44-  
14 1991.

15 **E. Mark Bosworth Directly Participated In The Violations Of The Arizona**  
16 **Securities Act.**

17 The Bosworth Motion asserts that the Division must "pierce the corporate veil" in order to  
18 establish that Mark Bosworth is liable for violations of the Securities Act. Mark Bosworth directly  
19 participated in the violations of the Securities Act. The Notice clearly alleges that Mark Bosworth,  
20 individually and as manager of Mark Bosworth & Associates, LLC ("MBA") and as a member of 3  
21 Gringos Mexican Investments, LLC, ("3GMI") participated in the offer and/or sale of securities to  
22 investors by offering and selling investments entitled "Investment Agreement," "Promissory Note"  
23 or "Receipt of Investment Funds" on behalf of MBA and 3GMI. The Notice clearly alleges that  
24 Mark Bosworth and the other Respondents, in connection with transactions involving securities,  
25 directly or indirectly violated A.R.S. §44-1991. A primary violation of A.R.S. § 44-1991 can be  
26 either direct or indirect. It is now well settled in Arizona that indirectly violating A.R.S. § 44-

1 1991 is not to be narrowly interpreted. *Barnes v. Vozack*, 113 Ariz. 269, 550 P.2d 1070  
2 (1976)(Officers of company could be liable under A.R.S. § 44-1991 for the fraudulent statements  
3 of a salesman of the security.) The Division is required to provide notice to the Respondents as to  
4 what the allegations involve. Mark Bosworth received the notice required under the Securities Act,  
5 the A.A.C. and the Arizona Administrative Procedure Act.

6 There is no reason the Division is required to “pierce the corporate veil” as outlined in the  
7 Bosworth Motion. If the violations of the Securities Act are supported by the evidence, Mark  
8 Bosworth obligated his marital community through his actions by offering and selling unregistered  
9 securities through unregistered salesmen and violating the anti-fraud provisions. Pursuant to A.R.S.  
10 §44-2031(C), the Commission is authorized to join the spouse of a Respondent.

11 **F. Violations Of The Arizona Securities Act Are Strict Liability.**

12 Bosworth, throughout their Motion, state that the Division failed to establish Mark Bosworth  
13 “intentionally” violated the Securities Act. Again, Bosworth misstates the standard required under  
14 the Securities Act. Violations of A.R.S. §§ 44-1841; 44-1842 and 44-1991(A)(2-3) require no  
15 scienter. *See Allstate Life Insurance Company v. Baird & Co., Inc.*, 756 F.Supp.2d 1113 (2010),  
16 *State v. Gunnison*, 127 Ariz. 110, 113, 618 P.2d 604, 609 (1980); *State v. Burrows*, 13 Ariz. App.  
17 130, 474 P.2d 849 (1970). The Division does not have to prove that Respondents intended to violate  
18 the Securities Act or that they knew they were violating the Securities Act. The Division need only  
19 show that Respondents were offering and/or selling securities and the Respondents and the securities  
20 were not registered. In addition, the Division is required to show that the Respondents, directly or  
21 indirectly, made an untrue statement of material fact, or omitted to state any material fact necessary  
22 in order to make the statements made, in the light of the circumstances under which they were made,  
23 not misleading or operated as a fraud or deceit. *See* A.R.S. §44-1991. Again, no scienter is  
24 necessary.

25 The Notice filed by the Division meets all necessary requirements under the Securities Act,  
26 the A.A.C. and the Arizona Administrative Procedure Act.

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**G. The Burden Is On The Offeror To Not Mislead Investors.**

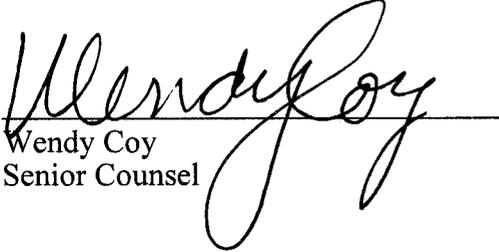
Bosworth’s Motion states that the Division’s Notice failed to assert any duties that Bosworth had to the “alleged investors.” What Bosworth fails to comprehend, is that offerors have an **affirmative duty** to not mislead the investors in any way. *See Fromkin*, 196 Ariz. at 227, 994 P.2d at 1042 and *Trimble*, 152 Ariz. at 553, 733 P.2d at 1136. Under the Securities Act, the investors are not required to act with due diligence; that burden is on Bosworth as the offeror. The Notice met the requirements of the Securities Act, the A.A.C. and the Arizona Administrative Procedure Act as required.

**II. Conclusion**

The Division respectfully requests that the Motion be denied for the following reasons: 1) the Division met its pleading burden under the Securities Act, the A.A.C. and the Arizona Administrative Procedure Act; 2) the legal arguments made in the Motion does not apply to this case; 3) there is no authority for the proposition that the allegations must be stated with any more particularity than they are in the Notice; and 4) the Notice is legally sufficient and contains facts that state a claim under A.R.S. § 44-1991.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of October 2011.

ARIZONA CORPORATION COMMISSION  
SECURITIES DIVISION

  
Wendy Coy  
Senior Counsel

1 **ORIGINAL and 8 COPIES** of the foregoing filed  
2 this 26<sup>th</sup> day of October 2011 with:

3 Docket Control  
4 Arizona Corporation Commission  
5 1200 W. Washington St.  
6 Phoenix, AZ 85007

7 **COPY** of the foregoing hand delivered  
8 this 26<sup>th</sup> day of October 2011 to:

9 The Honorable Marc E. Stern  
10 Hearing Division  
11 Arizona Corporation Commission  
12 1200 W. Washington St.  
13 Phoenix, AZ 85007

14 **COPY** of the foregoing mailed/e-mailed  
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