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8 Counsel for Respondents
 9 Denver Energy Exploration, LLC
 10 and Michael Lee Christopher

BEFORE THE ARIZONA CORPORATION COMMISSION

In the matter of:

CRAIG RANDAL MUNSEY, an unmarried man,

MARKETING RELIABILITY CONSULTING, LLC (d.b.a. MRC LLC), an Arizona limited liability company,

DENVER ENERGY EXPLORATION, LLC, a Texas limited liability company,

MICHAEL LEE CHRISTOPHER (CRD#2695315), an unmarried man,

Respondents.

Docket No. S-20804A-11-0208

RESPONDENTS DENVER ENERGY EXPLORATION, LLC'S AND MICHAEL LEE CHRISTOPHER'S APPLICATION FOR REHEARING OR REVIEW ON SECURITIES FRAUD FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER IN JUNE 20, 2014 OPINION AND ORDER

24 Pursuant to A.R.S. § 44-1974 and A.A.C. R14-3-112, Respondents Denver Energy
 25 Exploration, LLC ("DEE") and Michael Lee Christopher ("Christopher") (together, "Respondents")
 26 hereby apply for rehearing or review on the securities fraud findings of fact in paragraphs 39-42,
 27 155-157, and 177-178, conclusions of law in paragraphs 9-10, and order on pages 25-26 in the June
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1 20, 2014 Opinion and Order (Decision No. 74565). Securities fraud is a very serious matter that
2 will follow Christopher for the rest of his life and forever plague DEE's business. See Staheli v.
3 Kauffman, 122 Ariz. 380, 384, 595 P.2d 172, 176 (1975) (quoting Trollope v. Koerner, 106 Ariz.
4 10, 19, 470 P.2d 91, 100 (1970)) ("charging fraud is a serious matter"). As shown below, a
5 rehearing or review should be granted since the securities fraud findings of fact, conclusions of law
6 and order are not justified by the evidence and are contrary to law. See A.A.C. R14-3-112(C)(7).
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8 The findings of fact, conclusions of law and order for securities fraud are based on A.R.S. §
9 44-1991(A)(2), which provides in part:

10 It is a fraudulent practice and unlawful for a person, in connection with a transaction
11 or transactions within or from this state involving an offer to sell or buy securities, or
12 a sale or purchase of securities . . . directly or indirectly to . . . omit to state any
13 ***material*** fact necessary in order to make the statements made, in the light of the
14 circumstances under which they were made, ***not misleading***.

14 (Emphasis added). Accordingly, the omitted fact must be both material and misleading. The
15 plaintiff, *i.e.*, the Securities Division (the "Division") of the Arizona Corporation Commission (the
16 "Commission"), bears the burden of proving by a preponderance of evidence that the omitted fact
17 was material and misleading. See Aaron v. Fromkin, 196 Ariz. 224, 227, 994 P.2d 1039, 1042 (Ct.
18 App. 2000) ("Plaintiffs' burden of proof requires . . . that they demonstrate that the statements were
19 material and misleading.") (citing A.R.S. § 44-1991(A)(2)). The Division did not meet this burden.
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21 "Arizona . . . adopted an objective test for materiality." Trimble v. Am. Savs. Life Ins. Co.,
22 152 Ariz. 548, 553, 733 P.2d 1131, 1136 (Ct. App. 1986). An omitted fact is material only if there
23 is a "substantial likelihood that, under all the circumstances, the omitted fact would have assumed
24 actual significance in the deliberations of the reasonable shareholder' or 'a substantial likelihood
25 that the disclosure of the omitted fact would have been viewed by the reasonable investor as having
26 significantly altered the 'total mix' of information made available.'" Caruthers v. Underhill, 230
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1 Ariz. 513, 524, 287 P.3d 807, 818 (Ct. App. 2012) (quoting TSC Indus., Inc. v. Northway, Inc., 426
2 U.S. 438, 449 (1976); Rose v. Dobras, 128 Ariz. 209, 214, 624 P.2d 887, 892 (Ct. App. 1981)).

3 The allegedly material and misleading fact that Respondents supposedly omitted from one
4 person, the Division's Chief Investigator, Robert Eckert—who falsely represented himself to
5 Respondents as Jackson Roberts—is the May 4, 2010 Summary Order to Cease and Desist (the
6 "May 4, 2010 Order") issued by the Pennsylvania Securities Commission ("PSC"), which only
7 involves DEE and other third parties, not Christopher or Respondent Craig Randal Munsey
8 ("Munsey"). See Tr. Ex. S-4; Oct. 2, 2012 Hrg. Tr. Vol. II at pp. 339:19-340:2. However, the May
9 4, 2010 Order is not a material omitted fact, *i.e.*, there is not a substantial likelihood that the
10 existence of the May 4, 2010 Order would have assumed actual significance in the deliberations of
11 the reasonable investor or would have been viewed by the reasonable investor as having
12 significantly altered the total mix of information available for the following five significant reasons.

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15 First, the May 4, 2010 Order related to an entirely different independent contractor, Frank
16 Duvall ("Duvall") of Duvall Financial Services—not Christopher or Munsey—who posted an
17 Internet advertisement without DEE's authorization. See Tr. Ex. S-4; Tr. Ex. S-5; Oct. 2, 2012 Hrg.
18 Tr. Vol. II at pp. 339:19-341:13.

19 Second, the May 4, 2010 Order related to an entirely different oil and gas investment
20 (Koomey/Morrison #3 Prospect) than those investments sold in or from Arizona. See Tr. Ex. S-4;
21 Oct. 2, 2012 Hrg. Tr. Vol. II at pp. 341:14-20. The Koomey/Morrison #3 Prospect advertised by
22 Duvall on the Internet in Pennsylvania was never sold in or from Arizona.

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24 Third, no investments were sold in Pennsylvania as a result of Duvall's action underlying
25 the May 4, 2010 Order and DEE never had a client in Pennsylvania. See Tr. Ex. S-5; Oct. 2, 2012
26 Hrg. Tr. Vol. II at pp. 340:3-22.

1 Fourth, the May 4, 2010 Order merely resulted in a nominal fine of \$1,500 and Pennsylvania
2 allowed DEE to continue to do business in its state. *See* Tr. Ex. S-3; Oct. 2, 2012 Hrg. Tr. Vol. II at
3 pp. 339:19-341:13.

4 Fifth and foremost, the May 4, 2010 Order was “prospectively RESCINDED” on July 13,
5 2010. *See* Tr. Ex. S-3. To rescind means to “abrogate,” “cancel,” “void,” “repeal,” “annul,” or
6 “nullify.” Black’s Law Dictionary 1332 (8th ed. 2004). In other words, to rescind means to “end
7 officially” or “say officially that something is no longer valid.” *See* Merriam-Webster Dictionary,
8 available online at <http://www.merriam-webster.com/dictionary/rescind>. The June 20, 2014
9 Opinion and Order fails to even mention that the May 4, 2010 Order was prospectively rescinded,
10 and thus officially no longer valid, more than three months before the first investment at issue here.
11 By ignoring the fact that the May 4, 2010 Order was prospectively rescinded and finding that
12 Respondents had to disclose the May 4, 2010 Order to investors, the Commission has effectively
13 nullified the rescission and taken away any reason for DEE to have settled the matter with the PSC.
14 If DEE had known that the prospectively rescinded May 4, 2010 Order would later be used against
15 DEE to support a finding of securities fraud, DEE would never have settled the PSC matter.
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18 Given the significance of this final factor, that the May 4, 2010 Order was prospectively
19 rescinded more than three months before the first investment at issue here, the Division
20 conveniently relies in retrospect on the July 13, 2010 Order issued by the PSC. However, the July
21 13, 2010 Order was only mentioned in passing in paragraph 40 of the June 20, 2014 Opinion and
22 Order as having “described an offer of settlement.” That offer of settlement specifically indicated
23 DEE was settling the matter “without any adjudication of said allegations that Respondents violated
24 certain provisions of the Pennsylvania Securities Act of 1972” and that DEE was settling the matter
25 “without admitting or denying the allegations.” *See* Tr. Ex. S-5. There is no other mention in the
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1 June 20, 2014 Opinion and Order about the July 13, 2010 Order, let alone the substance of that July
2 13, 2010 Order other than to reference the innocuous settlement. The Division cannot rely on an
3 unidentified provision of the July 13, 2010 Order now to fulfill its burden of proof on materiality.
4 Instead, the Division is stuck with May 4, 2010 Order, which does not relate to the same persons or
5 same investment and was prospectively rescinded more than three months before the subject
6 investments, and thus is an erroneous basis for finding a material omission to prove securities fraud.
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8 The Division relies on a few cases to argue that the failure to disclose a cease and desist
9 order to investors is a material omission that constitutes securities fraud. Again, however, the only
10 cease and desist order here was the May 4, 2010 Order that was prospectively rescinded three
11 months before the first investment at issue here. The July 13, 2010 Order—which was not a basis
12 for securities fraud in the June 20, 2014 Opinion and Order as discussed above—does not contain
13 any cease and desist language. See Tr. Ex. S-3. And again, the May 4, 2010 Order was
14 prospectively rescinded more than three months before the first subject investment. Therefore, no
15 cease and desist order exists in this matter and the cases cited by the Division are wholly irrelevant.
16

17 Even if, *arguendo*, the May 4, 2010 Order had not been prospectively rescinded, the cases
18 simply do not apply. For example, the part of the one Arizona case cited by the Division merely
19 found the state alleged securities fraud, which referenced a cease and desist order among other
20 items, with sufficient particularity under Ariz. R. Civ. P. 9(b). See State ex rel. Corbin v. Goodrich,
21 151 Ariz. 118, 123-24, 726 P.2d 215, 220-21 (Ct. App. 1986). The court went on to uphold a
22 preliminary injunction, finding the trial court could properly infer the likelihood of future
23 violations, not a permanent injunction or liability with findings of actual violations of A.R.S. § 44-
24 1991. See *id.* at 126, 726 P.2d at 223. Thus, contrary to the Division's representation, the case did
25 not actually find that a cease and desist order was a material omission constituting securities fraud.
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1 The remaining cases cited by the Division are all federal court cases based on federal
2 securities laws, not Arizona cases based on Arizona securities laws, which are different from federal
3 securities laws. Therefore, those federal cases cited by the Division are not controlling here. Those
4 federal cases cited by the Division are also not persuasive here. For example, one case held “that it
5 was materially misleading to omit the existence of a contemporaneous cease and desist order that
6 prohibited [the defendant] from selling identical unregistered securities in California.” SEC v.
7 Merchant Capital, LLC, 483 F.3d 747, 771 (11th Cir. 2007) (emphasis added). It is only the
8 “existence of a state cease and desist order against identical instruments [that] is clearly relevant to
9 a reasonable investor.” *Id.* at 771 (emphasis added). Here, we have neither a contemporaneous
10 cease and desist order, as the May 4, 2014 Order was prospectively rescinded more than three
11 months before the first investment, nor the sale of identical securities, as the May 4, 2010 Order
12 related to an entirely different investment than those sold in or from Arizona. The other two cases,
13 like Goodrich, merely relate to an injunction. *See SEC v. Levine*, 671 F. Supp. 2d 14, 17 (D.D.C.
14 2009) (civil contempt proceedings related to injunction); SEC v. Paro, 468 F. Supp. 635 (N.D.N.Y.
15 1979) (preliminary injunctive relief). Notably, the Division has not cited to, and Respondents are
16 not aware of, any legal authority, let alone controlling Arizona law, finding a prospectively
17 rescinded cease and desist order that related to one investment was a material omission constituting
18 securities fraud for purposes of an entirely different investment. Such law simply does not exist.

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22 Accordingly, concluding the May 4, 2010 Order is a material omission of fact constituting
23 securities fraud is not justified by the evidence and is contrary to law.

24 In addition to being material, the omission must be misleading to constitute securities fraud.
25 *See* A.R.S. § 44-1991(A)(2); Fromkin, 196 Ariz. at 227, 994 P.2d at 1042. As discussed above, the
26 May 4, 2010 Order related to an entirely different independent contractor than Christopher or
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1 Munsey, an entirely different investment than those sold in or from Arizona, did not even result in
2 any investment in Pennsylvania and was prospectively rescinded more than three months before the
3 first investment at issue here. Thus, the May 4, 2010 Order is not misleading, *i.e.*, the May 4, 2010
4 Order does not constitute a material fact necessary to make the statements made with respect to the
5 investments sold in or from Arizona not misleading. There were no statements made about the
6 investments at issue here that were misleading but would have not been misleading if Respondents
7 had disclosed the May 4, 2010 Order about a different investment. It is also absurd and confusing
8 to require DEE to tell every investor that there was a cease and desist order, when that order was
9 prospectively rescinded and thus is no longer valid and does not even relate to the same investment.
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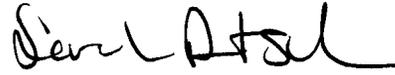
11 Finally, the public policy behind Arizona securities law is to protect the public, preserve fair
12 and equitable business practices, suppress fraudulent or deceptive practices in the sale or purchase
13 of securities, and prosecute persons engaged in such fraudulent or deceptive practices. *See Siporin*
14 *v. Carrington*, 200 Ariz. 97, 100, 23 P.3d 92, 95 (Ct. App. 2001) (citing 1951 Ariz. Sess. Laws ch.
15 18, § 20); *Rose*, 128 Ariz. at 212, 624 P.2d at 890. That public policy is not fulfilled by a finding of
16 securities fraud here, where it is undisputed that: (1) none of the investors have ever complained
17 about their investments; (2) there was only one investor in Arizona, who was notified about this
18 matter, offered a refund, refused it and instead inquired into additional investments; (3) the
19 investors received distributions of more than 10% return on their investments to date; and thus, (4)
20 there were no unfair, inequitable, fraudulent or deceptive business practices. *See Tr. Ex. 69; Oct. 2,*
21 *2012 Hrg. Tr. Vol. II at pp. 334:13-335:17; 349:10-12; 357:17-21; 362:7-13; 391:6-392:13.*
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24 Based upon the foregoing, the findings of fact, conclusions of law and order in the June 20,
25 2014 Opinion and Order related to securities fraud under A.R.S. § 44-1991 are not justified by the
26 evidence and are contrary to the law, and the Commission must grant a rehearing or review thereon.
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DATED this 27th day of June, 2014.

MITCHELL & ASSOCIATES
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dec/pldgs/dee resp appl for rehearing

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