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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

BOB STUMP - Chairman  
GARY PIERCE  
BRENDA BURNS  
BOB BURNS  
SUSAN BITTER SMITH

Arizona Corporation Commission

DOCKETED

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DOCKETED BY

IN THE MATTER OF:

DOCKET NO. S-20906A-14-0063

CONCORDIA FINANCING COMPANY, LTD,  
a/k/a "CONCORDIA FINANCE,"  
ER FINANCIAL & ADVISORY SERVICES, LLC,  
LANCE MICHAEL BERSCH, and  
DAVID JOHN WANZEK and LINDA WANZEK,  
husband and wife.

Respondents.

ORIGINAL

**FOURTH  
PROCEDURAL ORDER  
(Denies Motion to Dismiss and  
Schedules Pre-Hearing Conference)**

BY THE COMMISSION:

On February 27, 2014, the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") filed a Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order for Administrative Penalties, and Order for Other Affirmative Action ("Notice") against Concordia Financing Company, Ltd, a/k/a Concordia Finance ("Concordia"), ER Financial & Advisory Services, LLC ("ER"), Lance Michael Bersch, and David John Wanzek and Linda Wanzek, husband and wife (collectively "Respondents"), in which the Division alleged multiple violations of the Arizona Securities Act ("Act") in connection with the offer and sale of securities in the form of investment contracts and promissory notes within or from Arizona.

The spouse of David John Wanzek, Linda Wanzek ("Respondent Spouse"), is joined in the action pursuant to A.R.S. § 44-2031(C) solely for the purpose of determining the liability of the marital community.

The Respondents were duly served with copies of the Notice.

1 On March 6, 2014, Respondents ER, Lance Michael Bersch and David John Wanzek filed a  
2 Request for Hearing. On March 14, 2014, Respondent Linda Wanzek filed a Request for Hearing.

3 On March 17, 2014, by Procedural Order, a pre-hearing conference was scheduled for April  
4 10, 2014.

5 On March 26, 2014, Respondent Concordia filed a Request for Hearing.

6 On March 27, 2014, by Procedural Order, the pre-hearing conference scheduled for April 10,  
7 2014, was affirmed, with notice issued to Respondent Concordia.

8 On April 4, 2014, Respondents ER, Lance Michael Bersch, David John Wanzek, and Linda  
9 Wanzek (collectively the "ER Respondents") filed a Motion to Dismiss and Answer ("Motion").

10 On April 9, 2014, Respondent Concordia filed an Answer.

11 On April 10, 2014, at the pre-hearing conference, the parties appeared through counsel and  
12 requested oral argument regarding the Motion to Dismiss. The parties further proposed a schedule  
13 for filing motions prior to oral argument.

14 On April 15, 2014, by Procedural Order, oral argument and a status conference were  
15 scheduled to commence on May 21, 2014. It was further ordered that Respondent Concordia shall  
16 file any Motion to Dismiss by April 25, 2014, the Division shall file its Response to the Motions to  
17 Dismiss by May 9, 2014, and the Respondents shall file any Reply by May 16, 2014.

18 On April 25, 2014, Respondent Concordia filed its Joinder to Motion to Dismiss of  
19 Respondents ER Financial & Advisory Services, LLC, Lance Michael Bersh, David John Wanzek  
20 and Linda Wanzek.

21 On May 5, 2014, Respondents ER, Lance Michael Bersch, David John Wanzek, and Linda  
22 Wanzek filed Acknowledgments of Possible Conflicts.

23 On May 9, 2014, the Division filed its Response to Motion to Dismiss by All Respondents  
24 ("Response").

25 On May 16, 2014, Respondents ER, Lance Michael Bersch, David John Wanzek, and Linda  
26 Wanzek filed their Reply in Support of Motion to Dismiss ("Reply").

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1 On May 21, 2014, oral argument and a status conference were held. The parties appeared  
2 through counsel and oral argument was presented. The Motion was taken under advisement and a  
3 schedule was proposed for the parties to submit supplemental citations.

4 On May 22, 2014, the Division filed its Supplemental Citation of Authorities.

5 On May 29, 2014, Respondents Concordia, ER, Lance Michael Bersch, David John Wanzek,  
6 and Linda Wanzek filed their Joint Supplemental Citation of Authorities.

7 Motion to Dismiss

8 The Commission's Rules of Practice and Procedure ("Rules of Practice and Procedure"),  
9 contained in Title 14, Chapter 3 of the Arizona Administrative Code ("A.A.C."), govern actions that  
10 are within the jurisdiction of the Commission. Under A.A.C. R14-3-109(C), the Commission may  
11 dismiss an application or complaint with or without prejudice. However, the Rules of Practice and  
12 Procedure do not identify a basis for determining when dismissal would be appropriate, nor do they  
13 specifically mention dismissal of notices of an opportunity for hearing. Pursuant to A.A.C. R14-3-  
14 101(A), "[i]n all cases in which procedure is set forth neither by law, nor by these rules, nor by  
15 regulations or orders of the Commission," the Arizona Rules of Civil Procedure shall apply. Though  
16 the Rules of Practice and Procedure have no specific rule for considering motions to dismiss, A.A.C.  
17 R14-3-106(K) requires that motions "conform insofar as practicable" to the Arizona Rules of Civil  
18 Procedure. Therefore the Motion will be construed under the Arizona Rules of Civil Procedure.

19 Under Ariz. R. Civ. P. Rule 12(b), a motion to dismiss for failure to state a claim upon which  
20 relief can be granted shall be treated and disposed of as a motion for summary judgment under Rule  
21 56 when matters outside the pleading are presented and not excluded by the court. Here,  
22 Respondents' Motion was accompanied by two documents, a Concordia "Sale of Contracts and  
23 Servicing Agreement" (the "Servicing Agreement") and an Affidavit of Linda Wanzek. The Division  
24 Response contained three exhibits: a Mohave County Assessor Parcel Search regarding residential  
25 property owned by David and Linda Wanzek, an Arizona Certified Public Accountant Registration  
26 Renewal Form filed by David Wanzek, and printouts from the web site of the Florida Institute of  
27 Certified Public Accountants. Respondents' Reply was also accompanied by additional documents:  
28 an April 8, 2014 letter from Division counsel to counsel for Respondents ER, Bersch and the

1 Wanzeks regarding *Trimble v. American Savings Life Ins. Co.*, 152 Ariz. 548, 733 P.2d 1131 (App.  
2 1986), an April 9, 2014 letter to Division counsel in response to the *Trimble* letter, and an affidavit of  
3 David Wanzek supplemented with copies of Mr. Wanzek's Florida driver's license and Florida  
4 Certified Public Accountant license.

5 Respondents' Motion raises three grounds for dismissal of the Notice in its entirety: 1) the  
6 Division's allegations, as set forth in the Notice, are too old, 2) the Servicing Agreements at issue are  
7 not securities, and 3) the Notice fails to adequately plead clear and specific allegations. The Motion  
8 raises a fourth basis for dismissal as to Respondent Spouse Mrs. Wanzek, and the respective marital  
9 community, based upon her residence in Florida. In considering the appropriate standard for review,  
10 Rule 12(b)(6), failure to state a claim upon which relief can be granted, most accurately reflects the  
11 nature of the three general grounds for dismissal, while the fourth falls under Rule 12(b)(2), lack of  
12 jurisdiction over the person, as to Mrs. Wanzek.

13 Under Ariz. R. Civ. P. Rule 12(b), matters submitted outside the pleading will invoke the  
14 application of Rule 56 when the defense asserted is failure to state a claim upon which relief can be  
15 granted. Here, the documents submitted by the Division and the affidavits submitted by the  
16 Respondents all regard the jurisdictional issue of the inclusion of Mrs. Wanzek and the marital  
17 community. Contrary to the procedure in addressing Rule 12(b)(6) motions, a court may consider  
18 affidavits, depositions, exhibits, and even an evidentiary hearing to resolve a Rule 12(b)(2) challenge  
19 without converting the motion to dismiss into one for summary judgment.<sup>1</sup> The documents related to  
20 the issue of jurisdiction may therefore be considered without invoking the application of Rule 56. The  
21 question remains as to whether the Service Agreement and the two letters submitted by Respondents  
22 require the Rule 12(b)(6) issues be considered under a summary judgment analysis.

23 When evidence extrinsic to the pleadings is offered to, and relied on by, the trial judge in  
24 making a decision, a motion to dismiss should properly be treated as one for summary judgment.<sup>2</sup>  
25 However, summary judgment treatment is not required "of a motion that attaches 'extraneous matters  
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28 <sup>1</sup> *Gatecliff v. Great Republic Life Ins. Co.*, 154 Ariz. 502, 506, 744 P.2d 29, 33 (App. 1987).

<sup>2</sup> *Frey v. Stoneman*, 150 Ariz. 106, 109, 722 P.2d 274, 277 (1986).

1 [that] neither add to nor subtract from the deficiency of the pleading.’’<sup>3</sup> Nor will a motion to dismiss  
2 be converted to summary judgment treatment when the court does not rely on the proffered  
3 extraneous materials.<sup>4</sup> The April 8, 2014 letter from the Division alleged that the failure to mention  
4 the *Trimble* decision in the Respondents’ Motion to Dismiss amounted to a violation of Ariz. R. Civ.  
5 P. Rule 11(a).<sup>5</sup> The Division’s letter further included a copy of the *Trimble* decision. The April 9,  
6 2014 letter from counsel for the ER Respondents responds to the alleged Rule 11(a) violation by  
7 setting forth counsel’s basis for concluding that the *Trimble* decision is distinguishable and does not  
8 control in this matter. Neither of the letters introduces new relevant evidence beyond the assertions  
9 in the Notice of Opportunity. The letters contain mere legal argument. As the April 8 and 9 letters  
10 contain no extrinsic evidence that would be relied upon in making a decision regarding the  
11 Respondents’ Motion, their submission does not require the Motion to be considered under Rule 56.

12         Lastly, the Servicing Agreement must be considered. The Servicing Agreement clearly  
13 consists of extrinsic evidence. However, an exception to the conversion rule applies to matters that  
14 “although not appended to the complaint, are central to the complaint”.<sup>6</sup> Here, the Servicing  
15 Agreement is central to the Division’s allegations in the Notice of Opportunity. The Servicing  
16 Agreement is referenced multiple times and directly quoted within the Notice of Opportunity. A  
17 contract central to a plaintiff’s claim is not a matter outside the pleadings for purposes of Rule  
18 12(b)(6).<sup>7</sup> The Servicing Agreement does not act to convert Respondents’ Motion to Dismiss to a  
19 summary judgment motion. Accordingly, the Motion shall be considered under Rule 12.

20         Motions to dismiss for failure to state a claim are not favored in Arizona.<sup>8</sup> In determining  
21 whether a complaint fails to state a claim, the truth of the allegations must be assumed and all  
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23 <sup>3</sup> *Strategic Dev. & Const., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 63, 226 P.3d 1046, 1049 (App. 2010)  
quoting *Brosie v. Stockton*, 105 Ariz. 574, 576, 468 P.2d 933, 935 (1970).

24 <sup>4</sup> *Id.*

25 <sup>5</sup> Ariz. R. Civ. P. Rule 11(a) provides, in pertinent part: “[t]he signature of an attorney or party constitutes a certificate by  
the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer’s knowledge,  
information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a  
good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any  
improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”

26 <sup>6</sup> *Strategic Dev. & Const.*, 224 Ariz. at 64, 226 P.3d at 1050.

27 <sup>7</sup> *Cullen v. Koty-Leavitt Ins. Agency, Inc.*, 216 Ariz. 509, 513, 168 P.3d 917, 921 (App. 2007) *aff’d in part, vacated in part*  
*on other grounds sub nom. Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 189 P.3d 344 (2008).

28 <sup>8</sup> *Acker v. CSO Chevira*, 188 Ariz. 252, 255, 934 P.2d 816, 819 (App. 1997).

1 reasonable inferences therefrom must be indulged.<sup>9</sup> A motion to dismiss should not be granted unless  
 2 it appears certain that the plaintiff would be entitled to no relief under any state of facts susceptible of  
 3 proof in the stated claim.<sup>10</sup>

4 I. Is Dismissal Required Due to the Age of the Claims?

5 The Respondents argue that dismissal is appropriate as the events in the notice “are far too  
 6 old,” stretching back to 1994.<sup>11</sup> The Respondents contend that the time limits imposed under A.R.S.  
 7 § 44-2004<sup>12</sup> should apply to bar the Division’s claims.<sup>13</sup> The Respondents argue that A.R.S. § 44-  
 8 2004 should not be limited to “civil actions” as “American law has long opposed ... unlimited claims  
 9 to government power” with even the prosecution of serious felonies being subject to statutes of  
 10 limitations.<sup>14</sup> The Respondents note that the S.E.C. is subject to a federal statute of limitations, 28  
 11 U.S.C. § 2462, barring administrative enforcement actions after five years.<sup>15</sup> The Respondents rely  
 12 upon *Sell v. Gama*, 231 Ariz. 323, 327, 295 P.3d 421, 425 (2013) in asserting that Arizona securities  
 13 law is strongly influenced by the federal securities law.<sup>16</sup>

14 Respondents also contend that “the events alleged in the Notice are so stale” that proceeding  
 15 with this matter would deprive the Respondents of due process.<sup>17</sup> The Respondents support their due  
 16 process argument by citing a West Virginia case, *State ex rel. Fillinger v. Rhodes*, 230 W.Va. 560,  
 17 567, 741 S.E.2d 118, 125 (2013).<sup>18</sup> The Respondents argue that over the past ten to twenty years  
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19 <sup>9</sup> *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008).

20 <sup>10</sup> *Dressler v. Morrison*, 212 Ariz. 279, 281, 130 P.3d 978, 980 (2006).

21 <sup>11</sup> Motion at 3.

22 <sup>12</sup> **A.R.S. § 44-2004. Limitation of civil actions**

23 A. No civil action shall be maintained under this article to enforce any liability based on a violation of section 44-1841 or  
 44-1842 unless brought within one year after the violation occurs.

24 B. Except as provided in subsection C of this section, no civil action shall be brought under this article to enforce any  
 25 liability based on a violation of article 13 of this chapter unless brought within two years after discovery of the fraudulent  
 practice on which the liability is based, or after the discovery should have been made by the exercise of reasonable  
 diligence.

26 C. No civil action shall be brought under this article to enforce any liability based on a violation of section 44-1997 or 44-  
 1998 unless brought within two years after the discovery of the untrue statement or the omission. No action shall be  
 brought to enforce a liability created under section 44-1997 more than five years after a bona fide offer of the security to  
 the public or under section 44-1998 more than five years after the sale of the security.

27 <sup>13</sup> Motion at 4.

28 <sup>14</sup> Motion at 4-5.

<sup>15</sup> Motion at 5-6.

<sup>16</sup> Motion at 7.

<sup>17</sup> *Id.*

<sup>18</sup> Motion at 8.

1 “witnesses have moved or passed away, memories have faded, and important business records have  
 2 likely been lost or disposed of in the ordinary course of business.”<sup>19</sup> Alternatively, the Respondents  
 3 contend that the “stale nature of the claims” justify the Commission administratively closing this  
 4 matter rather than expending limited resources pursuing it.<sup>20</sup>

5 In its Response, the Division argues that the Motion fails under controlling Arizona legal  
 6 precedent set forth in *Trimble v. American Savings Life Ins. Co.*, 152 Ariz. 548, 733 P.2d 1131 (App.  
 7 1986).<sup>21</sup> The Division contends that under *Trimble*, state agencies pursuing an action in the public  
 8 interest are immune from a statute of limitations defense.<sup>22</sup> The Division quotes *Trimble* for the  
 9 proposition that “[u]nless the legislature expressly declares that a statute of limitations bars an action  
 10 brought for the public benefit we will not give it effect.”<sup>23</sup> The Division argues that since the  
 11 Legislature amended A.R.S. § 44-2004 in 1996 without expressly making the statute applicable to  
 12 public enforcement actions, *Trimble* remains controlling law.<sup>24</sup>

13 The Division further contends that A.R.S. § 44-2004 on its face is specifically limited to  
 14 actions brought under Title 44, Chapter 12, Article 14, which applies to civil remedies and  
 15 liabilities.<sup>25</sup> The Division asserts its enforcement action is brought under Article 16, and therefore  
 16 not subject to the terms of A.R.S. § 44-2004.<sup>26</sup> The Division distinguishes A.R.S. § 44-2004 as not  
 17 being parallel to 28 U.S.C. § 2462 and notes that Arizona courts “will give less weight and not  
 18 necessarily defer to federal case law that construes a parallel federal statute when the state and federal  
 19 statutory provisions or their underlying policies materially differ.”<sup>27</sup> The Division also contends that  
 20 the limitations period imposed by 28 U.S.C. § 2462 applies only to civil penalties and does not  
 21 prevent a finding of liability or other remedies being awarded to the S.E.C.<sup>28</sup>

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24 <sup>19</sup> *Id.*

25 <sup>20</sup> *Id.*

26 <sup>21</sup> Response at 5.

27 <sup>22</sup> Response at 6.

28 <sup>23</sup> Response at 6 (quoting *Trimble* at 556, 733 P.2d at 1139).

<sup>24</sup> Response at 6-7.

<sup>25</sup> Response at 7.

<sup>26</sup> *Id.*

<sup>27</sup> Response at 8 (quoting *Sell v. Gama*, 231 Ariz. 323, 327, 295 P.3d 421, 425 (2013)).

<sup>28</sup> Response at 8.

1 As to the due process issue, the Division counters the Respondents' fairness claims by noting  
2 that the allegations of unlawful sales of securities extend through 2009 and that investor approval for  
3 amendments had been sought as recently as December 2011.<sup>29</sup> Furthermore, the Division argues that  
4 the *Fillinger* case, cited by the Respondents in support of their due process claim, involved a nurse  
5 whose requested hearing before the West Virginia Board of Examiners for Registered Nurses had  
6 been repeatedly continued without adequate explanation by that agency, a scenario that "bear[s] no  
7 resemblance to this case."<sup>30</sup> The Division contends that the Respondents "flouted and ignored the  
8 Securities Act's anti-fraud and registration requirements ... for nearly two decades" which places  
9 them in no position to opine on the use of Commission resources.<sup>31</sup>

10 In their Reply, the Respondents argue that *Trimble* does not control because: 1) the present  
11 case is distinguishable as an administrative enforcement proceeding while *Trimble* was brought to  
12 replace an insurance company in receivership; 2) *Trimble* likely only applies to receivership cases; 3)  
13 the insurance rehabilitation statutes considered in *Trimble* are inapplicable in this case; 4) the *Trimble*  
14 court's consideration of federal securities law makes it likely that developments in federal securities  
15 law should also be considered in applying a statute of limitations; and 5) policy considerations  
16 favoring the application of a statute of limitations have been subsequently enunciated by the United  
17 States Supreme Court in *Gabelli v. S.E.C.*, 133 S. Ct. 1216 (2013), wherein the Supreme Court held  
18 that the clock on the five year statute of limitations under 28 U.S.C. § 2462 begins to run against the  
19 S.E.C. at the time the fraud occurs, not when it is discovered.<sup>32</sup> Respondents also contend that  
20 *Trimble* relied upon an application of the concept of sovereign immunity, an antiquated notion that  
21 has been rejected in recent case law.<sup>33</sup>

22 Regarding A.R.S. § 44-2004, the Respondents contend that the Division's case could be  
23 brought under both Articles 14 and 16, thereby making applicable the statute of limitations to this  
24 proceeding.<sup>34</sup> Alternatively, Respondents argue that if A.R.S. § 44-2004 does not directly apply, case

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26 <sup>29</sup> Response at 9.

<sup>30</sup> *Id.*

<sup>31</sup> Response at 10.

<sup>32</sup> Reply at 1-4, Exh. 2.

<sup>33</sup> Reply at 3.

<sup>34</sup> Reply at 4.

1 law supports adopting it as an analogous statute of limitations.<sup>35</sup> If a statute of limitations does not  
 2 apply, Respondents argue that “the case should be dismissed on due process grounds, or equitable  
 3 grounds such as laches or estoppel.”<sup>36</sup>

4 The affirmative defense of statute of limitations is properly raised in a motion to dismiss when  
 5 it appears from the face of the complaint that the claim is barred.<sup>37</sup> Though well argued,  
 6 Respondents’ arguments are not persuasive to establish a statute of limitations defense where none  
 7 expressly applies.

8 *Trimble* held the state to be immune from a statute of limitations defense brought under  
 9 A.R.S. § 44-2004.<sup>38</sup> The Respondents have argued that *Trimble* should be read narrowly and limited  
 10 to insurance receivership cases. While the *Trimble* court considered the insurance rehabilitation  
 11 statutes in its decision, the court’s focus was on the legislative intent of those statutes, namely the  
 12 benefit of the public.<sup>39</sup> The court found that “[t]he public interest is served by the cessation of illegal  
 13 and fraudulent acts.”<sup>40</sup> The court further reasoned that requiring “restitution to the victims has a  
 14 deterrent effect, which also serves the public interest.”<sup>41</sup> The *Trimble* court further held that “[u]nless  
 15 the legislature expressly declares that a statute of limitations bars an action brought for the public  
 16 benefit we will not give it effect.”<sup>42</sup> Protection of the public interest is likewise the impetus behind  
 17 the Arizona Securities Act (the “Act”). The legislature intended the Act to be “‘a remedial measure’  
 18 for the ‘protection of the public’ and therefore specified that the Act be ‘liberally construed.’”<sup>43</sup> The  
 19 statutory language “confirms broad intent to sanction wrongdoing in connection with the purchase or  
 20 sale of securities.”<sup>44</sup> With protection of the public being the key factor behind the decision not to  
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22  
 23 <sup>35</sup> Reply at 4. “It ‘is standard practice for courts to “borrow” a statute of limitations when one is not explicitly provided.’”  
 Reply at 4, citing *Coal River Energy LLC v. Jewell*, 751 F.3d 659, 663 (D.C. Cir. 2014).

24 <sup>36</sup> Reply at 5.

<sup>37</sup> *Anson v. Am. Motors Corp.*, 155 Ariz. 420, 421, 747 P.2d 581, 582 (App. 1987).

25 <sup>38</sup> *Trimble*, 152 Ariz. at 554-555, 733 P.2d at 1137-1138.

<sup>39</sup> *Trimble*, 152 Ariz. at 555-556, 733 P.2d at 1138-1139.

26 <sup>40</sup> *Trimble*, 152 Ariz. at 556, 733 P.2d at 1139.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

27 <sup>43</sup> *Grand v. Nacchio*, 225 Ariz. 171, 174, 236 P.3d 398, 401 (2010) (quoting 1951 Ariz. Sess. Laws, ch. 18, § 20 (1st  
 Reg.Sess.)).

28 <sup>44</sup> *Id.*

1 hold the state subject to the A.R.S. § 44-2004 statute of limitation in *Trimble*, the *Trimble* holding  
2 must equally apply to this case absent express legislative intent to the contrary.

3 As the legislature is presumed not to have intended to write a statute containing void or  
4 meaningless provisions, statutes are interpreted to give meaning to every word, if possible.<sup>45</sup> By the  
5 plain language of the statute, the time limits imposed by A.R.S. § 44-2004 specifically apply to civil  
6 actions brought under Article 14, while the Division's ability to bring administrative enforcement  
7 actions are covered in Article 16. Respondents argue that the agency's enforcement actions could  
8 come under both Articles. However, such an interpretation would render meaningless the  
9 legislature's express limitation to civil actions "brought under this article."

10 A.R.S. § 44-2004 has been amended three times since the *Trimble* decision.<sup>46</sup> None of those  
11 amendments served to legislatively overturn *Trimble* by expressly applying the A.R.S. § 44-2004  
12 statute of limitations to enforcement actions brought by the Division. Indeed, a review of the most  
13 recent legislative history of A.R.S. § 44-2004 reveals no intent to apply the statute's restrictions to the  
14 Division's enforcement actions. A.R.S. § 44-2004 was most recently amended by H.B. 2159 of the  
15 Forty-Sixth Legislature, First Regular Session. As set forth in the House Summary:

16 HB 2159 amends Arizona Securities Act to reflect the federal statute of  
17 limitations for securities fraud contained in Sarbanes-Oxley Act of  
18 2002. Specifically, the bill extends the statute of limitations for a civil  
19 action to be brought no later than the earlier of two years after the  
20 discovery of the facts constituting the violation or five years after a  
21 violation occurs.<sup>47</sup>

22 The House Summary further goes on to specify that the bill "[a]mends the statute of  
23 limitations for private civil actions for securities fraud after the discovery of the facts constituting the  
24 violation from one year to two years" and "[a]mends the statute of limitations for private civil actions  
25 for securities fraud from three years after the violation to five years."<sup>48</sup>

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27 <sup>45</sup> *State v. Pitts*, 178 Ariz. 405, 407, 874 P.2d 962, 964 (1994).

<sup>46</sup> See Laws 1996, Ch. 197, § 7; Laws 2000, Ch. 108, § 43; and Laws 2003, Ch. 30, § 3.

<sup>47</sup> H.B. 2159, 46th Legislature—First Regular Session, House Summary (April 28, 2003).

28 <sup>48</sup> *Id.*

1           The Sarbanes-Oxley Act amended 28 USC § 1658 by adding a statute of limitations for “a  
2 private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in  
3 contravention of a regulatory requirement concerning the securities laws.”<sup>49</sup> This statute of  
4 limitations imposed by the Sarbanes-Oxley Act is limited to a private right of action, and it is a  
5 separate statute from 28 U.S.C. § 2462, which was reviewed by the United States Supreme Court in  
6 *Gabelli*.<sup>50</sup> The Respondents have not established any intent of the Arizona legislature to impose a  
7 statute of limitations upon enforcement actions comparable to that found in 28 U.S.C. § 2462.  
8 Accordingly, there is no basis to dismiss this matter under A.R.S. § 44-2004.

9           The Respondents also cite the age of the Division’s claims in asserting the matter should be  
10 dismissed for due process or for the equitable defenses of laches and estoppel. The Respondents  
11 support these arguments by citing cases from non-controlling jurisdictions. Generally, equitable  
12 defenses, such as estoppel and laches, do not apply against the state or its agencies in matters  
13 affecting governmental or sovereign functions.<sup>51</sup> As noted by the Division, the *Fillinger* case cited  
14 by the Respondents involved a West Virginia agency that effectively denied a licensee her requested  
15 hearing.<sup>52</sup> No such action has occurred here.

16           The other case cited by the Respondents, *Appeal of Plantier*, 126 N.H. 500, 509, 494 A.2d  
17 270, 275 (1985), involved a complaint against a doctor before the New Hampshire Board of  
18 Registration in Medicine wherein the complainant delayed to act for over nine years after the alleged  
19 incident of sexual misconduct. Here, the Respondents fail to assert that the Division, or any of the  
20 investors, slept on their rights. Further, while the *Plantier* court stated that it was important to  
21 impose some form of time limit in that case, the court noted that “the situation is different in a  
22 disciplinary proceeding in which the evidence is largely documentary, rather than testimonial ...  
23 [b]ecause documentary evidence ‘is not the kind of evidence that is lost or becomes unreliable as  
24 time passes,’ disciplinary actions turning on evidence that is documentary in nature are less likely to

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27 <sup>49</sup> Sarbanes-Oxley Act of 2002, Sec. 804(a).

<sup>50</sup> “This case centers around the meaning of 28 U.S.C. § 2462.” *Gabelli*, 133 S. Ct. at 1220.

<sup>51</sup> *Mohave Cnty. v. Mohave-Kingman Estates, Inc.*, 120 Ariz. 417, 421, 586 P.2d 978, 982 (1978).

<sup>52</sup> *Fillinger*, 230 W.Va. at 567, 741 S.E.2d at 125.

1 be prejudiced by the passage of time.”<sup>53</sup> Based on the allegations of the Notice, it is reasonable to  
 2 infer that significant documentary evidence would be submitted in this case, likely including: a  
 3 brochure for investors, presentation materials, a flow chart for marketing to investors, vehicle titles,  
 4 investment papers including servicing agreements and/or promissory notes for approximately 446  
 5 investments made by about 192 investors, information to investors regarding two amendments to the  
 6 servicing agreements, and financial documents reflecting payouts of repayments and profits to  
 7 investors totaling approximately \$32,929,066.<sup>54</sup> The Respondents have failed to establish that the  
 8 age of the Division’s claims justify dismissing this matter on the grounds of due process, or the  
 9 equitable remedies of estoppel or laches.

10 II. Do the Notice’s Alleged Facts Support a Finding That the Servicing Agreements Are  
 11 Securities?

12 The Respondents contend that the Servicing Agreements are not securities, but rather “simple  
 13 loans to truck drivers” with “any profit coming from the truck driver repaying the loan, not through  
 14 the efforts or profits of Respondent Concordia.”<sup>55</sup> The Respondents argue that the Servicing  
 15 Agreements can be considered securities only if they are investment contracts.<sup>56</sup> The Respondents  
 16 analyze the Servicing Agreements in light of the standards set forth in *S.E.C. v. W.J. Howey Co.*, 328  
 17 U.S. 293 (1946), adopted as law in Arizona in *Rose v. Dobras*, 128 Ariz. 209, 624 P.2d 887 (App.  
 18 1981).<sup>57</sup> Under *Howey* and *Rose*, an investment contract will be found in “any situation where (1)  
 19 individuals are led to invest money (2) in a common enterprise (3) with the expectation that they will  
 20 earn a profit solely through the efforts of others.”<sup>58</sup> According to the Respondents, the Servicing  
 21 Agreements fail the second and third prongs of this test as there is no common enterprise and the  
 22 Servicing Agreements do not involve an expectation of profits solely through the efforts of others.<sup>59</sup>

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 25 <sup>53</sup> *Appeal of Plantier*, 126 N.H. 500, 508, 494 A.2d 270, 274 (1985) quoting *Raymond v. Eli Lilly & Co.*, 117 N.H. 164,  
 174, 371 A.2d 170, 176 (1977).

26 <sup>54</sup> See Notice at 4-7.

27 <sup>55</sup> Motion at 8-9.

28 <sup>56</sup> Motion at 9. By definition, “security” includes an investment contract. A.R.S. § 44-1801(26).

<sup>57</sup> Motion at 9.

<sup>58</sup> *Rose*, 128 Ariz. at 211, 624 P.2d at 889.

<sup>59</sup> Motion at 10-11.

1           The Division contends that while it is a question of law whether an instrument is a security,  
2 this determination of law must be based on the facts as determined by the fact finder.<sup>60</sup> The Division  
3 argues that the Notice has alleged facts asserting the investments at issue are securities, facts which  
4 have been denied by the Respondents.<sup>61</sup> Further, the Division contends that the Notice must meet  
5 only a notice pleading standard, without the Division needing to prove the securities issue at this  
6 stage.<sup>62</sup> With relevant facts in dispute and only a notice pleading standard being required, the  
7 Division argues that the Respondents' Motion to Dismiss should be denied.<sup>63</sup>

8           While the Division contends that facts are in dispute and that it only needs to meet a notice  
9 pleading standard, these points are not dispositive of the Respondents' Motion to Dismiss. As noted  
10 above, a motion to dismiss will succeed if there exists no set of facts subject to proof in the stated  
11 claim upon which the claim may prevail. In ruling on the Respondents' Motion, the assertions set  
12 forth in the Notice must be assumed true with the Division benefiting from reasonable inferences  
13 therefrom. Therefore, it is necessary to rule on the Motion to Dismiss by considering the allegations  
14 made in the Notice as well as the information contained in the Servicing Agreement submitted by the  
15 Respondents. As the Respondents have not contested the first prong of the *Howey* test, that  
16 individuals have invested money, only the second and third prongs shall be considered in evaluating  
17 the merits of the Motion.

18           A. Common Enterprise

19           "A common enterprise exists when 'the fortunes of the investor are interwoven with and  
20 dependent upon the efforts and success of those seeking the investment or of third parties'."<sup>64</sup> A  
21 common enterprise will be found when either horizontal commonality or vertical commonality  
22 exists.<sup>65</sup> "Horizontal commonality requires a pooling of funds collectively managed by a promoter or  
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24

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25 <sup>60</sup> Response at 13.

26 <sup>61</sup> Response at 14.

27 <sup>62</sup> *Id.*

28 <sup>63</sup> *Id.*

<sup>64</sup> *Vairo v. Clayden*, 153 Ariz. 13, 17, 734 P.2d 110, 114 (App. 1987) quoting *S.E.C. v. Glenn W. Turner Enterprises, Inc.*,  
474 F.2d 476, 482 n. 7 (9th Cir.).

<sup>65</sup> *Id.*

1 third party” while “[v]ertical commonality requires a direct correlation between the success of the  
2 investor and the success of the promoter without a pooling of funds.”<sup>66</sup>

3 1. Horizontal Commonality

4 Respondents argue that the Servicing Agreement provides for investment in specific truck  
5 financing contracts, not an investment in a pool of funds as would be required to find horizontal  
6 commonality.<sup>67</sup> The Notice asserts that, in practice, Concordia did not use an individual investor’s  
7 capital to purchase the truck financing contract assigned to the investor’s servicing agreement, but  
8 rather purchased the truck financing contracts from pooled monies of multiple investors and other  
9 sources.<sup>68</sup> The Notice further alleges that interest paid by Concordia on a given investment was not  
10 dependent upon performance of specific truck financing contracts but rather Concordia pooled the  
11 proceeds derived from all the truck financing contracts and other sources of income to pay  
12 investors.<sup>69</sup> According to the Respondents, the Division’s assertion that Concordia pooled funds in  
13 practice is irrelevant under *Daggett v. Jackie Fine Arts, Inc.*, 152 Ariz. 559, 565, 733 P.2d 1142, 1148  
14 (App. 1986), which held that “what actually occurred, or in speculation what could have occurred,  
15 following the transaction is immaterial. The transaction must be characterized at the time when it  
16 transpired.”<sup>70</sup>

17 The courts have applied a liberal interpretation of the definition of “security,” with form being  
18 disregarded for substance and an emphasis placed on economic reality.<sup>71</sup> Though *Daggett* instructs  
19 that the transaction must be characterized at the time it transpired,<sup>72</sup> a review of the transaction is not  
20 limited to the four corners of the Service Agreement. The Notice alleges, and it must be considered  
21 as fact, that approximately 446 distinct investments in Concordia were made over a period of years.<sup>73</sup>

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23  
24 <sup>66</sup> *Foy v. Thorp*, 186 Ariz. 151, 158, 920 P.2d 31, 38 (App. 1996).

25 <sup>67</sup> Motion at 10.

26 <sup>68</sup> Notice at 6, ¶ 21.

27 <sup>69</sup> Notice at 6, ¶ 23.

28 <sup>70</sup> Motion at 10, quoting *Daggett v. Jackie Fine Arts, Inc.*, 152 Ariz. 559, 565, 733 P.2d 1142, 1148 (App. 1986).

<sup>71</sup> *Rose*, 128 Ariz. at 212, 624 P.2d at 890 (App. 1981).

<sup>72</sup> It bears noting that at least some of the Servicing Agreements had been amended in 2009 and again in 2011. Notice at 7, ¶¶ 27-28. Arguably, amending the contracts at these later dates could be deemed as having made material those activities that followed the initial signing of the Service Agreement.

<sup>73</sup> See Notice at 7, ¶ 26.

1 From the facts asserted in the Notice, it is reasonable to infer that a pooling of funds had been  
2 ongoing at the time some, if not all, of these Service Agreements were entered.

3 Furthermore, the Respondents have presented only a sample Servicing Agreement. Under the  
4 terms of the Servicing Agreement, the individual truck financing contracts are to be listed and  
5 described in an Attached Exhibit accompanying the Servicing Agreement.<sup>74</sup> None of the actual  
6 attachments for any of the Servicing Agreements have been submitted for review. The Notice  
7 alleges, and it must be adopted as fact for purposes of ruling on the Motion to Dismiss, that not all  
8 Servicing Agreements were assigned specific truck financing contracts.<sup>75</sup> As all investor funds were  
9 not specifically allocated to assigned truck contracts, it is again reasonable to infer that these monies  
10 were being pooled. The facts as alleged support a finding of horizontal commonality.

## 11 2. Vertical Commonality

12 The Respondents further assert that an investor's success is dependent on repayment of the  
13 loans, not the success of Concordia, and therefore, no vertical commonality is present.<sup>76</sup> Vertical  
14 commonality may be established when the fortunes of the investors are linked with those of the  
15 promoters.<sup>77</sup> Where a promoter's "interest does not end upon consummation of the purchase  
16 agreement, there exists a positive correlation between the success of the investor and the success of  
17 the promoter" which establishes a common enterprise.<sup>78</sup>

18 Under the terms of the Servicing Agreement, the Investor "engages and hires Concordia as its  
19 servicing agent for all servicing matters related to the Contracts."<sup>79</sup> Concordia's fee for servicing the  
20 contract is "to retain, during the entire term of the Contract, (a) all late payment fees, (b) all NSF  
21 charges, and (c) all interest and other fees or charges in excess of that amount required to pay  
22 Investor a \_\_\_\_ per month return (\_\_\_\_ per annum, simple interest) on the then existing principal  
23 balance due under the Contracts."<sup>80</sup> The Servicing Agreement also establishes a Custodian "who  
24 shall hold the originally executed Contracts, with transferable title documents, pursuant to the terms

25 <sup>74</sup> Servicing Agreement at §§ 1.1, 2.

26 <sup>75</sup> Notice at 6, ¶ 21.

26 <sup>76</sup> Motion at 10.

27 <sup>77</sup> *S.E.C. v. R.G. Reynolds Enterprises, Inc.*, 952 F.2d 1125, 1130 (9th Cir. 1991).

27 <sup>78</sup> *Daggett*, 152 Ariz. at 566, 733 P.2d at 1149.

28 <sup>79</sup> Servicing Agreement at § 6.1

28 <sup>80</sup> Servicing Agreement at § 6.3.

1 of the Agreement.”<sup>81</sup> The Notice alleges that ER was the custodian in most of these Servicing  
2 Agreements and that Respondents “Bersch or Wanzek, either directly or through [ER], were paid  
3 custodian fees of at least \$2,904,929.”<sup>82</sup> The Servicing Agreement submitted by the Respondents  
4 states no provision as to how the custodian was to be compensated. The Notice alleges that a  
5 Custodial Agreement was incorporated into the Servicing Agreement which provided that the  
6 custodian, in exchange for holding the truck financing contracts assigned to a Servicing Agreement  
7 and holding the titles to the vehicles subject to those truck financing contracts, was to be paid by  
8 Concordia a monthly fee for services in the amount of 0.25% of the principal balance of the  
9 underlying investment.<sup>83</sup>

10 Contrary to the Respondents’ assertion, the alleged facts support a finding that the fortunes of  
11 both Concordia and the investor are linked by the terms of the Servicing Agreement. As servicing  
12 agent under the Servicing Agreement, Concordia earned ongoing fees. While the Respondents assert  
13 that the investors’ success relied upon the loan repayments of the truck drivers, the alleged facts  
14 indicate that the success of Concordia in obtaining its servicing fees was likewise contingent upon the  
15 truckers making repayments. Since Concordia paid the ongoing custodial fees earned by ER, Bersch,  
16 and Wanzek from the Servicing Agreements, a reasonable inference is that ER, Bersch, and Wanzek  
17 directly benefitted from Concordia’s regular receipt of servicing fee income. Under the alleged facts,  
18 the success or failure of the investors was intertwined with that of the Respondents in an ongoing  
19 basis, thereby supporting a finding of vertical commonality.

20 A common enterprise will be found if either vertical commonality or horizontal commonality  
21 exists. The alleged facts indicate that vertical commonality and horizontal commonality are present  
22 in this case. For purposes of ruling on the Motion to Dismiss, the second prong of the *Howey* test has  
23 been met.

24 B. Expectation of Earning a Profit Solely Through the Efforts of Others

25 The Respondents contend that the Servicing Agreements fail the third prong of the *Howey* test  
26 as the investors’ profits are not dependent upon the profits of Concordia, but rather they are reliant

27 <sup>81</sup> Servicing Agreement at § 1.4.

28 <sup>82</sup> Notice at 8, ¶ 29(d).

<sup>83</sup> Notice at 3, ¶ 10.

1 upon whether truckers repay their specific loans.<sup>84</sup> Respondents cite case law for the proposition that  
 2 interest earned on a note will not be considered profit or the efforts of others, and therefore, the  
 3 Servicing Agreements fail to meet the third prong of *Howey*.<sup>85</sup> The Respondents conclude that the  
 4 Servicing Agreements are more aptly considered commercial loan transactions rather than investment  
 5 contracts.<sup>86</sup>

6 The third prong of *Howey* requires an expectation that profits will be earned solely from the  
 7 efforts of others. Such profits may be in the form of dividends or other periodic payments and can  
 8 include promises of fixed returns.<sup>87</sup> The efforts of others need not be those of the promoter, but can  
 9 be that of any third party.<sup>88</sup>

10 The cases cited by Respondents are distinguishable from the present matter. The cases cited  
 11 by the Respondents involved loan participation made by banks or savings and loans,<sup>89</sup> so-called  
 12 “sophisticated lending institutions.”<sup>90</sup> The intent and expectations of an investor when entering an  
 13 agreement are clearly significant in determining whether that agreement is an investment contract or  
 14 a loan transaction, as evidenced in a portion of a quote cited by the Respondents: “First Citizens  
 15 provides no evidence that at the time it entered into the Agreement it sought an investment or thought  
 16 it was making an investment in Worthen Bank or the borrower rather than entering into a commercial  
 17 loan transaction.”<sup>91</sup> Here, the Servicing Agreement fails to set forth any basis to conclude that one  
 18 entering into the agreement would believe he or she is becoming involved in a commercial loan  
 19 transaction. Indeed, the words “loan” or “lend” appear nowhere in the Servicing Agreement while  
 20

21 <sup>84</sup> Motion at 11.

22 <sup>85</sup> Motion at 11-12, citing *First Citizens Fed. Sav. & Loan Ass'n v. Worthen Bank & Trust Co.*, 919 F.2d 510, 515-16 (9th  
 Cir. 1990), *United American Bank of Nashville v. Gunter*, 620 F.2d 1108, 1115-1119 (5th Cir. 1980), and *Union Nat'l  
 Bank of Little Rock v. Farmers Bank*, 786 F.2d 881, 885 (8th Cir. 1986).

23 <sup>86</sup> Motion at 12.

24 <sup>87</sup> *S.E.C. v. Edwards*, 540 U.S. 389, 394 (2004).

25 <sup>88</sup> *Daggett*, 152 Ariz. at 566-67, 733 P.2d at 1149-50.

26 <sup>89</sup> “First Citizens Federal Savings and Loan Association (‘First Citizens’), Worthen Bank and Trust Company  
 (‘Worthen’), and 20 other savings and loan institutions entered into a loan participation agreement (‘Agreement’) in  
 connection with a real estate development.” *First Citizens*, 919 F.2d at 512. “This is an action for damages arising out of  
 the purchase by plaintiff United American Bank of Nashville (‘United American’) of a participation interest in a loan  
 extended by the Hamilton National Bank of Chattanooga (‘Chattanooga Bank’) to defendants William L. and Camille S.  
 Gunter.” *Gunter*, 620 F.2d at 1110. “This case involves a transaction between two banks related to participation in a  
 note.” *Farmers Bank*, 786 F.2d at 883.

27 <sup>90</sup> *First Citizens*, 919 F.2d at 514.

28 <sup>91</sup> Motion at 11-12, quoting *First Citizens*, 919 F.2d at 516.

1 the individual entering the agreement with Concordia is called the "Investor" throughout the  
2 document. Based on the plain language of the Servicing Agreement, it is reasonable to infer that the  
3 investors believed they were entering into investment contracts, not loans.

4 As the Respondents state, "[t]he investor is successful if the specific trucker repays the loan  
5 for his or her 'big rig' truck."<sup>92</sup> Therefore, the investors are reliant upon the managerial skills of  
6 these third party truckers to be able to make payments on their contracts. Further, the terms of the  
7 Servicing Agreement provide that Concordia act as servicing agent responsible for "all servicing  
8 matters related to the Contracts, including but not limited to sending monthly invoices to Customers  
9 for payment, the collection of payments, correspondence and telephone communication with any  
10 Customer in default, imposition and collection of late payment fees and NSF check charges, initiation  
11 at Concordia's sole discretion of all collection decisions, actions and activities, including  
12 repossession, retention of attorneys or collection agents, making repairs to damaged vehicles,  
13 reselling repossessed vehicles and all other matters and decisions relating to the Contracts and the  
14 vehicles covered by the Contracts, as if in all respects Concordia remained the owner of the Contracts  
15 and had sole authority with respect to the collection and disposition of the Contracts."<sup>93</sup> Pursuant to  
16 the Servicing Agreement, Concordia also conducted credit checks of the debtors under the truck  
17 financing contracts "to determine the payment risk."<sup>94</sup> Under the terms of the Servicing Agreement,  
18 Concordia would transfer and assign substitute contracts for those in default.<sup>95</sup> The Servicing  
19 Agreement also contains an investor acknowledgement wherein, based on fluctuations between the  
20 relative strength and weaknesses of individual truck drivers as customers, the investor "acknowledges  
21 the importance of utilizing an experienced servicing agent for such Contracts" and requires  
22 Concordia to be that agent during the entire term of the contracts.<sup>96</sup> Therefore, a reasonable  
23 interpretation of the Servicing Agreement, would be that the ultimate success or failure of the  
24 investments rely upon the managerial efforts of Concordia. Based on the terms of the Servicing  
25 Agreement, it is reasonable to infer that an investor would expect any profits to come solely from the

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26 <sup>92</sup> Response at 11.

27 <sup>93</sup> Servicing Agreement at § 6.1.

28 <sup>94</sup> Servicing Agreement at §§ 1.5, 3.6.

<sup>95</sup> Servicing Agreement at § 3.7.

<sup>96</sup> Servicing Agreement at § 8.

1 efforts of others. For purposes of ruling on the Motion to Dismiss, the third prong of the *Howey* test  
2 has been met.

3 C. Conclusion as to Whether the Notice's Alleged Facts Support a Finding That the  
4 Servicing Agreements Are Securities

5 As noted above, the *Howey* test, as adopted by Arizona courts in *Rose*, creates a three prong  
6 test for defining an investment contract. An investment contract will be found when (1) individuals  
7 are led to invest money (2) in a common enterprise (3) with the expectation that they will earn a  
8 profit solely through the efforts of others. Here, the Respondents have not contested the first prong.  
9 The allegations in the Notice, and the reasonable inferences drawn therefrom, support a finding of  
10 both vertical commonality and horizontal commonality, either of which individually demonstrates the  
11 existence of a common enterprise, thereby satisfying the second prong under *Howey*. Lastly, it is  
12 reasonable to infer that an investor would expect any profits received to come solely through the  
13 efforts of others. The alleged facts and the reasonable inferences derived therefrom, which must be  
14 adopted in considering the Respondents' Motion to Dismiss, support a finding that the investments at  
15 issue are securities.

16 III. Is the Notice Inadequate?

17 The Respondents contend that the Notice fails to give proper notice as to which allegations  
18 are made against which Respondents.<sup>97</sup> Respondents argue that the Notice fails to state when the  
19 alleged sales were made, which Respondent made each of the alleged sales, and what promotional  
20 material was shown by whom and to which investor.<sup>98</sup> The Respondents further assert that, pursuant  
21 to Ariz. R. Civ. P. Rule 9(b),<sup>99</sup> allegations of fraud must be pled with particularity.<sup>100</sup> Respondents  
22 contend that the fraud count in the Notice lacks specific information as to what alleged  
23 representations had been communicated to which investors.<sup>101</sup>

24  
25 <sup>97</sup> Motion at 13.

26 <sup>98</sup> *Id.*

27 <sup>99</sup> **Rule 9(b). Fraud, mistake, condition of the mind**

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

28 <sup>100</sup> Motion at 13.

<sup>101</sup> Motion at 14.

1 The Division contends that the Commission's Rules of Practice and Procedure, Arizona  
 2 Administrative Code R14-3-101 *et. seq.*, govern all cases before the Commission and, under A.A.C.  
 3 R-14-3-101(A), the Arizona Rules of Civil Procedure will apply only if appropriate procedure is not  
 4 otherwise set forth by law, the Commission's rules, or by regulations or orders of the Commission.<sup>102</sup>  
 5 The Division contends that its notices are governed by A.A.C. R-14-3-306, which is a notice pleading  
 6 rule.<sup>103</sup> The Division notes that this notice pleading standard is consistent with the requirements of  
 7 the Arizona Administrative Procedure Act which requires only "[a] short plain statement of the  
 8 matters asserted."<sup>104</sup> The Division contends that Ariz. R. Civ. P. Rule 9(b) is not applicable in these  
 9 proceedings and that the Respondents have cited only case law pertaining to federal civil actions  
 10 applying Rule 9(b) of the Federal Rules of Civil Procedure.<sup>105</sup> The Division further argues that even  
 11 if Rule 9(b) did apply to the Division's Notice, the degree of specificity sought by the Respondents is  
 12 not required due to the large numbers of investors and investments involved.<sup>106</sup>

13 In their Reply, the Respondents assert that the Commission has held itself to a higher pleading  
 14 standard under A.A.C. R14-3-106(L),<sup>107</sup> a standard that the Notice fails to meet.<sup>108</sup> The Respondents  
 15 also contend that regulatory agencies have been held not to be exempt from Rule 9(b), citing  
 16 favorable federal case law.<sup>109</sup>

17 Arizona is a notice pleading state, therefore extensive fact pleading is not required.<sup>110</sup> The  
 18 purpose of the notice pleading standard "is to 'give the opponent fair notice of the nature and basis of  
 19

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20 <sup>102</sup> Response at 10.

21 <sup>103</sup> Response at 11.

22 <sup>104</sup> Response at 11, quoting A.R.S. § 41-1061(B)(4), though misattributed as A.R.S. § 41-1061(A)(4).

23 <sup>105</sup> Response at 11-12.

24 <sup>106</sup> Response at 12.

25 <sup>107</sup> Arizona Administrative Code R14-3-106 provides, in pertinent part:

26 L. Formal complaints. Complaints shall be in writing and shall contain the name and address of the complainant, the  
 27 name of the person or company against whom complaint is made, a complete statement of the grounds for said complaint,  
 28 indicating the date or dates of the commission or omission of the acts or things complained of, and the nature of the relief  
 sought by the complainant. The complaint shall be signed by the complainant, or by one of the complainants if there be  
 more than one, or by an officer of the complainant if the complainant be a corporation, association or other organization,  
 or for the complainant by an agent or attorney. If the complainant has an attorney, his name and address shall appear in  
 the complaint and he shall sign the complaint.

<sup>108</sup> Reply at 7-8.

<sup>109</sup> Reply at 8-9, citing *S.E.C. v. Tambone*, 417 F. Supp. 2d 127, 131 (D. Mass. 2006) and *S.E.C. v. Kelly*, 663 F. Supp. 2d  
 276, 283 (S.D.N.Y. 2009).

<sup>110</sup> *Rosenberg v. Rosenberg*, 123 Ariz. 589, 592-93, 601 P.2d 589, 592-93 (1979).

1 the claim and indicate generally the type of litigation involved.”<sup>111</sup> The test of an allegation that a  
 2 complaint has failed to state a claim is whether enough is stated which would entitle the plaintiff to  
 3 relief upon some theory to be developed at trial.<sup>112</sup> Under Ariz. R. Civ. P. Rule 9(b), the  
 4 circumstances constituting fraud shall be stated with particularity in all averments of fraud.

5 The Respondents contend that the Division is subject to higher pleading standards under  
 6 A.A.C. R14-3-106(L). The pleading standards established under A.A.C. R14-3-106(L) do not apply  
 7 to the proceedings here. A.A.C. R14-3-106(L) applies specifically to formal complaints. A notice of  
 8 an opportunity for hearing is not a complaint. Separate rules govern the actions taken by the  
 9 Securities Division, including notices of opportunity for hearing<sup>113</sup> and temporary orders,<sup>114</sup> as well  
 10 as answers filed in response to notices of opportunity for hearing.<sup>115</sup> To the extent that A.A.C. R14-  
 11 4-306 fails to provide a pleading standard for notices of opportunity, guidance must come elsewhere.

12 An agency must follow its own rules and regulations.<sup>116</sup> Under A.A.C. R14-4-101(A), in all  
 13 cases in which procedure is set forth neither by law, nor by the Commission’s rules, nor by  
 14 regulations or orders of the Commission, the Rules of Civil Procedure for the Superior Court of  
 15 Arizona shall govern. Therefore, it is necessary to determine whether a pleading standard has been  
 16 set by law before considering the Arizona Rules of Civil Procedure. Indeed, a pleading standard has  
 17 been established by the legislature. Under A.R.S. § 41-1061(B)(4), notice in a contested case<sup>117</sup>  
 18 requires “[a] short and plain statement of the matters asserted.” The question as to whether a more  
 19 exacting standard would apply to fraud allegations brought under A.R.S. §§ 44-1991 and 44-1992 has  
 20

21 <sup>111</sup> *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. at 419, 189 P.3d at 346, quoting *Mackey v. Spangler*, 81 Ariz. 113, 115, 301  
 P.2d 1026, 1027–28 (1956).

22 <sup>112</sup> *Guerrero v. Copper Queen Hosp.*, 112 Ariz. 104, 106, 537 P.2d 1329, 1331 (1975).

23 <sup>113</sup> See A.A.C. R14-4-306.

24 <sup>114</sup> See A.A.C. R14-4-307.

25 <sup>115</sup> See A.A.C. R14-4-305.

26 <sup>116</sup> *Clay v. Arizona Interscholastic Ass’n, Inc.*, 161 Ariz. 474, 476, 779 P.2d 349, 351 (1989).

27 <sup>117</sup> At the time of the filing of the Notice, A.R.S. § 41-1001(4) provided:

28 "Contested case" means any proceeding, including rate making, price fixing and licensing, in which the legal rights,  
 duties or privileges of a party are required or permitted by law, other than this chapter, to be determined by an agency  
 after an opportunity for an administrative hearing.

Effective July 24, 2014, the definition of contested case was amended pursuant to Laws 2014, Ch. 204 § 1. A.R.S. § 41-  
 1001(5) provides:

"Contested case" means any proceeding, including rate making, except rate making pursuant to article XV, Constitution  
 of Arizona, price fixing and licensing, in which the legal rights, duties or privileges of a party are required or permitted by  
 law, other than this chapter, to be determined by an agency after an opportunity for an administrative hearing.

1 also been addressed legislatively. More exacting requirements have been established for allegations  
 2 of fraud under A.R.S. § 44-2082.<sup>118</sup> However, A.R.S. § 44-2082 expressly places these requirements  
 3 upon private actions and complaints. No additional pleading requirements are placed on contested  
 4 cases, enforcement actions brought under Article 16, or notices of opportunity for hearing.

5 The principal goal in interpreting a statute is to discern the legislative intent.<sup>119</sup> A statute's  
 6 own words are the best and most reliable indicator of legislative intent.<sup>120</sup> Here, the legislative intent  
 7 is clear in the statute's express language, which identifies only private actions and complaints as  
 8 being subject to heightened pleading requirements for fraud. Without heightened pleading  
 9 requirements, the standard for contested cases remains A.R.S. § 41-1061.<sup>121</sup> As pleading standards

10  
 11 **<sup>118</sup> A.R.S. § 44-2082. Requirements for securities fraud actions involving misleading statements or omissions**

12 A. In any private action arising under section 44-1991 or 44-1992 in which the plaintiff alleges that the defendant made  
 13 an untrue statement of a material fact or omitted a statement of a material fact necessary in order to make the statements  
 14 made, in the light of the circumstances in which they were made, not misleading, the complaint shall specify each alleged  
 15 untrue statement or material omission and the reason or reasons why the statement or omission is misleading or the  
 16 omission is material and, if an allegation regarding the statement or omission is made on information and belief, the  
 17 complaint shall state with particularity all facts on which that belief is formed.

18 B. In any private action arising under section 44-1991 or 44-1992 in which the plaintiff may recover money damages only  
 19 on proof that the defendant acted with a particular state of mind, for each act or omission that allegedly violates section  
 20 44-1991 or 44-1992, the complaint shall state with particularity facts giving rise to a strong inference that the defendant  
 21 acted with the required state of mind.

22 C. In any private action arising under section 44-1991 or 44-1992:

23 1. On any defendant's motion, the court shall dismiss the complaint if the requirements of subsections A and B of  
 24 this section are not met.

25 2. All discovery and other proceedings shall be stayed during the pendency of any motion to dismiss pursuant to  
 26 rule 12 of the Arizona rules of civil procedure, unless the court finds on the motion of any party that  
 27 particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

28 D. During the pendency of any stay of discovery pursuant to subsection C of this section, unless ordered by the court, any  
 party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data  
 compilations, including electronically recorded or stored data, and tangible objects that are in the custody or control of  
 that person and that are relevant to the allegations as if they were the subject of a continuing request for production of  
 documents from an opposing party under the Arizona rules of civil procedure or any applicable federal or other  
 jurisdictional counterpart to the rules. A party aggrieved by the wilful failure of an opposing party to comply with this  
 subsection may apply to the court for an order awarding appropriate sanctions.

E. Except as provided in section 44-1991, subsection B, including actions based on allegations of activities constituting  
 dishonest or unethical practices in the securities industry, in any private action arising under this chapter, the plaintiff has  
 the burden of proving that the act or omission of the defendant alleged to violate the section under which the private  
 action is brought caused the loss for which the plaintiff seeks to recover damages.

<sup>119</sup> *Pleak v. Entrada Prop. Owners' Ass'n*, 205 Ariz. 471, 474, 73 P.3d 602, 605 (App. 2003).

<sup>120</sup> *Sedona Grand, LLC v. City of Sedona*, 229 Ariz. 37, 40, 270 P.3d 864, 867 (App. 2012).

<sup>121</sup> A.R.S. § 41-1061 provides, in pertinent part:

A. In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. Unless otherwise  
 provided by law, the notice shall be given at least twenty days prior to the date set for the hearing.

B. The notice shall include:

1. A statement of the time, place and nature of the hearing.

2. A statement of the legal authority and jurisdiction under which the hearing is to be held.

3. A reference to the particular sections of the statutes and rules involved.

1 have been statutorily set, the Commission's rules require that those standards be followed. Therefore,  
 2 Respondents' contention, that the Division's allegation of fraud is subject to the requirements of Ariz.  
 3 R. Civ. P. Rule 9(b), must be rejected.

4 Review of the Notice in consideration of the applicable pleading standard establishes that, as  
 5 required by A.R.S. § 41-1061(B)(2), the Division properly stated the Commission's jurisdiction  
 6 under Article XV of the Arizona Constitution and the Securities Act.<sup>122</sup> The Notice references  
 7 relevant statutes and rules by section, drawing specific attention to those sections involving the  
 8 alleged violations through the use of capitalized bold typeface, thereby complying with the  
 9 requirements of A.R.S. § 41-1061(B)(3).<sup>123</sup> The Notice also contains several pages of alleged facts  
 10 setting forth relevant details of the Servicing Agreements, the sale of the Servicing Agreements as  
 11 investments, representations made by the Respondents to investors, and the lack of registration with  
 12 the Corporation Commission of both the Servicing Agreements as securities and the Respondents as  
 13 either brokers or salesmen.<sup>124</sup> While the Respondents correctly point out that the Notice fails to  
 14 identify with specificity what representations were made to which investors on what dates, such a  
 15 level of particularity is not required. The Notice meets the standard of setting forth a short and plain  
 16 statement of the matters asserted, as required by A.R.S. § 41-1061(B)(4).

17 IV. Does the Commission Have Jurisdiction over Mrs. Wanzek and the Marital Community?

18 The Respondents contend that Mrs. Wanzek should be dismissed from this proceeding as  
 19 "there is no marital community."<sup>125</sup> The Respondents argue that the Wanzek Respondents reside in  
 20 Florida, where Mrs. Wanzek has been since April 2010.<sup>126</sup> As Florida is not a community property  
 21 state, the Respondents contend that there is no marital property to proceed against.<sup>127</sup>

22  
 23 4. A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in  
 24 detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved.  
 Thereafter upon application a more definite and detailed statement shall be furnished.

25 C. Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

26 <sup>122</sup> Notice at 2, ¶ 1.

27 <sup>123</sup> Notice at 1-2, 8-12.

28 <sup>124</sup> Notice at 2-8. The Notice also alleges the sale of Promissory Notes in addition to the Servicing Agreements. Notice at  
 3, 7, 8.

<sup>125</sup> Motion at 15.

<sup>126</sup> Motion at 15. Respondents attached an Affidavit of Linda Wanzek wherein Mrs. Wanzek attests to her residence in  
 Florida since April 2010.

<sup>127</sup> Motion at 15.

1           The Division contends that disputed issues of fact preclude dismissing Mrs. Wanzek from the  
 2 proceeding.<sup>128</sup> The Division asserts that the Respondents' failure to state Mr. Wanzek's residence  
 3 leads to the reasonable inference that he still resides in Arizona, as alleged in the Notice.<sup>129</sup> In  
 4 support of this inference, the Division attached three exhibits: 1) a Mohave County Assessor Parcel  
 5 Search showing residential property owned by David and Linda Wanzek, 2) an Arizona Certified  
 6 Public Accountant Registration Renewal Form filed by David Wanzek for the renewal period of  
 7 2013-2015, and 3) printouts from the web site for the Florida Institute of Certified Public  
 8 Accountants.

9           In their Reply, the Respondents assert that Mr. Wanzek also moved to Florida.<sup>130</sup> In an  
 10 attached affidavit, Mr. Wanzek states that Florida has been his permanent residence since April  
 11 2010.<sup>131</sup> In support of Mr. Wanzek's affidavit, the Respondents submit a copy of a certified public  
 12 accountant license issued to Mr. Wanzek by the Florida Department of Business and Professional  
 13 Regulation on November 12, 2013, and a copy of a Florida driver's license issued to Mr. Wanzek on  
 14 October 5, 2012.<sup>132</sup>

15           The portion of the Motion applicable solely to Mrs. Wanzek involves a question of personal  
 16 jurisdiction over Mrs. Wanzek and the community property, if any. "When 'jurisdictional fact issues  
 17 are not intertwined with fact issues raised by a plaintiff's claim on the merits, the resolution of those  
 18 jurisdictional fact issues is for the trial court.'"<sup>133</sup> Mrs. Wanzek was "joined in this action under  
 19 A.R.S. § 44-2031(C) solely for purposes of determining the liability of the marital community."<sup>134</sup> A  
 20 decision regarding jurisdiction over Mrs. Wanzek and the marital community would not affect the  
 21 merits of the Division's claims against the other Respondents. The mere presence of disputed issues  
 22 of fact does not preclude making a decision on the issue of jurisdiction.

23  
 24  
 25 <sup>128</sup> Response at 15.

<sup>129</sup> Response at 15.

<sup>130</sup> Reply at 9-10.

<sup>131</sup> Reply at Exh. 3.

<sup>132</sup> Reply at Exh. 3.

<sup>133</sup> *Moulton v. Napolitano*, 205 Ariz. 506, 510, 73 P.3d 637, 641 (App. 2003) quoting *Swichtenberg v. Brimer*, 171 Ariz. 77, 82, 828 P.2d 1218, 1223 (App. 1991).

<sup>134</sup> Notice at 2, ¶ 6.

1 Ultimate findings of fact are made by the Commission.<sup>135</sup> However, it is necessary for the  
 2 Administrative Law Judge to weigh the evidence pertaining to personal jurisdiction to determine  
 3 whether dismissal should be recommended to the Commission.<sup>136</sup> Neither the Respondents nor the  
 4 Division requested an evidentiary hearing on the jurisdictional issue. In considering the affidavits  
 5 and exhibits submitted by the parties accompanying their respective pleadings, the weight of the  
 6 evidence indicates that while the Respondents Mr. and Mrs. Wanzek may continue to own real  
 7 property within Arizona, they have been residents of Florida since April 2010. The question then, is  
 8 whether the Wanzeks' relocation to Florida requires dismissal of the action as to Mrs. Wanzek and  
 9 the marital community.

10 The Corporation Commission has the authority to join a spouse in an action to determine the  
 11 liability of the marital community.<sup>137</sup> All property acquired by either the husband or the wife during  
 12 the marriage is the community property of the husband and wife, except for property that is (1)  
 13 acquired by gift, devise, or descent; or is (2) acquired after service of a petition for dissolution of  
 14 marriage, legal separation or annulment if the petition results in a decree of dissolution of marriage,  
 15 legal separation or annulment.<sup>138</sup> The Arizona Supreme Court has found that "the presumption of  
 16

17 <sup>135</sup> See A.A.C. R14-3-110(A).

<sup>136</sup> See A.A.C. R14-3-109(C).

<sup>137</sup> **A.R.S. § 44-2031. Jurisdiction and venue of offenses and actions; joinder of spouse**

18 A. The superior court in this state shall have jurisdiction over violations of this chapter, the rules and orders of the  
 19 commission under this chapter and all actions brought to enforce any liability or duty created under this chapter, except  
 actions or proceedings brought under section 44-2032, paragraph 2, 3 or 4 or appeals filed under article 12 of this chapter,  
 over which the superior court in Maricopa county shall have exclusive jurisdiction.

20 B. Any action authorized by this chapter may be brought in the county in which the defendant is found, is an inhabitant or  
 transacts business, or in the county where the transaction took place, and in such cases, process may be served in any  
 21 other county in which the defendant is an inhabitant or in which the defendant is found.

22 C. The commission may join the spouse in any action authorized by this chapter to determine the liability of the marital  
 community.

23 A.R.S. § 44-2031(C) was amended effective July 24, 2014, pursuant to Laws 2014, Ch. 87 § 1, to include the following  
 sentence: This subsection does not authorize the commission to join any individual who is divorced from the defendant at  
 the time an action authorized by this chapter is filed.

24 <sup>138</sup> **A.R.S. § 25-211. Property acquired during marriage as community property; exceptions; effect of service of a  
 petition**

25 A. All property acquired by either husband or wife during the marriage is the community property of the husband and  
 wife except for property that is:

26 1. Acquired by gift, devise or descent.

27 2. Acquired after service of a petition for dissolution of marriage, legal separation or annulment if the petition results in a  
 decree of dissolution of marriage, legal separation or annulment.

28 B. Notwithstanding subsection A, paragraph 2, service of a petition for dissolution of marriage, legal separation or  
 annulment does not:

1. Alter the status of preexisting community property.

1 law is, in the absence of the contrary showing, that all property acquired and all business done and  
 2 transacted during coverture, by either spouse, is for the community.”<sup>139</sup>

3 Under A.R.S. § 25-214(B), the spouses have “equal management, control and disposition  
 4 rights over their community property and have equal power to bind the community.”<sup>140</sup> Either spouse  
 5 may contract debts and otherwise act for the benefit of the community except as prohibited under  
 6 A.R.S. § 25-214.<sup>141</sup> “[A] debt is incurred at the time of the actions that give rise to the debt.”<sup>142</sup> In an  
 7 action on such a debt or obligation the spouses shall be sued jointly and the debt or obligation shall be  
 8 satisfied: first, from the community property, and second, from the separate property of the spouse  
 9 contracting the debt or obligation.”<sup>143</sup>

10  
 11  
 12  
 13 2. Change the status of community property used to acquire new property or the status of that new property as community  
 14 property.

15 3. Alter the duties and rights of either spouse with respect to the management of community property except as prescribed  
 pursuant to section 25-315, subsection A, paragraph 1, subdivision (a).

16 <sup>139</sup> *Johnson v. Johnson*, 131 Ariz. 38, 45, 638 P.2d 705, 712 (1981), citing *Benson v. Hunter*, 23 Ariz. 132, 134-35, 202 P.  
 233, 233-34 (1921).

<sup>140</sup> **A.R.S. § 25-214. Management and control**

17 A. Each spouse has the sole management, control and disposition rights of each spouse's separate property.

18 B. The spouses have equal management, control and disposition rights over their community property and have equal  
 power to bind the community.

19 C. Either spouse separately may acquire, manage, control or dispose of community property or bind the community,  
 except that joinder of both spouses is required in any of the following cases:

20 1. Any transaction for the acquisition, disposition or encumbrance of an interest in real property other than an unpatented  
 mining claim or a lease of less than one year.

21 2. Any transaction of guaranty, indemnity or suretyship.

22 3. To bind the community, irrespective of any person's intent with respect to that binder, after service of a petition for  
 dissolution of marriage, legal separation or annulment if the petition results in a decree of dissolution of marriage, legal  
 separation or annulment.

<sup>141</sup> **A.R.S. § 25-215. Liability of community property and separate property for community and separate debts**

23 A. The separate property of a spouse shall not be liable for the separate debts or obligations of the other spouse, absent  
 agreement of the property owner to the contrary.

24 B. The community property is liable for the premarital separate debts or other liabilities of a spouse, incurred after  
 September 1, 1973 but only to the extent of the value of that spouse's contribution to the community property which  
 would have been such spouse's separate property if single.

25 C. The community property is liable for a spouse's debts incurred outside of this state during the marriage which would  
 have been community debts if incurred in this state.

26 D. Except as prohibited in section 25-214, either spouse may contract debts and otherwise act for the benefit of the  
 community. In an action on such a debt or obligation the spouses shall be sued jointly and the debt or obligation shall be  
 27 satisfied: first, from the community property, and second, from the separate property of the spouse contracting the debt or  
 obligation.

<sup>142</sup> *Arab Monetary Fund v. Hashim*, 219 Ariz. 108, 111, 193 P.3d 802, 805 (Ct. App. 2008)

28 <sup>143</sup> A.R.S. § 25-215(D).

1 Florida is not a community property state.<sup>144</sup> Under Florida law, “the law of the situs has  
2 primary control over property within its borders.”<sup>145</sup> However, Florida courts have held that  
3 community property will retain its characteristics when brought into the state.<sup>146</sup>

4 Here, the transactions that allegedly violated Arizona Securities Law occurred “from about  
5 1998 to 2009.”<sup>147</sup> The evidence submitted by the Respondents establishes that the Wanzeks did not  
6 reside in Florida until April 2010, after the alleged transactions occurred. Under Arizona law, debts  
7 arising from these transactions, such as penalties and restitution that may be ordered as a result of  
8 these proceedings, would be considered as having been incurred at the time the actions occurred.  
9 Should penalties or restitution be ordered by the Commission, such debts would be considered as  
10 having been incurred when the Wanzeks resided in Arizona. Therefore, the debts would have been  
11 incurred by the marital community.

12 The Wanzeks continue to own real property within Arizona, which remains community  
13 property. Any community property brought by the Wanzeks to Florida remains community property  
14 under Florida law. Therefore, community property exists from which a community obligation may  
15 be satisfied. The Respondents have failed to demonstrate that Mrs. Wanzek and the marital  
16 community should be dismissed from this matter due to lack of jurisdiction.

#### 17 V. Conclusion

18 The Respondents alleged three general grounds for dismissal of the Notice for failure to state  
19 a claim. The Respondents also requested dismissal as to Mrs. Wanzek and the marital community  
20 based on a lack of jurisdiction. Respondents have failed to establish that the Division would be  
21 entitled to no relief under any state of facts susceptible of proof in the stated claim. The Respondents  
22 have failed to establish a lack of jurisdiction as to Mrs. Wanzek and the marital community. Without  
23 a basis to dismiss, it is necessary and proper to proceed with the Respondents’ request for a hearing

24  
25 <sup>144</sup> *Herrera v. Herrera*, 673 So. 2d 143, 144 (Fla. 5th DCA 1996).

26 <sup>145</sup> *Quintana v. Ordone*, 195 So. 2d 577, 579 (Fla. 3d DCA 1967).

27 <sup>146</sup> See *Republic Credit Corp. I v. Upshaw*, 10 So. 3d 1103, 1104 (Fla. 4th DCA 2009) (Since California does not  
recognize tenancy by the entireties as a form of ownership, proceeds from the sale of California home cannot retain  
characteristics it never had); see also *Quintana v. Ordone*, 195 So. 2d 577, 579 (Fla. 3d DCA 1967) (adopting the rule set  
forth in Restatement, Conflict of Law § 290 (1934) that the “interests of one spouse in movables acquired by the other  
during the marriage are determined by the law of the domicile of the parties when the movables are acquired”).

28 <sup>147</sup> Notice at 8-9.

1 on the matters asserted in the Notice. It bears noting that while the Respondents have failed to  
2 demonstrate that dismissal is appropriate, the Respondents will have a full opportunity to present  
3 evidence to rebut the allegations that the Division will seek to prove at the hearing.

4 Accordingly, a pre-hearing conference should be scheduled.

5 IT IS THEREFORE ORDERED that a **pre-hearing conference shall be held on September**  
6 **2, 2014, at 10:00 a.m., at the Commission's offices, 1200 West Washington Street, Hearing**  
7 **Room No. 1, Phoenix, Arizona.**

8 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113-Unauthorized  
9 Communications) is in effect and shall remain in effect until the Commission's Decision in this  
10 matter is final and no longer subject to re-hearing.

11 IT IS FURTHER ORDERED that all parties must comply with Rules 31 and 38 of the Rules  
12 of the Arizona Supreme Court and A.R.S. § 40-243 with respect to the practice of law and admission  
13 *pro hac vice*.

14 IT IS FURTHER ORDERED that withdrawal or representation must be made in compliance  
15 with A.A.C. R14-3-104(E) and Rule 1.16 of the Rules of Professional Conduct (under Rule 42 of the  
16 Rules of the Arizona Supreme Court). Representation before the Commission includes appearances  
17 at all hearings and procedural conferences, as well as all Open Meetings for which the matter is  
18 scheduled for discussion, unless counsel has previously been granted permission to withdraw by the  
19 Administrative Law Judge or the Commission.

20 IT IS FURTHER ORDERED that the Presiding Administrative Law Judge may rescind, alter,  
21 amend, or waive any portion of this Procedural Order either by subsequent Procedural Order or by  
22 ruling at hearing.

23 DATED this 13<sup>th</sup> day of August, 2014.

24  
25   
26 MARK PRENY  
27 ADMINISTRATIVE LAW JUDGE  
28

1 Copies of the foregoing mailed/delivered  
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