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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION  
DOCKET CONTROL

**COMMISSIONERS**

SUSAN BITTER SMITH, Chairman  
BOB STUMP  
BOB BURNS  
DOUG LITTLE  
TOM FORESE

In the matter of:

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.

Docket No. S-20906A-14-0063

**STATUS REPORT**

Arizona Corporation Commission  
**DOCKETED**

JUN 16 2015

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Respondents Lance Michael Bersch, David John Wanzek, and Linda Wanzek provide notice that on Friday, June 12, 2015, they filed their Motion to Stay Administrative Hearing Pending Appeal with the Arizona Court of Appeals, Division One. A copy of the motion (excluding exhibits) is attached.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of June 2015.

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Original + 13 copies of the foregoing  
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Copies of the foregoing hand-delivered/mailed  
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**ARIZONA COURT OF APPEALS**

**DIVISION ONE**

LANCE MICHAEL BERSCH; DAVID  
JOHN WANZEK and LINDA  
WANZEK, husband and wife,

Appellants,

vs.

THE STATE OF ARIZONA; THE  
ARIZONA CORPORATION  
COMMISSION, an agency of the State  
of Arizona; MATTHEW J. NEUBERT,  
in his official capacity as Director of the  
Securities Division of the Arizona  
Corporation Commission; MARK  
PRENY, in his official capacity as  
Administrative Law Judge of the Arizona  
Corporation Commission,

Appellees.

No. 1 CA-CV 15-0340

Maricopa County Superior Court No.  
LC2014-000415-001

**MOTION TO STAY  
ADMINISTRATIVE HEARING  
PENDING APPEAL**

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**EXHIBITS**

Exhibit A: ACC Amended Notice of Opportunity (May 7, 2015)

Exhibit B: ACC 14<sup>th</sup> Procedural Order (May 7, 2015)

Exhibit C: Motion to Dismiss and Answer to Amended Notice of Opportunity  
(June, 8 2015)

Exhibit D: Affidavit of Timothy J. Sabo (June 12, 2015)

## PRELIMINARY STATEMENT

Michael Bersch, David Wanzek, and Linda Wanzek move that this Court stay the administrative proceedings against them pending before the Arizona Corporation Commission (ACC). The administrative charges span the period from February 18, 1998 to July 18, 2008. Mr. Bersch and the Wanzeks are being forced to defend actions they took up to 17 years ago. What's more, the ACC charges include a "securities fraud" count—forcing Mr. Bersch and the Wanzeks to litigate the content of conversations up to 17 years ago.

Believing that it was unfair to defend charges so stale, Mr. Bersch and the Wanzeks filed a motion to dismiss with the ACC. They argued that the ACC's administrative charges violate the statute of limitations or due process. The ACC's Administrative Law Judge denied the motion, and Mr. Bersch and the Wanzeks sought special action relief from the Superior Court. The Superior Court denied relief, and this appeal ensued. The Opening Brief is due August 3, while a 12 day hearing before the ACC is set to begin August 5.

Mr. Bersch and the Wanzeks ask this Court to stay the ACC proceedings until this Court can rule on the merits of the statute of limitations and due process issues. If no stay is issued, Mr. Bersch and the Wanzeks will be forced through a lengthy and expensive hearing process, concerning complex securities issues. But if their appeal is successful on these pure issues of law, the administrative charges

cannot stand, and the hearing would be an enormous waste of resources for all involved. Thus, a stay pending appeal is reasonable.

## ARGUMENT

### **I. Introduction.**

The ACC alleges that Mr. Bersch and Mr. Wanzek sold Truck Financing Contracts offered by Concordia Financing Company, Ltd., beginning in 1998.<sup>1</sup> The Truck Financing Contracts were loans to truck drivers to buy used “Big Rig” trucks.<sup>2</sup> Concordia originated and serviced the loans, and sold the truck loans to investors.

The truck contracts preformed as expected for many years, and Concordia paid the investors millions over the years.<sup>3</sup> Indeed, the ACC concedes that Concordia paid out more to the investors than it took in.<sup>4</sup> Like many businesses, Concordia ran into difficulties with the financial crisis in 2008.<sup>5</sup> Concordia and

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<sup>1</sup> R. 1, Complaint, Exhibit A [ACC Notice of Opportunity for a Hearing] at ¶ 15.

<sup>2</sup> R. 1, Complaint, Exhibit A [ACC Notice of Opportunity for a Hearing] at ¶ 16.

<sup>3</sup> R. 1, Complaint, Exhibit A [ACC Notice of Opportunity for a Hearing] at ¶ 26.

<sup>4</sup> Amended Notice of Opportunity, filed May 7, 2015 at ¶ 62; attached as Exhibit A. A copy is also available at the following link to the ACC’s eDocket system: <http://images.edocket.azcc.gov/docketpdf/0000160803.pdf>

<sup>5</sup> R. 1, Complaint, [ACC Notice of Opportunity for a Hearing] at ¶ 27 (“Concordia began experiencing financial problems in about 2008”).

its investors thus amended their contracts in 2009, and again in 2011.<sup>6</sup>

All the while, the ACC did nothing. Not when the truck loans were first offered in the 1990's, not when the Mr. Bersch and Mr. Wanzek became involved in 1998, not when the contracts were amended in 2009 or 2011. Concordia, Mr. Bersch and Mr. Wanzek had no reason to suspect the ACC disagreed with their assessment that the truck loan contracts were not securities.

Only in 2014 did the ACC finally take action, filing administrative charges against Concordia, Mr. Bersch, Mr. Wanzek, as well as Mrs. Wanzek for community property purposes (collectively, the "ACC Respondents"). The ACC Respondents must now defend actions they took up to 17 years ago, and they face millions in potential liability. The ACC's charges against Mr. Bersch and Mr. Wanzek include "fraud" charges, forcing them to litigate the content of specific conversations with investors up to 17 years ago.

The ACC Respondents contend that the truck loans are not securities.<sup>7</sup> The ACC argues that the truck loans are securities, and seeks up to \$685,000 in administrative penalties, \$3,078,909 in restitution, and forfeiture of \$3,094,761

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<sup>6</sup> R. 1, Complaint, Exhibit A [ACC Notice of Opportunity for a Hearing] at ¶¶ 27-28.

<sup>7</sup> *See e.g.* R. 1, Complaint, Exhibit B [Motion to Dismiss and Answer] at pages 8-12; R. 19, Plaintiffs' Response to the State's Motion to Dismiss at pages 12-14.

for these stale administrative charges.<sup>8</sup>

The ACC Respondents asked the ACC to dismiss the charges as too old, under the statute of limitations or due process.<sup>9</sup> The ACC Administrative Law Judge<sup>10</sup> decided that no statute of Limitations applied and that due process did not require dismissal.<sup>11</sup> Mr. Bersch and the Wanzeks then filed their Special Action in the Superior Court, and after briefing, the Superior Court issued a Ruling Minute Entry in January declining to take special action jurisdiction over this case.<sup>12</sup> However, the Court also seemed to make a number of rulings on the merits, including that the ACC's enforcement proceeding was not barred by the statute of limitations.<sup>13</sup> The Superior Court's Final Judgment was entered on April 20<sup>14</sup>, and Plaintiffs filed their Notice of Appeal on April 22.<sup>15</sup>

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<sup>8</sup> Amended Notice of Opportunity, filed May 7, 2015 at pages 18 to 19; attached as Exhibit A. A copy is also available at the following link to the ACC's eDocket system: <http://images.edocket.azcc.gov/docketpdf/0000160803.pdf>

<sup>9</sup> R. 1, Complaint, Exhibit B [Motion to Dismiss and Answer] at pages 3-8 and Exhibit D [Reply in Support of Motion to Dismiss] at pages 1-5.

<sup>10</sup> The ACC is exempt from the Office of Administrative Hearings. and the ACC maintains its own group of Administrative Law Judges. See A.R.S. § 41-1092.02(4); <http://www.azcc.gov/divisions/hearings/>

<sup>11</sup> R. 1, Compliant, Exhibit E [ACC 4<sup>th</sup> Procedural Order] at pages 6-12.

<sup>12</sup> R. 21, Minute Entry dated January 13, 2015.

<sup>13</sup> R. 21, Minute Entry dated January 13, 2015 at page 2 (bullet points 1 and 2)

<sup>14</sup> R. 27.

Mr. Bersch and the Wanzeks then moved that the Superior Court stay the ACC's administrative hearing pending appeal.<sup>16</sup> After briefing and oral argument, the Superior Court denied the motion.<sup>17</sup> Rather than acting under ARCAP Rule 7(a)(3), the Court applied Civil Procedure Rule 62(c), and found that:

A stay is an extraordinary remedy; and Plaintiff must satisfy stringent standards to justify a stay of the pending appeal. Under the circumstances of this case, Plaintiff has failed to satisfy the standards established in Ariz. R. Civ. P. rule 62(c). Specifically, this Court finds that Plaintiffs have failed to demonstrate (1) a likelihood of success on the merits; (2) that it will be irreparably harmed if a stay is not granted; (3) that a stay will not injure the opposing party; and that (4) the stay furthers the public interest.

However, the Superior Court did approve a temporary stay of 30 days.

Subsequently, the ACC filed an amended "Notice of Opportunity" (which states the administrative charges)<sup>18</sup>, the ACC hearing was rescheduled for 12 days beginning August 5, 2015,<sup>19</sup> and Mr. Bersch and the Wanzeks filed an Answer to

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<sup>15</sup> R. 29.

<sup>16</sup> R. 31.

<sup>17</sup> R. 46, Minute Entry dated May 4, 2014.

<sup>18</sup> Amended Notice of Opportunity, filed May 7, 2015 at pages 15 to 17; attached as Exhibit A. A copy is also available at the following link to the ACC's eDocket system: <http://images.edocket.azcc.gov/docketpdf/0000160803.pdf>

<sup>19</sup> ACC 14<sup>th</sup> Procedural Order, filed May 7, 2015, attached as Exhibit B. A copy is also available at the following link to the ACC's eDocket system: <http://images.edocket.azcc.gov/docketpdf/0000161994.pdf>

the Amended Notice of Opportunity.<sup>20</sup> The Court may take judicial notice of these subsequent filings at the ACC under Arizona Rule of Evidence 201.

**II. A stay will preserve the status quo pending appeal.**

Under ARCP 7(c), this Court may “stay proceedings during the pendency of an appeal”, and the Court may “enter any order appropriate to preserve the status quo, and may enter any order to preserve the effectiveness of the decision that the appellate court will enter.” Here, a stay is appropriate in order to preserve the status quo and enable this Court to rule on pure issues of law—whether the ACC’s administrative prosecution of actions dating back to 1998 is barred by the statute of limitations or due process.

A stay pending appeal may be granted when the moving party demonstrates “the following elements:

1. a strong likelihood of success on the merits;
2. irreparable harm if the stay is not granted;
3. that the harm to the requesting party outweighs the harm to the party opposing the stay;
4. that public policy favors the granting of the stay.”

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<sup>20</sup> Motion to Dismiss and Answer to Amended Notice of Opportunity, filed June 8, 2015, and attached as Exhibit C. A copy is also available at <http://images.edocket.azcc.gov/docketpdf/0000160937.pdf>

*Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410-411 ¶ 10, 132 P.3d 1187, 1190-91 (2006). But this is a sliding scale, and a stay is appropriate when the moving party establishes the “presence of serious questions and [that] the balance of hardships tip[s] sharply in favor of the moving party.” *Id.* (alterations in original, quotation marks and citation omitted). Here, Mr. Bersch and the Wanzeks raise serious questions about whether the ACC’s administrative prosecution of actions from 7 to 17 years ago should be barred by the statute of limitations or due process. The balance of hardships tips sharply in favor of Mr. Bersch and the Wanzeks, who face the heavy expense and high stress of a lengthy hearing with millions of dollars at stake, while the ACC faces little or no harm from briefly delaying the hearing.

**III. There is a serious question whether the ACC proceedings violate the statute of limitations.**

**A. Statutes of limitation are a vital protection that promotes justice.**

Mr. Bersch and the Wanzeks have a strong likelihood of success on the merits. The ACC argues that it is not bound by *any* statute of limitations, meaning there is no limit to how far back it can reach with an administrative prosecution. But statutes of limitation are commonly applied in administrative enforcement actions. As the United States Supreme Court recently explained in a SEC case, the statute of limitations provides vital protections to citizens:

- It “would be utterly repugnant to the genius of our laws” if enforcement actions could “be brought at any distance of time.”
- Statutes of limitations “promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.”
- Statute of limitations provide “security and stability to human affairs” and are “vital to the welfare of society.”

*Gabelli v. S.E.C.*, 133 S.Ct. 1216, 1221, 1223 (2013). This is no new-fangled theory. As Chief Justice Marshall explained in 1805, “[i]n a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.” *Adams v. Woods*, 6 U.S. 336, 342 (1805).

Relying on *Adams*, the D.C. Circuit explained that statutes of limitations extend to administrative enforcement cases. *3M Co. (Minnesota Min. & Mfg.) v. Browner*, 17 F.3d 1453, 1455-1457 (D.C. Cir. 1994). As with any other type of case, “after the passage of time ‘evidence has been lost, memories have faded, and witnesses have disappeared.’” *Id.* at 1457, (quoting *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944)). And there comes a time

when a citizen “ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations.” *Id.* (citation omitted). Further, administrative enforcement actions based on long-past events would upset the “settled expectations” of defendants. *Id.* Two years after issuing its opinion in *3M*, the D.C. Circuit rejected the SEC’s argument the statute of limitations should not apply to securities enforcement cases. *Johnson v. S.E.C.*, 87 F.3d 484, 492 (D.C. Cir. 1996). The SEC argued that securities enforcement cases should be exempt from the statute of limitations. The Court strongly disagreed, noting that:

Whatever prejudice there may have been in ancient times against statutes of limitations, it is a cardinal principle of modern law and of this court, that they... are not to be construed so as to defeat their obvious intent to secure the prompt enforcement of claims during the lives of the witnesses, and when their recollection may be presumed to be still unimpaired.

*Id.* (quoting *Campbell v. City of Haverhill*, 155 U.S. 610, 617 (1895)).

In *Gabelli*, the Supreme Court unanimously confirmed that the statute of limitations applies to SEC enforcement actions. 133 S.Ct. at 1219. The unanimous teaching of *Gabelli*, that statutes of limitations “promote justice” and are “vital to the welfare of society”, applies with great force here, where the ACC is attempting to prosecute acts from 7, 10 and even 17 years ago. There is no reason for the ACC to be able to tread where the SEC cannot. *See Sell v. Gama*, 231 Ariz. 323, 327 ¶ 18, 295 P.3d 421, 425 (2013) (“We will interpret the ASA by

following settled federal securities law unless there is a good reason to depart from that authority”).

The principles of fundamental fairness and justice recognized in *Gabelli*, *Johnson*, and *Adams* are part of Arizona law, which follows the general common law of limitations. *John W. Masury & Son v. Bisbee Lumber Co.*, 49 Ariz. 443, 461, 68 P.2d 679, 687 (1937) (“The rules laid down by the common law of England, therefore, on the subject of limitations are the law of Arizona, except as they be modified or changed by our statute.”). Thus, Arizona recognizes that the statutes of limitations serve: (1) “to protect defendants from stale claims” because the “pursuit of a claim after an unreasonable amount of time may be thwarted when evidence may have been lost or witnesses’ memories have faded”; (2) to “protect defendants from insecurity—economic, psychological, or both” because “there comes a time when [a person] ought to be secure in [their] reasonable expectation that the slate has been wiped clean of ancient obligations”; and (3) “to protect courts from the burden of stale claims.” *Porter v. Spader*, 225 Ariz. 424, 427 ¶7, 239 P.3d 743, 746 (App. 2010) (citations and quotation marks omitted) (quoting *Ritchie v. Grand Canyon Scenic Rides*, 165 Ariz. 460, 464, 799 P.2d 801, 805 (1990)).

**B. The statute of limitations in A.R.S. § 44-2004 or A.R.S. § 13-107 should apply to the ACC's administrative proceeding.**

It “is standard practice for courts to ‘borrow’ a statute of limitations when one is not explicitly provided.” *Coal River Energy, LLC v. Jewell*, 751 F.3d 659, 663 (D.C. Cir. 2014); *see also Blood Sys., Inc. v. Roesler*, 972 F. Supp. 2d 1150, 1154 (D. Ariz. 2013). Borrowing preserves important societal interests and promotes justice:

The purpose of [a] statute of limitation ... is ... to (1) prevent the unexpected enforcement of stale and fraudulent claims by allowing persons after the lapse of a reasonable time, to plan their affairs with a reasonable degree of certainty, **free from the disruptive burden** of protracted and unknown potential liability, and (2) to **aid in the search for truth** that may be impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise. Therefore, when a statute includes no express statute of limitations, we should not simply assume that there is no limitation period. Instead, we **borrow the most suitable statute of limitations....**

*Bellemare v. Wachovia Mortgage Corp.*, 931 A.2d 916, 921 (Conn. 2007) (citations and quotation marks omitted) (emphasis added). Because Arizona follows the general common law of statutes of limitation (*John W. Masury & Son*, 49 Ariz. at 461, 68 P.2d at 687), this Court should follow the borrowing rule and apply a statute of limitations to the ACC proceeding.

The Arizona Securities Act (ASA) includes a statute of limitations that applies to civil court cases, A.R.S. § 44-2004. For violations of A.R.S. §§ 44-

1841 and 1842, the statute of limitations is one year, and for all other alleged violations of the ASA, the limitation is two years. A.R.S. § 44-2004(A), (B). This is the most analogous statute of limitations and should apply here, as the ACC alleges that Mr. Bersch and the Wanzeks have violated A.R.S. §§ 44-1841, -1842 and -1991.<sup>21</sup>

The ACC's claims would also be barred by the seven-year criminal statute of limitations, A.R.S. § 13-107. In *Adams*, Chief Justice Marshall borrowed a criminal statute of limitations and applied it to a civil penalty sought by the government, because assuming that there was no limitation at all "would be to attribute a capriciousness on this subject to the legislature, which could not be accounted for." *Adams*, 6 U.S. at 341. Thus, in the alternative, the Court could apply this criminal statute of limitation to the ACC's stale claims.

**C. *Trimble* does not control.**

The ACC's argument that its administrative enforcement case is exempt from any statute of limitation rests almost entirely on *Trimble v. Am. Sav. Life Ins. Co.*, 152 Ariz. 548, 554, 733 P.2d 1131, 1137 (App. 1986). The Superior Court's

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<sup>21</sup> R. 1, Complaint, Exhibit A [ACC Notice of Opportunity for a Hearing] at pages 8-9.; see also Amended Notice of Opportunity, filed May 7, 2015 at pages 15 to 17, attached as Exhibit A.

ruling was also premised on *Trimble*.<sup>22</sup> But *Trimble* is both inapplicable and antiquated.

**1. *The Trimble rule is limited to receivership cases.***

*Trimble* concerned an ongoing Pyramid scheme that was placed into receivership under the insurance rehabilitation statutes, A.R.S. § 20-620, *et al.* The ACC proceedings here do not involve the insurance statutes or receivership. Nor are there any ongoing transactions to prevent—the ACC alleges that Mr. Bersch and Mr. Wanzek’s last sale was at least seven years ago. And there is certainly no Pyramid scheme; the contracts were real loans to real truckers backed by titles to real trucks.

In holding that the ASA’s statute of limitations (A.R.S. § 44-2004) did not apply to the receivership action in *Trimble*, the Court explained that “proper focus must be on the legislative intent of insurance rehabilitation statutes” and “[w]e emphasize the importance of the insurance rehabilitation statutes in this matter.” *Trimble*, 152 Ariz. at 555-556, 733 P.2d at 1138-1139.

Only one Arizona state court case discusses the statute of limitations portion of *Trimble*. See *In re Diamond Benefits Life Ins. Co.*, 184 Ariz. 94, 98, 907 P.2d 63, 67 (1995). *Diamond Benefits* extended the exception from the statute of limitations recognized in *Trimble* for insurance receiverships involving

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<sup>22</sup> R. 21, Ruling Minute Entry dated January 13, 2015, at page 3, first bullet point.

rehabilitation under A.R.S. § 20-620(A) to also include insurance receiverships involving liquidation under A.R.S. § 20-621(A). *Diamond Benefits*, in turn, has been cited in various other receivership cases. See *Warfield v. Alaniz*, 453 F. Supp. 2d 1118, 1131 (D. Ariz. 2006) (refusing to exempt receiver from statute of repose related to fraudulent transfers) *aff'd*, 569 F.3d 1015 (9th Cir. 2009); *Warfield v. Gardner*, 346 F. Supp. 2d 1033, 1047 (D. Ariz. 2004) (extending *Diamond Benefits* to receiver pursuing conversion claim). Thus, *Trimble* and *Diamond Benefits* are limited to receivership cases. They have no application to the ACC's stale administrative enforcement action brought under the ASA.

**2. *Trimble* was based on antiquated notions of royal prerogative.**

*Trimble* relied on the “rule of *nullum tempus occurrit regi* (time does not run against the king)”, a rule derived from the concept of “a royal prerogative similar to sovereign immunity.” *Trimble*, 152 Ariz. at 555, 733 P.2d at 1138. These outdated ideas have been rejected in more recent cases: “We begin by noting that [prior cases] were decided in an era when the government could do no wrong.... Significant changes have since occurred....” *Valencia Energy Co. v. Arizona Dep't of Revenue*, 191 Ariz. 565, 571, ¶¶ 15-16, 959 P.2d 1256, 1262 (1998) (citations omitted). Indeed, “Arizona courts have moved away from rules based on the notion that ‘the king can do no wrong’”. *State v. Garcia*, 187 Ariz.

527, 529-30, 931 P.2d 427, 429-30 (App. 1996); see also *Tucson Elec. Power Co. v. Arizona Dep't of Revenue*, 174 Ariz. 507, 515-16, 851 P.2d 132, 140-41 (App. 1992) (“[r]ecent Arizona decisions have shown a marked tendency to retreat from rigid common law principles formerly assumed essential to the maintenance of state sovereignty.”)

Therefore, the “former rules based on the notion that ‘the king can do no wrong’ should not be arbitrarily applied, but rather consideration should be given in each instance to the injustice that might result from the application of the rule, balanced against the effect that non-application would have on the state’s effective exercise of its sovereignty and any resulting damage to the public interest.” *Tucson Elec. Power Co.*, 174 Ariz. at 516, 851 P.2d at 141. Neither the State’s sovereignty nor the public interest will be impaired by requiring the State to bring administrative prosecutions in a reasonable timeframe. Indeed, the federal courts rejected a similar “public interest” argument by the S.E.C. See *Johnson*, 87 F.3d at 492.

The equitable concerns that animated *Trimble*—a case about shutting down an ongoing fraud—have no place here, and *Trimble*’s doctrinal basis, the royal prerogative concept, has been superseded by more current cases. Thus, *Trimble* does not apply, or in the alternative, it should be overruled.

**IV. Whether due process bars the ACC from prosecuting 17-year-old claims is also a serious question.**

An administrative proceeding can violate due process if it is unfairly delayed. *See Appeal of Plantier*, 494 A.2d 270, 275 (N.H. 1985) (“It is fundamentally unfair to make a physician defend a nine-year-old complaint when the complaint was not delayed by fraud or the lack of ability to discover the misconduct.”); *State ex. rel. Fillinger v. Rhodes*, 741 S.E.2d 118, 125 (W. Va. 2013) (board “effectively denied the petitioner an opportunity to be heard in opposition to the allegations against her” due to excessive delay). Here, the ACC’s extreme delay is unfair. The ACC charges involving truck loans from up to 17 years ago, and the ACC seeks millions in penalties, restitution and forfeiture over these long-past transactions. Concerns about lost evidence, faded memories, and missing witnesses are very strong in a case based on facts this stale. This is especially the case for the “fraud” count, where Mr. Bersch and Mr. Wanzek will have to defend what they said up to 17 years ago.

**V. The balance of hardships tips strongly in favor of Mr. Bersch and the Wanzeks.**

If a stay is not issued, Mr. Bersch and the Wanzeks will be harmed by the very high cost of defending the complex securities charges brought by the ACC,

as well as the considerable time and stress involved in preparing for and participating in a lengthy hearing with millions of dollars at stake.

The cost to defend these stale administrative charges will be high. The hearing is scheduled for 12 days.<sup>23</sup> The charges relate to 137 investors who invested over a ten year period from 1998 to 2008.<sup>24</sup> The case presents complex issues of securities law, as well as voluminous documents. The ACC has disclosed 721 exhibits<sup>25</sup> spanning some 3,582 pages, and 24 witnesses.<sup>26</sup> The ACC Respondents have disclosed additional exhibits and witnesses.<sup>27</sup> The hearing will be followed by extensive post-hearing briefing, a recommended order from the ALJ, exceptions to the recommended order, and an ACC open meeting.<sup>28</sup>

Yet if this Court rules that the statute of limitations, or due process, bars the ACC bringing administrative claims for actions this old, then the significant expense of a hearing will have been incurred defending a case that legally cannot

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<sup>23</sup> ACC 14<sup>th</sup> Procedural Order, filed May 7, 2015, attached as Exhibit B. A copy is also available at the following link to the ACC's eDocket system: <http://images.edocket.azcc.gov/docketpdf/0000161994.pdf>

<sup>24</sup> Amended Notice of Opportunity, filed May 7, 2015 at pages 15 to 17, attached as Exhibit A.

<sup>25</sup> Counting separately lettered parts, such as Exhibit S-114(j) or S-178(b).

<sup>26</sup> See Affidavit of Timothy J. Sabo dated June 11, 2015, attached as Exhibit D.

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

<sup>28</sup> See A.A.C. R14-3-110.

proceed. For this reason, this Court frequently considers special actions on statute of limitations defenses. *See Safeway Stores, Inc. v. Maricopa Cnty. Superior Court*, 19 Ariz. App. 210, 212, 505 P.2d 1383, 1385 (1973) (“In this situation, there is thus no possibility of appellate review of an erroneous ruling on a question of law which should determine a matter until after a full-fledged trial, with its necessarily attendant delay and expense, unless special action relief is available.”); *see also Canteen Corp. v. Superior Court In & For Pima Cnty.*, 158 Ariz. 461, 461, 763 P.2d 525, 525 (App. 1988) (“Special action review is particularly appropriate where the issue of the statute of limitations has been raised and, where that claim is denied incorrectly, there is no plain, speedy or adequate remedy by appeal”) *overruled on other grounds by Ritchie v. Grand Canyon Scenic Rides*, 165 Ariz. 460, 799 P.2d 801 (1990); *Montano v. Browning*, 202 Ariz. 544, 545-46 ¶ 2, 48 P.3d 494, 495-96 (App. 2002); *Flood Control Dist. of Maricopa Cnty. v. Gaines*, 202 Ariz. 248, 250 ¶ 2, 43 P.3d 196, 198 (App. 2002).

The ACC will likely argue, as they did to the Superior Court, that the harm is merely economic, and the Mr. Bersch and the Wanzeks would be able to recoup their attorney’s fees under A.R.S. § 12-348 if they prevail on appeal. But Mr. Bersch and the Wanzeks can never be compensated for the time and stress from

preparing for and attending a lengthy hearing. Further, relief under § 12-348 is a distant and uncertain prospect.

The hearing will be followed by lengthy briefing, and it can take the ALJ many months to issue a recommended order in ACC securities cases. Once the order is issued, exceptions will be filed, and then the matter will be heard by the ACC Commissioners at an open meeting, after which they will issue a signed order.<sup>29</sup> Only then could Mr. Bersch and the Wanzeks appeal to the Superior Court, and the appeal process is not quick. And even if they prevail on appeal, and the Superior Court awards fees, the ACC would likely appeal, and the payment of fees would be stayed until this Court resolves the appeal, perhaps three or four years from now.

Mr. Bersch and the Wanzeks are not large corporations, for whom litigation costs are merely a cost of doing business. These legal expenses are a great burden to Mr. Bersch and the Wanzeks. For example, the Wanzeks have ten children, eight of whom are minor children living with them in Florida, and five of whom are adopted.<sup>30</sup>

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<sup>29</sup> See A.A.C. R14-3-110.

<sup>30</sup> See Exhibit C, Motion to Dismiss and Answer to Amended Notice of Opportunity, at Page 5.

Nor is A.R.S. § 12-348 a certain remedy. It would not apply if Mr. Bersch and the Wanzeks prevail before the ACC Commissioners, rendering an appeal unnecessary. And even if Mr. Bersch and the Wanzeks prevail on appeal, the Court has discretion to deny fees in certain circumstances [A.R.S. § 12-348(C)], or the fees may be limited to the presumptive cap of \$75 per hour.

In contrast, there is little or no harm to the ACC. There is no pressing need for a hearing concerning actions from so long ago. Indeed, public resources will be preserved if an unnecessary hearing is prevented. Briefing begins in August, so any delay will be short. Further, public policy strongly supports statutes of limitation, as shown by cases like *Gabelli*, *Adams*, *Bellemare*, and *Porter*.

## **VI. Conclusion.**

If the ACC hearing goes forward, Mr. Berch and the Wanzeks must litigate contracts and conversations dating back to 1998. But the hearing will be rendered moot if they prevail in this court. It is not sensible to waste resources on a potentially needless hearing. A stay will “preserve the status quo” and “preserve the effectiveness” of this Court’s decision on the merits. ARCAP 7(c).

This case presents serious questions about whether the ACC’s administrative proceeding is barred by the statute of limitations or due process. Mr. Bersch and the Wanzeks will be greatly harmed by the significant expense of defending a 12 day hearing with hundreds of exhibits and dozens of witnesses,

concerning complex issues of securities law. They will also lose much time and face significant stress. The balance of hardships tips sharply in their favor, especially in light of the minimal hardship to the ACC of any delay. Accordingly, this Court should stay the ACC proceedings until it issues its mandate in this appeal.

DATED this 12<sup>th</sup> day of June 2015.

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