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 10 Attorneys for Victim Patricia Peterson

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 AZ CORP COMMISSION  
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2016 JUN 30 PM 3 35

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

11 DOUG LITTLE, Chairman  
 12 BOB BURNS  
 13 TOM FORESE  
 14 BOB STUMP  
 15 ANDY TOBIN

Arizona Corporation Commission  
 DOCKETED

JUN 30 2016

DOCKETED BY

In the matter of

16 KENNETH JOSEPH PLEIN, a married  
 17 man,

18 MARY KATHRYN PLEIN (a.k.a. "MARY  
 19 KAY PLEIN"), a married woman,

20 KENNETH JOSEPH PLEIN and MARY  
 21 KATHRYN PLEIN (a.k.a. "MARY KAY  
 22 PLEIN"), Co-Trustees of THE PLEIN  
 23 FAMILY TRUST U/T/A dated  
 24 DECEMBER 1, 1993,

25 PLEIN ENTERPRISES INCORPORATED  
 26 (d.b.a. "TRI-STAR REALTY"), an Arizona  
 27 corporation,

Respondents.

DOCKET NO. S-20774A-10-0494

MOTION TO CONTINUE

1           Victim, Patricia Peterson, by and through counsel undersigned, requests that this  
2  
3 matter be continued pending a final Order by the Superior Court regarding distribution of  
4 victim restitution funds.

5           The Maricopa Superior Court, in case number CR2012-009415-001, issued a Ruling  
6  
7 on May 31, 2016, proposing a distribution list for restitution funds, and allowing Victims to  
8 request modification of the list by June 13, 2016. Several Victims, including Ms. Peterson,  
9 filed requests for modifications prior to that deadline. On June 13, 2016, the Attorney  
10 General and Arizona Corporation Commission jointly requested a sixty (60) day extension of  
11 time to file an objection to the restitution orders.<sup>1</sup> **Exhibit 1.** In its Motion, the State noted  
12 that the Commission still held the restitution funds, and requested that the Court order those  
13 funds transferred to the Clerk's Office.<sup>2</sup> The Court has not ruled on this Motion.

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16           Because the restitution funds remain with the Commission, Ms. Peterson respectfully  
17 requests that this matter be continued for sixty (60) days, or until the funds are transferred  
18 from the Commission to the Clerk's Office, or distributed to the Victims. This short  
19 continuance will not prejudice the Commission, and will ensure that the funds being held by  
20 the Commission are properly handled. If the funds are transferred or distributed sooner than  
21 sixty days, Ms. Peterson will promptly withdraw her objection before the Commission.  
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23  
24  
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26 <sup>1</sup> This is contrary to the Commission's statement that "[t]he Commission is not a party to the criminal  
27 case and does not participate in the hearings before the Court." Commission's February 12, 2016  
Response at 2.

28 <sup>2</sup> This is also contrary to the Commission's statement in this matter that "[t]he funds at issue will not  
be transferred to the Commission. Any issues regarding total distribution will be handled by the  
Court." *Id.* at 3.



# **EXHIBIT 1**

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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA**

STATE OF ARIZONA

Plaintiff,

v.

**KENNETH J. PLEIN,**

Defendant.

Case No: **CR2012-009415-001 DT**

**STATE'S MOTION TO REQUEST AN  
EXTENSION OF TIME TO FILE AN  
OBJECTION TO THE RESTITUTION  
ORDERS**

(Honorable Judge Pamela Gates)

The State, by and through the undersigned Assistant Attorney General, hereby requests that the State, the Arizona Corporation Commission, and any victim be given sixty (60) days to file an objection to the restitution orders set for in the Minute Entry prepared by the Court on May 31, 2106. The Arizona Attorney General ("Attorney General") and the Arizona Corporation Commission ("Commission") jointly submit this pleading in response to the Court's Minute Entry Order of May 31, 2016 ("Order").

The Minute Entry issued by the Court on May 31, 2106 gave the State, Mr. Plein, the Arizona Corporation Commission, and any victim until June 13, 2016 to file any objections. Even though the Minute Entry was issued on May 31, 2016 it was not received

by the State until June 7, 2016. Given the number of victims included in the above captioned matter the State was not able to provide notification to all victims of the June 13, 2016 deadline. Additionally, the State and the Commission raises one point that the Court may want to consider in fairness to Mr. Plein's victims.

The Order's restitution list appears to be derived from the bankruptcy case. However, that list only contains names of investors who filed claims in the Bankruptcy Court. *See Wilson v. Allegheny Int'l, Inc.*, 134 B.R. 282 (N.D. Ill. 1991) (The only claims allowed to share in the bankruptcy estate are those for which proofs of claims have been filed.) All victims may not have done so. There are a myriad of reasons why victims might not have filed claims in that proceeding. They may not have received notice of the bankruptcy case, they may have thought the case had nothing to do with them, they may not have understood the claims procedure, they may have been untimely in filing their claims, they may have thought that there was no money available, particularly if they were an unsecured creditor or they simply may have received bad advice. For example, the first bankruptcy pleading that most victims received specifically told them, "Please Do Not File a Proof of Claim Unless You Receive a Notice To Do So." Exhibit A, at 1.<sup>1</sup> The Notice went on to reiterate, "There does not appear to be any property available to the trustee to pay creditors. You therefore should not file a proof of claim at this time." *Id.* at 2. Later, a notice was sent out that proofs of claim were required but it is unknown how many victims paid attention to that later pleading.

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<sup>1</sup> This pleading relies upon a number of documents filed with the United States Bankruptcy Court in *In re Plein*, Case No. 10-24919-PHX-GBN, and *In re Plein Enterprises*, Case No. 10-24921-PHX-GBN. Pursuant to Ariz. R. Evid. 201, the Attorney General and the Commission request this Court take judicial notice of those records. In aid of such notice, copies of the relevant documents are attached.

At an even more basic level, victims simply may simply have still be in denial about being defrauded by Mr. Plein. *See e.g., Investor Fraud Study Final Report*, NASD Investor Education Foundation, May 12, 2006, at 23 (Significant numbers of investment fraud victims fail to acknowledge their losses in financial schemes.) The fact that victims did not file a claim as a creditor in the bankruptcy proceeding should not forestall their right to receive criminal restitution as victims of Mr. Plein. After all, bankruptcy and criminal restitution are designed to serve different purposes. “There are inherent differences between the creditors and debtors of bankruptcy proceedings and the victims and defendants of criminal proceedings. These differences are reflected in the goals of the different proceedings.” *Cabla v. State*, 6 S.W.3d 543, 545 (Tex. Crim. App. 1999). “Chapter 7’s purpose is to achieve a fair distribution to creditors of whatever non-exempt property the debtor has [while] restitution was intended to adequately compensate the victim of the offense in the course of punishing the criminal offender.” *Id.* at 547, 545. Allowing those victims who for some reason are not listed in the bankruptcy schedules to seek criminal restitution owed to them as victims is only fair.

Additionally, in the bankruptcy, a number of matters were resolved by settlement. Some of the intervening investors argued that these investors should receive nothing as they had settled their dispute in Bankruptcy Court. However, the settlement documents from that case make clear that those settling investors thought they were settling the bankruptcy claims. Nothing in any of the settling documents mentioned or discussed resolution of the securities or criminal cases. It is possible that these investors would not have settled their bankruptcy claims, or made different decisions, if they had known that they were also relinquishing their criminal restitution claims. Therefore, these investors’

should be given the opportunity to speak before their restitution claims are eliminated.

For example, David Andrews filed a claim in Bankruptcy Court for \$140,000. The trustee and he settled the claim in exchange for the property being transferred to Mr. Andrews. *See* Exhibit B. As part of that agreement, Mr. Andrews released:

[A]ll known and unknown claims against Trustee, his agents, employees, officers, attorneys, accountants, and Property Manager arising before the date of entry of an Order approving this Application, This includes any claims in the bankruptcy, claims for any Deposits, claims to the Cash Collateral, claims concerning the Property and claims to the Maintenance Reserve arising out of the Property.

*Id.* Apparently as a result of the settlement, the trustee's final report listed Mr. Andrew's claims balance as zero. That may be appropriate in bankruptcy. But nothing of the release mentions anything about releasing criminal restitution claims. *See* Exhibit C, concerning claims of Geraldine Van Horn, for similar language. While certainly any sums that a victim received in settlement in bankruptcy should be applied as an offset to their restitution, wiping out a victim's criminal restitution claim merely because they resolved their claim in bankruptcy would seem unfair. Additionally, doing so provides an advantage to those creditors who chose to litigate their bankruptcy claims or were able to resolve them without releasing all their claims. While that may be appropriate in bankruptcy court, in criminal court it would appear to favor some victims over others.

Finally, the Commission filed its case in December 2010. Since that time, it has informed investors as to whether they on the Commission's restitution list. The Commission acknowledges that the criminal restitution list is different. But due to the fact until recently it was viewed that the \$4,000,000 being collected and at issue here was being collected on behalf of the Commission, those investors who inquired as to their status with

the Commission may be penalized as a result of this change.

As a solution to these issues, the Attorney General and the Commission request that this Court consider implementing a limited claims period of sixty (60) day. They request that the Court direct the Attorney General's Victim Services Office to provide notice to all investors, either on the Order's list or the original victims' list from Mr. Plein's sentencing whom are not being represented by counsel and whose contact information is available to either the Commission or the Attorney General. The notice should inform the investor that unless the investor disputes the amount listed in the Order's list, and provide evidence in support of the disputed amount, that amount listed in the Order will be final. The Attorney General and the Commission suggest that the investors be extended an additional sixty (60) days to file a claim.

One advantage of such a period is that it would allow any errors in the list to be corrected. As the Court is well aware, preparing such a restitution list in this case is a monumental task. Not surprising, some mathematical errors do slip through. For example, Herbert Ash made three investments totaling \$60,000 with Mr. Plein. Since Mr. Plein filed for bankruptcy individually as well as the entity filing for a separate bankruptcy, Mr. Ash filed proofs of claim in both cases. *See* Exhibits D and E. Apparently as a result of Mr. Ash filing the two claims, the Court's order lists Mr. Ash as having invested \$120,000, twice what he actually invested. The same situation also apparently occurred with Jennifer Mayes, who invested \$5,000. *See* Exhibits F and G. The Court's order lists her total investment as \$10,000.<sup>2</sup> Some amounts owed also appear to be in error. For example,

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<sup>2</sup> Both the Trustee's Final Report and the Commission's restitution list filed with this Court list Mr. Ash's investment as \$60,000 and Ms. Mayes' investment as \$5,000.

Aulden Miller is listed in the Court's Order as having received \$90,007.87 in the bankruptcy. That appears to be a typographical error as the trustee's report lists him as having received back \$9,000.87, a difference of \$81,000. *See* Trustee's Final Report, at 200.<sup>3</sup> Also, some creditors received payments that are not reflected on the Court's list. For example, Dawn Sicher is listed on the Court's list as being owed \$10,064.82. However, Ms. Sicher has already received a payment for \$10,064.82 as insurance proceeds on one of the properties that secured her investments. *See* Trustee's Final Report, at 93, reflecting a disbursement of \$10,064.82 on 4/27/11 to Ms. Sicher. Similarly, Ronald and Kathy Timmerman are listed as being owed \$2,357.27. *See* Trustee's Final Report, at 105, reflecting a disbursement of \$2,357.27 on 5/09/12 to Ronald Timmerman. Again, they received a check for that amount from the trustee as insurance proceeds for a claim on one of the properties.

Allowing a short claim's time period would allow interested parties to review the list and give them an opportunity to provide information to the Attorney General and this Court about such financial disputes as listed above. If no claims are filed then the Commission and the Attorney General would request that the Court adopt the restitution orders as set forth in the Minute Entry issued on May 31, 2016.

As one final issue, the Commission is currently holding funds as restitution for investors. It would like to transfer this amount to the Clerk's office so that all funds can be distributed at one time by one office. Therefore, it respectfully requests this Court issue an Order allowing the Commission to transfer those funds to the Clerk's Office for the Clerk

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<sup>3</sup> Since this is a very lengthy report and has previously been lodged in this case, in the interest of saving paper it is not attached as an exhibit to this pleading. If the Court desires it to be refiled, the parties would be happy to do so.

to distribute to victims.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of June, 2016.

MARK BRNOVICH  
ATTORNEY GENERAL

/s/ Scott W. Blake  
SCOTT W. BLAKE  
Assistant Attorney General

ORIGINAL of the foregoing e-filed  
this 13<sup>th</sup> day of June, 2016, with:

Clerk of the Superior Court  
201 West Jefferson  
Phoenix, Arizona 85003

COPIES of the foregoing hand-delivered/mailed  
this 13<sup>th</sup> day of June, 2016, to:

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Maricopa County Superior Court  
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