

1 **ARIZONA CORPORATION COMMISSION**

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8 **STATE OF ARIZONA**

9 **MARICOPA COUNTY SUPERIOR COURT**

10 ARIZONA CORPORATION COMMISSION )

No. CV \_\_\_\_\_

11 Plaintiff )

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR TEMPORARY  
RESTRAINING ORDER WITHOUT  
NOTICE, ORDER TO SHOW CAUSE  
AND APPOINTMENT OF RECEIVER**

12 v. )

13 MATHON MANAGEMENT COMPANY, )  
14 L.L.C., fka an Arizona limited liability company )  
15 now dba a Delaware limited liability company, )  
16 SLADE WILLIAMS AND ASSOCIATES, )  
17 L.L.C., an Arizona limited liability company, )  
18 MATHON FUND I, L.L.C., an Arizona limited )  
19 liability company, MATHON FUND, L.L.C., fka )  
20 an Arizona limited liability company now dba a )  
21 Delaware limited liability company, INTEGRITY )  
22 101, L.L.C., an Arizona limited liability company, )  
23 INTEGRITY 201, L.L.C., an Arizona limited )  
24 liability company, INTEGRITY 301, L.L.C., an )  
25 Arizona limited liability company, INTEGRITY )  
26 401, L.L.C., an Arizona limited liability company, )  
INTEGRITY 501, L.L.C., an Arizona limited )  
liability company, INTEGRITY 601, L.L.C., an )  
Arizona limited liability company, INTEGRITY )  
701, L.L.C., an Arizona limited liability company, )  
INTEGRITY 801, L.L.C., an Arizona limited )  
liability company, INTEGRITY 901, L.L.C., an )  
Arizona limited liability company, ROUND )  
VALLEY CAPITAL, L.L.C., an Arizona limited )  
liability company, W.S.F. – WORLD SPORTS )  
FANS L.L.C., an Arizona limited liability )  
company, MILL CREEK L.L.C., an Arizona )  
limited liability company, BELLEVUE )  
HOLDINGS, L.L.C., an Arizona limited liability )

1 company, OAK HARBOR FINANCIAL, L.L.C., )  
 2 an Arizona limited liability company, SW )  
 3 STRATEGIC WEALTH ADVISORS, L.L.C., an )  
 4 Arizona limited liability company, EVERETT )  
 5 CAPITAL, L.L.C., an Arizona limited liability )  
 6 company, CRE CAPITAL, L.L.C., an Arizona )  
 7 limited liability company, MEZZANINE )  
 8 MANAGEMENT, L.L.C., an Arizona limited )  
 9 liability company, MEZZANINE FUND I, )  
 10 L.L.C., an Arizona limited liability company, )  
 11 JONAS FUND I, L.L.C., an Arizona limited )  
 12 liability company, TEMPLAR FUND, L.L.C., fka )  
 13 an Arizona limited liability company now dba a )  
 14 Delaware limited liability company, MERCER )  
 15 ISLAND, L.L.C., an Arizona limited liability )  
 16 company, CONNECTICUT PROPERTIES, )  
 L.L.C., an Arizona limited liability company, )  
 FIRST ATLANTA INVESTMENTS, L.L.C., a )  
 Georgia limited liability company, MM )  
 COLONIAL FUND, L.L.C., a Delaware limited )  
 liability company, SLADE CONSTRUCTION, )  
 L.L.C., an Arizona limited liability company, )  
 DUANE SLADE and JENNIFER SLADE, )  
 husband and wife, GUY ANDREW WILLIAMS )  
 and LISA WILLIAMS, husband and wife, )  
 Defendants. )

17 **I. INTRODUCTION.**

18 Plaintiff, the Arizona Corporation Commission (the “ACC”), submits this Memorandum of  
 19 Points and Authorities In Support of its Motion For Temporary Restraining Order, Preliminary  
 20 Injunction and Appointment of Receiver to protect its ability to recover investor funds  
 21 misappropriated in a fraudulent securities scheme and to prevent further violations of the Securities  
 22 Act of Arizona (the “Securities Act”) by certain party Defendants. This matter involves an  
 23 ongoing fraudulent scheme in which Mathon Management Company, L.L.C. (“MMC”), Slade  
 24 Williams and Associates, L.L.C. (“Slade Williams”), Mathon Fund I, L.L.C. (“Mathon Fund I”),  
 25 Mathon Fund, L.L.C. (“Mathon Fund”), Round Valley Capital L.L.C. (“RVC”), W.S.F. – World  
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1 Sports Fans L.L.C. (“WSF”), Duane Slade (“Slade”), Guy Andrew Williams (“Williams”) and  
2 certain other party Defendants raised at least \$150 million dollars from at least 216 investors  
3 through the offer and sale of securities in the form of notes, evidence of indebtedness and/or  
4 investment contract within or from Arizona and continues to raise funds today. All evidence  
5 suggests that the manner in which the Mathon programs were operated, *and continues to be*  
6 *operated*, bears characteristics similar to that of a classic “Ponzi” scheme. Unless otherwise  
7 indicated, all specific terms shall have the same meaning as given to them in the Verified  
8 Complaint.

## 9 **II. STATEMENT OF FACTS**

10 MMC, Slade Williams, Mathon Fund I, Mathon Fund, Round Valley, WSF, Slade, Williams  
11 (“Defendants”) and certain other party Defendants located Borrowers in need of financing and who  
12 possessed sufficient hard assets to serve as collateral for the loan. (See Affidavits of Lowe ¶17  
13 Mattaini ¶5). MMC, Slade Williams, Mathon Fund I, Mathon Fund, Round Valley, WSF, Slade,  
14 Williams and certain other party Defendants solicited investors to lend money to fund the loans to  
15 the various Borrowers. (See Affidavits of Lowe ¶12 and Mattaini ¶4). According to MMC, Slade  
16 Williams, Mathon Fund I, Mathon Fund, Round Valley, WSF, Slade, Williams and certain other  
17 party Defendants the loans would be secured by hard assets and personal guarantees in amount two  
18 to three times to amount of the loan. (See Affidavit of Lowe ¶12, 15b, 19, 20, 31). According to  
19 MMC, Slade Williams, Mathon Fund I, Mathon Fund, Round Valley, WSF, Slade, Williams and  
20 certain other party Defendants the loans were structured to be short-term loans under nine months  
21 in length. (See Affidavits of Lowe ¶12, 14, 17, 28 and Mattaini ¶6). Investors were told the return  
22 on investments would be up to 120%. (See Affidavit of Lowe ¶31).  
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1 MMC, Slade Williams, Mathon Fund I, Mathon Fund, Round Valley, WSF, Slade, Williams  
2 and certain other party Defendants operated two different investment programs. (See Affidavit of  
3 Lowe ¶8). The initial program was Mathon Fund I. Then MMC, Slade Williams, Mathon Fund,  
4 Round Valley, WSF, Slade, Williams and other party Defendants formed Mathon Fund.

### 5 **MATHON FUND I**

6 Mathon Fund I operated from about April of 2002 through November of 2003. There were  
7 about 114<sup>1</sup> investors who invested approximately \$68,000,000<sup>2</sup>. MMC, Slade Williams, Mathon  
8 Fund I, Round Valley, WSF, Slade, Williams and other party Defendants represented that Mathon  
9 Fund I was offering fully secured short-term notes paying up to 75% annualized rates of return.  
10 (See Affidavits of Lowe ¶16 and Mattaini ¶9). The funds raised by MMC, Slade Williams, Mathon  
11 Fund I, Round Valley, WSF, Slade, Williams and other party Defendants were to be used to fund  
12 high interest rate loans to Borrowers who needed immediate cash. (See Affidavits of Lowe ¶12 and  
13 Mattaini ¶6). MMC, Slade Williams, Mathon Fund I, Round Valley, WSF, Slade, Williams and other  
14 party Defendants represented that they conducted due diligence and were assured that the Borrower  
15 had a plan to repay the loan plus “pre-earned”<sup>3</sup> interest. (See Affidavits of Lowe ¶15e, 31 and  
16 Mattaini ¶6). In addition, MMC, Slade Williams, Mathon Fund I, Round Valley, WSF, Slade,  
17 Williams and other party Defendants represented that they required the Borrower to provide  
18 collateral two to three times the amount of the loan plus interest. (See Affidavit of Lowe ¶12, 15b,  
19 20, 31).  
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25 <sup>1</sup> The number of investors is an estimate based upon records provided by the Defendants.

26 <sup>2</sup> The dollar figures represent an estimate based upon records provided by the Defendants.

<sup>3</sup> The promissory notes signed by the Borrowers include the principal amount borrowed plus the amount of interest accrued on the due date. Defendants claim this is “pre-earned” interest.

1 Each investor was to pay a \$25,000 annual management fee to MMC and agreed to invest a  
2 minimum of \$500,000 over a twelve month period. (See Affidavits of Lowe ¶21, 29 and Mattaini  
3 ¶8).

4 Investors were not told specifically about the identity of the Borrowers. (See Affidavit of  
5 Lowe ¶17). The funds were not to be pooled. Investors were given general information about the  
6 Borrowers and the terms of the loan. Investors were given a non-recourse, unsecured promissory  
7 note issued by MMC, Slade Williams, Mathon Fund I, Round Valley, WSF, Slade, Williams and/or  
8 other party Defendants. (See Affidavit of Lowe ¶22). MMC, Slade Williams, Mathon Fund I, Round  
9 Valley, WSF, Slade, Williams and other party Defendants were parties to a promissory note with the  
10 Borrowers. (See Affidavit of Lowe ¶23). Any collateral was assigned to MMC, Slade Williams,  
11 Mathon Fund I, Round Valley, WSF, Slade and Williams or other party Defendants, not to the  
12 investors. (See Affidavits of Lowe ¶23). MMC, Slade Williams, Mathon Fund I, Round Valley,  
13 WSF, Slade, Williams and other party Defendants represented that the collateral would take the form  
14 of Deeds of Trust, UCC-1 filings, personal property and a personal guarantee from the principals of  
15 the Borrower. (See Affidavit of Lowe ¶19 and 31). With at least one investor, MMC and Slade  
16 personally guaranteed an investors' principal investments. (See Affidavit of Lowe ¶40). This  
17 opportunity for additional security was not offered to other investors.  
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19 The Borrowers paid MMC, Slade Williams, Mathon Fund I, Round Valley, WSF, Slade and  
20 Williams or other party Defendants about ten points plus due diligence fees to fund the loan. (See  
21 Affidavits of Lowe ¶23 and Mattaini ¶8). The Borrowers paid 3% to 6% per month interest on  
22 each loan. (See Affidavits of Lowe ¶15). The Borrowers would make their payment to MMC,  
23 Slade Williams, Mathon Fund I, Round Valley, WSF, Slade and Williams or other party Defendants.  
24 MMC, Slade Williams, Mathon Fund I, Round Valley, WSF, Slade and Williams or other party  
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1 Defendants were then to make the payments to the specific investors connected to that Borrower.  
2 (See Affidavit of Lowe ¶22).

3 According to MMC, Slade Williams, Mathon Fund I, Round Valley, WSF, Slade, Williams  
4 and certain other party Defendants, if a Borrower defaulted on the loan, one of the Defendant  
5 entities would attempt to collect on the assets securing the loans. (See Affidavit of Lowe ¶20).

6 The investors' funds were commingled among the many accounts held by MMC, Slade  
7 Williams, Mathon Fund I, Round Valley, WSF, Slade and Williams or other party Defendants. (See  
8 Affidavit of Klamrzynski ¶8g). When money was needed in different accounts and/or entities, the  
9 Defendants would transfer funds without regard to the origin of the funds. (See affidavit Klamrzynski  
10 ¶8h).

11 In at least one instance, MMC, Slade Williams, Mathon Fund I, Round Valley, WSF, Slade,  
12 Williams and other party Defendants transferred funds paid by a Borrower to other Defendant Entities  
13 (as defined in Verified Complaint) and the funds were used to pay investors who did not fund the loan  
14 to the Borrowers. (See Affidavit of Klamrzynski ¶9). At least one of the investors that funded the  
15 loan has not received payment on the defaulted note.(See affidavit Klamrzynski ¶10).

### 17 **MATHON FUND**

18 From on or about November of 2003 through the present, Mathon Fund raised about  
19 \$82,000,000<sup>4</sup> from about 104<sup>5</sup> investors. (See Affidavit of Lowe ¶9). Investors in Mathon Fund I  
20 were given the opportunity to roll their investment into Mathon Fund. (See Affidavits of Lowe ¶26  
21 and Mattaini ¶12). A number of the Borrowers of Mathon Fund I were in default at the time the  
22 investors rolled into Mathon Fund. (See Affidavit of Lowe ¶26). MMC, Slade Williams, Mathon  
23 Fund I, Mathon Fund, Round Valley, WSF, Slade, Williams and other party Defendants allowed  
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26 <sup>4</sup> The number of investors is an estimate based upon records provided by the Defendants.

<sup>5</sup> The dollar figures represent an estimate based upon records provided by the Defendants.

1 Mathon Fund I investors to be credited for the full amount of their principal and interest in Mathon  
2 Fund even though the funds were not collected and no cash was rolled into Mathon Fund. (See  
3 Affidavit of Lowe ¶26).

4 Mathon Fund was similar to Mathon Fund I in that it funded short-term loans to Borrowers  
5 who would secure the loans with hard assets and personal guarantees. In Mathon Fund however,  
6 MMC, Slade Williams, Mathon Fund, Round Valley, WSF, Slade, Williams and other party  
7 Defendants would pool investors' funds representing to investors that this lowered the risk to  
8 investors. (See Affidavit of Lowe ¶30). Investors were still required to pay an annual \$25,000  
9 management fee and invest \$500,000 within a year. (See Affidavit of Lowe ¶29).

10 MMC, Slade Williams, Mathon Fund, Round Valley, WSF, Slade, Williams and other party  
11 Defendants provided investors with a Private Placement Memorandum<sup>6</sup> ("PPM"). (See Affidavits  
12 of Lowe ¶28 and Mattaini ¶12). According to the PPM, MMC, Slade Williams, Mathon Fund,  
13 Round Valley, WSF, Slade, Williams and other party Defendants were to provide a reserve fund for  
14 defaulted loans as added protection for investors. (See Affidavit of Lowe ¶32). According to the  
15 PPM, the Reserve Fund was to be maintained for bad credit risks. (See Affidavit of Lowe ¶32, 33,  
16 Exhibit A, page 4). The PPM further stated that the "Fund Manager<sup>7</sup> will set aside, designate, and  
17 allocate certain Fund assets as a reserve fund for the protection of the principal investment of its  
18 Members." (See Affidavit of Lowe ¶, Exhibit A, page 4). Moreover, the PPM stated that the  
19 "Manager will fund and hold in a separate account a reserve in cash or assets not less than \$5  
20 million or 5% of the aggregate of Capital Accounts of the Members<sup>8</sup>." (See  
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25 <sup>6</sup> There were two versions of the PPM one dated November 25, 2003 and one dated July 6, 2004.

26 <sup>7</sup> The PPM defines the "Manager" as Mathon Management Company L.L.C.

<sup>8</sup> Members are the investors in Mathon Fund.

1 Affidavit of Lowe ¶32, Exhibit A, page 12). In reality, the reserve fund is non-existent (See  
2 affidavit of Klamrzynski ¶12). Numerous investors relied upon this representation in making their  
3 investment decision. (See Affidavit of Lowe ¶35).

4 In addition to the alleged reserve fund as added protection for the investors, the initial PPM  
5 and representations from MMC, Slade Williams, Mathon Fund I, Round Valley, WSF, Slade,  
6 Williams and other party Defendants also included a representation that MMC, Slade Williams,  
7 Mathon Fund, Round Valley, WSF, Slade, Williams and other party Defendants would obtain fund  
8 insurance to further protect the investors' investments. (See Affidavit of Lowe ¶34). The PPM  
9 stated that within 90 days of the initial closing date of the Fund, the Manager shall obtain Fund  
10 Insurance with a policy limit of \$20 million with a deductible of \$5 million. (See Affidavit of  
11 Lowe, Exhibit A, page 12). There is no fund insurance. (See affidavit of Lowe ¶36). The later PPM  
12 did not include a representation regarding fund insurance. (See affidavit of Lowe ¶34)

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14 Although MMC, Slade Williams, Mathon Fund, Round Valley, WSF, Slade, Williams and  
15 other party Defendants represented that the investments were secured, on a number of occasions, no  
16 security interest was filed to secure the asset to the benefit of the investors or to the Defendants. (See  
17 Affidavit of Lowe ¶42). In addition, the Defendants represented to investors in the PPMs that they  
18 were not parties to any litigation involving the loan programs or securities violations when in fact  
19 numerous actions had been filed both by the Borrowers and Defendants in both State and Federal  
20 Courts. (See Affidavit of Lowe ¶37). Moreover, on or about August 27, 2003, the Division of  
21 Securities of the Department of Commerce of the State of Utah ("Utah Securities") filed an Order to  
22 Show Cause and Notice of Agency Action against Defendants Slade, Mathon Fund I, MMC, Round  
23 Valley, Slade Williams and two unnamed parties involving violations of the Utah Securities Act. On  
24 or about September 24, 2004 Defendants Slade, Mathon Fund I, MMC, Round Valley, Slade Williams  
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1 and two unnamed parties reached a Stipulation and Order with Utah Securities. (See Affidavit of  
2 Lowe ¶37).

3 MMC, Slade Williams, Mathon Fund, Round Valley, WSF, Slade, Williams and other party  
4 Defendants have commingled funds from the investors. Any funds coming into the various  
5 Defendant Entities are freely moved between entities and accounts. (See affidavit of Klamrzynski  
6 ¶8h). Funds raised from investors in Mathon Fund are being used to pay back prior investors  
7 including their expected return. (See affidavits of Klamrzynski ¶9).

### 8 **MATHON FUND I AND MATHON FUND**

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10 Based upon information and documents obtained by the Securities Division during the  
11 course of its investigation, during the course of the operation of both Mathon Fund I and Mathon  
12 Fund programs, Defendants commingled investor funds in the Defendant Entities without the  
13 investors' knowledge and consent. Moreover, from January 1, 2003 through November 30, 2004,  
14 at least 75% of the amounts funded to Borrowers appear to be in default. In addition, in some  
15 instances, new investor money was used to pay old investors' interest payments or principal  
16 payments. All evidence suggests that the manner in which the Mathon programs were operated,  
17 *and continues to be operated*, bears characteristics similar to that of a classic "Ponzi" scheme.

### 18 **III. LEGAL ANALYSIS.**

#### 19 **A. The Investments Offered By Certain Defendants Are Securities.**

##### 20 **1. The Registration Requirement.**

21 "By legislative design, the Securities Act of Arizona (the "Securities Act") protects the  
22 public by preventing dishonest promoters from selling financial schemes to unwary investors who  
23 have little or no knowledge of the realistic likelihood of the success of their investments." *Siporin*  
24 *v. Carrington*, 200 Ariz. 97, 98, 23 P.3d 92 (App. 2001). The facts above indicate that MMC,  
25 Slade Williams, Mathon Fund I, Mathon Fund, RVC, WSF, Slade, Williams and certain other party  
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1 Defendants have issued (and continue to issue) securities in the form of notes, evidence of  
2 indebtedness and/or investment contracts and have offered or sold (and continue to offer and sell)  
3 securities in the form of notes, investment contracts and/or evidence of indebtedness.

4 2. The Mathon Fund I and Mathon Fund Interests are “Securities”.

5 a. The Promissory Notes are “Securities.”

6 MMC, Slade Williams, Mathon Fund I, Round Valley, WSF, Slade, Williams and other party  
7 Defendants issued promissory notes to investors as evidence of the investors’ investment. MMC,  
8 Slade Williams, Mathon Fund I, Round Valley, WSF, Slade, Williams and other party Defendants  
9 issued “Non-Recourse & Unsecured Promissory Notes” to investors in Mathon Fund I. (See affidavit  
10 of Lowe).

11  
12 The Mathon Fund I promissory notes (collectively, “Notes”) are securities because they are  
13 promissory notes or evidence of indebtedness. The Securities Act defines a security as “any note . .  
14 . evidence of indebtedness. . . .” A.R.S. § 44-1801(26). While a promissory note is presumed to be  
15 a security, the Supreme Court has identified certain types of notes that are excluded from the  
16 definition of security. *See Reves v. Ernst & Young*, 494 U.S. 56, 65 (1990); *MacCollum v.*  
17 *Perkinson*, 185 Ariz. 179, 913 P.2d 1097 (App. 1996)(adopting the *Reves*’ test in Arizona.). In  
18 *Reves*, the Supreme Court held that every promissory note is a security unless it bears a strong  
19 “family resemblance” to a judicially crafted list of non-securities.<sup>9</sup> *Reves*, 494 U.S. at 65. The  
20 parties may rebut the presumption by examining a note transaction in light of four factors. *Id.* at  
21 66-67: Instruments do not have a familial resemblance to one of the excluded categories and, thus,  
22 are considered to be securities if (1) the seller’s motivation is to raise money or finance investments  
23 and the buyer’s purpose is to make a profit; (2) there is common trading of the instrument for

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26 <sup>9</sup> In *Reves*, the Supreme Court held that the *Howey* test for investment contracts does not apply to promissory notes. 494 U.S. at 64.

1 speculation or investment; (3) the public expects that the instrument is a security; and (4) there is  
2 no other regulatory scheme to significantly reduce the risk of the instrument, thereby rendering the  
3 application of the securities laws unnecessary. *Id.* Applying the “familial resemblance” test, the  
4 Mathon Fund I Notes do not bear a family resemblance to any of the categories listed in *Reves*, and  
5 thus are securities.

6 Although “evidence of indebtedness” is undefined and quite broad, commentators have  
7 indicated that the criteria developed in the “notes” cases are helpful in the analysis of this type of  
8 security. *See* 2 Louis Loss & Joel Seligman, *Fundamentals of Securities Regulation*, 962-64 (3d ed.  
9 1989 & Supp. 2001). Thus, the Mathon Fund I Notes are securities because they are notes and/or  
10 evidence of indebtedness.

11  
12 **b. The Mathon Fund Investment Units Are Investment Contracts**

13 The Mathon Fund Investment Units, although not specifically named as “securities” in  
14 either federal or state securities laws, are considered investment contracts. Investment contracts,  
15 of course, are included in the definition of securities. A.R.S. § 44-1801(26)( “Security means . . .  
16 investment contract . . . .”)

17 The core definition of an investment contract was set forth in *S.E.C. v. W.J. Howey Co.*,  
18 328 U.S. 293 (1946). Under the *Howey* test, an investment contract exists if it involves (1) an  
19 investment of money or other consideration; (2) in a common enterprise; and (3) with the  
20 expectation of profits earned solely from the efforts of others.<sup>10</sup> In Arizona, the *Howey* test  
21 remains the basis for investment contract analysis, although more recent case law has served to  
22 expand the confines of this test considerably. Citing *Howey*, Arizona courts agree that the  
23 definition of securities including investment contracts embody “a flexible rather than static  
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26 <sup>10</sup> The *Howey* case originally used the phrase “solely from the efforts of others,” however, this language  
was later modified to “substantially” in *SEC v. Glenn W. Turner Enterprises*, 474 F.2d 476, 482 (9<sup>th</sup> Cir. 1973).

1 principal, one that is capable of adaptation to meet the countless and variable schemes devised by  
2 those who seek to use the money of others on the promise of profits.” *Nutek Information Systems,*  
3 *Inc. v. Arizona Corporation Commission*, 194 Ariz. 104, 108, 977 P.2d 826 (App.1998); *Rose v.*  
4 *Dobras*, 128 Ariz. 209, 211, 624 P.2d 887 (App.1981). In accordance with this view, Arizona  
5 courts have developed flexible interpretations for each of the three prongs set forth in *Howey*.

6 The first prong of the *Howey* test - the investment of money - is satisfied by the investors  
7 tendering funds to Defendants.

8 With respect to the second element of *Howey*, “Two tests have been developed to  
9 determine the existence of a common enterprise in order to satisfy the second prong of the *Howey*  
10 test: (1) the horizontal commonality test and (2) the vertical commonality test.” *Daggert v. Jackie*  
11 *Fine Arts, Inc.*, 152 Ariz. 559, 565, 733 P.2d 1142 (App. 1986). Arizona courts have held that  
12 commonality will be satisfied if either horizontal or vertical commonality can be shown. *Id.* at  
13 566. Horizontal commonality requires a pooling of investor funds collectively managed by a  
14 promoter or third party. *Id.* at 565. For the vertical form of commonality to be established, a  
15 positive correlation between the potential profits of the investor and the potential profits of the  
16 promoter need only be demonstrated. *Id.* at 566.

17  
18 It is evident that the Mathon Fund Investment Units satisfy the horizontal commonality  
19 element since the investors’ funds and assets are pooled in a common account, and then loaned to  
20 the Borrower. Upon repayment of the loan by the Borrower, the payments were to be placed into  
21 the Mathon Fund and Defendants would allocate the funds and either pay the principal and/or  
22 interest to the investors pursuant to the terms of their respective agreements or continue to use the  
23 funds to loan to more Borrowers.  
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1 The third and final prong of the *Howey* test has evolved since it was first handed down  
2 over 50 years ago. In order to satisfy the third *Howey* prong in Arizona, one must only establish  
3 that the efforts made by those other than the investors were the undeniably significant ones, and  
4 were those essential managerial efforts that affected the failure or success of the enterprise.  
5 *Nutek*, 194 Ariz. at 108. The Defendants clearly indicate in their PPM that the “[m]anager will  
6 have exclusive discretionary authority with respect to all loan and investment decisions and the  
7 admission of investors.” The PPM further states that “[a]ll business decision are made by the  
8 manager. Holders of investment units shall have no authority to make decisions or to exercise  
9 business discretion on behalf of the fund. The success of the fund is expected to be significantly  
10 dependent upon the expertise of the manager.” Mathon Fund Investment Units satisfies the final  
11 prong of the *Howey* test.  
12

13 Thus, Defendants’ Mathon Fund Investment Units satisfy all three elements of the *Howey*  
14 test. Defendants touted not only the secure nature of the product, but also the income-producing  
15 benefits of the investment. Investors surrendered their money and securities believing that they  
16 were purchasing an interest in Mathon Fund whose sole purpose was to loan money to Borrowers,  
17 to be secured by an interest in real property and personal property, who, in turn, would pay them a  
18 high rate of return. In reality, Defendants appear to have been the primary beneficiary of the  
19 investors’ funds through use of its fraudulent scheme.  
20

21 B. The Defendants violated the Securities Act’s Antifraud Provisions

22 Under A.R.S. § 44-1991, it is a fraudulent practice and unlawful for a person, in connection  
23 with a transaction or transactions within or from this state involving an offer to sell or buy  
24 securities, or a sale or purchase of securities, to directly or indirectly do any of the following: (1)  
25 employ any device, scheme or artifice to defraud; (2) make untrue statements of material fact, or  
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1 omit to state any material fact necessary in order to make the statements made, in the light of the  
2 circumstances in which they were made, not misleading; or (3) engage in any transaction, practice  
3 or course of business which operates or would operate as a fraud or deceit. A.R.S. § 44-1991(A).  
4 Securities fraud may be proven by any one of these acts. *Hernandez v. Superior Court*, 179 Ariz.  
5 515, 880 P.2d 735 (App. 1994).

6 In the context of these provisions, “materiality” requires a showing of substantial likelihood  
7 that, under all the circumstances, the misstated or omitted fact would have assumed actual significance  
8 in the deliberations of a reasonable buyer. *Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 553,  
9 733 P.2d 1131 (1986). Under this objective test, there is no need to investigate whether an omission  
10 or misstatement was actually significant to a particular buyer. Additionally, the affirmative duty not to  
11 mislead potential investors in any way places a heavy burden on the offeror and removes the burden of  
12 investigation from the investor. *Trimble*, 152 Ariz. at 553. A misrepresentation or omission of a  
13 material fact in the offer and sale of a security is actionable even though it may be unintended or the  
14 falsity or misleading character of the statement may be unknown. In other words, scienter or guilty  
15 knowledge is not an element of a violation of A.R.S. § 44-1991(2). *See e.g., State v. Gunnison*, 127  
16 Ariz. 110, 113, 618 P.2d 604 (1980). Stated differently, a seller of securities is strictly liable for any  
17 of the misrepresentations or omissions he makes. *Rose v. Dobras*, 128 Ariz. at 214. Additionally,  
18 there is no requirement to show that investors relied on the misrepresentations or omissions, *Rose*, 128  
19 Ariz. at 214, or that the misrepresentations or omissions caused injury to the investors. *Trimble*, 152  
20 Ariz. at 553. A primary violation of A.R.S. § 44-1991 can be either direct or indirect. It is now well-  
21 settled in Arizona that *indirectly* violating A.R.S. § 44-1991 is not to be narrowly interpreted. *Barnes*  
22 *v. Vozack*, 113 Ariz. 269, 550 P.2d 1070 (1976)(Officers of company could be liable under A.R.S. §  
23 44-1991 for the fraudulent statements of a salesman of the security.)  
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1 As is shown by the Affidavit of Lowe and/or Klamrzynski, MMC, Slade Williams, Mathon  
2 Fund I, Round Valley, WSF, Slade, Williams and other party Defendants have violated A.R.S. §44-  
3 1991 by: (1) utilizing Borrower payments for purposes other than providing payment to investors; (2)  
4 misrepresenting to investors that the investments were secure when, in fact, in a number of occasions  
5 there was no recordation of the security interest in the Borrowers' property; (3) misrepresenting that  
6 the Defendant Entities were not in litigation when, in fact, numerous lawsuits had been filed either by  
7 the Defendants or the Borrowers involving the Mathon Fund I loan program and the state of Utah filed  
8 a securities action against a number of the Defendants; (4) failing to disclose to investors of Mathon  
9 Fund that Mathon Fund I loans that were already in default would be rolled into the Mathon Fund and  
10 the investor credited with an investment of their principal and interest; (5) misrepresenting that a  
11 reserve fund would be maintained to protect the investors from defaulted loans; (6) misrepresenting to  
12 investors prior to July of 2004 that Defendants would be obtaining fund insurance as a protection  
13 against defaulted loans; (7) failing to disclose to investors that the main source of capital in the  
14 Mathon Fund was new investment funds and that very few if any Borrowers were making payments to  
15 Defendants; and (8) failing to disclose that all funds would be commingled in the various Defendant  
16 bank accounts and moved to other accounts as needed.

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18 Any *one* of these actions would violate the Securities Act. Taken together, they show  
19 egregious and fraudulent conduct by Defendants that must be restrained prior to additional damage  
20 occurring to the investing public.  
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**V. REQUESTED RELIEF**

A. Injunctive Relief

1. Temporary Restraining Order is Appropriate

A.R.S. § 44-2032(2)<sup>11</sup> authorizes the ACC to seek emergency relief when it appears that a person is engaged or is about to engage in acts or practices in violation of the Securities Act. Emergency relief is warranted in this matter not only because Defendants repeatedly violated the Arizona Securities Act but that the conduct is continuing, as is shown by the Affidavit of Lowe, in which it is clear that MMC, Slade Williams, Mathon Fund I, Mathon Fund, Round Valley, WSF, Slade, Williams and other party Defendants are continuing to use raise investment funds in violation of A.R.S. § 44-1991. A Temporary Restraining Order is necessary to halt the ongoing scheme and prevent additional securities law violations, which are occurring or about to occur. MMC, Slade Williams, Mathon Fund I, Mathon Fund, Round Valley, WSF, Slade, Williams and other party Defendants have the current ability to continue to engage in a similar scheme.

2. Preliminary and Permanent Injunctions are Appropriate

A.R.S. § 44-2032(2) authorizes the issuance of an injunction when it appears that a person is engaged or is about to engage in acts or practices in violation of the Securities Act. “In actions for statutory injunctions then, the moving party need show only that probable cause exists to believe that the statute in question is being violated and that there is some reasonable likelihood of future violations.” *United States v. Richlyn Laboratories, Inc.*, 827 F. Supp. 1145, 1150 (E.D. Pa.

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<sup>11</sup> A.R.S. § 44-2032 states, “If it appears to the commission, either on complaint or otherwise, that any person has engaged in, is engaging in or is about to engage in any act, practice or transaction that constitutes a violation of this chapter, or any rule or order of the commission under this chapter, the commission may, in its discretion:

(2) Apply to the superior court in Maricopa county or any federal court for an injunction restraining the person from the violation, and on a showing by the commission that the person has engaged in, is engaging in or is about to engage in an act, practice or transaction in violation of this chapter or any rule or order of the commission, a temporary restraining order, preliminary injunction or permanent injunction shall be granted without bond. Process in those actions may be served on the defendant in any county of this state in which the defendant transacts business

1 1992)(Injunction under Food, Drug and Cosmetic Act); *S.E.C. v. Globus International, Ltd.*, 320 F.  
2 Supp. 158 (S.D.N.Y. 1970) (Similar ruling under Federal Securities Act and Securities and  
3 Exchange Act.) Additionally, past misconduct is highly suggestive of future violations. *Richly*, 827  
4 F. Supp. at 1150.

5 In analyzing the need for injunctive relief, courts focus on whether there is a reasonable  
6 likelihood that the Defendants, if not enjoined, will engage in future illegal conduct. *SEC v.*  
7 *Comserv Corp.*, 908 F.2d 1407, 1412 (8th Cir. 1990). In determining the likelihood of future  
8 violations, the totality of the circumstances is to be considered. *SEC v. Murphy*, 626 F.2d 633,  
9 655 (9th Cir. 1980). In granting or denying injunctive relief, courts have considered the  
10 following factors: (1) the egregious nature of the defendant's actions; (2) the isolated or recurrent  
11 nature of the violations; (3) the degree of scienter involved; (4) the sincerity of the defendant's  
12 assurances, if any, against future violations; (5) the defendant's recognition of the wrongful  
13 nature of his conduct; and (6) the likelihood that the defendant's occupation will present  
14 opportunities (or lack thereof) for future violations.  
15

16 Preliminary and permanent injunctive relief against Defendants is appropriate. Their  
17 violations were not merely technical in nature, but rather were of provisions that lie at the very  
18 heart of the remedial statutes. Indeed, the violations are clear that Defendants lied to investors and  
19 took their money. Defendants have engaged in the type of repeated and persistent misconduct that  
20 justifies the issuance of injunctive relief. The violations were not just an isolated incident, unlikely  
21 to recur, but rather have been repeatedly committed taking millions of dollars from their victims.  
22 In addition, emergency relief is warranted in this matter, as is shown by the Affidavit of Lowe, in  
23 which it is clear that the Defendants are continuing to offer and sell unregistered securities in  
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26 or is found.”

1 continued violation of the Securities Act. Injunctive relief is necessary to halt the ongoing  
2 scheme and to prevent additional securities law violations, which are occurring or about to occur.

3 Defendants have the current ability to continue to engage in a similar scheme.

4 3. Appointment of a Receiver is Appropriate

5 As set forth above, pursuant to the Securities Act, courts may order appointment of a  
6 Receiver to preserve defendants' assets and to ensure that wrongdoers do not profit from their  
7 unlawful conduct. A.R.S. § 44-2013.<sup>12</sup> The ACC requests the appointment of a receiver to  
8 conserve the assets in the possession of, or under the control of the Defendants. As is shown by the  
9 Affidavit of Klamrzynski, funds paid to MMC, Slade Williams, Mathon Fund I, Mathon Fund,  
10 Slade, Williams and certain other party Defendants by investors were commingled and transferred  
11 from MMC, Slade Williams, Mathon Fund I, Mathon Fund, Slade, Williams and certain other party  
12 Defendants to and among other Defendant entities. Defendants are failing to honor the promissory  
13 notes issued to investors in that they are using Borrower's payments to pay other investors or  
14 themselves and failing to pay the investors who funded the loan. It would be impossible to make  
15 the investors whole without all of the funds and/or assets. As stated herein, a receiver is necessary  
16 to safeguard funds and preserve assets for the benefit of the investors. A receiver is necessary here  
17 to marshal, liquidate and distribute assets to the victims of Defendants' scheme.

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23 <sup>12</sup> A.R.S. § 44-2013. A. The superior court may, after the complaint is filed, issue a preliminary injunction  
24 restraining the defendant named in the complaint from removing, encumbering or otherwise disposing of his property  
25 located within this state, and the court may in its discretion appoint a temporary conservator or receiver to take  
26 possession of the books, records and assets of every description of the defendant, pending further order of the court.

B. The court shall set a time, not more than ten days from the date of the preliminary injunction, for a hearing  
on the complaint and any response filed thereto, or response to the preliminary injunction.

**VI. CONCLUSION**

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2 Based on the foregoing facts and for the reasons set forth above, the ACC respectfully  
3 requests that the Count enter the attached order.

4 Dated this \_\_\_\_ day of \_\_\_\_\_, 2005.

5 ARIZONA CORPORATION COMMISSION

6 By \_\_\_\_\_

7 Wendy Coy

8 Attorney for the Arizona Corporation

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