

1 Michael Carmel, Esq. #007356
2 **LAW OFFICES OF MICHAEL W. CARMEL, LTD**
3 80 East Columbus Avenue
4 Phoenix, Arizona 85012-2334
5 (602) 264-4965
6 e-mail michael@mcarmellaw.com
7 *Attorney for the Reorganized Debtors*

8 Lawrence E. Wilk, #006510
9 Jonathan P. Ibsen, #023284
10 **JABURG & WILK, P.C.**
11 3200 North Central Avenue, Suite 2000
12 Phoenix, Arizona 85012
13 (602) 248-1000
14 e-mail lew@jaburgwilk.com
15 *Attorneys for the Receiver/
16 Special Counsel to the Reorganized Debtors*

17 UNITED STATES BANKRUPTCY COURT
18 DISTRICT OF ARIZONA

19 In re:
20 AMERICAN NATIONAL MORTGAGE
21 PARTNERS, LLC,
22 Debtor.

23 In re:
24 ANMP 74TH ST., LLC,
25 Debtor.

In Proceedings Under
Chapter 11

Case Nos: 03-03803 PHX RJH
03-03799 PHX RJH

SUBSTANTIVELY CONSOLIDATED

**NOTICE TO PARTIES IN INTEREST
OF STATE COURT RULING**

26 Pursuant to the confirmed Plan of Reorganization dated July 15, 2005 (the "Plan"), the
27 State Court order dated March 1, 2005, and the Order of this Court in these Consolidated
28 Bankruptcy Cases, dated March 30, 2005 and entered as Docket No. 189, James C. Sell in his
capacities as State Court Receiver and Responsible Party in these Bankruptcy Cases obtained
authorization to commence, and has commenced actions against the individuals, professionals
and financial institutions responsible for perpetrating the "ponzi scheme" which detrimentally
affected the investors of ANMP.

The action was commenced on June 9, 2005 in the United States District Court for the
District of Arizona, and is now pending in the Superior Court of the State of Arizona, in and for

1 the county of Maricopa, Case Numbers CV2004-003803; CV2004-013037; CV2005-003832
2 (consolidated), before the Honorable Peter B. Swann.

3 The action was described to each of you in the Plan and Amended Disclosure Statement
4 (the "Disclosure Statement") filed in these Bankruptcy Cases and was referenced therein as the
5 "Financial Institution Litigation." A copy of the complaint was also included in the Disclosure
6 Statement as Exhibit I.

7 Additionally, the Plan and Disclosure Statement described the nature of the action as
8 being based upon assignments of former ANMP Investors/Creditors to the Receiver/Bankruptcy
9 Estates. Finally, the proceeds from the Financial Institution Litigation were described as being a
10 major source of funding for the Plan Fund, and its proceeds were to be deposited into such fund
11 and distributed pursuant to the Plan's provisions and priorities mandated by the Bankruptcy Code.

12 Consequently, your vote on the Plan necessarily included your evaluation and
13 consideration of the Financial Institution Litigation, and its effect on the feasibility of the Plan
14 and your projected recovery thereunder.

15 On or about October 3, 2006, the Honorable Peter B. Swann issued a minute entry, a copy
16 of which is attached hereto as Exhibit "A", which in effect, determined that the
17 Receiver/Reorganized Debtors did not have standing, and therefore lacked authority to assert
18 claims on behalf of the investors of ANMP. As a result, the claims of the ANMP
19 Investors/Creditors were dismissed.

20 **THE STATE COURT'S RULING WILL IMPACT THE RIGHTS OF**
21 **ALL INVESTORS AND CREDITORS AND SHOULD BE**
22 **CAREFULLY REVIEWED AND FULLY UNDERSTOOD. THE**
23 **RULING WILL GREATLY REDUCE PROCEEDS AVAILABLE FOR**
24 **DISTRIBUTION UNDER THE PLAN AND EFFECT ITS**
25 **IMPLEMENTATION.**

26 In response to the State Court decision, the Receiver has filed a Motion, a copy of which
27 is attached hereto as Exhibit "B", seeking a stay of enforcement, and requesting that the State
28 Court defer any determination as to the intent of the Plan to this Court for review, and final
determination, as is required under the Bankruptcy Code.

1 In the interim period, until this Motion has been determined, the investors are urged to
2 seek independent counsel to determine their rights in the event of an adverse ruling on the
3 pending Motion.

4 **RESPECTFULLY SUBMITTED** this 1st day of November, 2006.

5 **LAW OFFICES OF MICHAEL
6 W. CARMEL, LTD**

7 /s/ Michael Carmel, # 007356

8 **by Michael W. Carmel, Esq.**
9 *Counsel for the Reorganized Debtors*

10 **JABURG & WILK, P.C.**

11 /s/ Lawrence E. Wilk, # 006510

12 **by Lawrence E. Wilk, Esq.**
13 *Counsel for the Receiver/
14 Special Counsel to the Reorganized Debtors*

15 COPY of the foregoing mailed
16 this 1st day of November, 2006.

17 Michael W. Carmel 18 80 E. Columbus Ave. 19 Phoenix, AZ 85012-4965	Elizabeth Amorosi OFFICE OF THE U.S. TRUSTEE 230 N. 1 st Avenue, Suite 204 Phoenix, AZ 85003-1725
20 Stanford E. Lerch, Esq. 21 Anthony E. DePrima, Esq. 22 LERCH & DEPRIMA, P.L.C. 4000 N Scottsdale Road, Suite 107 Scottsdale, AZ 85251	Wendy L. Coy, Esq. ARIZONA CORPORATION COMMISSION, SECURITIES DIVISION 1300 West Washington, 3 rd Floor Phoenix, Arizona 85007
23 J. Phillip Glasscock, Esq. 24 J. PHILLIP GLASSCOCK, P.C. 13430 N. Scottsdale Road, Suite 106 25 Scottsdale, Arizona 85254 <i>Attorney for Pamela Coulter as Personal Representative of the Estate of Darrell Coulter</i>	Alan A. Meda, Esq. STINSON MORRISON HECKER 1850 N. CENTRAL AVE., #2100 Phoenix, Arizona 85067-6379 <i>Attorney for Dexter Distributing Corp. in related proceedings And Castle Real Property Entities</i>
26 Thomas A. Draghi 27 WESTERN BALL EDERER MILLER & SHARFSTEIN 170 Old Country Road, Suite 400 28 Mineola, New York 11501	Constance Sutton, P.C. File 093103 5025 N. Central Avenue, Suite 631 Phoenix, Arizona 85012

JABURG & WILK, P.C.
ATTORNEYS AT LAW
3200 NORTH CENTRAL AVENUE
SUITE 2000
PHOENIX, ARIZONA 85012

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Camelback Stone Canyon Rachelle Smith C/O AMERICAN FINANCIAL RESOURCES 3770 N. 7 th Street, Suite A Phoenix, Arizona 85012	Patricia A. Premeau COMBS LAW GROUP, P.C. 2200 E. Camelback Road, Suite 221 Phoenix, AZ 85016 <i>Attorney for Airport Way Properties, LLC</i>
Mark J. Giunta LAW OFFICE OF MARK J. GIUNTA 845 N. Third Avenue Phoenix, Arizona 85003-1408	STEPHEN WADE NEBGEN, PLLC 2025 N. 3 rd Street, Suite 157 Phoenix, Arizona 85004 <i>Attorney for Fifth Avenue Condominiums Assoc</i>
David T. Bonfiglio DAVID T. BONFIGLIO, PC 4422 N. Civic Center Plaza, Suite 101 Scottsdale, Arizona 85251	Christopher R. Perry PERRY & PARTNERS P.O. Box 33080 Phoenix, Arizona 85067-3080
Barbara B. Maroney, Esq. LAW OFFICES OF BARBARA B. MARONEY 15433 N. Tatum Blvd, Suite 106 Phoenix, AZ 85302-4231	James P. Kneller, Esq. LAW OFFICES OF JAMES P. KNELLER, PC 7509 E. First Street Scottsdale, AZ 85251
Dave Dow, Esq. MOHR HACKETT PEDERSON BLAKELEY & RANDOLPH 2800 N. Central Ave., #1100 Phoenix, AZ 85004	Lyman Davis 920 West Wagner Drive Gilbert, AZ 85233

A COPY of the foregoing mailed
this 1st day of November, 2006 to
all Parties-In-Interest/Creditors maintained
by the United States Bankruptcy Court:

/s/Janet Forster

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-003803

10/03/2006

HONORABLE PETER SWANN

CLERK OF THE COURT
T. Melius
Deputy

JAMES C SELL

ROGER L COHEN

v.

ROBERT GUCCIONE, et al.

JONATHAN A DESSAULES

ASHLEY D ADAMS-FELDMAN
JENNIFER HADLEY DIOGUARDI
RICHARD L GREEN
RICHARD H HEROLD JR.
JASON M KALAFAT
RAYMOND A KENNEY
ALAN L LIEBOWITZ
STEVEN C MAHAFFY
RICHARD K MAHRLE
DONALD M PETERS
MICHAEL PETER SALCIDO
RICHARD R THOMAS

MINUTE ENTRY

Pending before the court are (1) Motions to Dismiss pursuant to Ariz. R. Civ. P. 12(b)(1) and 12(b)(6) brought by Zions Bank (and joined by numerous other defendants); (2) Plaintiff's Motion for Summary Judgment against Defendant Guccione re: Fraud Liability; (3) Plaintiff's Motion for Summary Judgment against Defendant Berry re: Standard of Care and (4) Defendant Guccione's Motion to Dismiss Counts 7, 8 and 9 of the Second Amended Complaint. The Court has reviewed the voluminous written submissions, supplemental briefing and oral argument. For the following reasons, it is ordered as follows:

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-003803

10/03/2006

IT IS ORDERED GRANTING in part the motion to dismiss pursuant to Rule 12(b)(1);

IT IS FURTHER ORDERED GRANTING in part and DENYING in part the motion to dismiss pursuant to Rule 12(b)(6) without prejudice;

IT IS FURTHER ORDERED DENYING plaintiff's Motion for Summary Judgment against defendant Guccione;

IT IS FURTHER ORDERED GRANTING plaintiff's Motion for Partial Summary Judgment against defendant Berry;

IT IS FURTHER ORDERED DENYING the Motion to Dismiss Counts 7, 8 and 9.

1. The 12(b)(1) Motion

This action is a component of multi-forum litigation brought to redress an alleged Ponzi scheme carried out by American National Mortgage Partners and related entities (the "ANMP Entities"). Plaintiff was appointed as Receiver for the ANMP Entities by the Arizona Superior Court in a separate action (the "Receivership Action") brought by the Arizona Corporation Commission shortly after ANMP sought bankruptcy protection. At issue in the Zions Motions are claims that the Receiver seeks to assert on behalf of hundreds of individual investors against various financial institutions and individuals alleged to have wrongfully participated in inducing the investors to make investments in fraudulent schemes.

The Receiver would have the court hold that he may maintain the investor claims as a consequence of orders by the Bankruptcy Court and the Superior Court in the Receivership Action. In addition, the Receiver claims that he holds assignments of the individual investors' claims that allow him to proceed here. As a matter of procedural fact, the Court finds that the Receiver has not been conclusively determined to have the capacity to pursue the investors' claims. As a matter of law, the Court concludes that no such authority exists.

It is true that the Receiver sought leave in both the bankruptcy matter and the Receivership Action to assert the claims at issue in this case. It also bears note that the Receivership Action has now been substantively consolidated into the bankruptcy matter. While the Receiver here claims that his authority is a creature of Arizona law (and is therefore purportedly broader than that conferred under federal bankruptcy law), the Court concludes that the substantive consolidation ordered by the bankruptcy court operates to ensure that bankruptcy law acts as the ultimate determinant of his inherent authority. Review of the pertinent records of the proceedings in which the Receiver was permitted to assert the investors' claims reveals that no

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-003803

10/03/2006

other court has yet decided (and the Receiver specifically reserved for later ruling in this action) the issue of his standing to pursue investors' claims in this action. The Receiver cannot benefit from the representation to the bankruptcy court and the Receivership judge that the question would be reserved for later argument by now sidestepping that position and asking this court to deprive Zions and its codefendants of the right even to assert standing here.

In *Williams v. California 1st Bank*, 859 F.2d 664 (9th Cir. 1988), the Ninth Circuit held that a Chapter 7 Trustee lacked the authority to pursue investor claims analogous to those here at issue, despite the fact that the investors had "assigned" their claims as they have in this case. In view of the substantive consolidation of the Receivership Action and the bankruptcy, the court finds *Williams* particularly instructive.

Here, the Receiver is not attempting to pursue claims that are the property of the Receivership entities. The "Assignments," while purporting on their face to convey the investors' interests in the claims to the Receiver, provide that the proceeds of the claims will be distributed back to the investors pursuant to further court order – here, an order of the bankruptcy court as the arbiter of the Plan. Moreover, the assignments recite no consideration apart from the Receiver's obligation to prosecute the claims in the "best interests" of the investors. The Assignment therefore presents an inherent conflict between the Receiver's obligation to the debtor entities and the preservation of Receivership Assets on the one hand, and the interests of the individual investors, on the other. Neither the Receiver nor his counsel has any attorney-client relationship with the investors (or any properly-designated class representative) and the assignments provide no means of reconciling the fiduciary duties of the Receiver with his purported newly-assumed duties to act in the best interests of parties whose interests are directly adverse to those of the Receivership Entities.

The Assignments further recite that the court "unequivocally assigned the Investor's (sic) right to proceed against the defendants to the Receiver" but that the Court directed the Receiver to obtain as many written assignments as possible. The Receiver now asks this court to treat the March 1 2005 Order in the Receivership action as binding here. The Court declines. First, the March 1 Order was entered after the Receiver expressly assured the Court on the record that the defendants would have a later opportunity to file a motion to dismiss on the ground that the action was not being prosecuted in the name of the real parties in interest. That is precisely what has happened. Second, the Order was not a final judgment in the Receivership action, and this Court is free to review the propriety of a nonfinal order of another judge in the existing circumstances of this case. *Cf. Zimmerman v. Shackman*, 204 Ariz. 231, 237 (Ct. App. 2003). Third, in addition to the serious conflict of interest presented by the assignments, the Order purports to bind investors to the result of the Receiver's action without requiring the Receiver to plead, much less satisfy, the requirements of Ariz. R. Civ. P. 23. Though a class action on behalf of the investors might well be warranted, the court has nothing before it to enable such a

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-003803

10/03/2006

determination at this juncture. The Order in the Receivership Action gave the Receiver the authority to commence this action – it cannot serve to determine the outcome or eliminate the procedural prerequisites to the full prosecution of the investors' claims.

The Court does not by this Order intend to deprive the investors of their claims. But if those claims are to be asserted at all in this case, they must be asserted by the investors individually pursuant to Rule 17, or in the form of a properly pled class action pursuant to Rule 23. Accordingly, the investor claims shall be dismissed without prejudice to their refile in this or another action unless the real parties in interest join this action in a procedurally appropriate manner within 120 days of the date of this minute entry.

2. The 12(b)(6) Motion

The moving defendants first assert that Counts 16-20 and 23-24 are barred by the statute of limitations. The court rejects this argument. Each of the counts subject to the limitations challenge are investor claims. The court has already ruled that the investor claims were asserted pursuant to a process by which investors likely relied on representations made by the receiver concerning the status and ownership of their claims. During the Receiver's efforts to prosecute the investors' claims in their own names, the investors justifiably relied on statements by their own Committee, the Receiver and the Court in the Receivership action to the effect that their claims had been preserved and would be prosecuted by virtue of the "assignments" that this Court has now held invalid. Defendants' Motions are based upon the theory that the Receiver was untimely in bringing the actions. The court holds that the limitations period was equitably tolled by the unusual procedural events in this case through the date of this order, and the investors are free to assert their claims in this action within the time provided by this order.

While the court would have agreed with the moving defendants that the investor fraud claims were not pled with sufficient specificity to satisfy the requirements of Ariz. R. Civ. P. 9(b) and granted the 12(b)(6) motion, it is unnecessary to dismiss those claims on that ground in view of the other rulings under Rules 12(b)(1) and 17 concerning the Receiver's standing to prosecute those claims. Any investor fraud claims to be asserted in this action must be pled with specificity as Rule 9(b) requires, either as individual or class claims.

To the extent that any claims in an amended, supplemental or new pleading are asserted against the Zions arising from alleged conduct of Coulter, the Court will evaluate such claims as they are pled. The Court does not hold categorically that Zions is immune from liability based upon Coulter's conduct as a matter of law. Likewise, the current state of the record does not permit the court to evaluate definitively the moving defendants' other attacks on the SAC under Rule 12(b)(6)– until and unless the investor claims are repled with sufficient specificity to permit

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-003803

10/03/2006

the court to understand who is alleged to have done what to whom, any ruling by the court would amount to little more than speculation.

3. Plaintiff's Motion for Summary Judgment against Guccione.

Plaintiffs have moved for summary judgment on his claim of fraud in connection with loans that Guccione took from ANMP. The elements of fraud must be proven at trial by clear and convincing evidence. And "the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 250 (1986). Here, for reasons stated on the record, the court concludes that a reasonable jury could conclude that the elements of scienter and reliance have not been satisfied by clear and convincing evidence if it were provided only with the evidence that the court has before it today. Moreover, even applying a preponderance standard, and viewing the facts in the light most favorable to the non-movant, the court concludes that a reasonable jury believing the facts set forth in paragraphs 5-7 and 14 could find against plaintiff on a misrepresentation claim.

Accordingly, plaintiff's Motion for Summary Judgment on its fraud and negligent misrepresentation claims against Guccione are DENIED.

4. Plaintiff's Motion for Partial Summary Judgment against the Berry Defendants.

Plaintiff has moved for partial summary judgment on the issue of breach of the standard of care by the Berry defendants. In support of its motion, plaintiff submitted a statement of facts and a detailed expert affidavit of Frank Lewis, Esq. to the effect that the Berry defendants had fallen below the applicable standard of care. The Berry defendants, through counsel, responded with a 2 ½ page memorandum, no separate statement of evidence and a conclusory Declaration from Mr. Berry that merely asserted personal knowledge and denied falling below the standard of care. The Declaration is insufficient as a matter of law to avoid summary judgment. *See Florez v. Sargeant*, 185 Ariz. 521 (1996). Plaintiff has presented a *prima facie* case, and defendants have not presented admissible evidence to rebut it. While they note that there is still time to disclose experts, defendants have not sought relief under Rule 56(f). They did, however, include a perfunctory request for fees pursuant to ARS 12-349.

The Berry defendants' counsel has effectively taken the position that the Motion for Partial Summary Judgment is so lacking in substance that a serious response would be a waste of time. The court disagrees. There has been ample time to generate a meaningful factual response to the Motion, whether by a third-party expert or by something more than a conclusory denial by Mr. Berry himself. While the court is reluctant to grant summary judgment based upon procedural deficiencies in the response, this record here contains no facts to generate a triable issue of fact.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-003803

10/03/2006

(There is no small irony in the fact that this motion addresses an attorney's failure to comply with the standard of care and neither the attorney/client nor his lawyer found compliance with Rule 56(c)(2) a worthwhile exercise). And it is not enough for defendants to state that their expert disclosure deadline has not passed while complaining about the "tactic" of making them hire an expert. Mr. Berry is free to act as his own expert. But he is not free to keep his expert opinions so closely guarded. His Declaration does not satisfy even the basic requirements of Rule 26.1(c)(6), and those disclosures should have been made (under oath) long ago.

Accordingly, the Motion for Partial Summary Judgment is GRANTED.

5. Guccione's Motion to Dismiss Counts 7, 8 and 9.

The Guccione defendants argue that Counts 7, 8 and 9 of the SAC (which allege sale of unregistered securities and securities fraud) should be dismissed because the notes in question were "commercial paper" "secured" by real estate and are therefore exempt pursuant to ARS 44-1843(8) and (10). The court disagrees. First, the statute distinguishes between "commercial paper" and "notes." The court finds that the Guccione defendants have failed to establish their entitlement to exemption (8). Second, giving the benefit of all reasonable inferences to plaintiff, the court cannot hold as a matter of law that the notes were actually secured by real property, or that they were sold as a unit. Accordingly, exemption (10) does not apply.

Finally, the Guccione defendants argue that these counts are time barred. Pursuant to 11 U.S.C. § 108(a), the court concludes that the claims are not time-barred.

The Motion to dismiss is therefore DENIED.

1 Roger L. Cohen, #004409
2 Kathi Mann Sandweiss, #011078
3 **JABURG & WILK, P.C.**
4 3200 North Central Avenue, Suite 2000
5 Phoenix, Arizona 85012
6 (602) 248-1000

7 Attorneys for Plaintiff

8 **SUPERIOR COURT OF ARIZONA**
9 **MARICOPA COUNTY**

10 JAMES C. SELL, as Receiver for
11 American National Mortgage Partners,
12 L.L.C. and Related Entities,

13 Plaintiff,

14 v.

15 ROBERT GUCCIONE, an unmarried man;
16 et al,

17 Defendants.

Case No. CV2004-003803
Case No. CV2004-013037
Case No. CV2005-003832
(Consolidated)

**MOTION TO VACATE OR STAY,
PENDING BANKRUPTCY COURT
CLARIFICATION, PORTION OF
OCTOBER 3, 2006 RULING
INTERPRETING AND APPLYING
FEDERAL BANKRUPTCY LAW**

(Assigned to the Honorable Peter Swann)

18 By its Minute Order of October 3, 2006, this Court determined, in part, that the
19 Plan Confirmation Order in *In re American National Mortgage Partners, LLC*, Case No.
20 03-03799 (substantively consolidated) (the "ANMP Bankruptcy") does not constitute an
21 Order, binding on this Court, that the Receiver has authority to assert claims in this case
22 on behalf of the ANMP Investors. This portion of the Court's ruling, on its face, purports
23 to construe and give effect to a final order of a United States Bankruptcy Judge. The
24 Receiver believes, and will demonstrate below, that this Court exceeded its jurisdiction in
25 making that ruling. Accordingly, and for reasons more fully set forth below, it is
26 requested that the Court vacate that portion of the October 3, 2006 Minute Order that
27 dismisses the Receiver's claims on behalf of the ANMP Investors or, in the alternative,
28 stay that portion of the Minute Order (and the corresponding 120-period for the filing of

JABURG & WILK, P.C.
ATTORNEYS AT LAW
3200 NORTH CENTRAL AVENUE
SUITE 2000
PHOENIX, ARIZONA 85012

1 new claims by the Investors) pending application by the Receiver to the Bankruptcy Court
2 for clarification or supplemental orders.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. PREFATORY STATEMENT**

5 This Court has determined that bankruptcy law is the ultimate determinant of the
6 Receiver's authority to bring this action on behalf of the Investors. But that begs the
7 threshold question: Which Court has the authority to make the determination? Under the
8 Bankruptcy Code and applicable Bankruptcy law, coupled with the express language of
9 the confirmed Plan of Reorganization in the ANMP Bankruptcy (the "Confirmed Plan"),
10 that determination may only be made by the Bankruptcy Court.

11 The record reflects that Judge Haines indeed made the determination that the
12 Receiver has the authority to assert claims made on behalf of the hundreds of defrauded
13 investors who were victimized by the Ponzi scheme at issue in both the ANMP
14 Bankruptcy and this case (the "Investors"). That determination is reflected in the
15 Confirmed Plan, the funding for which relies in large part on the present litigation, which
16 in turn relies in significant part on the Receiver's ability to bring claims on behalf of the
17 Investors.

18 The Receiver continues to believe that the Confirmed Plan answers the question
19 whether he has "standing" to bring claims made in this case on behalf of the Investors,
20 whose interests he has represented since the case was first filed in February 2004. The
21 Receiver also believes, with all due respect to this Court, that the Court's October 3, 2006,
22 Minute Order is contrary to the ANMP Confirmed Plan. However, if the record is not
23 clear, or if this Court is unsure of Judge Haines's determination, then it must stay these
24 proceedings for sufficient time to permit Judge Haines to clarify or supplement his prior
25 rulings.

1 **II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND.**

2 A. The ANMP Bankruptcy

3 The ANMP Bankruptcy was commenced on March 10, 2003, by the filing of
4 petitions on behalf of certain ANMP Entities. Thereafter, all of the ANMP Entities were
5 substantively consolidated as Debtors, effective *nunc pro tunc* to the original filing date.
6 On July 15, 2005, Debtors filed their Joint Plan of Reorganization and Disclosure
7 Statement. The Bankruptcy Court entered its Order Confirming the Plan on December 7,
8 2005.

9 B. The Present Case.

10 The Receiver's Amended Complaint alleges that the various Defendants conspired
11 and participated in a multi-year conspiracy to use the Receivership Entities to facilitate a
12 sophisticated Ponzi scheme. Certain of the individual Defendants had been convicted of
13 felonies involving loan fraud, embezzlement or other financial wrongdoing, and were
14 therefore disqualified from being licensed as mortgage brokers. Other Defendants acted
15 as "fronts" for licensing purposes, while those with felony convictions continued to
16 control the lending entities. From 1999 through 2003, Defendants falsely represented to
17 hundreds of elderly and fixed-income investors that their investments were low risk with a
18 high rate of return.

19 Defendants Zions First National Bank ("Zions") and National Bank of Arizona
20 ("NBA") (collectively, "Zions/NBA") filed Motions to Dismiss pursuant to Rules
21 12(b)(1) and 12(b)(6) and other Defendants filed Joinders. Following complete briefing
22 and oral argument, this Court ordered the parties to file supplemental briefs on the issue of
23 the Receiver's authority to assert claims on behalf of the defrauded Investors. The
24 Receiver's Supplemental Brief explained, *inter alia*, that Zions/NBA's argument that the
25 Receiver lacks "standing" to bring claims derived from injuries suffered by the Investors
26 is barred by the *res judicata* effect of the Confirmed Plan ordered by Judge Haines in the
27 ANMP Bankruptcy. After supplemental briefing and review of the written memoranda,
28

1 this Court issued its Minute Order of October 3, 2006 (filed October 4, 2006) (the
2 “Minute Order”).

3 The Minute Order, among other things, granted in part the Motion to Dismiss
4 pursuant to Rule 12(b)(1). This Court concluded that “the substantive consolidation
5 ordered by the bankruptcy court operates to ensure that bankruptcy law acts as the
6 ultimate determinant of [the Receiver’s] inherent authority.” The Court nevertheless found
7 that the Receiver “has not been conclusively determined to have the capacity to pursue the
8 investors’ claims [and that] as a matter of law, the Court concludes that no such authority
9 exists.” The Court accordingly dismissed the claims brought by the Receiver on behalf of
10 the Investors, without prejudice to their refiling “in a procedurally appropriate manner”
11 within 120 days. The present Motion addresses only this portion of the Minute Order.

12 **III. BECAUSE THIS COURT PROPERLY DETERMINED THAT**
13 **BANKRUPTCY LAW IS THE ULTIMATE DETERMINANT OF THE**
14 **RECEIVER’S AUTHORITY, THIS COURT MUST DEFER TO THE**
15 **BANKRUPTCY COURT’S DETERMINATION OF SUCH AUTHORITY**

16 A. State Courts Must Recognize the Doctrine of Federal Preemption in
17 Bankruptcy

18 Bankruptcy is one of only two federal legislative powers enumerated in Article I,
19 Section 8 of the U.S. Constitution as to which the power to make “uniform” laws is made
20 explicit. See *Pacific Gas and Elec. Co. v. California ex rel. California Dept of Toxic*, 350
21 F.3d 932, 943 (9th Cir. 2003). The power of Congress to establish uniform laws on the
22 subject of bankruptcies throughout the United States is unrestricted and paramount. U.S.
23 Const. Art. I, § 8, cl. 4; *International Shoe Co. v. Pinkus*, 278 U.S. 261, 265, 49 S.Ct. 108,
24 73 L.Ed. 318 (1929). Congress exercised this power by enacting national, uniform
25 bankruptcy laws, including the Bankruptcy Code, which necessarily exclude or displace
26 any conflicting state regulation. *International Shoe*, 278 U.S. at 265, 49 S.Ct. 108.
27 Accordingly, states may not pass or enforce laws to interfere with or complement the
28 Bankruptcy Code or to provide additional or auxiliary regulations. *Id.* at 266, 49 S.Ct.
108.

1 State courts are barred from intruding on a bankruptcy court's orders. *In re*
2 *McGhan*, 288 F.3d 1172, 1179 (9th Cir. 2002). The Federal courts have made clear,
3 moreover, that state courts must recognize "the scope of the federal preemption of the
4 field of bankruptcy law." *In re Davis*, 170 F.3d 475, 486 (5th Cir. 1999).

5 B. Bankruptcy Courts Retain Jurisdiction to Enforce and Interpret Their Own
6 Orders, Including Confirmed Plans.

7 The district courts have "original and exclusive jurisdiction" of all cases under title
8 11. See 28 U.S.C.A. § 1334. The district courts shall have original but not exclusive
9 jurisdiction of all civil proceedings "arising under title 11, or arising in or related to cases
10 under title 11." *Id.* Proceedings "arising in" bankruptcy cases are generally referred to as
11 "core" proceedings, and essentially are proceedings that would not exist outside of
12 bankruptcy, such as "matters concerning the administration of the estate." *In re Pegasus*
13 *Gold Corp.*, 394 F.3d 1189, 1193 (9th Cir. 2005). Core proceedings include, *inter alia*,
14 matters concerning administration of the estate and confirmation of plans. 28 U.S.C.A. §
15 157. It is well established that bankruptcy courts have jurisdiction to interpret and
16 enforce their own orders. *In re Allegheny Health, Education and Research Foundation*,
17 383 F.3d 169, 175-76 (3d Cir.2004) (holding that a bankruptcy court had jurisdiction to
18 consider a core proceeding that required the court to interpret and give effect to its
19 previous sale orders); *In re Texaco, Inc.*, 182 B.R. 937, 944 (Bankr.S.D.N.Y.1995)
20 (recognizing that "it is essential for a bankruptcy court to have jurisdiction to adjudicate
21 controversies respecting, and to enforce, its own orders"); *In re Johns-Manville Corp.*, 97
22 B.R. 174, 180 (Bankr.S.D.N.Y.1989) (deciding that a bankruptcy court retains post-
23 confirmation jurisdiction to enforce its own orders in aid of their proper execution).

24 The Sixth Circuit Bankruptcy Appellate Panel recently addressed this issue
25 directly, concluding that the bankruptcy court has continuing jurisdiction to interpret a
26 Chapter 11 plan and disclosure statement:

27 It is difficult to imagine a closer nexus to the Debtor's
28 bankruptcy case and the confirmed Plan than this direct
request for interpretation and clarification of the Plan's terms:
Indeed, even the most restrictive views of post-confirmation

JABURG & WILK, P.C.
ATTORNEYS AT LAW
3200 NORTH CENTRAL AVENUE
SUITE 2000
PHOENIX, ARIZONA 85012

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

jurisdiction acknowledge that the bankruptcy courts retain jurisdiction to interpret and enforce confirmed plans of reorganization.

In re Thickstun Bros. Equipment Co., Inc. 344 B.R. 515, 522 (6th Cir.BAP 2006).

Confirming that fundamental principle, the appellate court in *First Western SBL, Inc. v. Mac-Tav, Inc.*, 231 B.R. 878 (1999), while noting that various courts have taken differing views on the breadth of post-confirmation jurisdiction, found that even under the narrowest approach, a bankruptcy court has jurisdiction to interpret its own confirmed plan, “at least to protect its [confirmation] decree, to prevent interference with the debtor’s plan of reorganization, and to otherwise aid in its execution.” 231 B.R. at 882-883, citing *In re Dilbert’s Quality Supermarkets, Inc.*, 368 F.2d 922, 924 (2d Cir.1966); *Walnut Assocs. v. Saidel*, 164 B.R. 487, 492 (E.D.Pa.1994); *In re H & L Developers*, 178 B.R. 71, 76 (Bankr.E.D.Pa.1994); *In re Cinderella Clothing Indus.*, 93 B.R. 373, 376 (Bankr.E.D.Pa.1988). See also *In re Leeds Bldg. Prod., Inc.*, 160 B.R. 689, 691 (Bankr.N.D.Ga.1993) (stating that bankruptcy court’s role post-confirmation is limited to matters involving the execution, or *interpretation of the plan’s provisions*, and to disputes requiring the application of bankruptcy law).

C. Ninth Circuit Law Unequivocally Recognizes That Bankruptcy Courts Retain Exclusive Jurisdiction to Enforce and Interpret Their Own Orders, Including Confirmed Bankruptcy Plans.

The Ninth Circuit Bankruptcy Appellate Panel (“BAP”) held that the Bankruptcy Court had exclusive jurisdiction to interpret and enforce its plan and confirmation order, and that the state court would exceed its jurisdiction if it had construed the plan incorrectly. *In re Birting Fisheries, Inc.*, 300 B.R. 489, 501 (9th Cir. BAP 2003). The BAP noted, first, that “the bankruptcy court’s exclusive jurisdiction encompasses ‘all matters connected with the bankruptcy estate.’” 300 B.R. at 498 - 499. Exclusive jurisdiction exists over “core” proceedings. See *Gruntz v. County of Los Angeles (In re Gruntz)*, 202 F.3d 1074, 1081 (9th Cir.2000). A “‘core proceeding’ is one ‘that invokes a substantive right provided by title 11 or ... a proceeding that, by its nature, could arise only in the context of a bankruptcy case.’” *Gruntz*, 202 F.3d at 1081. Core proceedings

1 include, but are not limited to: confirmation of plans. *Birting*, 300 B.R. at 499. In
2 addition, a bankruptcy court's original core jurisdiction "continues" so that it may enforce
3 its own orders, even after the case has been closed. The BAP further noted that,

4 where bankruptcy court jurisdiction has been expressly
5 retained, it will be construed as exclusive, so as not to render
6 the provision a nullity. See *United States v. Alpine Land &*
7 *Reservoir Co.*, 174 F.3d 1007, 1013 (9th Cir.1999); *Flanagan*
8 *v. Arnaiz*, 143 F.3d 540, 545 (9th Cir.1998) ("it would make
no sense for the district court to retain jurisdiction to interpret
and apply its own judgment to the future conduct
contemplated by the judgment, yet have a state court
construing what the federal court meant in the judgment").

9 300 B.R. at 499.

10 Applying these principles to the issue of plan interpretation and enforcement, the
11 BAP made clear that such matters are within the exclusive jurisdiction of the bankruptcy
12 court. *Id.*

13 D. The Confirmed Plan Itself Expressly Requires Bankruptcy Court
14 Interpretation and Application

15 A Chapter 11 bankruptcy plan is etially a contract between the debtor and its
16 creditors, and an order confirming a bankruptcy plan is binding on all parties. *Miller v.*
17 *U.S.* 363 F.3d 999, 1004 (9th Cir. 2004). As a binding contract, the Confirmed Plan
18 expressly provides that the Bankruptcy Court will interpret and apply the terms and
19 conditions of the Plan and all controversies and disputes that arise in connection with the
20 Plan. (See Supplemental Brief, Exhibit D, §15.8). This express provision is fully
21 consistent with controlling Ninth Circuit law.

22 E. Jurisdiction to Construe the Confirmed Plan Is Granted Exclusively to the
23 Bankruptcy Court in the ANMP Bankruptcy.

24 Applying the foregoing principles in the context of this case, all questions
25 regarding the interpretation and effect of the Confirmed Plan are within the exclusive
26 jurisdiction of the Bankruptcy Court. Accordingly: (1) under the doctrine of federal
27 preemption, this Court is precluded from interpreting the Confirmed Plan; (2) under the
28 general rules of Bankruptcy law, the Bankruptcy Court retains exclusive jurisdiction to
interpret the Confirmed Plan, 28 U.S.C.A. §§ 157 and 1334; (3) under authority of the

1 Ninth Circuit BAP, the Bankruptcy Court retains exclusive jurisdiction to interpret the
2 Plan, *Birting Fisheries, Inc.*, 300 B.R. 489; and (4) under the Confirmed Plan itself, the
3 Bankruptcy Court is the ultimate enforcer and interpreter of the Plan. Therefore, to the
4 extent that a determination is required as to whether the Receiver has authority to assert
5 claims on behalf of the Investors, that determination must be made by Judge Haines of the
6 Bankruptcy Court.

7 **IV. JUDGE HAINES HAS DETERMINED THAT THE RECEIVER HAS**
8 **AUTHORITY TO ASSERT THE INVESTORS' CLAIMS**

9 A. A Finding that the Receiver is Authorized to Sue on Behalf of the Investors
10 Is Implicit in the Order Approving the Confirmed Plan.

11 The Confirmed Plan does not, in so many words, state that the Receiver is
12 authorized to assert claims on behalf of the Investor. When the Confirmed Plan, the
13 Amended Disclosure Statement, and the Findings of Fact and Conclusions of Law and
14 Order Confirming Joint Plan of Reorganization (the "Confirmation Order") are read
15 together and their collective effect is considered, however, the only reasonable inference
16 to be drawn is that the Receiver does indeed have authority.

17 That Judge Haines was aware of, and agreed to, the Receiver asserting claims on
18 behalf of the Investors is clear from the following provisions of the Disclosure Statement
19 and Confirmed Plan:

20 1. The Disclosure Statement recites that "The Receiver . . . has commenced
21 actions against the individuals, professionals and financial institutions responsible for
22 perpetuating the Ponzi scheme (the 'Financial Institution Litigation')" (See Disclosure
23 Statement, p. 7).¹ The Disclosure Statement, in this regard, refers specifically to the
24 Complaint filed in U.S. District Court, a copy of which is attached as Exhibit I to the
25 Disclosure Statement, which alleges claims by the Receiver on behalf of the Investors. *Id.*

26
27
28 ¹ The Financial Institution Litigation, of course, is essentially the same case that the U.S. District Court dismissed
with leave to refile and was refilled in this case by permitted amendment of the Complaint.

1 2. The Disclosure Statement describes the effect of Substantive Consolidation
2 on any distributions, including the potential proceeds from the Financial Institution
3 Litigation. (*Id.*, p. 8).

4 3. The Class 3C Creditors are described in the Disclosure Statement as former
5 “ANMP Investors” (*Id.*, p. 12).

6 4. The Confirmed Plan provides that “[T]he Plan Fund will receive proceeds
7 from . . . the Financial Institution Litigation.” (Confirmed Plan, p. 2), that “all funds
8 received under the Plan will be deposited into the Plan Fund and distributed as set forth
9 herein.” (*Id.* p. 3), and that “James Sell [as Manager of the Reorganized Debtors] shall
10 have sole and exclusive authority to prosecute, settle, and compromise claims on behalf
11 of, and against, the Estate.” (*Id.*, p. 24).

12 There can be no serious doubt that Judge Haines signed the Confirmation Order
13 with the express knowledge and understanding of the foregoing provisions. The only
14 reasonable conclusion is that Judge Haines understood and agreed to those provisions.
15 The Receiver had previously filed and was prosecuting the Financial Institution Litigation
16 on behalf of both the Receivership Entities *and* the Investors, and would continue to
17 prosecute that litigation with the aim to distribute the litigation proceeds to the Investors
18 and others in compliance with the terms of the Plan. Had Judge Haines not agreed to this,
19 the Plan would not have been confirmed as written. Judge Haines has permitted the
20 Financial Institution Litigation to go forward, and in doing so, has implicitly interpreted
21 and applied the Confirmed Plan to authorize the Receiver to assert claims on behalf of the
22 Investors in this case.

23 B. The Williams Case Has an Extensive Negative History and Is Otherwise
24 Inapplicable.

25 Nor may it be inferred that Judge Haines would be bound by *Williams v. California*
26 *1st Bank*, 859 F.2d 664 (9th Cir. 1988), which this Court found “particularly instructive” on
27 the issue of investor assignment.
28

1 Relying on *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 92 S.Ct.
2 1678, 32 L.Ed.2d 195 (1972), the *Williams* Court held that a bankruptcy trustee who had
3 obtained assignments of claims from investors nevertheless lacked standing to sue based
4 on the assigned claims. *Williams* set forth three reasons why trustees should not be
5 allowed to pursue assigned claims: (1) because there would be no net benefit to the estate,
6 but only to the assignors; (2) because the trustee did not have the ability to assert the
7 claims absent the assignment; and (3) because not all of the claim holders had assigned
8 their claims to the trustee, creating the possibility of conflicting results or liabilities
9 between the trustee and those creditors who retained their claims and might assert them.
10 859 F.2d 664. *Williams* has a lengthy history of being distinguished, disagreed with,
11 declined to follow, and declined to extend.

12 Judge Haines himself spoke to the issue, holding specifically that *Williams* did not
13 bar the Trustee's pursuit of assigned claims for the benefit of the entire estate. *In re*
14 *Southwest Supermarkets, L.L.C.*, 315 B.R. 565 (Bankr.D.Ariz. 2004). The secured
15 creditors in *Southwest* assigned to the Trustee all the claims that had been assigned to
16 them under a global settlement agreement. The first threshold question, according to
17 Judge Haines, was "whether *Williams* precludes the Trustee from asserting the assigned
18 claims." 315 B.R. at 569. Of the three reasons set forth by the *Williams* Court, Judge
19 Haines described point number two as not cogent at all, and point number three as having
20 "extremely limited cogency." In any event, Judge Haines found that the Trustee in
21 *Southwest* was free to pursue the claims for the benefit of the entire estate. He noted that
22 the facts in *Southwest* were distinguishable from *Williams*, where the assignors made
23 their assignments only on the condition that the net benefits would be turned over to the
24 assignors.

25 In *Southwest*, "the claims are expressly assigned to the Trustee for the benefit of
26 the estate." 315 B.R. at 570. As in *Southwest*, and unlike in *Williams*, the claims in this
27 case were assigned to the Receiver for the benefit of the Bankruptcy Estate. The
28 Assignments expressly provide that each Investor "irrevocably assigns and transfers to the

1 Receiver all right, title and interest in and to any claims against the Defendants as set forth
2 in the Complaint.” Accordingly, the Confirmed Plan provides that the Plan Fund receive
3 proceeds from the Financial Institution Litigation, and that distributions be made to the
4 Investors, as Class 3C Creditors, out of the Plan Fund. Therefore, to the extent that Judge
5 Haines were asked to apply *Williams* to this case, his conclusion is expected to be that
6 *Williams* does not preclude the Receiver from asserting claims based upon the Investor
7 assignments.

8 *Williams* has not been cited with approval in any reported decision. The Arizona
9 Court of Appeals distinguished *Williams* on the basis that it involved federal standing
10 issues related to a bankruptcy trustee. *Citibank (Arizona) v. Miller & Schroeder Financial,*
11 *Inc.*, 168 Ariz. 178, 184, 812 P.2d 996, 1002 (App. 1990).

12 The Court in *Semi-Tech Litigation, LLC v. Bankers Trust Co.*, 272 F.Supp.2d 319,
13 323 -324 (S.D.N.Y. 2003) found that *Williams* is simply not “persuasive.” The Court said
14 the issue both in *Williams* and in *Semi Tech* was “whether assignments should be stripped
15 of legal effect because the assignee is a creature of a bankruptcy.” That the plaintiff-
16 assignee had no claim of its own is no different than in most cases, outside the bankruptcy
17 context, in which assignees may sue on assigned claims. Likewise, there always is a risk,
18 outside the bankruptcy context, that a non-assigning note or debenture holder may sue and
19 obtain results inconsistent with a result obtained by an assignee of an identical claim, but
20 “that affords no basis for refusing to allow suit on assigned claims.” Thus, the *Semi-Tech*
21 Court found no basis for treating an assignee created by, or assignments made pursuant to,
22 a Chapter 11 plan any differently.

23 The Second Circuit Court of Appeals declined to follow *Williams*, holding that if a
24 claim is a general one, with no particularized injury arising from it, and if that claim could
25 be brought by any creditor of the debtor, the trustee is the proper person to assert the
26 claim, and the creditors are bound by the outcome of the trustee's action. *St. Paul Fire and*
27 *Marine Ins. Co. v. PepsiCo, Inc.* 884 F.2d 688, 701 (2nd cir. 1989).

1 Other Courts that have expressly refused to follow or extend *Williams* include: *In*
2 *re City Communications, Ltd.*, 105 B.R. 1018 (Bankr.N.D.Ga. 1989); *In re Davey*
3 *Roofing, Inc.*, 167 B.R. 604 (Bankr.C.D.Cal. 1994); *In re Adam Furniture Industries, Inc.*,
4 191 B.R. 249 (Bankr.S.D.Ga. 1996); *In re Latin Inv. Corp.*, 168 B.R. 1 (Bankr.D.Dist.Col.
5 1993); *Towe v. Martinson*, 195 B.R. 137 (D.Mont. 1996); *In re Icarus Holdings, LLC.*,
6 290 B.R. 171 (Bankr.M.D.Ga. 2002); *Kalb, Voorhis & Co. v. American Financial Corp.*,
7 8 F.3d 130 (2nd Cir. 1993); *In re Buildings by Jamie, Inc.*, 230 B.R. 36 (Bankr.D.N.J.
8 1998); *Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc.*, 267 F.3d
9 340 (3rd Cir. 2001); *Smith ex rel. Estates of Boston Chicken, Inc. v. Arthur Andersen*
10 *L.L.P.*, 175 F.Supp.2d 1180 (D.Ariz. 2001 *In re AgriBioTech, Inc.*, 319 B.R. 207 (D.Nev.
11 2004); *In re AgriBioTech, Inc.*, 319 B.R. 216 (D.Nev. 2004); *In re Bogdan*, 414 F.3d 507
12 (4th Cir. 2005); *Smith v. Arthur Andersen LLP*, 421 F.3d 989 (9th Cir. 2005).

13 The most important reason to distinguish *Williams* is that it directly conflicts with
14 the Confirmed Plan. In this case, the Plan expressly contemplates that the Receiver will
15 proceed with the Financial Institution Litigation; that the proceeds of the Financial
16 Institution Litigation will be used to fund, in part, the Plan; and that the Investors and
17 others will receive the proceeds of the Financial Institution Litigation out of the Plan
18 Fund. Because a copy of the Financial Institution Litigation is attached as an Exhibit to
19 the Disclosure Statement, and because the litigation expressly includes claims asserted by
20 the Receiver on behalf of the Investors, the only reasonable interpretation of the Plan is
21 that it authorizes the Receiver to assert these claims.

22 There is every reason to believe that Judge Haines, by entering the Confirmation
23 Order, will decline to follow *Williams*, for the same reasons and based upon the same
24 analysis he previously applied in *Southwest*.

1 **V. IN THE ALTERNATIVE, THIS MATTER SHOULD BE STAYED FOR**
2 **SUFFICIENT TIME TO PERMIT THE BANKRUPTCY COURT TO**
3 **INTERPRET AND APPLY THE CONFIRMED PLAN**

4 Paragraph 15 of the Plan, at pages 29-31, provides that the Bankruptcy Court will
5 retain jurisdiction regarding a variety of matters relating to the Plan. Specifically,
6 Paragraph 15.8, captioned "Plan Interpretation," provides:

7 The Bankruptcy Court may enforce and interpret the terms and
8 conditions of the Plan and all controversies and disputes that
9 may arise in connection with the enforcement, interpretation
10 or consummation of the Plan.

11 This provision, like all provisions of the Plan, must be interpreted according to the
12 rules governing the interpretation of contracts. *Hillis Motors, Inc. v. Haw. Auto. Dealers*
13 *Ass'n*, 997 F.2d 581, 588 (9th Cir.1993). A contract is ambiguous if it is "capable of more
14 than one reasonable interpretation." *State ex rel. Goddard v. R.J. Reynolds Tobacco Co.*,
15 206 Ariz. 117, 120, 75 P.3d 1075, 1078 (App. 2003); see also *Local Motion, Inc. v.*
16 *Niescher*, 105 F.3d 1278, 1280(9th Cir.1997) (per curiam) ("The existence of an
17 ambiguity in a contract is ... a matter of law. An ambiguous term is one susceptible to
18 more than one reasonable interpretation.").

19 It is the Receiver's position, as set forth above, that the Confirmed Plan is not
20 ambiguous, and that Judge Haines has already determined that the Receiver has authority
21 to bring the Investor claims. One point is absolutely clear – there is nothing in the
22 Confirmed Plan, the Disclosure Statement, the Confirmation Order or anywhere else in
23 the record to suggest that Judge Haines ruled to the contrary. Therefore, he either has or
24 has not ruled that the Receiver has authority to assert these claims. If he has not ruled, or
25 if this Court believes that he has not ruled, it is solely within Judge Haines's jurisdiction
26 to do so now. Any other conclusion would violate the law of federal preemption.

27 Given the terms of the Minute Order, it is the Receiver's intention to request that
28 Judge Haines clarify or interpret the Confirmed Plan. It is not the Receiver's intention,
however, to force a collision between federal and state courts. Nor is it the Receiver's
desire to ask that the Bankruptcy Court overrule a decision of this Court on federal

JABURG & WILK, P.C.
ATTORNEYS AT LAW
3200 NORTH CENTRAL AVENUE
SUITE 2000
PHOENIX, ARIZONA 85012

1 preemption grounds. Therefore, it is appropriate at this juncture for this Court to either
2 vacate or stay the subject portion of the Minute Order, pending Bankruptcy Court
3 clarification and/or interpretation of the Plan.

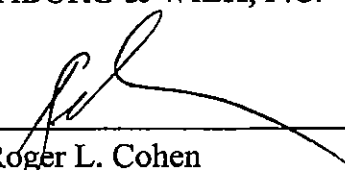
4 **VI. CONCLUSION**

5 For the reasons set forth above, it is the province of the Bankruptcy Court to
6 interpret the Plan and to ascertain the Receiver's authority under the Plan. As set forth
7 above, the Bankruptcy Court has already determined that the Receiver is authorized to
8 assert claims on behalf of the Investors. Therefore, it is requested that this Court vacate
9 that part of the Minute Order that rules to the contrary.

10 To the extent this Court is unable to find that the Bankruptcy Court has made such
11 a determination, it is requested that this Court stay these proceedings, including without
12 limitation the 120 day period for the real parties in interest to join or refile, pending a
13 clarification by the Bankruptcy Court.

14 DATED this 23rd day of October, 2006.

JABURG & WILK, P.C.



18 Roger L. Cohen
19 Kathi Sandweiss
20 Attorneys for Plaintiff

21 **ORIGINAL** of the foregoing E-FILED
22 this 23rd day of October, 2006.

23 **COPY** of the foregoing mailed
24 this 23rd day of October, 2006 to:

25 Ashley Adams Feldman, Esq.
26 THE PHOENIX LAW GROUP
27 8765 East Bell Rd., Suite 110
28 Scottsdale, Arizona 85260
Attorney for Defendant Greg Harrington
And Vector Partners, LLC

Brian Holohan, Esq.
HINSHAW & CULBERTSON, LLP
3800 North Central Avenue, Suite 1600
Phoenix, Arizona 85012-1946
Attorneys for Defendants Berry and Titus
Brueckner & Berry, P.C.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Alan L. Liebowitz, Esq.
16042 North 32nd Street, Suite D-10
Phoenix, Arizona 85032
Attorney for Defendants Samel and Galanis

Donald M. Peters, Esq.
MILLER LASAROTÁ & PETERS, PLC
722 East Osborn Road, Suite 100
Phoenix, Arizona 85014
Attorneys for Defendants Meka

Steven C. Mahaffy, Esq.
WINSOR LAW FIRM, PLC
1201 S. Alma School Rd., Suite 11100
Mesa, Arizona 85210
Attorneys for Defendants Boyce

Wesley S. Loy, Esq.
BROENING OBERG WOODS & WILSON
Post Office Box 20527
Phoenix, Arizona 85036
Attorneys for Defendants Kiesel

Michael R. King, Esq.
GAMMAGE & BURNHAM, PLLC
Two North Central Ave, 18th Floor
Phoenix, Arizona 85004-4470
Attorneys for Defendant
First International Bank and Trust

Richard R. Thomas
DAVIS MILES, PLLC
P.O. Box 15070
Mesa, AZ 85211
Attorneys for Defendants Dunning

Richard L. Green, Esq.
O'STEEN & HARRISON
300 W. Clarendon Ave., Suite 400
Phoenix, Arizona 85013-3424
Attorney for Defendant Western
Security Bank

Curtis D. Ensign, Esq.
LAW OFFICES OF CURTIS ENSIGN
3225 N. Central Ave., Suite 1609
Phoenix, Arizona 85012-2413
Attorneys for Defendants Vigarino

Jonathan A. Dessaulles, Esq.
DESSAULES HARPER, PLC
One North Central Avenue, Suite 1130
Phoenix, Arizona 85004
Attorneys for Defendant Guccione

Joel P. Hoxie, Esq.
Jennifer H. Dioguardi, Esq.
SNELL & WILMER, LLP
One Arizona Center
400 E. Van Buren
Phoenix, Arizona 85004-2202
Attorneys for Defendants Zions First
National Bank and National Bank of
Arizona

Jason Mark Kalafat, Esq.
KIMERER & DERRICK, PC
221 East Indianola Ave
Phoenix, Arizona 85012-2002
Attorneys for Defendants Kesler

Nicholas J. DiCarlo, Esq.
DICARLO CASERTA & PHELPS, LLC
6750 E. Camelback Road, Suite 103
Scottsdale, Arizona 85251
Co-counsel for Defendant Rehm

Michael Salcido, Esq.
RENAUD COOK DRURY MESAROS, PA
Phelps Dodge Tower
One North Central, Suite 900
Phoenix, Arizona 85004-4418
Attorneys for Defendants Caspare

Dustin T. Dudley, Esq.
ISRAEL & GERITY, PLLC
3300 N. Central Ave., Suite 2000
Phoenix, Arizona 85012
Attorneys for Defendants Stocker

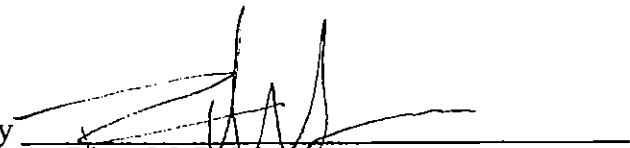
Joseph B. Pierce, Esq.
MCKEIGHAN PIERCE, PC
6900 E. Camelback, Suite 240
Scottsdale, Arizona 85251
Co-counsel for Defendant Rehm

J. Philip Glasscock, Esq.
J. PHILLIP GLASSCOCK, PC
13430 N. Scottsdale Road, Suite 106
Scottsdale, Arizona 85254
Attorney for Defendant Coulter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Ms. Helen C. Hartz
5952 W. Gail Drive
Chandler, Arizona 85226
Defendant Pro Per

Mr. Eric Strasser
2851 Bedford Lane, #176
Chino Hills, California 91709
Defendant Pro Per

By 
Rima M. LaMont

JADURG & WILK, P.C.
ATTORNEYS AT LAW
3200 NORTH CENTRAL AVENUE
SUITE 2000
PHOENIX, ARIZONA 85012