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10  
11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
12 **IN AND FOR THE COUNTY OF MARICOPA**  
13

14 OWNER-OPERATOR INDEPENDENT ) Case No.: CV2013-000615  
DRIVERS ASSOCIATION, et al., )  
15 ) **PLAINTIFFS' RULE 59 MOTION FOR**  
Plaintiffs, ) **NEW TRIAL**  
16 )  
v. ) (Assigned to the Honorable J. Richard  
17 ) Gama)  
PACIFIC FINANCIAL ASSOCIATION, )  
18 INC, et. al., )  
19 Defendants. )  
20 )

21 Pursuant to A.R.C.P. 59(a), Plaintiffs respectfully submit their motion for new trial  
22 in regard to the Court's December 3, 2013 Under Advisement Ruling granting the  
23 Defendants' Ariz. R. Civ. P., Rule 12(b)(6) motion to dismiss. Together with this motion,  
24 the Plaintiffs are filing an Ariz. R. Civ. P., Rule 15(a) motion seeking leave to amend the  
25 complaint.

26 **INTRODUCTION**

27 On December 3, 2013, this Court entered an Under Advisement Ruling granting  
28 Defendants' Ariz. R. Civ. P., Rule 12(b)(6) motion to dismiss the Plaintiffs' complaint,

1 finding that the relationship created by the signing of a Form BMC-85 Trust Fund  
2 Agreement upon which Plaintiffs' complaint is predicated "is not a 'trust' under Arizona  
3 law." The Court accepted Defendants' contention that the BMC-85-created relationship is  
4 a "trust for the primary purpose of paying debts," and thus excluded from the ambit of  
5 Arizona law by operation of A.R.S. Title 14, Chapter 1, § 14-1201(58). For the reasons set  
6 forth below, Plaintiffs respectfully seek a new trial pursuant to Ariz. R. Civ. P., Rule  
7 59(a)(8).

## 8 DISCUSSION

### 9 **A. Standard for Granting Motion for New Trial**

10 A new trial is proper where "the verdict, decision, findings of fact, or judgment is not  
11 justified by the evidence or is contrary to law." Ariz. R. Civ. P., Rule 59(a)(8). The trial  
12 judge has broad discretion in granting a new trial. *Glendale v. Bradshaw*, 114 Ariz. 236,  
13 238, 560 P.2d 420, 422 (1977). An order granting a new trial, particularly one based on Rule  
14 59(a)(8), will not be disturbed "unless the probative force of the evidence clearly  
15 demonstrates that the decision of the trial judge is a manifest abuse of discretion." *Carlton v.*  
16 *Emhardt*, 138 Ariz. 353, 357, 674 P.2d 907, 911 (App.1983). *See also Arthur E. Anderson,*  
17 *Co. v. Preferred Stock Food Markets*, 175 Ariz. 208, 854 P. 2d 1194 (App. 1993)(Superior  
18 Court granted motion for new trial after granting summary judgment to plaintiff).

### 19 **B. Grounds for New Trial**

#### 20 **1. Plaintiffs' Claims are Authorized by Common Law**

21 As demonstrated in Plaintiffs' separately filed Ariz. R. Civ. P., Rule 15(a) motion for  
22 leave to amend, the Court's ruling did not address the fact that Plaintiffs' Complaint did not  
23 exclude Arizona common law as a basis of relief with respect to, *inter alia*, Defendants'  
24 breach of fiduciary duty and negligence. In their original Complaint, Plaintiffs asserted the  
25 following counts without differentiating whether they arose from statute or common law:

#### 26 **Claims against Pacific Financial:**

- 27 I. Breach of fiduciary duty,
- 28 II. Breach of fiduciary duty, failure to inform,

- 1 III. Breach of duty of good faith and fair dealing (re claims handling practices),  
2 IV. Negligence, and  
3 V. Breach of fiduciary duty, misallocation of trust assets,

4 **Claims against Federal Service:**

- 5 VI. Negligence, against Federal Service, and  
6 VII. Aiding and abetting another's tortious conduct, against Federal Service, and

7 **Request for declaratory judgment re Pacific Financial:**

- 8 VIII. Declaratory judgment that Pacific Financial is in the "trust business."

9 Plaintiffs cited certain provisions from A.R.S. Title 14, Chapter 11 at paragraph 47 of  
10 their original complaint regarding Defendants' duties as trustees which preceded Counts I-  
11 VIII, beginning at paragraph 88. But Counts I-VIII did not expressly exclude common law  
12 principles, nor were they expressly limited to statutory principles. They did not do so  
13 principally because the two sets of principles substantially overlap. There was no intention  
14 to exonerate Defendants' common law liability. Nonetheless, to remove any future  
15 misapprehension, Plaintiffs now seek to amend paragraph 47 to specify that these duties  
16 arise under common law as well.

17 Defendants never challenged whether Plaintiffs could assert common law claims for,  
18 *inter alia*, breach of fiduciary duty or negligence. Again, Plaintiffs' original complaint did  
19 not explicitly differentiate between claims arising under common law and Arizona statute.  
20 But Defendants' motion to dismiss incorrectly treated Plaintiffs' claims as arising solely  
21 from Arizona statute. Plaintiffs' claims are independently and distinctly meritorious under  
22 Arizona common law. *See, e.g., Golleher v. Horton*, 148 Ariz.537, 543, 715 P. 2d 1225,  
23 1231 (App. 1986); *Lane Title and Trust Co. v. Brannan*, 103 Ariz. 272, 276-277, 440 P.2d  
24 105, 109-110 (1968); *Jabczenski v. Southern Pac. Memorial Hosp. Inc.*, 119 Ariz. 15, 19,  
25 579 P.2d 53, 57 (App.1978).

26 Further, the common law of trusts is expressly preserved by Arizona statute through  
27 A.R.S. Title 14, Chapter 11, § 14-10106, providing:

28

1 Common law of trusts; principles of equity

2 A. The common law of trusts and principles of equity supplement this  
3 chapter, except to the extent modified by this chapter or another statute of  
4 this state.

5 B. The court shall look to the restatement (second) of trusts for  
6 interpretation of the common law and not to subsequent restatements of  
7 trusts to determine:

- 8 1. The rights and powers of creditors of beneficiaries.
- 9 2. The duties of trustees to distribute to those to whom a beneficiary owes  
10 any duties.
- 11 3. Whether public policy may affect enforceability and effectiveness of the  
12 terms of the trust.
- 13 4. And effectuate the settlor's intent.

14 A.R.S. § 14-1201(58), upon which the Defendants relied, does not modify the  
15 common law of trusts, and does not modify or qualify the fundamental elements, derived  
16 from common law, that distinguish a trust relationship from other legal relationships. If the  
17 common law is to be changed or abrogated by statute, the legislature must do so expressly  
18 or by necessary implication; absent a clear manifestation of legislative intent to abrogate the  
19 common law, the Supreme Court interprets statutes “with every intendment in favor of  
20 consistency with the common law.” *Pleak v. Entrada Property Owners' Ass'n*, 207 Ariz.  
21 418, 422, 87 P.3d 831, 835 (2004). A.R.S. § 12-1201(58) fails this test. Therefore,  
22 Plaintiffs should be allowed to pursue their common law claims.

23 Finally, it would violate the Arizona Constitution to disallow Plaintiffs’ common law  
24 claims. Article 18, § 6 of the Arizona Constitution provides:

25 The right of action to recover damages for injuries shall never be  
26 abrogated ...

27 The Arizona Supreme Court has ruled:

28 article 18, § 6 is an “ ‘open court’ guarantee intended to constitutionalize the  
right to obtain access to the courts...” \*\*\* The language of the provision is to  
be construed broadly and unrestrictively. \*\*\* As such, article 18, § 6 prevents  
abrogation of all common law actions for negligence, intentional torts, strict  
liability, defamation, and other actions in tort which trace origins to the  
common law.

*Cronin v. Sheldon*, 195 Ariz. 531, 538, 991 P. 2d 231, 238 (1999) (citations omitted).

1 For the foregoing reasons, Plaintiff’s motion for a new trial should be granted.

2 **2. The Court’s Ruling Effectively Abrogates Thousands of BMC-85**  
3 **Trusts Thereby Eliminating All Security for Tens of Thousands of**  
4 **Transactions, Thereby Vitiating a Long-standing Federal Mandate**  
5 **Designed to Protect Motor Carriers and Shippers From Dishonest**  
6 **Brokers**

7 The Court has ruled that “Form BMC-85 is not a ‘trust’ under Arizona law.”<sup>1</sup> The  
8 Court did not just rule that the trust fund agreement entered into by Pacific Financial and  
9 Alliance Transportation (“Alliance Transportation Trust”) fails to create a trust relationship  
10 under A.R.S. Title 14, Chapter 1. By dismissing the case in its entirety the Court implicitly  
11 ruled that the Alliance Transportation Trust is not a trust “created pursuant to a statute”  
12 under A.R.S. Title 14, Chapter 11, or under Arizona common law, or even under the terms  
13 of the BMC-85 itself. The Court effectively ruled that Arizona law does not in any way  
14 govern the three-way relationship between brokers located all over, on the one hand  
15 (“trustors”), and a foreign corporation operating in Arizona (Pacific Financial) through a  
16 domestic corporation (Federal Service), on the other (“trustees”), and any motor carrier  
17 entitled to protection from that relationship (“beneficiaries”). The court has basically ruled  
18 that Pacific Financial owes no duties to “beneficiaries” making claims against the trusts  
19 administered by it. Unless the Court intended to rule that trust beneficiaries are without any  
20 rights vis a vis Pacific Financial, it should not have dismissed the complaint.

21 Because the Alliance Transportation Trust explicitly incorporates Arizona law, as do  
22 thousands of other BMC-85 trust fund agreements into which Pacific Financial has entered  
23 as “trustee”<sup>2</sup> (probably affecting tens of thousands of motor carriers and hundreds of  
24 thousands of transactions), the Court’s ruling not only eliminates the security to which the

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25 <sup>1</sup> Defendants’ never cited any case-law supporting their proposition the BMC-85 Trust is a  
26 “liquidating trust and trust for the primary purpose of paying debts.” To the contrary, liquidating  
27 trusts are generally found only in the area of bankruptcy law for the specific purpose of liquidating a  
28 bankruptcy estate. *See, e.g., In re Consolidated Pioneer Mortgage Entities*, 248 B.R. 368 (9th Cir.  
BAP 2000).

<sup>2</sup> See ¶ 2, 15 and 46 of the Plaintiffs’ complaint.

1 motor carriers doing business with Alliance Transportation were entitled, but debilitates a  
2 large portion of the federal trust-as-security program to protect motor carriers and shippers  
3 from outlaw brokers. “[T]he primary purpose of Congress in regulating motor transportation  
4 brokers is to protect carriers and the traveling and the shipping public against dishonest and  
5 financially unstable middlemen in the transportation industry.” *Gray Line Nat’l Tours Corp.*  
6 *v. United States*, 380 F.Supp. 263, 267 (S.D.N.Y.1974). The imposition of a requirement  
7 that brokers be secured and monitored by trustees such as Pacific Financial was designed to  
8 curb such abuses. Thus, in “adopting final rules that authorize property brokers to establish  
9 trust funds as an alternate security to surety bonds,” the Interstate Commerce Commission  
10 stated:

11 We believe broker surety bonds and trust fund agreements will protect motor  
12 carriers and the shipping public against dishonest and financially unstable  
13 brokers with minimal government interference in the business dealings  
14 between brokers, on the one hand, and shippers and carriers, on the other. \*\*\*  
15 Surety companies, for example, thoroughly investigate a bond applicant as to  
16 reputation, integrity, business ability, and financial stability. We expect  
17 financial institutions to similarly investigate a broker before entering a trust  
18 agreement with the Broker. The possibility of questionable brokers preying on  
19 shippers and carriers is thereby all but eliminated.

20 Property Broker Security for the Protection of the Public, 4 I.C.C.2d 358, 1988 WL 225581  
21 (1988). Now, because of the precedential import of the Court’s ruling on a matter of first  
22 impression, not one of the tens of thousands of shippers and motor carriers doing business  
23 with brokers, purportedly secured by Pacific Financial, can have any confidence that Pacific  
24 Financial is or will be answerable to anyone for misfeasance and nonfeasance in handling  
25 their claims against “trustor” brokers. Perhaps inadvertently, the Court has effectively  
26 undercut, rather than enforced or enhanced, this important federal remedial scheme.

27 Moreover, because the federally mandated BMC - 85 trust provides the *raison d’etre*  
28 for Defendants to market such trusts out of the State of Arizona, there is now a serious  
question as to whether Defendants can legitimately advertise themselves as a responsible  
issuer of such Trusts – or even engage in the Trust business at all. Importantly, these Trusts

1 have been promulgated to protect shippers and carriers as intended beneficiaries. Defendants  
2 have availed themselves of the federally regulated privilege of marketing such trusts with  
3 the auspices of honoring their duties to the beneficiaries. But if these beneficiaries cannot  
4 seek redress from Arizona courts for Defendants' negligence, then the trusts they endorse  
5 are essentially a sham.

6 Finally, most trusts in which the corpus is money require the trustee to make  
7 payments. Many such payments satisfy debts. But the mere payment of debts by a trustee  
8 does not render them any less "trusts" under Arizona law. For example, a trust requiring the  
9 trustee to use the trust res for the payment of a beneficiary's college tuition, expenses and  
10 debts would clearly have a "primary purpose of paying debts." Under Defendants' theory of  
11 what constitutes a "trust for the primary purpose of paying debts," and the Court's ruling,  
12 because the college-expense trust is not a "trust" under Arizona law, the trustee could  
13 misapply trust assets without fear of facing accountability. Such a result would establish a  
14 precedent disrupting an untold number of trust relationships in Arizona. Yet, that is the  
15 result the Defendants' theory will have accomplished unless it is rectified by the Court  
16 recognizing a right to redress under Arizona statute and/or common law.

17 **3. The Terms of the Trust Require that Plaintiffs be Allowed**  
18 **Recourse under Arizona Law**

19 Plaintiffs should be afforded a new trial to demonstrate that Arizona law must allow  
20 them redress with respect to Defendants' wrongful and injurious acts and omissions—  
21 whether by statute, by common law, or by equity. First the BMC-85 trust fund agreement  
22 executed by Pacific Financial and Alliance Transportation specifies that it "*shall be*  
23 *governed by the laws in the State of Arizona*, to the extent not inconsistent with the rules and  
24 regulations of the FMCSA." (Emphasis added.) The Alliance Trust also defines an  
25 Arizona-trust-relationship with Plaintiffs as beneficiaries. Again, it is well settled that "[t]he  
26 essential elements of a trust are a competent settlor and a trustee, clear and unequivocal  
27 intent to create a trust, ascertainable trust res, and sufficiently identifiable beneficiaries."  
28 *Golleher, Lane Title and Trust Co., Jabczynski.*

1 Arizona-trust-relationships, the enforcement of the duties explicit and implicit in the  
2 Alliance Trust document, can be redressed under Arizona Revised Statutes, Title 14.  
3 Arizona-trust-relationships can also be redressed under the common law.<sup>3</sup> And, plaintiffs  
4 submit that Arizona-trust-relationships can also be redressed under the court’s inherent  
5 equitable authority. By dismissing Plaintiffs’ entire complaint on the grounds that the Form  
6 BMC-85 is “not a ‘trust’ under Arizona law....,” the Court denied Plaintiffs any and all  
7 redress – period. This defeated the express intentions of the parties to allow redress – of  
8 some form - under Arizona law. It also defeated the federal policy underlying the statutory  
9 mandate requiring such trusts by disallowing redress – in some form - under Arizona law.<sup>4</sup>  
10 Disallowing any redress for Defendants’ violation of their duties the trust is surely  
11 “inconsistent with the rules and regulations of the FMCSA.” Based on the Court’s ruling,  
12 brokers in Arizona can commit any negligence or breach of fiduciary duty under a BMC-85  
13 trust, and get away with it - the courthouse doors will be closed to their victims. This is a  
14 patently unconscionable result. In sum, the complaint should not have been dismissed. The  
15 complaint alleges a trust countenanced by Arizona common law, even if not a trust  
16 governed by A.R.S. § Title 14.

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18  
19  
20 <sup>3</sup> Arizona common law provides undeniable redress with respect to Plaintiffs’ claims. *See*  
21 *Bulla v. Valley Nat. Bank of Phoenix*, 82 Ariz. 84, 89, 308 P.2d 932, 935 (1957) (“Generally, the  
22 powers and duties of a trustee are measured by the terms of the instrument creating the trust and in  
23 the performance of these duties, he must in good faith protect the interests of all the beneficiaries  
24 and exercise the care and diligence which an ordinary prudent person under the circumstances  
25 would exercise in the management of his own affairs.”); and *Lane Title & Trust Co. v. Brannan*,  
103 Ariz. 272, 278, 440 P.2d 105, 111 (1968) (“...the trustee owes the beneficiary a duty of  
undivided loyalty. Restatement (Second), Trusts ss 170, 206; Bogert, Trusts and Trustees, s 543 (2d  
ed. 1964).”).

26 <sup>4</sup> In remanding the case after Defendants’ improper removal, the U.S. District Court held:  
27 “contrary to defendants’ assertion, there is no federal right of action for plaintiffs’ claims against  
28 them as trustees under 49 U.S.C. 14707(a).” (*OOIDA v. Pacific Financial, Ass’n Inc.*, 2013 WL  
3772656 \*3 (D. Ariz. July 18, 2013). Denying Plaintiffs a right of action under Arizona law would  
therefore lead to an absurd result.

1                   **4. The Claim For a Declaratory Judgment is not Governed by A.R.S.**  
2                   **Title 14 “Definitions” Of “Trust.”**

3                   Count VIII of the original complaint seeks a declaratory judgment to the effect that  
4 Pacific Financial is in the trust business. The claim is governed not by A.R.S. Title 14, but  
5 by A.R.S. Title 6. The operative definitions are different. A.R.S. § 6-851 *Definitions*  
6 provides:

7                   A. In this chapter, unless the context otherwise requires:

8                   1. “Trust business” means the holding out by a person to the public at large by  
9 advertising, solicitation or other means that such person is available to act as a  
10 fiduciary in this state and accepting and undertaking to perform the duties as  
such fiduciary in the regular course of his business.

11 Title 14 definitions by their explicit terms do not apply to Title 6 issues. A.R.S. § 14-1201  
12 *Definitions* starts off as follows: “**In this title**, unless the context otherwise requires:....”  
13 (Emphasis added.) As set forth above, the BMC-85 trust fund agreement establishes an  
14 Arizona-trust-relationship, whether or not it also establishes an Arizona-trust-statutes-  
15 relationship. It is error to dismiss the declaratory judgment claim without addressing its  
16 merits under A.R.S. Title 6.

17                   **CONCLUSION**

18                   For the foregoing reasons Plaintiffs request that the Court grant their motion for a  
19 new trial.

20                   DATED this 17<sup>th</sup> day of December, 2013.

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