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12 SUPERIOR COURT OF ARIZONA  
13 MARICOPA COUNTY

14 ARTIFFANY GRAHAM-PAYNE, RN; et al., )  
15 Plaintiffs, )  
16 vs. )  
17 )  
18 )  
19 )  
20 ARIZONA STATE BOARD OF NURSING, et al., )  
21 Defendant. )

Case No. CV2010-053962

PLAINTIFFS' RESPONSE TO DEFENDANT'S  
MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

(Assigned to the Honorable  
Michael R. McVey)

22 I. BACKGROUND

23 Defendant Nursing Board is charged with the duty to know and objectively enforce its  
24 own statutes. For over ten years, Defendant knowingly and with gross negligence, violated the  
25 very statutes it employed against the Plaintiffs, by requiring Plaintiffs to pay for costly  
investigatory evaluations. During the investigation of complaints against Plaintiffs, Defendant  
issued "Interim Orders" for Plaintiffs to undergo and pay for evaluations. In every Interim  
Order and accompanying cover letter, Defendant threatened Plaintiffs with disciplinary action if  
they failed to undergo and pay for the evaluations. The law provided NO basis or authority for  
Defendant to require Plaintiffs to pay for the evaluations. This absence of legislative authority  
was acknowledged by Defendant on April 19, 2010, as a result of a lawsuit in Maricopa County  
Superior Court. (Slusser et al. v. Arizona State Board of Nursing, Case No. LC-2010-000300-  
001DT).

1 This lawsuit seeks reimbursement for Plaintiffs' evaluation costs. Defendant is not  
2 shielded by absolute immunity because its actions (1) were investigatory, not judicial; and (2)  
3 were operational decisions, not policy decisions. The statute of limitations did not begin to run  
4 until April 19, 2010, when Defendant admitted it acted without authority in requiring Plaintiffs  
5 to pay for the evaluations. Although Defendant purportedly terminated its wrongdoing on that  
6 date, it did not even offer to reimburse those already financially damaged. Obtaining  
7 reimbursement is the basis of this very real, justiciable controversy.

## 8 II. LEGAL ARGUMENT

9 Motions to Dismiss are not favored. In reviewing motions to dismiss for failure to state  
10 a claim, the facts alleged in the complaint are presumed true and dismissal is appropriate *only*  
11 *if*, as a matter of law, the plaintiff would not be entitled to relief on any interpretation of those  
12 facts. *Cullen v. Koty-Leavitt Insurance Agency, Inc.*, 216 Ariz. 509, 168 P.3d 917, 923 (App.  
13 2007), citing *Doe v. State*, 200 Ariz. 174, ¶ 2, 24 P.3d 1269, 1270 (2001).

### 14 A. Governmental Liability is the Rule and Immunity is the Exception.

#### 15 1. Plaintiffs' Claims are NOT Barred by Absolute Immunity.

16 Absolute immunity under the "licensing and regulating" clause of the immunity statute  
17 does not apply because issuing interim orders for investigatory evaluations did not involve the  
18 "determination of fundamental governmental policy", required by A.R.S. § 12-820-01(B)(3).<sup>1</sup>  
19 Defendant failed to include this germane portion of the statute. Licensing and regulation must  
20 involve the "determination of fundamental governmental policy."

21 Defendant glossed over *Doe v. State*,<sup>2</sup> the seminal case that defines when licensing and  
22 regulation involves a determination of fundamental governmental policy, and details the  
23 legislative history of governmental immunity in Arizona. *Doe v. State*, 200 Ariz. 174, 24 P.3d  
24 1269 (2001). In *Doe*, the Plaintiff sued the State for negligently issuing a teaching certificate.  
25 The trial court granted the State's Motion to Dismiss based on absolute immunity and the Court  
of Appeals affirmed. Our Supreme Court reversed, explaining the boundaries of governmental  
immunity in A.R.S. §§ 12-820 to 12-826, ("the Act"). The **purpose and intent of the Act** states  
that "**the public policy of this state [is] that public entities are liable for acts and omissions of**  
**employees in accordance with the statutes and common law of this state.**" Accordingly,

1 governmental liability is the rule in Arizona and immunity is the exception.<sup>3</sup> **Therefore,**  
2 **immunity provisions are construed narrowly.**<sup>4</sup>

3 Absolute immunity for judicial and legislative functions is distinguished from absolute  
4 immunity for administrative functions. See A.R.S. § 12-820.01. "Licensing and regulation" is an  
5 "administrative function." The statute immunizes **only administrative functions that involve**  
6 **"the determination of fundamental governmental policy."**<sup>5</sup> For Defendant to receive absolute  
7 immunity, "fundamental governmental policy is the element which, first and foremost, must  
8 [have been] present in the decision making process." Included are "such matters as . . . a  
9 decision as to the direction and focus of an entire regulatory scheme," but **not operational**  
10 **actions and decisions within that regulatory scheme.**<sup>6</sup>

11 Defendant was not deciding the 'direction and focus' of an entire regulatory scheme  
12 when it required Plaintiffs to undergo and pay for investigative evaluations.<sup>7</sup> Rather, it was  
13 processing investigations of complaints against Plaintiffs according to established procedures.  
14 It then took operational actions (requiring Plaintiffs to pay for evaluations), within its regulatory  
15 scheme. These actions did not involve the determination of fundamental governmental policy,  
16 and did not determine as a matter of policy that all licensees under complaint investigations  
17 would undergo evaluations at the licensees' expense. If such a policy existed, in any case,  
18 Defendant did NOT have statutory authority to support it.<sup>8</sup>

19 Defendant selectively quoted from the *Doe* case, failing to include the pertinent  
20 language that "absolute immunity extends to the regulation and licensing of a profession as a  
21 whole, rather than to a decision to grant a license to a particular member of that profession.  
22 Cf. *Fidelity Sec. Life Ins. Co.*, 191 Ariz. at 225 ¶ 11, 954 P.2d at 583 ¶ 11 (noting that the statute  
23 provides absolute immunity for decisions "as to the direction and focus of an entire regulatory  
24 scheme"). *Doe*, 24 P.3d 1273. Defendant's actions of illegally requiring the Plaintiffs to pay for  
25 evaluations was not a decision about the direction and focus of an entire regulatory scheme  
(such as to not issue licenses to felons). Rather, its actions pertained only to Plaintiffs. Our  
Supreme Court stated, "applying the absolute immunity provision to licensing decisions that are  
. . . operational . . . would be inconsistent with the legislature's directive . . . absolute immunity  
[applies] only to decisions affecting 'professions and occupations,' rather than to decisions

1 affecting individual professionals." *Doe*, 24 P.3d 1273. The present case arises from  
2 Defendant's decisions affecting only individual professionals (the member Plaintiffs).

3 Officials who seek absolute exemption from liability for illegal conduct bear the burden  
4 of showing that public policy requires an exemption of that scope. *Butz v. Economou*, 438 U.S.  
5 478, 506 (1978). Allowing an immunity defense for certain governmental actions must  
6 outweigh the importance of a damages remedy to protect citizens. The balance in this case is  
7 against Defendant for acting illegally for 12 years, causing substantial financial damages to the  
8 unsuspecting Plaintiffs.

9 Defendant's actions were not related to the "licensing and regulation" function as a  
10 whole, and did not "determine fundamental governmental policy." Defendant should be held  
11 responsible for its illegal actions and the resulting damages Plaintiffs suffered. To hold  
12 otherwise is contrary to law and would absolve Defendant of any responsibility for illegal  
13 actions that it was fully capable of controlling through basic risk management practices, such as  
14 reading and complying with its statutes, and obtaining and following competent legal advice.<sup>9</sup>

15 The Defendant enjoys NO immunity.

16 2. Plaintiffs' claims arise from Defendant's Investigative, not Judicial,  
17 Function.

18 Absolute "Judicial" Immunity does NOT apply, as Defendant was performing an  
19 Investigative Function. Defendant issued these orders for evaluations during its *investigation* to  
20 obtain information, akin to issuing subpoenas.<sup>10</sup> There is no statutory requirement for  
21 Defendant to issue or vote on an Interim Order for investigatory evaluations. The phrase  
22 "interim order" does not even appear in Defendant's statutes or rules. A.R.S. § 32-1601 *et seq.*  
23 Using this "interim order" procedure enabled Defendant to then threaten nurses with  
24 disciplinary action if they did not comply with "a Board order".<sup>11</sup>

25 Defendant's authority to require investigatory evaluations is set forth in the  
"investigation" paragraphs of its statutes (A.R.S. § 32-1664(A-F)). The act of obtaining fact-  
gathering evaluations during investigations does not transform the process of obtaining them  
to "judicial." This is a regulatory task that is part of an administrative function as stated in  
A.R.S. § 12-820.01(B)(3). Without the accompanying "determination of a fundamental  
governmental policy" requirement, "regulating" does not qualify for absolute immunity (See

1 Governmental Liability/Immunity Rule Section, *infra*). Rather, the regulatory task of gathering  
2 information during investigations **precedes** possible “judicial” action.<sup>12</sup> “Judicial” means “of or  
3 relating to a judgment”.<sup>13</sup> Defendant’s interim orders were not judgments or adjudications.  
4 After completing its investigations, Defendant then made “judicial” determinations whether to  
5 take disciplinary action.

6 **By its own admission and quoting directly from Defendant’s Motion to Dismiss in  
7 another case:**

8 **“ . . . it issued the Interim Order under its general investigation authority . . . it  
9 was not an adjudication, the Board’s Interim Order for the evaluation . . . was  
10 investigatory . . . interim orders . . . issued under an agency’s investigative  
11 authority are not discipline . . . The Board . . . may order evaluations as part of  
12 its *investigation* of whether a disciplinary proceeding is even warranted.”**

13 See Exhibit 1, relevant pages attached (italicized in original, bold added).

14 Moreover, other state agencies characterize evaluations to be part of their investigative  
15 function, not judicial. See *Arizona Board of Medical Examiners v. Superior Court of Arizona In  
16 and For Maricopa County, et. al.*, 922 P.2d 924, 186 Ariz. 360 (App. 1996).<sup>14</sup> As admitted by  
17 Defendant, its illegal interim orders were part of its investigation, not an adjudication. See  
18 Exhibit 1. Accordingly, this case is not subject to dismissal. *Cullen*, 168 P.3d 917, 923.

19 The statutes Defendant cites (1) support Plaintiffs’ position that these evaluations were  
20 part of Defendant’s investigatory function; (2) acknowledge that the ordered evaluations are  
21 part of the investigation; and (3) state that Defendant’s judicial function does NOT begin until  
22 after completing its investigative function.<sup>15</sup> In three of the five cases cited by Defendant to  
23 support judicial immunity, such immunity was denied. The other two cases are factually  
24 distinguishable.<sup>16</sup>

25 Incredibly, despite Defendant’s position set forth in Exhibit 1, it now claims its  
investigatory actions are “judicial” because it is required to determine “reasonable cause” for  
the evaluations. First, “reasonable cause” to require the investigatory evaluations is not the  
issue in this case. Illegally requiring Plaintiffs to pay for the evaluations, under the threat of  
disciplinary action, is the issue. (Complaint: ¶¶ 28, 33, 35-38, 40, 72-74, 88). Second,  
Defendant never made a finding of reasonable cause for any of the interim orders.

1 Defendant also claims absolute judicial immunity even if it's willful and wanton conduct  
2 was done maliciously or corruptly. (Citing *Acevedo*, 142 Ariz. at 321)[The Supreme Court  
3 rejected immunity in this case]. Defendant is wrong. It must set forth extraordinary  
4 circumstances and prove that it neither knew, nor should have known, of the relevant legal  
5 standard to support an absolute judicial immunity defense.<sup>17</sup> The appropriate inquiry to  
6 analyze Defendant's immunity claim is to determine whether the law that Defendant violated  
7 was clearly established at the time its actions occurred so that Defendant can fairly be said to  
8 "know" that it had no authority to require Plaintiffs to pay for costly investigative evaluations.  
9 Here, the law at issue has been clearly established since 1997, allowing Defendant only to  
10 require the evaluations, NOT to require Plaintiffs to pay for them. Therefore, the immunity  
11 defense fails, since "a reasonably competent public official should know the law governing his  
12 conduct." *Harlow*, 457 U.S. at 819.

11 **B. Plaintiffs' Claims are Timely.**

12 The only question before the Court as it relates to the statute of limitations is the time  
13 the cause of action accrues. Arizona has long followed the rule that the cause of action accrues  
14 when the plaintiff knows, or in the exercise of reasonable diligence should have known, of the  
15 defendant's unlawful conduct. *Sato v. Van Denburgh*, 123 Ariz. 225, 227, 599 P. 2d 181, 183  
16 (1979)(citations omitted).

17 1. Plaintiffs' Cause of Action Accrued on April 19, 2010.

18 Defendant's assertion that Plaintiffs' claims before August 27, 2009 are time-barred is  
19 wrong. None of Plaintiffs' claims are time-barred. In Arizona, Courts apply the discovery rule,  
20 that a cause of action does not accrue until a plaintiff discovers or should have discovered by  
21 reasonable diligence that he or she has been injured. *Gust, Rosenfeld & Henderson v.*  
22 *Prudential Insurance Company of America*, 182 Ariz. 586, 589, 898 P. 2d 964, 966 (1995). It is  
23 unjust to deprive Plaintiffs a cause of action before they have a basis for determining that a  
24 claim exists, particularly when "[t]he injury or the act causing the injury, or both, have been  
25 difficult for the plaintiff to detect." *Gust, Rosenfeld & Henderson* at 589, 967. Likewise, the  
discovery rule applies to lawsuits against public entities. The discovery rule tolls limitations  
"until the plaintiff possesses a minimum knowledge sufficient to recognize that a wrong

1 occurred and caused injury." *Ritchie v. Krasner*, 221 Ariz. 288, 304, 211 P. 3d 1272, 1288 (App.  
2 2009)(citing *Walk v. Ring*, 202 Ariz. 310, 316, 44 P. 3d 990, 996 (2002)).

3 Here, from September 1997 until April 19, 2010, Defendant engaged in unlawful  
4 conduct: requiring Plaintiffs to pay for evaluations under threat of discipline. (Complaint: ¶¶  
5 30-41). Defendant lacked legal authority to do this. *Id.* On April 19, 2010, Defendant admitted  
6 its wrongdoing and its unlawful conduct, and for the first time, stated it lacked legal authority  
7 to mandate that Plaintiffs pay for the evaluations. (Complaint: ¶¶ 79, 80, 81, 82). Further  
8 substantiating April 19, 2010 as the "accrual date" is a statement in Defendant's July 9, 2010  
9 pleading that it was "unaware of these statutes." (Complaint: ¶¶ 89, 94, 95; *See* Exhibit 2,  
10 relevant pages attached). In Exhibit 2, Defendant purportedly relied on its implied authority  
11 and the lack of a successful challenge as the justification for issuing illegal mandates to  
12 Plaintiffs. *Id.*

13 When questioned about its authority in 2005, Defendant claimed its authority came  
14 from the fact that its statutes do not prohibit it ordering licensees to pay for evaluations. *See*  
15 Exhibit 1. In the 2005 motion, Defendant used statutory silence as a basis to order licensees to  
16 pay for evaluations. On the contrary, Defendant needed statutory authority, not statutory  
17 silence, to order licensees to pay for evaluations. (Complaint: ¶¶ 85-87). All other agencies  
18 that order licensees to pay for these evaluations have the specific statutory authority to do so.  
19 (Complaint: ¶ 96; A.R.S. §§ 32-1451.C-Medical Board, 32-924.C-Chiropractic Board, 32-1551-  
20 Naturopathic Board, 32-2081-Psychology Board, 32-3442.J-Occupational Therapy Board, and  
21 32-3281.B-Behavioral Health Board).

22 Considering Defendant's inconsistent application and erroneous interpretation of its  
23 own statutes, *Plaintiffs* certainly cannot be held to know that Defendant's conduct was  
24 unlawful until Defendant admitted it. (Complaint: ¶¶ 89, 90, 91). Plaintiffs' complaint  
25 sufficiently alleges facts establishing that they could not have known of Defendant's unlawful  
conduct before Defendant admitted it. This is abundantly clear since Defendant claimed *it* did  
not even know it was violating the law! *See* Exhibit 2. It is preposterous to suggest that  
Plaintiffs, in their inferior position, would know and understand the statutes that the Defendant  
has a duty to know and properly enforce. (Complaint: ¶¶ 26-29, 39-54, 92-93). Public policy  
demands that Defendant knows and follows the laws and rules that govern it.

1 In 2005, Defendant was questioned about the precise issue raised in this lawsuit.  
2 (Complaint: ¶¶ 55-71). Rather than examine the statutes at that time, obtain legal advice, or  
3 stop the illegal practice, Defendant continued the unlawful conduct. *If* Defendant did not know  
4 it was acting unlawfully, by virtue of continuing its unlawful conduct, Plaintiffs certainly did not  
5 know, nor could they have known. Plaintiffs correctly expected its regulatory board to know  
6 and follow its laws. Therefore, **discovery of Defendant's wrongdoing did not occur until April**  
7 **19, 2010**, when Defendant admitted it lacked authority to order nurses to pay for costly  
8 evaluations, and when it rescinded the outstanding Interim Orders.<sup>18</sup>

9 Plaintiffs should be allowed to pursue their claims to deter Defendant from violating the  
10 law to the damage of innocent licensees.

11 2. All Interim Orders Issued Before April 19, 2010 are the Basis of this  
12 Lawsuit.

13 Defendant asserts that Plaintiffs did not allege dates for the Interim Orders in their  
14 Complaint. These dates are irrelevant because *all* Interim Orders issued before April 19, 2010  
15 (that were not rescinded) are the basis of this lawsuit.

16 In its Motion to Dismiss, Defendant presented nine exhibits outside the complaint. If a  
17 party presents matters outside the Complaint that are not excluded by the Court, a motion to  
18 dismiss for failure to state a claim upon which relief can be granted is treated as a summary  
19 judgment motion under Rule 56. In that situation, all parties shall be given reasonable  
20 opportunity to present all material made pertinent to such a motion by Rule 56. *See* Ariz. R.  
21 Civ. P. Rule 12(b). Because Defendant presented material outside the Complaint (Motion to  
22 Dismiss Exhibits 1 through 9), the Court should not consider these Exhibits or Defendant's  
23 claims about them, in ruling on the Motion to Dismiss. Exhibits 1 through 9 (Interim Orders for  
24 9 of the Plaintiffs) are not a matter of public record and Defendant failed to cite authority that  
25 Interim Orders are public records. The Interim Orders are part of Defendant's investigations;  
therefore, they are confidential by statute.<sup>19</sup> In addition, Exhibits 1 through 9 are incomplete in  
that Defendant excluded the cover letters transmitting the Interim Orders that threatened  
Plaintiffs with disciplinary action if they failed to comply with the Interim Orders. (Complaint:  
¶¶ 33-38). Ironically, Defendant threatened disciplinary action if Plaintiffs violated "the nurse

1 practice act," the same act Defendant admitted on April 19, 2010 that it had violated by  
2 requiring Plaintiffs to pay for the evaluations since 1997!

3 3. Plaintiffs Timely Filed Their Notice of Claim.

4 Plaintiffs served their Notice of Claim in full compliance with A.R.S. § 12-821.01 and  
5 controlling case law. *City of Phoenix, et al. v. The Honorable Kenneth L. Fields, Judge of the*  
6 *Superior Court of the State of Arizona, in and for the County of Maricopa (Perez), et al.*, 219 Ariz.  
7 568, 201 P.3d 529 (2009), and *Backus v. State of Arizona, et al.*, 220 Ariz. 101, 203 P.3d 499  
8 (2009). Contrary to Defendant's assertion, the Notice of Claim was filed on behalf of two  
9 specific individuals, "each individually **and as anticipated class representatives of all others**  
10 **similarly situated (the "Class").**" (Complaint: ¶¶ 98-103). See Motion to Dismiss, Exhibit 10,  
11 which *is* a public record.

12 C. **Plaintiffs Stated Multiple Claims Upon Which Relief Can Be Granted.**

13 1. The Justiciable Controversy is Defendant's Failure to Reimburse  
14 Plaintiffs after Illegally Ordering and Compelling them to Pay for  
15 Evaluations under the Threat of Disciplinary Action.

16 This lawsuit has NOTHING to do with the Interim Orders Defendant rescinded on April  
17 19, 2010. The nurses against whom Defendant issued Interim Orders that were rescinded on  
18 April 19, 2010, are not parties to this lawsuit because they had not yet paid for evaluations.  
19 Defendant states, "Plaintiffs seek reimbursement for the costs of the evaluations that were  
20 previously ordered by the Board. Plaintiffs concede that as of April 19, 2010, the board  
21 "rescinded all outstanding" Interim Orders." (Motion to Dismiss, pg. 6, lines 24-26). This is  
22 false. Plaintiffs already paid for the evaluations to comply with the interim orders to avoid  
23 license discipline. So, their interim orders were NOT "outstanding" and were NOT "rescinded".

24 Plaintiffs are seeking reimbursement for the unlawful Interim Orders with which they  
25 had already complied, because of Defendant's threats and misrepresenting the applicable facts  
and law. Plaintiffs need declaratory relief because Defendant did not fully redress the harm  
resulting from its unlawful actions. A Court order is necessary to ensure Defendant will not  
repeat its unlawful conduct and to reimburse Plaintiffs its monetary damages suffered because  
they paid for the evaluations. Defendant failed to respond to Plaintiffs' reimbursement

1 requests sent by letter and the Notice of Claim. (Complaint: ¶¶ 84, 101). Therefore, this suit  
2 was brought.

3 2. Plaintiffs' Claims for Reimbursement of Payment made in Compliance  
4 with the Illegal Interim Orders are Not Moot.

5 "Mootness" exists when changes in factual circumstances no longer require a judicial  
6 decision. *Chambers v. United Farm Workers Organizing Committee*, 25 Ariz. App. 104, 106, 541  
7 P. 2d 567, 569 (1975). Here, there were no changes in factual circumstances to Plaintiffs, only  
8 to other licensees whose Interim Orders were rescinded on April 19, 2010. Plaintiffs require a  
9 judicial decision ordering Defendant to reimburse them.<sup>20</sup>

10 Although Defendant rescinded interim orders that had not yet been complied with,  
11 there is no judicial order in place to prevent it from recurrence of the unlawful conduct,  
12 especially to the unwary. Defendant acted in blatant disregard of the law for over 10 years.  
13 The remedy is not, as Defendant claims, for this Court to rescind the interim orders that  
14 Defendant already rescinded. The remedy is an order that states and declares, *inter alia*, that  
15 (1) Defendant must fully reimburse Plaintiffs; (2) Defendant lacks authority to require licensees  
16 to pay for evaluations; (3) Defendant lacks authority to take disciplinary action if licensees do  
17 not pay for evaluations; and (4) Defendant's actions constituted fraud or mistake and gross  
18 negligence.

19 The fact that Plaintiffs complied with the interim orders and paid for the evaluations  
20 does not make this lawsuit moot. For Plaintiffs, the alternative was to suffer license discipline  
21 for non-compliance. Notwithstanding, the court may decide an issue of law despite its  
22 mootness if the matter is of considerable public importance. *State v. Superior Court*, 104 Ariz.  
23 440, 441, 454 P. 2d 982, 983 (1969). It is of considerable public importance for Defendant to be  
24 ordered that it shall only act within its statutory authority. Defendant admittedly acted  
25 unlawfully and in excess of its legal authority. Plaintiffs' request for special action relief is  
appropriate.

3. Plaintiffs' Fraud Claim Alleges Defendant Misrepresented the Law and the  
4 Facts.

Contrary to Defendant's assertion, Plaintiff did allege a misrepresentation of facts, and  
law. Plaintiffs allege that Defendant issued Interim Orders and cover letters that

1 misrepresented the facts, *to wit*, that Plaintiffs had to pay for the evaluations, and that  
2 Defendant would take disciplinary action if Plaintiffs failed to do so.<sup>21</sup> Defendant's assertion  
3 that Plaintiffs could not have been misled because "the law presumes Plaintiffs knew the law  
4 which they allege is clear and unambiguous," once again shows Defendant's continuing pattern  
5 of misrepresentation. (Motion to Dismiss, p. 9, lines 7-8).<sup>22</sup>

6 Defendant is charged with a duty to know and properly enforce its statutes, not  
7 Plaintiffs. (Complaint: ¶¶ 26-29, 42-54). Defendant cannot have it both ways by (1) claiming  
8 Plaintiffs had a duty to know that Defendant was violating the law, and (2) claiming Defendant,  
9 itself, has no liability for its illegal conduct due to ignorance of its own statutes. As shown by its  
10 years of issuing illegal mandates to Plaintiffs under the threat of discipline, Defendant either  
11 knew the law and recklessly abandoned it, so that Plaintiffs would pay for costly evaluations, or  
12 Defendant was blatantly ignorant of the law. (Complaint: ¶¶ 55-71). Either way, Defendant's  
13 years of cost savings by illegally forcing Plaintiffs to pay for the evaluations should come to an  
14 end, and what Defendant saved by its actions must now be reimbursed to Plaintiffs with  
15 interest. If Defendant knew the law, as it claims Plaintiffs should, then its conduct was  
16 fraudulent and grossly negligent because it chose not to follow it. (Complaint: ¶¶ 73-76). If  
17 Defendant was ignorant of the law, it cannot hold Plaintiffs to a higher standard with regard to  
18 knowledge of that same law.

19 Each element of fraud cited by Defendant in *Echols v. Beauty Built Homes, Inc.*, has been  
20 pled by Plaintiffs, including allegations of multiple misrepresentations of fact; namely: (1) the  
21 fact that Defendant misrepresented its interpretation of the law by ordering Plaintiffs to pay for  
22 evaluations; (2) the fact that Defendant did not know, should have known, or knew and ignored  
23 its lack of legal authority to order Plaintiffs to pay for evaluations; (3) the fact that Defendant  
24 misrepresented to Plaintiffs that their failure to comply with the unlawful orders would result in  
25 violations of the nurse practice act; (4) the fact that Plaintiffs were ignorant that Defendant's  
representations were false; (5) the fact that Plaintiffs had a right to rely on Defendant to know  
and adhere to the laws it enforces; (6) the fact that Defendant threatened discipline for non-  
compliance with the unlawful orders; and (7) the fact that Plaintiffs were financially injured.  
(Complaint: ¶¶ 33-36, 44-46, 56-58, 60-62, 67, 69-72, 74, 89, 115-130). And, Defendant

1 continued to misrepresent its interpretation of the law even after being questioned in 2005  
2 about its legal authority.

3 4. Gross Negligence Does Not Require Bodily Harm

4 Defendant's claim that "bodily harm" is needed for gross negligence to succeed is  
5 frivolous. Gross negligence can arise from tort or contract, resulting in many forms of harm as  
6 the basis for a damage award, including financial harm. *Firstar Metropolitan Bank & Trust v.*  
7 *F.D.I.C.*, 964 F.Supp. 1353 (D.Ariz., 1997).<sup>23</sup> See also *Edwards v. Gerstein et al.*, 237 S.W.3d 580,  
8 581 (2007). [The Missouri Supreme Court denied immunity because of gross negligence, after  
9 which a jury awarded \$8,998,225.20 against the Missouri Chiropractic Board Members for its  
10 gross negligence in handling a complaint against a licensee, which did not involve bodily harm.  
11 *Edwards v. Gerstein et al.*, *Cole County Circuit Court*, Case 05AC-CC01021-01.] Contrary to  
12 Defendants statement that plaintiffs alleged *only* that they were *ordered to pay money*<sup>24</sup>,  
13 Plaintiffs alleged they *did pay monies* due to Defendants' grossly negligent actions. Plaintiffs  
14 suffered damages in the form of those monies paid. (Complaint: ¶¶ 31, 35, 38, 72, 76, 97, 102,  
15 109, 139, 140, 141).

16 Defendant misstates the *Walls* case for authority that a "gross negligence" claim  
17 requires an allegation of bodily harm. (Motion to Dismiss, pg 9, lines 16-21). The *Walls* Court  
18 held that if there is no evidence from which a reasonable juror could find the defendant was  
19 grossly negligent, summary judgment is appropriate; not that a gross negligence claim requires  
20 an allegation of bodily harm. *Walls v. Ariz. Dep't of Public Safety*, 170 Ariz. 591, 826 P.2d 1217,  
21 1222 (App. 1991). Moreover, *Walls* permits Plaintiffs' gross negligence claims to be decided by  
22 a jury.<sup>25</sup> Defendant admitted violating the law by requiring Plaintiffs to pay for costly  
23 evaluations. Plaintiffs' Complaint sufficiently alleges Defendant's breaches of its duties to  
24 know, follow, and enforce the laws relating to the duties and responsibilities of public officers,  
25 which constitutes gross negligence.<sup>26</sup> (Complaint: ¶¶ 37-78, 80, 82-83, 92, 131-141). Plaintiffs  
are entitled to reimbursement for the resulting financial harm.

III. **CONCLUSION**

For the foregoing reasons, Defendant's Motion to Dismiss should be denied in its  
entirety.

DATED this 4<sup>th</sup> day of February, 2011.

1 Original filed, and  
2 Copy mailed 4<sup>th</sup> day of February, 2010,  
3 to:  
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BY

  
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5  
6 <sup>1</sup> A public entity shall not be liable for acts and omissions of its employees constituting . . . The exercise of an  
7 administrative function involving the determination of fundamental governmental policy.  
8 B. The determination of a fundamental governmental policy involves the exercise of discretion and shall include,  
9 but is not limited to . . .  
10 3. The licensing and regulation of any profession or occupation.

11 <sup>2</sup> See Motion to Dismiss, page 5, line 23.

12 <sup>3</sup> E.g., *Fidelity Sec. Life Ins. Co.*, 191 Ariz. 222, 225-26 ¶¶ 7, 11-12, 954 P.2d 580, 583-84 (1998). In *Fidelity*, the  
13 Supreme Court denied absolute immunity because the state was negligent in implementing its regulatory scheme  
14 by certifying the company at issue. This was an "operational decision", not fundamental policymaking.

15 <sup>4</sup> *Doe*, 24 P.3d at 1271, citing 1984 Ariz. Sess. Laws ch. 285, § 1; *Arizona Governmental Tort Claims Act*, Governor's  
16 Commission on Governmental Tort Liability, December 16, 1983, pgs 8-9, 18, 19 ("Commission Report"); *Backus v.*  
17 *Ariz. Dept. of Corrections*, 220 Ariz. 101, 203 P.3d 499, 504 (2009) (emphasis added).

18 <sup>5</sup> A.R.S. § 12-820.01.A.2 (1992) (emphasis added). But immunity is not extended farther than necessary. *Doe*, 24  
19 P.3d at 1271.

20 <sup>6</sup> The legislature intended to provide absolute immunity only for fundamental governmental policy determinations  
21 involving the licensing of professions and occupations. Under that interpretation, the State's decision to require  
22 that teachers be certificated, and decisions establishing certification requirements, developing an application, and  
23 establishing procedures for processing applications and investigating applicants receive absolute immunity  
24 because they involve the determination of fundamental governmental policy. **The processing of a particular  
25 application in accordance with established procedures; however, does not involve the determination of  
fundamental governmental policy.** *Doe*, 24 P.3d at 1271-72 (citation omitted and emphasis added).

<sup>7</sup> The *Bird v. State* case cited by Defendant is distinguishable from the present case because *Bird* involved a  
fundamental governmental policy that applied to *all* licensees. In the present case, Defendant required Plaintiffs  
to pay for investigative evaluations as part of its investigation of each of them as *individuals* without legal authority  
to do so. 170 Ariz. 20, 821 P.2d 287 (App. 1991).

<sup>8</sup> Many courts denied absolute immunity because:

(1) Conduct did not involve a policy decision, but an operational one [See e.g. *Estate of Jacob Braden v. State of*  
*Ariz.*, 1 CA-CV 08-0764 (App. 2010), holding the state was NOT entitled to absolute immunity because it was not  
making a policy decision. See also *Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 166, 920 P.2d 41,  
46 (App. 1996) in which a decision by the district board to construct a playground and allocate funds for that  
purpose was a policy decision protected by immunity, but deciding what pieces of play equipment to have was an  
operational decision not entitled to immunity]; or

(2) Conduct was not objectively reasonable [See e.g. *Estate of Jacob Braden v. State of Ariz.*, 1 CA-CV 08-0764 (App.  
2010), holding the state was NOT entitled to absolute immunity because it was not making a policy decision, but  
negligently implemented a policy decision. See also *County of La Paz v. Yakima Compost Co.*, 1 CA-CV 08-0759  
(App. 2010), holding the County was NOT absolutely immune from liability because its breaches of obligations

1  
2 under an Agreement were flawed operational acts made during the implementation of the County's policymaking  
3 decision to enter into the Agreement. *See also Diaz v. Magma Copper Co.*, 190 Ariz. 544, 554, 950 P.2d 1165,  
4 1175 (App. 1997), holding that while absolute immunity shields policy decisions, it does not extend to the  
5 negligent implementation of those policy determinations.]

6  
7 <sup>9</sup> Commission Report at pg 13, citing *Grimm v. Arizona Bd. of Pardons & Paroles*, 115 Ariz. 260, 564 P.2d 1227  
8 (1977).

9 <sup>10</sup> Defendant's investigators issue subpoenas under the agency Executive Director's stamped signature to gather  
10 information during investigations, pursuant to A.R.S. § 32-1664(K).

11 <sup>11</sup> Violating a board order is grounds for disciplinary action. A.R.S. §§ 32-1601(18)(i) and 32-1663(D).

12 <sup>12</sup> *See* A.R.S. §§ 32-1606(C) [**following** an investigation, the Board may take disciplinary action], 32-1663(D) [if,  
13 **after** an opportunity for hearing, unprofessional conduct is found, the Board may take disciplinary action], 32-  
14 1664(G)(N) [if, **after** completing an investigation, . . . the board may . . .

15 <sup>13</sup> Black's Law Dictionary, 9<sup>th</sup> Ed., pg 922, (2009).

16 <sup>14</sup> In the Board of Medical Examiners ("BOMEX") case, the psychological evaluation BOMEX had the doctor  
17 undergo as part of its complaint investigation was held to be confidential. , citing A.R.S. § 32-1451.01(C).  
18 Defendant's similar confidentiality statute reads, ". . . records kept by the board as a result of the investigation  
19 procedure . . . are not available to the public and are not subject to discovery in civil or criminal proceedings."  
20 (A.R.S. § 32-1664(L)).

21 <sup>15</sup> *See* Motion to Dismiss, page 3, lines 10-12, "The Board may *investigate* whether a licensee has violated its rules"  
22 and "the Board *investigates* complaints". *See* *Id.*, page 3, lines 21-22, ". . .the *investigation*, includ[es] any ordered  
23 evaluations. . . ". *See* *Id.*, page 3, line 23 to page 4, line 7, where Defendant lists the actions it can take "after  
24 completing its investigation", such as dismissing the complaint or sending it to a hearing. (Emphasis added).

25 <sup>16</sup> In *Butz*, the U.S. Supreme Court rejected absolute immunity in a suit for civil damages against one of the  
President's Cabinet officials. Just because some of the functions a person or agency performs are subject to  
absolute immunity does not make all functions they perform subject to absolute immunity. The U.S. Supreme  
Court stated in this case that there is no absolute immunity if the conduct is not judicial. Judges do not have  
absolute immunity for conduct that is not judicial. *See Butz*, 438 U.S. at 509 (emphasis added).  
*Butz* also rests the burden of justifying absolute immunity on the official asserting the claim. *Id.*, 438 U.S. at 506.  
In order to establish absolute immunity the official must show that the responsibilities of its office embraced a  
function so sensitive as to require a total shield from liability, and that the protected function was being  
discharged when performing the act for which liability is asserted. *Harlow v. Fitzgerald*, 457 U.S. 800, 813, 73  
L.Ed.2d 396, 102 S.Ct. 2727 (1982).

In *Adams v. State of Arizona*, the Court rejected absolute immunity for the investigative and supervisory  
negligence alleged in that case, stating "that where negligence is the proximate cause of injury, the rule is liability  
and immunity is the exception." 185 Ariz. 440, 916 P.2d 1156, 1159 (App. 1996) (citations omitted).

In *Acevedo v. Pima County Adult Probation Department*, judicial immunity was not permitted because the  
probation officers did not act pursuant to the court's directive. A probation officer cannot assert for immunity  
unless the officer is acting pursuant to or in aid of the directions of the court. The evidence indicated that the  
probation officers acted contrary to the court's directive. 142 Ariz. 319, 690 P.2d 38, 41 (1984).

In *Burk v. State of Arizona*, the Court found a court Conciliation Services employee was entitled to judicial  
immunity when she properly performed her court-directed function for the court for its consideration. To find

1  
2 otherwise would chill similarly situated non-judge court personnel from providing independent recommendations  
to a judge for fear of being personally sued. 215 Ariz. 6, 156 P.3d 423, 429 (App. 2007).

3 In *Romano v. Bible*, the Court stated absolute immunity extends to agency officials when they preside  
over hearings, initiate agency adjudication, or otherwise perform functions analogous to judges and prosecutors.  
4 169 F.3d 1182, 1186 (9<sup>th</sup> Cir. 1999), citing *Butz*, 438 U.S. 478, 514-15. Defendant in the present case was not  
performing one of these judicial functions.

5  
6 <sup>17</sup> The public interest in deterring unlawful conduct and compensating victims remains protected by a test that  
focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that  
certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who  
7 suffers injury caused by such conduct may have a cause of action. See *Harlow v. Fitzgerald*, 457 U.S. 800, at 818-19  
(1982).

8 <sup>18</sup> The nurses who were issued Interim Orders that were rescinded on April 19, 2010 are not parties to this lawsuit.

9 <sup>19</sup> See Footnote 14, *infra*.

10 <sup>20</sup> Defendant argues that Plaintiffs did not file special actions while the orders were pending. (Motion to Dismiss,  
11 p. 7, line 18-20). As stated in Section B, *supra*, Plaintiffs did not know, nor could they have known at the time, that  
Defendant's conduct was unlawful. Plaintiffs relied on Defendant's claimed authority and were operating under  
12 Defendant's threat of discipline if Plaintiffs failed to comply with the Interim Orders.

13 <sup>21</sup> Defendant's also assert Plaintiffs only alleged a misrepresentation of the law stating that "misrepresentation of  
the law does not constitute actionable fraud at common law", relying on *Clearley v. Weiser*, 151 Ariz. 293, 295, 727  
14 P. 2d 346, 348 (App. 1986). Defendant's assertion is wrong. First, in *Clearley*, the operable statute was A.R.S. § 44-  
1522(A), the Consumer Fraud Statute. Second, the Consumer Fraud Statute is much broader than common law  
15 fraud. Third, nowhere in the *Clearley* case does the court support Defendant's proposition that misrepresentation  
of the law is not actionable fraud or that Defendant even be required to have knowledge that representations are  
16 false.

17 <sup>22</sup> Defendant also suggests that the law imposes a duty on all persons dealing with public offices to "know the  
extent and limits of their power", citing *Bigler v. Graham County*, 128 Ariz. 474, 477, 626 P. 2 d 1106, 1109 (App.  
18 1981). Defendant, however, failed to properly quote the case. The exact quote is: "Persons dealing with public  
officers are bound, at their peril, to know the extent and limits of their power **AND** no right can be acquired **except**  
19 **that predicated upon authorized acts of such officers.**" (Emphasis added).

20 <sup>23</sup> A Plaintiff can assert claims alleging breach of contract and breach of the contractual covenant of good faith and  
fair dealing as long as they assert gross negligence or willful misconduct . . . the distinction between a tort and  
21 contract claim based on the breach of the implied covenant of good faith and fair dealing is that Plaintiff need not  
demonstrate a special relationship between the parties for a contract claim. *Id.*, at 1358. Defendant and Plaintiffs  
22 herein had a special relationship as regulator and regulated.

23 <sup>24</sup> Motion to Dismiss, page 9, line 20.

24 <sup>25</sup> "Ordinarily, the issue of gross negligence is a question of fact to be decided by the jury . . . In order to present  
such an issue to the jury, gross negligence need not be established conclusively, but the evidence on the issue  
must be more than slight and may not border on conjecture." *Walls*, 826 P.2d 1217, 1222 (citations omitted).

25 <sup>26</sup> If Plaintiffs' gross negligence claim fails, Plaintiffs will seek leave to amend their Complaint to allege facts  
sufficient to support a negligence claim.

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7

8 **IN THE SUPERIOR COUNTY OF THE STATE OF ARIZONA IN AND FOR THE**  
9 **COUNTY OF MARICOPA**

11 MARK ALAN CLOSE )

12 Plaintiff, )

13 vs. )

) Case No.: LC2005-000513-001-DT

14 ) **MOTION TO DISMISS**

15 ARIZONA BOARD OF NURSING, and )  
ALICE GAGNAIRE, RN, MSHA, )  
16 PRESIDENT; KATHY MALLOCH, Ph.D., )  
MBA, RN, VICE-PRESIDENT; THISESA )  
17 CRAWLEY, CRNA, MSHSA, MEMBER; )  
TRISTA CAMPBELL, RN, BSN, MEMBER; )  
18 GREGORY Y. HARRIS, MEMBER; )  
SHARON MOLLEO, LPN, MEMBER; )  
19 KAREN HARDY, RN, MSN, MEMBER; PAT )  
JOHNSON, LPN, MEMBER; in their official )  
20 capacities. , )

21 Defendant. )

22 COMES NOW the Defendants, ARIZONA BOARD OF NURSING, and ALICE  
23 GAGNAIRE, RN, MSHA, PRESIDENT; KATHY MALLOCH, Ph.D., MBA, RN, VICE-  
24 PRESIDENT; THISESA CRAWLEY, CRNA, MSHSA, MEMBER; TRISTA CAMPBELL,  
25

1 the court stated the DOR had the "authority and expertise to make the necessary factual  
2 investigations." And that the "administrative decision whether a person owes taxes is within the  
3 primary jurisdiction of DOR." *Id.* The Court stated that the determination of whether plaintiff  
4 taxpayer was subject to the transaction privilege tax was a factual question that should first be  
5 examined by the agency. The plaintiff "may not preempt the administrative investigation by  
6 rushing to the tax court before all factual questions have been subjected to DOR's audit." *Id.*  
7 Similarly, Plaintiff is seeking to preempt the Board's investigation and hearing processes by  
8 claiming that his conduct does not fall under the Board's jurisdiction. Memorandum at 9 and 10.  
9 But under *Original Apartment Movers*, that question must first be resolved by the Board, not the  
10 Court.

11 Regarding the Board's charge that Plaintiff failed to comply with a Board order, the  
12 Board will afford Plaintiff a remedy through an administrative hearing and, should Plaintiff  
13 remain dissatisfied with the Board's decision after exhausting all his administrative remedies, he  
14 will then have the statutory right to an appeal to the courts through the Administrative Review  
15 Act. A.R.S. § 12-901 *et seq.* Plaintiff has presented no authority to support the Court's usurping  
16 the Board's primary jurisdiction in this case.

### 17 **III. The Interim Order did Not Violate Plaintiff's Due Process Rights**

18 Plaintiff argues that the Board violated his due process by ordering him to undergo a  
19 neuropsychological evaluation through an Interim Order. Complaint at ¶ 10. In essence,  
20 Plaintiff is arguing that due process required the Board to give him some sort of probable cause  
21 hearing before it could issue the Interim Order. Plaintiff is in error

22 The Board's mandate is to protect the public. A.R.S. §§. 32-1606(B)(9) and -1664(E)  
23 authorize the Board to conduct investigations. In order to complete its investigation, the Board  
24 can order mental, physical or psychological examinations. A.R.S. § 32-1664(F) states:  
25

1 For reasonable cause the board may require a licensee of certificate  
2 holder to undergo any combination of mental physical or  
3 psychological examinations or skills evaluations necessary to  
4 determine the person's competence and conduct.

4 Plaintiff errs because he fails to recognize that the Board did not order the evaluation as a  
5 disciplinary sanction in an administrative adjudicative proceeding. Rather, it issued the Interim  
6 Order under its general investigation authority to further identify the nature of the Plaintiff's  
7 difficulty in succeeding in basic nursing skills after several years of education, experience and  
8 remediation. The significance of that difference is that full due process requirements do not  
9 attach to investigations conducted by an agency. See *Hannah v. Larche*, 363 U.S. 420, 442  
10 (1978). See also, *Alexander D. v. State Bd. of Dental Exam'rs*, 282 Cal Rptr. 201, 204, 231 Cal.  
11 App. 3d 92, 95 (1988) (dentist's license to practice is not immediately at stake in an investigatory  
12 proceeding); *Humenansky v. Minn. Bd. Of Med. Exam'rs*, 525 N.W.2d 559 (Minn. App. 1994)  
13 (doctor's license to practice medicine not at stake when ordered to undergo mental and physical  
14 examination). Because it was not an adjudication, the Board's Interim Order for the evaluation  
15 did not in any way place Plaintiff's license in immediate jeopardy. Thus, it was investigatory  
16 and due process did not attach.

17 In support of his argument, Plaintiff cites to several due process cases.<sup>1</sup> The Board does  
18 not disagree that in an actual disciplinary proceeding Plaintiff is entitled to due process.  
19 However, the Board disagrees that any of the disciplinary proceedings cases to which Plaintiff  
20 cites has any relevance to the question presented here because interim orders for

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22 <sup>1</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Comeau v. State Bd. of Dental Exam'rs*, 196 Ariz.  
23 102, 993 P.2d 1006 (App. 1999); *Duel v. Ariz. State Sch. for the Deaf & Blind*, 165 Ariz. 524,  
24 799 P.2d 868 (App. 1990); and, *Webb v. State of Ariz. Bd. of Med. Exam'rs*, 202 Ariz. 555, 48  
25 P.3d 505 (App. 2002).

1 neuropsychological evaluations issued under an agency's investigative authority are not  
2 discipline. The cases are, therefore, irrelevant to whether Plaintiff was entitled to some sort of  
3 probable cause hearing prior to the Board's issuing the Interim Order, as he seems to expect.  
4 Also irrelevant is Plaintiff's citation to *Petersen v. City of Mesa*, 207 Ariz 35, 83 P.3d 35 (2004).  
5 Memorandum at 7. In *Petersen*, the Supreme Court considered whether the city's random drug-  
6 testing program violated the plaintiff's Fourth Amendment rights. The Board does not randomly  
7 apply A.R.S. § 32-1664(F) to its licensees or certificate holders. The Board issued the order after  
8 consideration of the detailed investigative report citing many concerns about the Plaintiff's  
9 difficulties with communication, organization, forgetfulness and processing. Moreover, with  
10 respect to the Board issuing a complaint based upon Plaintiff's failure to comply with the Interim  
11 Order, that is a separate matter, and the Board will afford Plaintiff his due process through an  
12 administrative hearing where Plaintiff presumably would wish to challenge the reasonableness of  
13 the Board's issuing the Interim Order in the first place. Thus, special action is unwarranted.

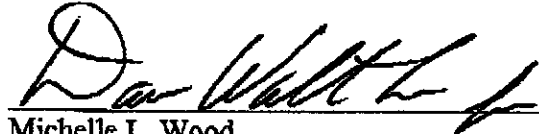
14 Citing to *Ross v. Indiana State Board of Nursing*, 790 N.E. 2d 110 (App. 2003), Plaintiff  
15 also claims that the Board violated his due process rights by requiring him to pay for the  
16 psychological evaluation. Memorandum at 6. While on the surface *Ross* may appear to support  
17 Plaintiff's contention, a closer look at that case reveals major distinguishing factors that make  
18 *Ross* inapplicable here. The first difference is that in Indiana, the nursing board "may order a  
19 practitioner to submit to a reasonable physical or mental examination if the practitioner's  
20 physical or mental capacity to practice is at issue in a disciplinary proceeding." *Ross*, 790 N.E.  
21 2d at 118, citing to Indiana Code Section 25-1-9-7. The Indiana court considered payment for  
22 the evaluation to be the board's responsibility because in a disciplinary proceeding the licensing  
23 board had the burden of proof and could recoup the costs at the end of the disciplinary  
24 proceedings. *Id.* at 120.

1 The Board, however, may order evaluations as part of its *investigation* of whether a  
2 disciplinary proceeding is even warranted. More importantly, the Indiana court recognized that  
3 section 25-1-9-15 of the Indiana Code authorized the nursing board to recover its costs from a  
4 licensee at the conclusion of the hearing, if it imposed disciplinary sanctions. *Id.* The Board has  
5 no such authority or funding provided by its legislation. If the Arizona Legislature wanted the  
6 Board, which regulates some ninety thousand licensees and certificate holders, to pay for each  
7 and every investigatory physical, mental, or drug-abuse evaluation it would have provided  
8 statutory language and funding to do so. To interpret the current language to encompass Board  
9 payment for such evaluations would in real economic terms prevent the Board from fulfilling its  
10 task of protecting the public from unqualified or impaired practitioners.

11 In construing statutes, the court considers the policy behind the statute and the evil it was  
12 intended to remedy. *State v. Korzep*, 165 Ariz. 490, 493, 799 P.2d 831, 834 (1990). Statutes  
13 must be given a sensible construction that accomplishes the legislative intent and avoids absurd  
14 results. *Ariz. Health Care Cost Containment Sys. v. Bentley*, 187 Ariz. 229, 233, 928 P.2d 653,  
15 657 (App. 1996). For the purposes of statutory construction, a result is absurd if it is so irrational  
16 or inconvenient that it cannot be supposed to have been the intention of persons with ordinary  
17 intelligence and discretion. *State v. Estrada*, 201 Ariz. 247, 251, 34 P.3d 356, 360 (2001).

18 Arizona Revised Statutes § 32-1664(F) is silent as to who is to pay for the ordered  
19 evaluations. Given the reality of the Board's budgetary constraints in light of its voluminous  
20 licensees and certificate holders, and given the fact that unlike in Indiana, the Board cannot  
21 recoup its costs in disciplinary proceedings, it is reasonable for the Board to interpret §32-  
22 1664(F) as allowing the Board to require the licensees to pay for their own evaluations in order  
23 to avoid the absurd result of being unable to enforce its statutes. Absent a contrary legislative  
24 intent, which does not exist here, that reasonable interpretation is entitled to great weight. *Davis*  
25 *v. Ariz. Dep't of Revenue*, 197 Ariz. 527, 200, 4 P.3d 1070, 1073 (App. 2000). The Court should

1 RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of July, 2005.

2  
3   
4 Michelle L. Wood  
5 Assistant Attorney General

6 ORIGINAL filed this 28<sup>th</sup> day of  
7 July, 2005, with:

8 Clerk of Maricopa County Superior Court  
9 101 W. Jefferson  
Phoenix, AZ 85003

10 COPY of the forgoing delivered  
this 28<sup>th</sup> day of July, 2005, to:

11 Hon. Michael D. Jones  
12 Judge of the Maricopa County Superior Court  
13 201 W. Jefferson  
Phoenix, Arizona 85003

14 COPY of the forgoing instrument was  
15 sent via U.S. Mail this 28<sup>th</sup> day  
of July, 2005, to:

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14 **ARIZONA SUPERIOR COURT**  
15 **COUNTY OF MARICOPA**

16 SHAMIE SLUSSER, RN and  
17 LORNA WEST, RN

18 Plaintiffs,

19 vs.

20 ARIZONA STATE BOARD OF  
21 NURSING, an agency of the State of  
22 Arizona, and JOHN and JANE DOES I-XII

23 Defendants.

Case No. LC-2010-000300-001DT

**DEFENDANT'S REPLY IN  
SUPPORT OF MOTION TO  
DISMISS PLAINTIFFS' VERIFIED  
COMPLAINT FOR INJUNCTIVE,  
DECLARATORY AND SPECIAL  
ACTION (MANDAMUS) RELIEF**

(Assigned to the Honorable  
Paul McMurdie)

24 Defendant Arizona State Board of Nursing ("Board"), through the undersigned  
25 Assistant Attorney General, replies in support of its Motion to Dismiss Plaintiff Shamie  
26 Slusser and Lorna West's ("Plaintiffs") Verified Complaint for Injunctive, Declaratory  
and Special Action (Mandamus) Relief ("Complaint") under Rule 12(b)(1) of the Arizona  
Rules of Civil Procedure. Plaintiffs' claims are moot and the Court should dismiss the  
Complaint for lack of jurisdiction and deny all relief requested by Plaintiffs, including  
costs and attorneys' fees.

*EXHIBIT 2*

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## RELEVANT FACTS

Plaintiffs acknowledge the Board's actions taken at its Special Meeting on April 19, 2010, at which the Board voted to: (1) rescind the Interim Orders issued to Plaintiffs; (2) rescind all other outstanding Interim Orders requiring licensees to pay for Board-ordered evaluations; and (3) propose a legislative revision to A.R.S. § 32-1664(F) to expressly authorize the Board to order that licensees bear the cost of complying with the Interim Orders. What remains to satisfy Plaintiffs is a mystery. Plaintiffs do not seek any additional action by the Board, likely because *the Board clearly has provided all viable relief requested by Plaintiffs*. If there is something more the Board can offer to satisfy Plaintiffs, they certainly have not made it clear in their Response.

Instead, Plaintiffs question the sincerity of the Board's actions, complaining that they were not prompt or voluntary, and falsely accusing the Board of knowingly violating the law by previously ordering that licensees obtain evaluations at their own expense. Plaintiffs contend that their counsel previously notified the Board that its orders were illegal, earlier in Plaintiffs' cases and in two other special actions filed in 2005. (Response at 7, fn. 5, citing *Stepp* and *Close*.)

However, Plaintiffs fail to note that it was not until they filed the instant Complaint on April 8, 2010 that they put forward the new and compelling argument that prompted the Board to take action – specifically, that A.R.S. § 32-1664(F) lacks express language found in similar statutes governing other Arizona licensing boards. Contrary to Plaintiffs' audacious assumption, the Board was unaware of these statutes. The Board previously had relied in good faith upon the authority implied by its own statute's silence as to where the cost should lie, as well as the lack of a successful legal challenge to its authority. Plaintiffs' new and compelling argument never was made before now, not in the *Stepp* and *Close* cases, and not in Plaintiffs' Motions to Reconsider Interim Orders, filed just two months previously on February 25, 2010. (Complaint, Exhibits 3 and 4.)

1 Thus, Plaintiffs' characterization of the Board's actions as involuntary and  
2 untimely is misplaced and unsupported by the facts. The truth is, the Board simply was  
3 not aware that its statute was flawed – and Plaintiffs' counsel apparently had yet to  
4 discover it, either. After Plaintiffs filed their Complaint on April 8, 2010, and after the  
5 Board's counsel had the opportunity to analyze the issues, research the law and advise its  
6 client, the Board promptly noticed a Special Meeting on Friday, April 16, 2010, to be  
7 held twenty-four hours later on Monday, April 19, 2010. When apprised at the Special  
8 Meeting of its flawed statute, the Board took swift and appropriate action to recognize the  
9 flaw, rescind all orders based on it, and seek a legislative change.

10 This leads to the Plaintiffs' next erroneous assertion – that the Board's actions  
11 somehow are conditioned upon its ability to revise its statute. There is absolutely no  
12 evidence to support this assertion and, to the contrary, the Board made it clear otherwise  
13 at its Special Meeting. After voting to rescind all outstanding Interim Orders requiring  
14 licensees to pay for Board-ordered evaluations, and to seek express authority from the  
15 legislature to order licensees to bear the cost, the Board directed its Executive Director  
16 “to look for funding sources for future evaluations at the Board's expense pending a  
17 legislative revision, and to determine the financial impact on the Board and report the  
18 findings at the May 2010 Board meeting.” (Defendant's Motion to Dismiss, Exhibit A.)  
19 Clearly, the Board intends to issue any future Interim Orders for evaluations at the  
20 Board's expense, unless and until it obtains express statutory authority to do otherwise.

21 None of Plaintiffs' assertions and assumptions is correct and their motive for  
22 continuing to pursue this litigation is clear. Plaintiffs seek an Order from this Court for  
23 the sole purpose of obtaining “prevailing party” status, which will expose the Board to an  
24 award of attorneys' fees and costs. Thus, Plaintiffs' claim that the Board will suffer no  
25 harm or prejudice from a Court order is disingenuous. Moreover, *the Board clearly has*  
26 *provided all viable relief requested by Plaintiffs*, and asking this Court to intervene

1 Respectfully submitted this 9<sup>th</sup> day of July, 2010.

2 Terry Goddard  
3 Attorney General

4   
5 Kim E. Zack  
6 Assistant Attorney General

7 **ORIGINAL** filed this 9<sup>th</sup> day of July, 2010 with:

8 Clerk of the Maricopa County Superior Court  
9 101/201 W. Jefferson Street  
10 Phoenix, AZ 85003

11 **COPY** of the forgoing delivered this 9<sup>th</sup> day of July 2010 to:

12 Honorable Paul McMurdie  
13 Judge of the Maricopa County Superior Court  
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15 Phoenix, AZ 85003

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