DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROGER HELMS, as trustee of the Helms Family Trust; LABELLE LIMITED PARTNERSHIP, a Michigan limited partnership; ROBERT CARR; ANTHONY J. SALCITO, SR.; ANTHONY J. SALCITO, JR.; SALCITO FAMILY INVESTMENTS, LLC, an Arizona limited liability company; ANTHONY J. SALCITO and REBECCA K. SALCITO REVOCABLE TRUST OF 2006; BLAKE MCKEE, Plaintiffs/Appellees, v. FINANCIAL AMERICAN CORPORATION, a Nevada corporation; JOHN W. PACHECO and ANGELA PACHECO, husband and wife; WILLIAM L. WALTERS aka BILL L. WALTERS, and JACQUELYN WALTERS, husband and wife; THE FINANCIAL AMERICAN GROUP, LLC, a Delaware limited liability company; AMERICAN APARTMENT FUND XI, LP, a Delaware limited partnership; AMERICAN APARTMENT MANAGEMENT COMPANY, LLC, a Delaware limited liability company; ARIZONA-PACHECO FAMILY LLC, a Nevada limited liability company; D.C. COMMONS, LLC, a Delaware limited liability Company, Defendants/Appellants.	1 CA-CV 12-0052 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-000427

The Honorable George H. Foster, Jr., Judge

AFFIRMED

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T H U M M A, Judge

¶1 Defendants John W. and Angela Pacheco (Pacheco); William L. and Jacqueline Walters (Walters) and the defendant corporations, limited partnerships and limited liability companies controlled by Pacheco and Walters (the Entity Defendants) appeal from the superior court's rulings striking their answers as a sanction, determining damages and interest and entering default judgment against them. Finding no error, the judgment is affirmed.

FACTS AND PROCEDURAL HISTORY

I. Plaintiffs' Claims.

¶2 Plaintiffs invested $1,750,000 with defendants in 2006 and 2007. On January 3, 2008, plaintiffs filed their complaint

alleging Pacheco and Walters fraudulently induced plaintiffs to make their investments, alleging various claims including securities registration violations and various forms of fraud. Among other things, plaintiffs sought rescission damages, interest, attorneys' fees and costs.[1]

II. Trial Settings.

¶3 Defendants initially were represented by counsel and filed a timely answer. In 2008 and much of 2009, the parties engaged in substantial discovery and pretrial motion practice. By October 2008, the parties jointly requested a trial date in mid-2009. After several delays caused by discovery deadline extensions and settlement attempts, the superior court set an October 5, 2010 trial. After a routine rotation of judges, the October 5, 2010 trial date was not placed on the newly-assigned judge's calendar and was lost.

III. Withdrawal of Defendants' Counsel.

¶4 After learning of the lost trial date, but before the trial was rescheduled, defendants' counsel moved to withdraw, citing unpaid legal fees. Although plaintiffs opposed the motion to withdraw, defendants did not object. In reply, counsel for

[1] Additional background regarding the Pachecos, the Walters and some of the Entity Defendants may be found in cease and desist orders issued by the Arizona Corporation Commission (ACC) on October 21, 2009 in Docket No. S-20688A-09-0326 Decision No. 71305 (Pachecos) and on April 7, 2010 in Docket No. S-20688A-09-0326 Decision No. 71598 (Walters and some Entity Defendants).

defendants noted that the parties had completed all discovery, were finalizing their pretrial memorandum, submitting jury instructions and marking exhibits, and added that three months "should be plenty of time for new counsel to prepare" for trial.

¶5 In late September 2010, the court continued trial to January 10, 2011, set a final trial management conference for January 3, 2011 and required the parties to submit a Rule 16(d)-compliant joint pretrial statement five days before that conference. In mid-October 2010, the court granted defense counsel's request to withdraw.

IV. Defendants' Conduct After Withdrawal Of Their Counsel.

¶6 From the time that defense counsel was allowed to withdraw until the entry of judgment, none of the defendants retained counsel. As discussed below, the Entity Defendants could not appear without counsel. Although Pacheco and Walters appeared pro se, as they were entitled to do, it was their own personal conduct and failure to comply with the superior court's orders and rules that resulted in their answers being stricken.

¶7 On November 4, 2010, in accordance with the court's order and rules, plaintiffs sent to defendants a draft joint pretrial statement and proposed jury instructions, via e-mail and letter. When defendants did not respond, plaintiffs made numerous telephone calls to defendants and sent follow-up e-mails and letters on multiple occasions. Defendants did not

respond to these inquiries. Given defendants' refusal to communicate, in early December 2010, plaintiffs requested a status conference in an attempt to obtain defendants' compliance with pretrial obligations.

¶8 At about this same time, Pacheco filed a motion to continue trial.[2] Although that unverified filing stated Pacheco had been unable to retain new counsel, he provided no detail about what efforts he had made to retain counsel. Later in December 2010, instead of obtaining new counsel, Pacheco filed a lengthy motion to disqualify plaintiffs' counsel, sought reconsideration of the decision allowing defense counsel to withdraw and again sought a trial continuance.

¶9 After multiple hearings and additional briefing, the court denied Pacheco's motions to reconsider and to disqualify plaintiffs' counsel but granted Pacheco's motion to continue trial, resetting trial to May 23, 2011. Although noting the inconvenience to plaintiffs, the court explained that "in balancing the equities of the case and giving Mr. Pacheco [and the other defendants] sufficient time to retain counsel so that the matters can be resolved on the merits and not because of default, the court finds, is a better remedy to take." The court

[2] Pacheco made several filings purporting to be on behalf of "defendants." Pacheco, however, is not an attorney and, although he can represent himself pro se, he cannot represent any of the other defendants (including his spouse or Walters). *Bloch v. Bentfield*, 1 Ariz. App. 412, 417, 403 P.2d 559, 564 (1965).

noted that the additional four and a half months to prepare for trial –- above and beyond the three months already provided –- would be sufficient for defendants to retain counsel. The court made it clear that May 23, 2011 was a firm trial date: "At that time there will be no further continuances, whether or not Mr. Pacheco and the other defendants are able to obtain counsel."

¶10 The court also addressed compliance with the court's orders regarding the parties' pretrial obligations, stating "[t]he parties are required to meet to prepare a joint, and I do mean joint, that means each party signs it, a joint pretrial memorandum. Rule 16 sets forth how that is set up." The court explained in some detail what was required by Rule 16 and told defendants what could happen if they did not comply with the court's orders and rules:

> [E]ven if you are not represented, you will need to cooperate with [plaintiffs' counsel] in preparing the [joint pretrial statement] . . . . I will tell you, under the rules, if you fail to do so, the Court can consider sanctioning you, which would also -- could also include entering a default against you.
>
> I tell you that here today because [plaintiffs' counsel] has already had to file one motion, an emergency motion to come before the court because he has had this lack of cooperation, and I will not have that repeated, okay? So I wanted to make it clear what your obligations are. Your obligations, if you're not represented is to know what the rules are and to proceed accordingly.

At no time during that hearing did defendants express any uncertainty or confusion regarding these obligations. The resulting minute entry set a final trial management conference for May 6, 2011, required the parties to submit a Rule 16(d) Joint Pretrial Statement five days prior to that conference and specified the types of information to be included in that statement.

¶11 On January 28, 2011, plaintiffs again sent a proposed joint pretrial statement to defendants. Receiving no response, plaintiffs followed up with defendants numerous times and in numerous ways. Defendants did not respond to any of plaintiffs' inquiries. Accordingly, on April 14, 2011, plaintiffs requested an accelerated status conference. The next day, Pacheco made a filing that failed to address defendants' failure to respond to plaintiffs but, instead, requested another trial continuance, stating he had spoken to three additional attorneys who had declined to take the case.

¶12 At an April 19, 2011 hearing, the court again ordered that "Defendants shall cooperate with Plaintiff's counsel in the preparation of a Joint Pretrial Statement in preparation for the upcoming Pretrial Management Conference." The court denied Pacheco's motion to continue trial, stating that "I gave you a firm trial date several months ago. . . . [T]here's been sufficient time in this Court's judgment to replace counsel."

The court then reaffirmed the final pretrial management conference and trial dates.

¶13 Despite the court's numerous oral warnings and written orders, defendants continued in their failure to cooperate and failure to participate in final pretrial activities and to even communicate with plaintiffs' counsel. Among other things, defendants failed to provide a list of trial witnesses, failed to provide a list of intended trial exhibits and failed to provide any information regarding contested or uncontested issues required for the final pretrial statement. Plaintiffs moved for sanctions under Rules 16(f) and 32(b)(2), asking the court to strike defendants' jury demand and to strike defendants' answer for their refusal to comply with their pretrial obligations and the court's orders. Plaintiffs also moved to strike the answer of the Entity Defendants, which were not represented by counsel and could not appear as pro se parties, and sought attorneys' fees and costs.

¶14 Instead of responding to the concerns expressed by plaintiffs, Pacheco and Walters sought an emergency hearing and another trial continuance, noting defendants still had not retained counsel. Their written response to plaintiffs' motion for sanctions also made clear that defendants would not participate in trial: "Without competent legal counsel to represent each of the corporate and individual Defendants, none

of the Defendants plan on appearing at trial on May 23, 2011. Each Defendant is willing to accept its fate."

¶15 The court heard argument on the motion for sanctions at the previously-scheduled final trial management conference, and plaintiffs' counsel, Pacheco and Walters appeared at that hearing. In open court, Pacheco and Walters repeated that they had not retained counsel and would not participate in the trial. Plaintiffs then reiterated their request that defendants' answer be struck, and stressed that speedy resolution was necessary due to Pacheco's threat to file bankruptcy. Taking the matter under advisement, the court provided defendants more time to file a written response to the motion for sanctions.

¶16 Defendants' written response again stated that they needed more time to obtain counsel and that they were unable to comply with their obligations and the court's orders because they were unrepresented. Repeating that "[e]ach Defendant is willing to accept its fate," defendants' response concluded: "Regrettably, the Defendant's [sic] are not planning to attend the trial scheduled to occur on or about May 23, 2011."

¶17 In a minute entry issued approximately one week later, the court found "Defendants have failed to comply with [joint pretrial statement preparation] orders" and that

> Defendants Pacheco and Walters have argued in their response that because they are not lawyers they are unable to properly

> participate in such matters. The Court disagrees as it pertains to them as individuals. The individuals do have the ability to participate in pretrial preparation. The individual defendants are not unsophisticated. They can follow rules and orders even though they are not licensed attorneys. Yet they have failed to engage counsel and have otherwise failed to comply.

The court noted defendants had been given at least seven months to retain counsel. The court also noted that defendants "refus[ed] to cooperate with the Plaintiffs" and "have indicated in writing that they intend not to appear at trial. In this regard it would only cause further waste, effort and expense to proceed to trial in this matter given the indications of the Defendants." Accordingly, the court granted plaintiffs' motion for sanctions, struck defendants' answer for their willful violations of the court's orders, entered default and awarded plaintiffs reasonable attorneys' fees and costs in amounts to be determined.

V. Damages Hearing And Entry Of Judgment.

¶18 Plaintiffs moved for entry of judgment, requesting damages only for the securities claims under Arizona Revised Statutes (A.R.S.) § 44-2001(A).[3] Plaintiffs sought as damages $1,750,000 (the full amount of their investment as alleged in the complaint), plus interest, attorneys' fees and costs. The

[3] Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

court held an evidentiary hearing to determine damages, at which plaintiffs presented one expert witness to substantiate their $1,750,000 investment. The expert also testified that no return on the investments had been received. When called by plaintiffs as a witness, Pacheco confirmed plaintiffs' $1,750,000 investment.

¶19 Pacheco attempted to call his own expert witness to show that one "investment is still current and still going and still honoring." Plaintiffs objected, arguing that the testimony was irrelevant because default had been entered and the purpose of the hearing was to determine the amount of damages, not to litigate the merits of the complaint. Given that plaintiffs had tendered any consideration previously received from defendants in connection with their investment and that default had been entered, the court found that unless Pacheco's expert would contradict the amount invested or testify to payment of some return on the investment, his testimony was precluded. In response, Pacheco made no offer of proof to show why his expert's testimony would be relevant to the issues as stated by the court. Accordingly, the court sustained plaintiffs' objection and precluded the testimony.

¶20 Following the hearing, the court entered judgment, awarding damages in the amount of the invested principal,

$1,750,000, plus prejudgment interest at the rate of ten percent per annum, post-judgment interest, costs and attorneys' fees.

¶21 Defendants, having retained new counsel for appeal, filed this timely appeal. This court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. § 12-2101(A)(1).

DISCUSSION

I. Standard of Review.

¶22 This court "must uphold the trial court's order [striking pleadings for pretrial violations] unless the record reflects a clear abuse of discretion." *Montgomery Ward & Co. v. Superior Court*, 176 Ariz. 619, 621, 863 P.2d 911, 913 (App. 1993); *see also Roberts v. City of Phoenix*, 225 Ariz. 112, 119, ¶ 24, 235 P.3d 265, 272 (App. 2010) ("[Appellate court] will affirm a trial court's imposition of sanctions for discovery violations, including entry of default judgment, unless the record reflects a clear abuse of discretion."). This court "defer[s] to the court's explicit or implicit factual findings and will affirm as long as such findings are supported by reasonable evidence." *Roberts*, 225 Ariz. at 119, ¶ 24, 235 P.3d at 272. Evidentiary rulings regarding the admissibility of expert testimony on damages are reviewed for abuse of discretion. *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 505, 917 P.2d 222, 234 (1996). An award of prejudgment interest is

subject to de novo review. *Alta Vista Plaza, Ltd. v. Insulation Specialists Co.*, 186 Ariz. 81, 82, 919 P.2d 176, 177 (App. 1995).

II. The Superior Court Did Not Abuse Its Discretion In Entering Judgment Against The Entity Defendants.

¶23 Although parties to this appeal, the Entity Defendants have not shown on appeal that the court's striking of their answers and entry of judgment was improper. The answers of the Entity Defendants correctly were stricken because a corporation, a limited liability company or a limited partnership "cannot appear in superior court except through counsel." *State v. Eazy Bail Bonds*, 224 Ariz. 227, 229, ¶ 12, 229 P.3d 239, 241 (App. 2010). Accordingly, because they were not represented by counsel as required, the court did not abuse its discretion in striking the Entity Defendants' answers and entering judgment against the Entity Defendants.

III. The Superior Court Did Not Abuse Its Discretion In Sanctioning Pacheco And Walters.

¶24 The court imposed sanctions under Arizona Rules of Civil Procedure 16(f) and 37(b)(2)(C) for repeated violations of the court's orders by Pacheco and Walters as well as violations of their obligation to participate in the preparation of a joint pretrial statement. Even absent a court order, each party "shall confer" with the other parties "and prepare a written joint pretrial statement" signed by each party and filed with the

court that includes, among other things, a statement of the case for use during voir dire, stipulations and contested issues of material fact and law, witnesses and objections, trial exhibits and objections, and deposition designations and objections. Ariz. R. Civ. P. 16(d)(1)-(2). The parties also are required to contemporaneously file "an agreed-upon set of jury instructions, verdict forms, and voir dire questions and [] any additional jury instructions, verdict forms, and voir dire questions requested, but not agreed upon." Ariz. R. Civ. P. 16(d)(3).

¶25 The Rule 16(d) joint pretrial statement is a key document and "controls the subsequent course of the litigation." *Carlton v. Emhardt*, 138 Ariz. 353, 355, 674 P.2d 907, 909 (App. 1983). A party may be sanctioned for failing "to obey a scheduling or pretrial order," being "substantially unprepared to participate in" a pretrial conference or failing "to participate in good faith in . . . preparation of the joint pretrial statement." Ariz. R. Civ. P. 16(f). Where a party fails to discharge its obligations under Rule 16, the superior court "shall, except upon a showing of good cause, make such orders with regard to such conduct as are just, including, among others, any of the orders provided in Rule 37(b)(2)(B), (C), or (D)." Ariz. R. Civ. P. 16(f). Rule 37(b)(2)(C), in turn, authorizes the superior court to issue various sanctions, including an "order striking out pleadings or parts thereof."

¶26 The parties agree that the five factors set forth in *Malone v. United States Postal Service*, 833 F.2d 128, 130 (9th Cir. 1987), provide a helpful framework to analyze the court's order imposing sanctions. The *Malone* factors are: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the [opposing party if sanctions were not imposed]; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Malone*, 833 F.2d at 130 (citation omitted). As applied, these factors fully support the court's order.

¶27 The public's interest in expeditious litigation and the court's need to manage its docket favor the sanctions imposed and weigh against the further delay that continued refusal by Pacheco and Walters to participate in pretrial proceedings would cause. *See id.* at 131 (expeditious litigation and docket control factors weighed against party whose "dilatory conduct greatly impeded resolution of the case and prevented the district court from adhering to its trial schedule"). Pacheco and Walters were given numerous opportunities and more than seven months to fulfill their pretrial obligations and/or to retain counsel to fulfill those pretrial obligations on their behalf. They did neither.

¶28 Turning to the third *Malone* factor, the record amply reflects prejudice to plaintiffs caused by the conduct of Pacheco and Walters. As in *Malone* itself, while Pacheco and Walters "did nothing to fulfill [their] responsibilities under the pretrial order[s, plaintiffs] made a diligent effort to comply with the pretrial order[s] in a timely manner." *Id.* Had sanctions not been imposed, plaintiffs would have incurred substantial additional costs caused by the continued and willful refusal of Pacheco and Walters to comply with court orders and pretrial obligations and incurred various other costs (financial, opportunity and otherwise) preparing for a trial in which Pacheco and Walters stated they would not participate. Moreover, plaintiffs would have been forced to incur these avoidable costs in a case where Pacheco was threatening bankruptcy. Therefore, the first three *Malone* factors support the court's sanctioning Pacheco and Walters by striking their answers.

¶29 Turning to the fourth *Malone* factor, the law clearly favors disposition of cases on the merits. *Treadaway v. Meador*, 103 Ariz. 83, 84, 436 P.2d 902, 903 (1968). The superior court's decision clearly runs counter to that directive. However, the court gave Pacheco and Walters many, many chances to comply with the court's orders and rules or retain counsel who would. Pacheco and Walters failed to do so and then stated they would

not attend trial. If sanctions are to have any meaning, the policy of favoring disposition on the merits cannot prevent imposition of serious sanctions given the repeated intransigence of Pacheco and Walters.

¶30 Turning to the final *Malone* factor, Pacheco and Walters argue the court improperly failed to consider "the availability of less drastic sanctions," 833 F.2d at 130, and immediately struck their pleadings and imposed default solely because they failed to retain counsel. For a variety of reasons, the record does not support this argument.

¶31 Sanctions were imposed on Pacheco and Walters not for being unrepresented by counsel, but rather for their failure to comply with obligations as unrepresented parties to comply with court orders. The court noted that "the parties have been diligently pursuing this case, the plaintiffs and defendants *prior to* the withdrawal of" counsel for Pacheco and Walters. (Emphasis added.) It was the personal conduct of Pacheco and Walters *after* the withdrawal of their counsel that resulted in the sanctions. As Pacheco and Walters admit, "it was the activities with regard to the pretrial deadlines that ultimately led to the imposition of the Rule 37 sanctions and the striking of the Answer."

¶32 It is true that the court could have imposed sanctions other than striking defendants' answer under Arizona Rules of

Civil Procedure 16(f) and 37(b)(2)(B), (C) and (D). Pacheco and Walters, however, have not cited any Arizona case holding that a superior court abused its discretion in striking a pleading after a party repeatedly caused delays, repeatedly failed to communicate and cooperate with an opposing party and repeatedly failed to comply with court rules and orders even after having been told, in open court, what the court expected and the consequences of failing to comply.

¶33 The record here shows that the court went to great lengths to avoid having to issue any sanction order. The court continued trial seven months to allow defendants ample time to secure counsel or prepare for trial themselves; held several hearings to address issues raised by the parties; told Pacheco and Walters in open court for their benefit what was expected in the hope they would comply; told Pacheco and Walters the consequences if they did not comply; held a hearing on the motion for sanctions and allowed Pacheco and Walters to file a post-hearing brief. Given these multiple actions by the court aimed at avoiding any sanctions, the record does not support defendants' arguments that the court failed to "thoroughly consider[] other, less severe, sanctions before resorting to the most extreme." *Nesmith v. Superior Court*, 164 Ariz. 70, 72, 790 P.2d 768, 770 (App. 1990); *see also Roberts*, 225 Ariz. at 121, ¶ 31, 235 P.3d at 274 (noting superior court's grant of extension

of time for compliance with orders, instead of striking answer, is consideration of lesser sanctions before imposition of dismissal).

¶34 Despite these intermediate steps designed to ensure compliance without resort to sanctions, Pacheco and Walters did not change their behavior and continued their refusal to cooperate, in violation of the court's orders. When faced with plaintiffs' motion for sanctions, Pacheco and Walters told the court -– both in open court and in writing -- that "none of the Defendants are planning on appearing at trial on May 23, 2011. Each defendant is willing to accept its fate." On this record, the court acted well within its discretion by refusing to grant another trial continuance, striking their answer and entering default, sanctions expressly authorized by Rule 37(b)(2)(C). *Cf. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212 (1958); *Wayne Cook Enters., Inc. v. Fain Props. Ltd. P'ship*, 196 Ariz. 146, 149, ¶ 12, 993 P.2d 1110, 1113 (App. 1999); *Montgomery Ward*, 176 Ariz. at 622-23, 863 P.2d at 914-15; *Simpson v. Heiderich*, 4 Ariz. App. 232, 243-44, 419 P.2d 362, 373-74 (1966).[4]

[4] The individual defendants have not argued on appeal comparative culpability amongst themselves. By appearing pro se, each of the individual defendants represented themselves only; Pacheco and Walters could not and did not represent their spouses. *Bloch*, 1 Ariz. App. at 417, 403 P.2d at 564. The record does not show that either Ms. Pacheco or Ms. Walters responded to plaintiffs'

IV. The Superior Court Correctly Determined Damages and Interest.

A. The Claimed Damages Were Liquidated.

¶35 Defendants argue the court improperly excluded on relevance grounds their expert testimony offered at the evidentiary hearing on damages because damages were unliquidated and expert testimony was necessary to determine the amount of damages. The complaint, however, alleged plaintiffs invested $1,750,000 in or through defendants and had received no income by dividend or otherwise from ownership of the securities. Tendering their investment, plaintiffs' statutory securities counts sought "the return of all principal invested with [d]efendants, plus interest at 10% per annum." Plaintiffs' proposed judgment sought recessionary damages and interest consistent with these allegations and Arizona's statutory provisions.

¶36 By statute, a purchaser of securities

> may bring an action . . . to recover the consideration paid for the securities, with interest, taxable court costs and reasonable attorney fees, less the amount of any income

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inquiries or otherwise cooperated when their spouses did not. Moreover, it is clear from the record that neither Ms. Pacheco nor Ms. Walters intended to appear at trial, as both signed defendants' response to plaintiffs' motions for sanctions that expressly states no defendant would appear at trial. Accordingly, the court did not err in sanctioning Ms. Pacheco and Ms. Walters for the same reasons applicable to their spouses.

> received by dividend or otherwise from ownership of the securities, on tender of the securities purchased or the contract made, or for damages if the purchaser no longer owns the securities.

A.R.S. § 44-2001(A). As such, plaintiffs sought as damages the return of the specific amount invested plus interest at the statutory rate, amounts readily calculated without the application of judicial discretion. Accordingly, the damages awarded in the judgment were liquidated. *See John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 544, ¶¶ 39-40, 96 P.3d 530, 542 (App. 2004) ("A claim is liquidated if the plaintiff provides a basis for precisely calculating the amounts owed. . . . All that is necessary is that the evidence furnish data which, if believed, makes it possible to compute the amount with exactness.").

¶37 At the evidentiary hearing, plaintiffs' expert witness, a certified public accountant and forensic accountant, confirmed that plaintiffs purchased $1,750,000 in securities, and that plaintiffs had received no return on their investment. Plaintiffs then called Pacheco, who confirmed the investment amount under oath. This information was sufficient to establish the amount of recessionary damages plaintiffs were entitled to recover under A.R.S. § 44-2001.

¶38 Although Pacheco and Walters attempted to call their own expert, Pacheco's offer of proof did not contend that this

expert would controvert the amount owed -- instead, the expert was offered to testify about the ongoing nature of one of the investments. At most, such testimony would establish the potential for return on investment in the future -- a topic not relevant to determining either the amount invested or whether any return on investment had been received. Given the limited nature of the evidentiary hearing, this testimony was not relevant, Ariz. R. Evid. 401, meaning the court did not err in excluding the testimony.

B. The Superior Court Properly Awarded Prejudgment Interest.

¶39 The court awarded plaintiffs prejudgment interest from the date of the investment to the date of judgment at 10% per annum. Defendants argue the court improperly determined the start date and rate for prejudgment interest.

¶40 "Prejudgment interest is awarded as a matter of right on a liquidated claim." *John C. Lincoln Hosp.*, 208 Ariz. at 544, ¶ 39, 96 P.3d at 542. Under Arizona law, a "court has discretion to determine the date of commencement of prejudgment interest." *AMHS Ins. Co. v. Mut. Ins. Co. of Ariz.*, 258 F.3d 1090, 1103 (9th Cir. 2001). The court awarded prejudgment interest from the date of the investments. Although defendants claim on appeal the proper start date for prejudgment interest was the date the complaint was filed, before the superior court, defendants did

not object to the court using the date of the investments. By failing to timely object, defendants have waived any contrary argument on appeal. *See Ruck Corp. v. Woudenberg*, 125 Ariz. 519, 522-23, 611 P.2d 106, 109-10 (App. 1980) (failure to object to prejudgment interest in the superior court constitutes waiver of argument on appeal).

¶41 For the claims relevant here, prejudgment interest "shall be at the rate" set in either A.R.S. § 44-1201(A) *or* (B). A.R.S. § 44-1201(F). Defendants concede that no interest rate was "contracted for in writing" as applicable under A.R.S. § 44-1201(A). Having awarded interest at "ten percent per annum," the superior court awarded prejudgment interest pursuant to A.R.S. § 44-1201(A). The unique investments at issue here, which contain substantial payment obligations to investors far exceeding the amount of the original investments, each constitute an "indebtedness or other obligation" under § 44-1201(A). Accordingly, the court did not err by awarding prejudgment interest pursuant to A.R.S. § 44-1201(A).

CONCLUSION

¶42 The judgment of the superior court is affirmed. As the successful parties on appeal, in exercising the court's discretion, plaintiffs are awarded their reasonable attorneys' fees upon compliance with ARCAP 21. *See* A.R.S. §§ 12-341.01(A), 44-2001(A). As the prevailing parties on appeal, plaintiffs are

awarded their costs upon compliance with ARCAP 21. A.R.S. § 12-341.

/s/_____
SAMUEL A. THUMMA, Presiding Judge

CONCURRING:

/s/_____
MICHAEL J. BROWN, Judge

/s/_____
DIANE M. JOHNSEN, Judge