

OPEN MEETING ITEM



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COMMISSIONERS  
JEFF HATCH-MILLER - Chairman  
WILLIAM A. MUNDELL  
MIKE GLEASON  
KRISTIN K. MAYES  
GARY PIERCE



ARIZONA CORPORATION COMMISSION

22

Arizona Corporation Commission  
**DOCKETED**

JAN 29 2007

DATE: JANUARY 29, 2007

DOCKET NO: S-20426A-05-0768

TO ALL PARTIES:

DOCKETED BY: *NR*

Enclosed please find the recommendation of Administrative Law Judge Marc E. Stern. The recommendation has been filed in the form of an Opinion and Order on:

GARY WAYNE HARDY, CRD# 1298371, dba HARDY ASSET MANAGEMENT and SHERRY HARDY (CEASE AND DESIST ORDER)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

FEBRUARY 8, 2007

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

MARCH 1, 2007

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602) 542-4250. For information about the Open Meeting, contact the Executive Secretary's Office at (602) 542-3931.

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*Brian C. McNeil*  
BRIAN C. McNEIL  
EXECUTIVE DIRECTOR

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 JEFF HATCH-MILLER, Chairman  
4 WILLIAM A. MUNDELL  
5 MIKE GLEASON  
6 KRISTIN K. MAYES  
7 GARY PIERCE

8 IN THE MATTER OF:

DOCKET NO. S-20426A-05-0768

9 GARY WAYNE HARDY, CRD# 1298371,  
10 dba HARDY ASSET MANAGEMENT, and  
11 SHERRY HARDY, husband and wife,  
12 1711 W. Gary Drive  
13 Chandler, AZ 85224

DECISION NO. \_\_\_\_\_

14 HARDY ASSET MANAGEMENT, a sole  
15 proprietorship  
16 4625 S. Wendler Drive, Ste. 111  
17 Tempe, AZ 85282

OPINION AND ORDER

18 DATE OF HEARING: November 16, 2006

19 PLACE OF HEARING: Phoenix, Arizona

20 ADMINISTRATIVE LAW JUDGE: Marc E. Stern

21 APPEARANCES: Ms. Pamela T. Johnson, Senior Counsel, on behalf of,  
22 the Securities Division of the Arizona Corporation  
23 Commission

24 **BY THE COMMISSION:**

25 On October 27, 2005, the Securities Division ("Division") of the Arizona Corporation  
26 Commission ("Commission") filed a Notice of Opportunity of Hearing Regarding Proposed Order to  
27 Cease and Desist, Order for Restitution, for Administrative Penalties, of Revocation, and for Other  
28 Affirmative Action ("Notice") against Gary Wayne Hardy, Sherry Hardy<sup>1</sup> and Hardy Asset  
Management ("HAM") (collectively the "Respondents"), in which the Division alleged multiple  
violations of the Arizona Securities Act ("Act") and the Investment Management Act ("IMACT") in  
connection with the offer and sale of securities.

Respondents were duly served with a copy of the Notice.

<sup>1</sup> The Division subsequently dismissed Sherry Hardy from the proceeding.

1 On November 10, 2005, Respondent Gary Wayne Hardy filed a request for hearing.

2 On November 23, 2005, Respondent Gary Wayne Hardy filed a second request for hearing  
3 and an Answer.

4 On November 23, 2005, counsel for Respondent Sherry Hardy filed a Notice of Bankruptcy  
5 Filing.

6 On December 5, 2005, by Procedural Order, a pre-hearing conference was scheduled for  
7 February 16, 2005.

8 On December 13, 2005, the Division filed a Notice of Dismissal of Respondent Sherry Hardy  
9 from the proceeding.

10 On December 23, 2005, Respondent Gary Wayne Hardy filed a request for a continuance of  
11 the pre-hearing stating that he was currently in the custody of the Maricopa County Sheriff and was  
12 scheduled to be transferred to the custody of the Arizona Department of Corrections ("ADOC") on  
13 February 16, 2006. According to Mr. Hardy, his anticipated release date from custody was to be  
14 April 28, 2006. Mr. Hardy further advised that his mailing address would be changed as of January  
15 5, 2006.

16 On January 4, 2006, by Procedural Order, the pre-hearing conference scheduled for February  
17 16, 2006, was continued indefinitely and the Division was ordered to file a Motion to Reschedule the  
18 pre-hearing conference after Mr. Hardy's release from custody.

19 On August 1, 2006, the Division filed a Motion to Amend the Notice which was served upon  
20 the Respondent while incarcerated. Mr. Hardy did not file a response.

21 On August 29, 2006, the Division filed a request to reschedule the pre-hearing conference and  
22 indicated that Mr. Hardy had been released from the ADOC's custody.

23 On August 30, 2006, by Procedural Order, the pre-hearing conference was rescheduled for  
24 September 22, 2006, and the Division's Motion to Amend the Notice was granted.

25 On September 14, 2006, Mr. Hardy filed a letter in which he indicated that he had been  
26 indicted in federal court on matters related to the Notice herein and requested that the Commission's  
27 administrative proceeding be stayed until the conclusion of the criminal proceeding.

28 ...

1 On September 22, 2006, the Division appeared through counsel. Mr. Hardy did not appear.  
2 The Division requested that a hearing be scheduled and cited case law in support of its request that  
3 the administrative proceeding go forward because the United States Constitution does not ordinarily  
4 require that a civil proceeding be stayed pending the resolution of criminal charges. By Procedural  
5 Order, a hearing was scheduled for November 16, 2006, and a date established for the exchange of  
6 exhibits and witness lists.

7 On November 16, 2006, a full public hearing was held before a duly authorized  
8 Administrative Law Judge of the Commission at its offices in Phoenix, Arizona. Respondents did  
9 not appear in person or through counsel. The Division appeared and was represented by counsel. At  
10 the conclusion of the hearing, the matter was taken under advisement pending submission of a  
11 Recommended Opinion and Order to the Commission.

12 \* \* \* \* \*

13 Having considered the entire record herein and being fully advised in the premises, the  
14 Commission finds, concludes, and orders that:

15 \* \* \* \* \*

16 **FINDINGS OF FACT**

17 1. Gary Hardy, since August 1984, has been at all pertinent times a registered securities  
18 salesman in Arizona, registered with CRD# 1298371, and has operated as a registered securities  
19 salesman and an investment adviser.

20 2. Ms. Meg Kennedy, a legal assistant for the Division, testified concerning the results of  
21 her investigation and the Division's Exhibits S-1 through S-10 which were admitted into evidence.

22 3. Mr. Hardy was registered in Arizona in association with Allmerica Investments, Inc.  
23 ("Allmerica") from August 8, 1984, to July 31, 2000.

24 4. Mr. Hardy was registered in Arizona in association with SunAmerica Securities, Inc.  
25 ("SunAmerica") from August 17, 2000, until he resigned on or about June 9, 2005. Mr. Hardy is  
26 currently not affiliated with any securities dealer.

27 5. HAM, since October 1, 2000, was a sole proprietorship owned and operated by Mr.  
28 Hardy, and registered with CRD# 116821, as an Arizona registered investment adviser.

1           6.     In approximately February 2005, a SunAmerica customer, Samuel Edmondson,  
2 purchased securities in the form of certificates of deposit ("CDs") which were termed "Internotes" by  
3 Mr. Hardy. Mr. Edmondson sent Mr. Hardy a check for \$50,000 payable to HAM and Mr. Hardy  
4 sent Mr. Edmondson a document purportedly reflecting an investment of \$50,000 in "Selected  
5 Bonds" that Mr. Hardy claimed to have acquired for him.

6           7.     After Mr. Edmondson made this investment, despite several requests for more  
7 information, Mr. Hardy failed to provide documentation as to how or if the money was invested.

8           8.     On or about June 20, 2005, Mr. Edmondson reported the matter to the Tempe Police  
9 Department, which proceeded to investigate the allegations by Mr. Edmondson.

10          9.     After being questioned by the Tempe Police Department, Mr. Hardy acknowledged  
11 that he had misappropriated funds from nine investors. After further investigation, the Tempe Police  
12 Department learned that Mr. Hardy misappropriated \$582,076 from nine investors in 16 transactions  
13 between 1998 and 2005. These investments were subsequently verified during the Division's  
14 investigation.

15          10.    Ms. Kennedy testified that none of the investors received confirmations, statements, or  
16 other written information verifying the existence of their investments. Mr. Hardy sent some  
17 customers falsified HAM statements or "customer reports" which reflected their purported purchase  
18 of the securities, while other customers received no information or documents concerning how Mr.  
19 Hardy invested their money.

20          11.    Ms. Kennedy testified about the documents which the Division had admitted into  
21 evidence including affidavits from six investors, copies of investor checks written to HAM, and  
22 statements demonstrating that the investors believed that they were purchasing legitimate  
23 investments, including CDs, bonds and/or annuities.

24          12.    Ms. Kennedy testified further that she interviewed another investor, Milton Zehr, who  
25 believed that he had invested in an annuity. Mr. Zehr's check for \$20,000 was paid to HAM and  
26 Respondents provided him with a HAM Account Statement that reflected an investment in a "5-year  
27 Private CD Annuity" with a maturity date of March 29, 2009 from what was called the "Capital  
28 Bank" in Norfolk, Virginia.

1           13.     The certified Tempe Police Department Incident Report, which was admitted into  
2 evidence, described the statements of each of the nine investors. Eight of them made their checks  
3 payable to HAM, and stated that they trusted Mr. Hardy and believed that he would place their funds  
4 in legitimate investments.

5           14.     The ninth investor, Ms. Rachel Baca, made her check payable to "Capital Investment"  
6 before Hardy had started doing business as HAM. She stated that although she had never received  
7 any verification that the money had actually been invested in the manner in which Mr. Hardy stated it  
8 was invested, she received some sort of quarterly reports from Mr. Hardy on her purported  
9 investment.

10          15.     The Tempe Police Department investigation concluded that Mr. Hardy did not invest  
11 investor funds as was represented to investors. Instead, Mr. Hardy used the funds of all nine  
12 investors for his own purposes.

13          16.     According to a certified statement from a representative of the National Association of  
14 Securities Dealers ("NASD"), in April 2006, the NASD accepted a properly signed and dated Letter  
15 of Acceptance, Waiver and Consent whereby Mr. Hardy consented to the imposition of a bar from  
16 association with any NASD member in any capacity.

#### CONCLUSIONS OF LAW

17  
18          1.     The Commission has jurisdiction over this matter pursuant to Article XV of the  
19 Arizona Constitution and A.R.S. §§44-1801, et seq. and 44-3101, et seq.

20          2.     Respondents offered and sold securities within or from Arizona, within the meaning of  
21 A.R.S. §44-1801(15), (21), and (26).

22          3.     In connection with the offer or sale of securities within or from Arizona, Mr. Hardy  
23 violated A.R.S. §44-1991 by (i) employing a device, scheme or artifice to defraud; (ii) making untrue  
24 statements of material fact or omitting to state material facts which were necessary in order to make  
25 the statements made not misleading in light of the circumstances under which they were made; or (iii)  
26 engaging in transactions, practices or courses of business which operated or would operate as a fraud  
27 or deceit upon offerees and investors. Mr. Hardy's conduct includes, but is not limited to, the  
28 following:

- 1 • misrepresenting and/or failing to disclose the use of the investors' investment funds by
- 2 stating that he was placing their funds in various types of investments;
- 3 • falsifying information about the purported investments;
- 4 • failing to disclose his own financial condition; and
- 5 • failing to disclose that he was misappropriating investor funds for his personal use.

6  
7 4. Respondents' misrepresentations, omissions of material facts, and misappropriation of  
8 investor funds in connection with the purported sale of the CDs, bonds and annuities constituted  
9 dishonest and unethical conduct in business and financial matters in violation of A.R.S. §44-  
3201(14).

10 5. Pursuant to A.R.S §44-1962, Mr. Hardy's registration as a securities salesman should  
11 be revoked by the Commission.

12 6. Pursuant to A.R.S §44-3201, HAM's registration as an investment adviser should be  
13 revoked by the Commission.

14 7. Respondents violated the Act and the IMACT and their conduct is grounds for the  
15 Commission to issue a cease and desist order pursuant to A.R.S. §§44-2032, 44-3292, 44-1962, 44-  
3201, and all other provisions under the Act and the IMACT.

16 8. Respondents violated the Act and the IMACT and their conduct is grounds for an  
17 order of restitution pursuant to A.R.S. §§44-2032, 44-3292, 44-1962, and 44-3201.

18 9. Respondents violated the Act and the IMACT and their conduct is grounds for the  
19 imposition of administrative penalties under A.R.S. §§44-2036, 44-3296, 44-1962, and 44-3201.

20 **ORDER**

21 IT IS THEREFORE ORDERED that pursuant to the authority granted to the Commission  
22 under A.R.S. §§44-2032, 44-3292, 44-1962 and 44-3201, the Respondents Gary Wayne Hardy and  
23 Hardy Asset Management, shall permanently cease and desist from violating all provisions of the  
24 Securities Act and the Investment Management Act.

25 IT IS FURTHER ORDERED that pursuant to A.R.S. §§44-2032, 44-3292, 44-1962, and 44-  
26 3201 Respondents Gary Wayne Hardy and Hardy Asset Management, jointly and severally, shall  
27 make restitution to the Commission on behalf of investors in the amount of \$582,076, which  
28 restitution shall be made pursuant to A.A.C. R14-4-308, subject to legal setoffs by Respondents and

1 confirmed by the Director of Securities, said restitution to be made within 30 days of the effective  
2 date of this Decision.

3 IT IS FURTHER ORDERED that any amount outstanding for restitution shall accrue interest  
4 at the rate of 10 percent per annum from the dates of investment until paid by Respondents.

5 IT IS FURTHER ORDERED that payment shall be made to the State of Arizona to be placed  
6 in an interest-bearing account maintained and controlled by the Commission. The Commission shall  
7 disburse the funds on a pro-rata basis to investors shown on the records of the Commission. Any  
8 restitution funds that the Commission cannot disburse because an investor refuses to accept such  
9 payment shall be disbursed on a pro-rata basis to the remaining investors shown on the records of the  
10 Commission. Any funds that the Commission determines it is unable to or cannot feasibly disburse  
11 shall be transferred to the general fund of the State of Arizona.

12 IT IS FURTHER ORDERED pursuant to A.R.S. §§44-2036, 44-3296, 44-1962, and 44-3201,  
13 that Respondents, Gary Wayne Hardy and Hardy Asset Management, jointly and severally, shall pay  
14 as and for an administrative penalty the sum of \$150,000.00.

15 IT IS FURTHER ORDERED that payment shall be made in full no later than 30 days after  
16 the effective date of this Decision payable by either cashier's check or money order to the State of  
17 Arizona.

18 IT IS FURTHER ORDERED that any amount outstanding for the administrative penalty shall  
19 accrue interest at the rate of 10 percent per annum from the effective date of this Decision until paid  
20 in full. The payment obligation for this administrative penalty shall be subordinate to any restitution  
21 obligations ordered herein and shall become immediately due and payable only after restitution  
22 payments have been paid in full or upon Respondents' default with respect of Respondents'  
23 restitution obligations.

24 IT IS FURTHER ORDERED that pursuant to A.R.S. §44-1962, Respondent Gary Wayne  
25 Hardy's securities salesman registration is revoked.

26 IT IS FURTHER ORDERED that pursuant to A.R.S. §44-3201, Hardy Asset Management's  
27 investment adviser license is revoked.

28

1 IT IS FURTHER ORDERED that a bankruptcy filing by any of the Respondents shall be an  
2 act of default. If any Respondent does not comply with this Decision, any outstanding balance may  
3 be deemed in default and shall be immediately due and payable.

4 IT IS FURTHER ORDERED that if any Respondent fails to comply with this Decision the  
5 Commission may bring further legal proceedings against the Respondent.

6 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

7 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

8  
9  
10 CHAIRMAN \_\_\_\_\_ COMMISSIONER

11  
12 COMMISSIONER \_\_\_\_\_ COMMISSIONER \_\_\_\_\_ COMMISSIONER

13  
14 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive  
15 Director of the Arizona Corporation Commission, have  
16 hereunto set my hand and caused the official seal of the  
17 Commission to be affixed at the Capitol, in the City of Phoenix,  
18 this \_\_\_\_ day of January, 2007.

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20 \_\_\_\_\_  
21 BRIAN C. McNEIL  
22 EXECUTIVE DIRECTOR

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