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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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KRISTIN K. MAYES
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In the matter of: LEONARD FRANCIS ALCARO (a/k/a "LENNY ALCARO"), and MARY BRIGID LAVIN ALCARO, husband and wife, 1140 West San Lucas Circle, Tucson, Arizona 85704, Respondents.	DOCKET NO. S-20520A-07-0155 **SECURITIES DIVISION'S POST HEARING BRIEF** **Hearing Dates: March 4 & 5, 2008** **Assigned to Administrative Law Judge Marc E. Stern**

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") submits its post-hearing brief as follows:

A. RESPONDENTS AND PROCEDURAL HISTORY.

On March 20, 2007, the Division filed a Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, For Restitution, For Administrative Penalties and For Other Affirmative Action ("Notice") against Leonard Francis Alcaro alleging violations of the Arizona Securities Act. Mr. Alcaro's spouse, Mary Brigid Lavin Alcaro was joined under A.R.S. § 44-2031(C) for the purpose of determining the liability of her marital community with Mr. Alcaro. **(Notice, ¶3)**.

The Notice was personally served on Mrs. Alcaro on March 27, 2007. Mrs. Alcaro filed her Request for Hearing on April 9, 2007, and she filed her Answer to the Notice on April 20, 2007.

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The Notice was personally served on Mr. Alcaro on April 2, 2007. Mr. Alcaro did not request a hearing or file an answer to the Notice. Mr. Alcaro did not properly appear in or defend this action despite his notice of all aspects of the same. (**Decision, pp. 1:13 to 2:8**).

At the September 6, 2007 securities open meeting, the Commission executed Decision No. 69900 holding that Respondent Leonard Francis Alcaro ("Mr. Alcaro") sold a net-total of $403,988.73 in unregistered securities to Arizona investors in violation of in violation of A.R.S. §§ 1841, 1842 and 1991. The Commission further ordered a related administrative penalty of $100,000. (**Decision, ¶¶2-3, p. 9; S-34**). Mr. and Mrs. Alcaro did not participate at the open meeting despite their notice of the same, and they failed to offer evidence, pleadings or arguments in opposition to the proposed Decision. (*See*, September 5, 2007 Return Receipt re: Recommended Order, Docket Item No. 14). The Decision was not timely appealed. *See*, A.R.S. § 12-904 (time limit to appeal final agency decision is 35 days).

A hearing on the remaining community property liability issue raised by Mrs. Alcaro was held on March 4 and 5, 2008.

Mrs. Alcaro stipulated to the admission of all of the Division's exhibits except the Division's three expert reports marked as S-3, S-4 and S-31. (**Transcript, Vol. I, pp. 41:17 to 42:19,** discussing stipulation re: S-1(a), S-1(b), S-2(a), S-2(b), S-5 to S-30, and S-32; ***see also*, Transcript, Vol. II, pp. 206:15 to 210:16,** stipulation re: S-33(a), S-33(b), and S-34).

Mrs. Alcaro did not object to the eventual admission of the Division's three expert accounting reports when they were offered by the Division (i.e., S-3, S-4 and S-31) (**Transcript, Vol. I, pp. 115:15 to 117:3, p.132:2-14**).

The Administrative Law Judge ("ALJ") recognized Mr. LeRoy Johnson as the Division's forensic accounting expert without objection. (***Id.*, p. 104:6-10**).

B. SUMMARY OF FACTUAL AND LEGAL ARGUMENT.

At all times relevant from 1995 to at least 2006, Mr. Alcaro and Mrs. Alcaro resided together as husband and wife in Tucson, Arizona. (*See*, **S-5 to S-13, S-15; Transcript, Vol. II, pp. 255:11 to 259:6**). They are still married. (**Transcript, Vol. I, p. 9:19-21**).

According to A.R.S. § 25-213(A), property acquired prior to marriage is "separate" property. On the other hand, absent gift or inheritance, property acquired during marriage is "community" property. *See*, A.R.S. § 25-211(1).[1] The property at issue is investor money, and it was acquired by Mr. Alcaro during his marriage with Mrs. Alcaro while they were residing together. Under Arizona law, the investor funds obtained by Mr. Alcaro are community assets, and given the Commission's uncontested Decision against Mr. Alcaro, those community funds are now a community liability as a matter of undisputed fact and law. .

Arizona law further mandates that Mrs. Alcaro had the burden of proving by "clear and convincing evidence" that the investor money is the separate property of Mr. Alcaro. Mrs. Alcaro did not provide the ALJ with any evidence that her marital community did not benefit from investor money. Mr. and Mrs. Alcaro did not testify at hearing. Mrs. Alcaro offered no expert or investor witnesses. She provided no documentary evidence. The record is devoid of any evidence that the Alcaros ever maintained any truly or legally separate property, income or debt. At hearing, Mrs. Alcaro essentially ignored her high burden of proof. Thus, Mrs. Alcaro did not meet her high burden of proving that the investor money was not obtained for the benefit of the Alcaros' marital community.

Despite the established presumption of community property/debt and Mrs. Alcaro's failure to provide the ALJ with any evidence to support a finding in her favor, the Division went *much further* and provided the ALJ with overwhelming objective evidence that: (1) the Alcaro marital community was directly and substantially benefited by investor money; and (2) at all times relevant

[1] The exact, relevant text states: "All property acquired by either husband or wife during the marriage is the community property of the husband and wife except for property that is: 1. Acquired by gift, devise or descent."

from 1995 to 2004, the Alcaros treated all income and debt as community income and debt. Based on his extensive education and experience, and review of: (1) Bank of Tucson and Wells Fargo bank records; (2), additional bank records including the Alcaros' joint 9095 Wells Fargo account; (3) the Alcaros' Bankruptcy records; (4) the Alcaros' 1997 to 2004 federal tax returns; (5) the Alcaro real estate records produced by Fidelity and Lawyers Title; (6) Alcaro investor documents including promissory notes and checks; and (7) and Division Investigator interview memos, the Division's expert witness LeRoy Johnson concluded that:

1. Mr. Alcaro did not use any of the $403,998.73 of investor money to invest in the Purported Investments.
2. Consequently, Mr. Alcaro did not receive any money from the Purported Investments.
3. Substantial amounts of Investor funds ($272,074) were commingled in the Bank of Tucson and Wells Fargo Accounts with other community funds ($192,534) from 1999 to 2004, such as those resulting from the Alcaros' tax returns and transferred from the Alcaros' other joint 9095 Wells Fargo account.
4. Investors were repaid a portion of their principal investments with checks drawn on the Bank of Tucson and Wells Fargo Accounts analyzed by Mr. Johnson.
5. Investor funds were used for the direct and substantial benefit of Alcaros marital community.

(**S-3; S-31, Exhibits 1 & 2**).

Mr. Johnson testified he had seen no evidence in this case that the restitution owed to investors is anything other than a community debt. (**Transcript, Vol. II, p. 227:2-25; pp. 246:12 to 247:5, p. 250:7-21, pp. 252:6 to 253:22**). Importantly, under cross examination, Mr. Johnson did not change his expert opinions, or the numbers, percentages, categorization of receipts and disbursements, and analysis appurtenant to the same. (**S-3, pp. 5-7, 10; S-31 at Exhibits 1 & 2;** *see e.g.*, **Transcript, Vol. I, pp. 138:1 to 150:10, pp. 152:17 to 153:10**, Mr. Johnson repeatedly

and consistently reiterating expert conclusion that Alcaros commingled community and allegedly separate investor funds, and that the Alcaro marital community was directly benefited by investor money).

Equally important, the Alcaros classified *$530,000* of investor debt as a "joint" obligation in their 2005 bankruptcy. Because the Alcaros sought the discharge of $580,379 in total debt, *investor debt constitutes 91% of the total debt they sought to discharge in their bankruptcy.* (**S-5; S-32**). Objectively, the Alcaros knowingly classified investor debt as being owed by both of them as husband and wife. This fact is supported by the admissions against interest contained in their bankruptcy schedules, and because Mrs. Alcaro argued that the Division's claim against her marital community is moot because investor debt was purportedly discharged therein. (*See*, **March 4, 2008 Securities Division's Notice of Provision of Applicable Bankruptcy Law to the ALJ, p.1:16-23; Transcript, Vol. I, p.18:18-20**).

With respect to the Division's compelling bankruptcy evidence, Mrs. Alcaro argued that: (1) she filed bankruptcy with Mr. Alcaro merely because married couples like them always have to file jointly; (2) they were merely following their attorney's "advice" in listing the investor debt as joint debt; and (3) married couples always have to identify debts as joint debts. (**Transcript Vol. I, p. 18:6-20, p.22:16 to 23:3**). However: (1) ample bankruptcy law demonstrates that a single spouse often files bankruptcy while married; and (2) the Alcaros had the express option to list investor debt as the separate debt of Mr. Alcaro, and that separate listing would affect the rights of creditors to attempt to collect the allegedly separate investor debt. *See*, A.R.S. § 25-215.

Mrs. Alcaro failed to address additional evidence presented to the ALJ demonstrating that investor money was obtained to benefit the Alcaros' marital community, including the facts that:

1. Investor checks were issued to both Mr. and Mrs. Alcaro, and Mrs. Alcaro countersigned at least one check (**S-14(a)-(d)**);

2. Several investors received many repayment checks issued from a joint Wells Fargo checking account held by Mr. and Mrs. Alcaro (**S-3, Exhibit 1, Note A, fn.1, S-16: S-25**);

3. The Alcaros filed joint tax returns as husband and wife (**S-6 to S-13; S-15**);

4. The Alcaros purchased and owned their home jointly as husband and wife (**S-15**), and they **both** executed at least 3 short form deeds of trust to partially repay investors from the sale of their joint, marital Tucson residence (**S-16, S-21 & S-26**); and

5. Several investors obtained un-appealed civil judgments against both Mr. and Mrs. Alcaro as husband and wife in an attempt to recover their principal investments. (**S-18, S-27 & S-28**).

It is difficult to imagine how the procurement of over $400,000 in cash by a husband over a period of many years did not directly or indirectly benefit his ongoing marital community, especially when there is no evidence that Mr. Alcaro invested a single investor dollar in any of the Purported Investments. (**Decision, ¶¶2, 8, 32-33**). Division expert LeRoy Johnson testified that Mr. Alcaro didn't do so, in part, because there is no evidence that the Purported Investments even existed. (**S-3, pp. 6-7; Transcript Vol. II, pp. 224:16 to 225:16**). Because there is overwhelming evidence in the record that at all times relevant the Alcaros treated all of their income and liabilities as community assets and debt, Mrs. Alcaro clearly did not meet her high burden of proof that the investor money at issue was Mr. Alcaro's sole and separate property/debt as required by law. Thus, the ALJ should issue a recommended order to the Commission that the Alcaros' marital community is liable for the restitution and related penalty set forth in the Decision.

At hearing, Mrs. Alcaro noted that substantial amounts of both community and allegedly separate investor funds were deposited into the Bank of Tucson and Wells Fargo Accounts primarily analyzed by the Division's expert Mr. Johnson. Mrs. Alcaro reasoned that the Alcaro marital community is not liable merely because the Division did not "trace" each and every

investor and non-investor dollar. (**Transcript, pp. 19:7 to 21:18**). However, allegedly separate property commingled with community property in a common fund over a substantial period of time is automatically converted to community property, absent clear and convincing evidence to the contrary. *Cooper v. Cooper*, 130 Ariz. 257, 260, 635 P.2d 850, 853 (1981)(held that commingling of monies from husband's salary for community expenses rendered savings account in wife's name community property and, in absence of wife's demonstrating which portion of monies in account retained their separate character; court then held that one-half of savings account was to be awarded to each spouse on dissolution of marriage). As noted by the Arizona Supreme Court, there is a:

> strong presumption, rebuttable only by clear and convincing evidence, that all earnings during coverture are community in nature…when separate and community funds have become commingled, the commingled funds are presumed to be community in nature, and the burden is upon one claiming them, or any portion of them, to be separate, to prove such fact and the amount by clear and satisfactory evidence.

Barr v. Petzhold, 77 Ariz. 399, 409, 273 P.2d 161, 167 (1954). Thus, contrary to Mrs. Alcaro's assertion, the Division was not required to prove or "trace" how each and every community and allegedly separate investor dollar was spent over a substantial period of time. Rather, Mrs. Alcaro had the burden of proving how all of the community and allegedly separate investor money at issue was spent. By failing to provide the ALJ with any independent documentary or testimony evidence, Mrs. Alcaro glaringly failed to meet her high burden at hearing. Thus, the allegedly separate investor money deposited into the Bank of Tucson and Wells Fargo Accounts became community property and, therefore, community liabilities.

Mrs. Alcaro also argued that Mr. Alcaro committed crimes and/or torts, and that restitution arising from such conduct is not binding on the Alcaros' marital community. This is not a tort or criminal case and, thus, case law regarding the same is not applicable. Moreover, Arizona decisions hold that marital communities are liable for even the intentional torts and criminal acts of one spouse, including any applicable punitive damages, if the community was benefited by such

improper conduct. The Division provided the ALJ with undisputed expert and documentary evidence that investor money directly and substantially benefited the Alcaros' marital community. (**Exhibit S-3; S-31 at Exhibits 1 & 2**). Even under Mrs. Alcaro's inapplicable tort/crime case law, the Alcaros' marital community is liable for Mr. Alcaro's conduct in raising hundreds of thousands of investor money from Arizona investors.

The Division was unable to obtain Bank of Tucson bank records prior to June 1999 from the Bank and from the Alcaros themselves. (**S-1; S-2**). Thus, Mrs. Alcaro alternatively argued that her community with Mr. Alcaro is not liable for "full" restitution to investors because the Division did not trace each and every investor dollar raised by Mr. Alcaro from July 1995 to June 1999. The investor money raised by Mr. Alcaro from July 1995 to June 1999 is not unaccounted for as suggested by Mrs. Alcaro. Considering repayments, there is no dispute that Mr. Alcaro sold a net-total of $403,998.73 worth of the Purported Investments. (**Decision No. 69900, p.9; S-3, pp. 5-6; S-31, Exhibits 1 & 2**). Because the Division's expert Mr. Johnson established that $272,074 of investor money was deposited into the Bank of Tucson and Wells Fargo accounts from July 1999 to November 2004, there is no question that Mr. Alcaro raised at least $131,924.73 from July 1995 to June 1999. (**Transcript, Vol. I, pp. 179:2-21; Transcript, Vol. II, pp. 225:17 to 227:24**). Mrs. Alcaro did not provide the ALJ with any evidence that, for instance, this $131,924.73 in investor funds was spent by Mr. Alcaro on illegal gambling or drugs, separate and apart from his marriage with Mrs. Alcaro, without her knowledge and/or actual and implied consent. (**Transcript, Vol. I, p. 167:1-12, pp. 194:7 to 196:9,** discussing lack of proof by the Alcaros as to exactly how any money was or was not spent). Thus, Mrs. Alcaro did not meet her high burden of proving that the $131,924.73 obtained by Mr. Alcaro from July 1995 to June 1999 did not benefit her marital community.[2] Thus, the Alcaros' martial community must be liable for the restitution and penalties set forth in the Decision as a matter of fact and law.

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[2] Judge correctly noting: "Okay. Look, Mr. Vingelli, Mr. Alcaro is found to have accumulated over $400,000, I think, in so-called investor funds. I think if we look at what Mr. Johnson found as to the so-called paid back to investors or however you want to -- what you want to term that money that goes back to

Mrs. Alcaro next argued that the ALJ must determine Mr. Alcaro's "intent" to benefit his marital community. (**Transcript, Vol. II, p. 240:4-9**). To the contrary, courts only look to a spouse's intent to benefit the community when there is no actual or likely benefit to the community from the spouse's conduct. For instance, a court may look to a husband's intent to benefit or protect his marital community when he assaults another person, and such assault is not logically or immediately relatable to the marital community. *See e.g.*, *Rodgers v. Bryan*, 82 Ariz. 143, 148, 309 P.2d 773, 776 (1957)(malicious assault and battery by one husband, "to protect the morals of his family, hotel guests, and his property against trespass" were "obviously community interests" and his "conduct and actions were intended to be performed in behalf of the community, and his separate property and that of the community are liable for the unfortunate results of his violent conduct."). As a threshold matter, the ALJ cannot base his proposed decision on any "unknown" purported intent because neither Mr. nor Mrs. Alcaro testified at hearing. Also, this is not a malicious assault/tort or drunken driving case in which a possible benefit to a community is questionable. This is a regulatory action in which the Division was not required to prove tort elements like intent, breach of a "duty," damages, etc. Importantly, the quintessential community asset is money, and a primary way and accepted way to benefit to a marital community is the procurement of such money through the buying and selling of investments. Not only did Mr. Alcaro obtain investor money while he was married and living with Mrs. Alcaro, the Division was able to prove that that at least $272,074 of such money directly benefited the Alcaro marital community. (**S-31, Exhibits 1 & 2**). Nevertheless, if he is inclined to do so despite any legal requirement, the ALJ can determine the Alcaros' alleged, post-hoc intent by looking at their objective conduct during the substantial

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the investors, a lot less than the money he received from them. So somewhere, somehow that money must have gone somewhere. It didn't vanish. It was spent on something. And if you're saying Mr. Alcaro spent it all on himself and on wine, women, and song, prove it. Rebut the Division's allegations here." She did not. (**Transcript, Vol. I, p. 167:1-12**). Judge also noting: "If you're saying that the community isn't liable for that difference and some change there, then you come in with some evidence and show Mr. Alcaro was flying around the world, taking month long boat trips, gambling it away in Las Vegas or whatever you're going to show because the Division's saying, here, the community benefited at least this much during this time frame. And I don't see anything from your saying, we've got evidence Leonard Alcaro spent all this money on all this other stuff, and the community never saw it." (***Id.*, p. 195:10-20**).

period of time that investor money was obtained and spent. As noted in detail below, Mr. Alcaro's undisputed procurement, and use of investor money to pay thousands of dollars of specific community expenses over a substantial period of time while he resided with his wife demonstrates an objective "intent" to benefit the Alcaro marital community with investor money.

Finally, A.R.S. § 44-2031(C) expressly permits the Commission to obtain jurisdiction over a non-participating spouse for the purpose of determining the liability of the marital community for violations of the Securities Act. Failing to name the non-participating spouse and the community in a Securities Act enforcement action like this one precludes later attempts to satisfy restitution from community property. Unlike a divorce proceeding, the ALJ has no authority or need to equitably apportion the restitution owed in this case amongst the Alcaros themselves. *See*, A.R.S. § 25-318(A)(permitting divorce court to apportion joint debts). The ALJ also does not have to determine how the restitution and penalty should be "collected" from either separate or community assets. *See*, A.R.S. § 25-215(applicable in a collection case when defendants are still married, and describing how joint debt is satisfied from separate or community property). Thus, because Mr. Alcaro fraudulently sold unregistered securities in Arizona to Arizona investors, the Commission has express jurisdiction over the Alcaro marital community to determine its liability.

The ALJ has an overwhelming factual record and unambiguous law to craft a proposed decision finding the Alcaro marital community liable for the restitution and penalty set forth in the Commission's Decision. In contrast, Mrs. Alcaro failed to provide any controverting evidence. As a result, the ALJ should issue a recommend order to the Commission holding that the Alcaros' marital community is liable for the full $403,998.73 in restitution and related $100,000 in administrative penalty ordered by the Decision. (**Decision No. 69900, p.9**).[3]

[3] The Decision also requires the payment of interest on the restitution amount at the rate of 10% per year until paid, with said interest to begin accruing on September 6, 2007. The interest requirement should be included in the Judge's Proposed Order.

C. **FACTS.**

1. **At All Times Relevant, the Alcaros Resided Together as Husband and Wife.**

At all times relevant from 1995 to the present, Mr. and Mrs. Alcaro have been married. (**S-5 to S-13**; **Transcript, Vol. I, p. 9:18-20, p. 17:13-20, p. 35:15-20**).[4]

At all times relevant from 1995 to at least 2005, Mr. and Mrs. Alcaro resided together at: (1) 5250 North Mount Lemmon Short Road, Tucson, Arizona 85749 (the, "Mount Lemmon Residence"); and (2) 1140 West San Lucas Circle, Tucson, Arizona 85704 (**Transcript, Vol. I, p.35:15-24, pp.40:9-20 to 41:15, pp. 58:3 to 60:23; Transcript, Vol. II, pp. 255:11 to 259:6; S-1(b); S-5 to S-13;** *also*, **S-15, at ACC003161, 003217, 003247-003250; S-25, and Transcript, Vol. I, pp.71:8 to 72:4**).

The Mount Lemmon Residence was both jointly purchased and owned by the Alcaros as husband and wife. (**S-15, ACC002989-002990; Transcript, Vol. I, pp. 57:4 to 58:3**). The Alcaros executed purchase money mortgages and a home equity loan on the Mount Lemmon Residence jointly as husband and wife. (**S-15, ACC002990-003001, ACC003152; S-19; Transcript, Vol. I, pp.57:4 to 58:3, pp. 66:21 to 68:1**).

2. **Alcaro Investments & Investors**

Mr. Alcaro sold unregistered securities while not registered as a securities salesman or dealer in the form of, inter alia, investment contracts, commodity investment contracts, promissory notes and stock that he alternately called: (1) unsecured foreign currency exchange investments; (2) high interest loan investments; (3) offshore "Trinity Court" investments; (4) offshore money market investments; (5) gold market investments; (6) coin investments; and (7) stock investments (collectively, the "Purported Investments"). (**S-3, p.3; S-33(a); 33(b); Decision, ¶¶2, 9, 13, 15,**

[4] The community continues to exist, together with its rights and obligations, even when the parties may be living separate and apart. *Jurek v. Jurek*, 124 Ariz. 596, 597, 606 P.2d 812, 813 (1980). The Alcaros provided the Judge with no evidence that they were living apart at all times relevant from July 1995 to at least 2006. The overwhelming evidence is that the Alcaros resided together at all times relevant. (**S-5 to S-13, S-15, S-19, S-21 to S-26**). Importantly, Mrs. Alcaro also stipulated that she and Mr. Alcaro lived Tucson together in Tucson as husband and wife from 1995 to 2006. (**Transcript, Vol. II, pp. 255:11 to 259:6**).

18, 21, 24, 27 & 29, and Conclusions of Law at ¶¶1-4; Transcript, Vol. I, p. 107:3-20; Transcript, Vol. II, pp. 251:13 to 252:2, Mr. Johnson testifying that Purported Investments were securities).[5]

Mr. Alcaro did not invest investor money in the Purported Investments and, consequently, no money was received from the Purported Investments, in part, because there is no evidence they even existed. (**S-3, pp. 6-8; S-4, p.1; Transcript, Vol. I, pp. 121:18 to 122:11; Transcript, Vol. II, pp. 224:16 to 225:16;** *also*, **S-6 to S-13,** joint Alcaro tax returns showing no investments in or returns from the Purported Investments).

Alcaro investors are identified, in part, in the Alcaros' Bankruptcy pleadings (**S-5 & S-32**), short form deeds of trust executed by the Alcaros to secure partial repayments to investors from sale of their joint Mount Lemmon Residence (**S-16, S-21 & 26**), civil judgments obtained by investors against the Alcaros as husband and wife (**S-18, S-27 & S-28**), the Preliminary Report dated October 4, 2007 (**S-3**) prepared by Division accounting expert LeRoy Johnson and the Division's final restitution list (**S-34**).[6] (*See also*, **Transcript, Vol. I, pp. 42:20 to 46:23, pp. 107:2 to 112:15,** identifying investors and basis for such categorization).

Alcaro investors include, in part:

1. David and Marjorie Baker (**S-5, ACC00739; S-34, ACC004356; Transcript, Vol. I, p. 46:1-11, pp. 66:23 to 68:1**);
2. David and Jeannie Haberman (**S-3, p. 4; S-5, ACC000739; S-28; S-34, ACC004355**)
3. John (Jack) & Mary Kiefer (**S-3, p.4; S-5, ACC000740; S-17; S-34, ACC004354**);
4. Pedro & Yung Najera (**S-3, p.4; S-5, ACC000741; S-31, Exhibit 1, fn.1**).

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[5] Further, Mrs. Alcaro offered no evidence, and elicited no cross-exam testimony that the investments at issue do not constitute unregistered securities.

[6] The Alcaro investors were also identified in bank records, real estate records, promissory notes and investor interview memos and related documents reviewed by Mr. Johnson. (*See e.g.*, **S-3, pp. 2-7, 9; Transcript Vol. I, pp. 107:2 to 112:15**). These other supporting documents were made available to Mrs. Alcaro, but she never requested that they be provided to her, and hence they were not introduced at the hearing. (*See*, **Division's Proposed List of Exhibits at fn.1**).

5. Gasper & Ruth Pellerito (**S-3, p.4; S-5, ACC000739; S-21; S-34, ACC004355**);

6. Gerald and Sandra Ross (**S-3, p.5; S-5, ACC000727, ACC000740; S-26; S-34, ACC004356**);

7. Alvera Schultz (**S-3, p. 4; ACC; S-5, ACC000722; S-16; S-34, ACC004354**);

8. Timothy Weil (***See e.g.*, S-3, p. 5; S-14(a), S-14(b), S-14(d); S-34, ACC004356**); and

9. Leslie White (**S-3, p. 5; S-5, ACC000741, ACC000749.001; S-18; S-27**).

(*Also*, **Transcript, Vol. I, pp. 109:24 to 112:15**). These investors are also identified in the Alcaros' joint 2005 Bankruptcy, discussed in part below. (***Id.*, pp. 44:15 to 46:23, p. 111:9-23**).

As of September 6, 2007, the Alcaro investors were owed $403,998.73 in restitution, with interest thereon at the rate of 10% per year until paid in full. (**Decision No. 69900, p.9**; *also*, **S-34**, Division restitution list). Mrs. Alcaro failed to offer any evidence or argument that investors were not owed $403,998.73 in restitution as of September 6, 2007. (**Transcripts Vol. I & II**). To date, no money has been paid by Mr. Alcaro towards the satisfaction of the restitution amount. (**Transcript, Vol. I, p. 7:20-25**).

3. The Alcaros Jointly Filed Bankruptcy as Husband and Wife and They Identified Much of the Investor Debt at Issue as "Joint" Debt.

On May 10, 2005, the Alcaro's jointly filed a voluntary, no-asset Chapter 7 bankruptcy as husband and wife, while residing at the same address, Case No. 4-05-bk-02539-EWH (the, "Bankruptcy"). (*See*, **S-5**, Copies of Bankruptcy Pleadings provided to the Division by the Alcaros, at **ACC000716, ACC000724-000726**; *see also*, **S-32(A), S-32(B), S-32(C)** and **S-32(D)**, Certified copies of the Alcaros' bankruptcy pleadings; **Transcript Vol. I, pp. 78:8 to 80:8**). Mr. and Mrs. Alcaro had the express option of listing investor debt as the separate debt of Mr. Alcaro. (**S-5, ACC000739-742; S-32(a); Transcript, Vol. I, pp. 46:24 to 47:11**). They did not do so.

Rather, the Alcaros listed a total of $530,000 dollars of investor debt as "joint" debt of the Alcaros as husband and wife, and not the allegedly separate debt of Mr. Alcaro. (**S-5, at**

ACC00739-ACC00742; Transcript, Vol. I, p. 47:4-16).[7] Because the overall debt sought to be discharged by the Alcaros in their Bankruptcy totals of $580,379, **Alcaro investor debt constitutes 91% of all of the joint debt** listed in the Alcaros' Bankruptcy schedules. (**S-5, ACC000736-744; S-32(a)**). There is no evidence in the record that the Alcaros amended or sought to alter the classification of investor debt in their Bankruptcy schedules from joint, to the separate debt of Mr. Alcaro.[8] (**S-32**). *See also*, *Bogue v. Better-Bilt Aluminum Co.*, 179 Ariz. 22, 31, 875 P.2d 1327, 1336 (App. 1994)(letter written by attorney for company that contained statements adverse to company and in favor of discrimination plaintiff constituted admissible non-hearsay evidence and an admission of by a party opponent under Rule 801(d)(2)(D), Ariz. R. Evid.); *Henry v. Partners of Southern Arizona*, 203 Ariz. 393, 395-96, 55 P.3d 87, 89-90 (App. 2002)("concessions by a party's attorney during oral argument to a trial court may be considered [admissible] statements adverse to the party...And a declarant need not 'have personal knowledge of the matter asserted in the statement' for it to be admissible...Such evidence may emanate from the pleadings of a party, whether signed by the client or the attorney... 'The time has passed when allegations in a pleading will be treated as mere fictions, rather than 'as statements of the real issues in the cause and hence as **admissions** of the parties.'").

4. <u>The Alcaros Filed Joint Tax Returns as Husband and Wife</u>.

At all times relevant, Mr. and Mrs. Alcaro filed joint federal tax returns as husband and wife while residing at the same address, all of which reported joint, versus any separate income. (*See*, **S-6 to S13; Transcript, Vol. I, pp.47:17 to 53:22, pp. 110:14 to 111:8**). There record contains no evidence that the Alcaros have ever filed separately or that they have ever had truly separate incomes, investments, property or debts. (***Id.***; *see also*, **S-3 to S-5, S-14(a)-(d); S-15 to S-**

[7] The Alcaro investors identified in the Alcaros' bankruptcy schedules are David & Jean Haberman, David Baker, John, Ellia & Enzio Magaletti, Gasper Pelerito c/o attorney Brett Huston, Gerald Ross, Jack Kiefer, Les White c/o attorney Jeff Greenberg, N. Blake Richards, Pedro Najera, Robert Ruskay, Shawn and Marian Tierney, Thomas Graue and William Mahan, and their total "joint" investor debt owed to these persons of $530,000. (*See*, **S-5, S-32** and **S-34**).

[8] On November 20, 2006, undersigned requested a copy of the file maintained by the Alcaro's bankruptcy attorney. The Alcaros did not provide the Division with this information. (**Tab 1**).

32 demonstrating jointly held property and debts; **Transcript, Vol. II, pp. 246:12 to 247:5, pp. 252:7 to 253:22,** noting lack of any evidence suggesting that the investor money was anything other than community property).

5. <u>Other Community Liability Evidence & Relevant Investor Transactions</u>

Neither Mr. nor Mrs. Alcaro testified. Mrs. Alcaro also did not proffer any expert, investor or other third-party witnesses or independent evidence. (**Transcripts, Vol. I & II**; Mrs. Alcaro's March 3, 2008 List of Witnesses and Exhibits; *also*, **Exhibits S-1(a), S-1(b), S-2(a) & S-2(b)** Division subpoenas requesting documents from both Mr. and Mrs. Alcaro for the time period of 1995 to the present).

In addition to the foregoing, other undisputed, admitted evidence in the record demonstrates that at all times relevant, the Alcaros treated all income, property and debts as "community" assets and liabilities.[9] For instance, in February 2004, the Alcaros **<u>both</u>** signed a contract to purchase a new home located in Santa Rita Acres Estates. (**S-20; S-22; Transcript, Vol. 1, pp. 70:9 to 71:4**). They jointly purchased and owned the Mount Lemmon Residence as husband and wife. (**S-15, ACC002893-2902; Transcript, Vol. I, pp. 58:3 to 60:21**).

On September 18, 2000, Alcaro investor Timothy Weil wrote an investment check to **<u>both</u>** Mr. and Mrs. Alcaro in the amount of $5,000. (***See*, S-14(a) & S-14(d); Transcript, Vol. I, pp.54:4 to 56:4, pp.57:4 to 58:3**). **<u>Both</u>** Mr. and Mrs. Alcaro countersigned this check, and it was deposited into the Bank of Tucson Account analyzed by the Division's expert LeRoy Johnson. (***Id.***; *also*, **S-3, pp. 5-7; S-31 at Exhibits 1 & 2; Transcript, Vol. I, p. 56:5-11, pp. 132:17 to 133:24**).

On October 10, 2000, Alcaro investor Timmothy Weil wrote an investment check to **<u>both</u>** Mr. and Mrs. Alcaro in the amount of $2,400. (**S-14(b) & S-14(d); Transcript, Vol. I, p.56:12-20, pp.57:4 to 58:3**). Again, the October 10, 2000 Weil investment check was deposited into the

[9] By way of limited example, in 2001 the Alcaros filed a civil lawsuit against jointly as husband and wife. (**S-30; Transcript, Vol. I, p. 77:4-22**).

Bank of Tucson Account analyzed by the Division's expert LeRoy Johnson. (**S-3, pp. 5-7; S-31 at Exhibits 1 & 2; Transcript, Vol. I, pp. 56:21 to 57:3**).

On July 16, 2002, **both** Mr. and Mrs. Alcaro executed a Deed of Trust and Assignment of Rents in favor of Alcaro investor Alvera Shultz in the amount of $10,000 to be satisfied from the sale of their joint marital residence at 5250 North Mount Lemmon Short Road. (**S-16; Transcript, Vol. I, pp.61:6 to 62:11**).

On February 10, 2003, **both** Mr. and Mrs. Alcaro executed a Deed of Trust and Assignment of Rents in favor of Alcaro investors Gasper and Ruth Pellerito in the amount of $16,000 to be paid from the sale of their joint marital residence at Mount Lemmon Short Road. (**S-21**). Mrs. Alcaro's signature on the Pellerito Deed of Trust is notarized. (**S-20; S-21, ACC001614; Transcript, Vol. 1, pp. 68:2 to 70:7**).

On January 16, 2004, **both** Mr. and Mrs. Alcaro executed a Modification Agreement of a deed of trust they originally executed in favor of Alcaro investors Gerald and Sandra Ross for partial repayment of their investment amount from the sale of their joint marital residence at 5250 North Mount Lemmon Short Road. (**S-20; S-26**). Mrs. Alcaro's signature on the Ross Deed of Trust is notarized. (**S-26, ACC001569; Transcript, Vol. I, p. 72:3-21**).

On July 3, 2002, Alcaro investor Leslie White filed a civil lawsuit regarding his investment against Mr. and Mrs. Alcaro as husband and wife, in Pima County Superior Court, Case No. C20023220 (the, "White Lawsuit"). (**S-27, Transcript Vol. I, pp. 72:22 to 74:25**). Mrs. Alcaro was personally served with process in the White Lawsuit, and she was represented therein by counsel. (**S-27, ACC004298, ACC004307**) On May 26, 2004, Alcaro investor Leslie White obtained a civil Default Judgment against **both** Mr. and Mrs. Alcaro, as husband and wife, in the amount of his then outstanding investments totaling $168,293.49 with interest. (**S-18; Transcript, Vol. I, pp.63:11 to 66:20; S-27, ACC004280-4281, ACC004342-4346**).

Similarly, Alcaro investors David and Jean Haberman filed a civil lawsuit against Mr. and Mrs. Alcaro, as husband and wife, in Pima County Justice Court, CV03-001134. (the, "Haberman

Lawsuit"). (**S-28**). On or about April 24, 2003, the Habermans obtained a judgment against the Alcaros as husband and wife that was eventually filed with the Clerk of the Pima County Superior Court for collection purposes, T20030544. (**S-28, ACC004251-004256; Transcript, Vol. I, pp. 75:1 to 76:8).**

The Alcaros both owned a joint checking account at Wells Fargo with the last four digits 9095. (*See*, **S-15, ACC003148**, re: joint 9095 Alcaro checking account at Wells Fargo; **S-29, ACC00004186,** re: joint 9095 Wells Fargo checking account; **Transcript, Vol. I, pp. 76:9 to 77:2**). Alcaro investor Pedro Najera's investment check was deposited into the Alcaro's joint 9095 Wells Fargo checking account. (**S-3, p. 4; S-31, Exhibit 1, p. 4, fn.1**). Further, the Alcaros issued many investment repayment checks to Alcaro investor Jack Kieffer written on the Alcaro's joint 9095 Wells Fargo checking account. (**S-17; Transcript, Vol. I, pp. 62:12 to 63:10**). On November 5, 2001, Mr. Alcaro issued a partial repayment check to Alcaro investor Les White in the amount of $2,640 on the Alcaros' joint 9095 Wells Fargo checking account. (**S-25; Transcript, Vol. I, pp.71:8 to 72:4**).

6. <u>The Alcaro's Marital Community was Directly Benefited by Substantial Amounts of Investor Money</u>.

A. Mr. Johnson's Expert Accounting Analysis of the Alcaros' Finances and Use of Investor Money

Mr. Johnson[10] reviewed the Alcaros' bank and financial records, memos of Division Special Investigator interviews of Alcaro investors and related documents such as their promissory notes, title and escrow documents relating to Alcaro real estate and related documents, the Alcaros' Bankruptcy Records and the Alcaros' 1997 to 2004 federal income tax returns to determine how investor and other funds were used. (**S-3, pp. 2-10; S-4; S-31; Transcript, Vol. I, pp. 104:12 to 106:5, pp. 107:21 to 109:23; pp. 110:14 to 113:14**).

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[10] An analysis of Mr. Johnson's qualifications are attached as **Tab 2**, incorporated herein by reference.

Mr. Johnson also reviewed the records to determine: (1) if investor funds were used for the purported investments sold by Alcaro; (2) whether any funds were received from the purported investments; and (3) if investor funds were used to benefit the marital community of Mr. and Mrs. Alcaro. (**S-3, p. 2; Transcript, Vol. I, pp. 106:6 to 109:20**).

As noted by Mr. Johnson, Investor money was *primarily* deposited into 2 bank accounts: (1) account number 1005172 at the Bank of Tucson (the, "Bank of Tucson Account'); and (2) account number 045-1522908 at Wells Fargo (the, "Wells Fargo Account"). (**S-3, pp. 5-7; S-31 at Exhibits 1 & 2; Transcript, Vol. I, p. 108:4-11, pp. 112:23 to 113:14**). All relevant money flowing into and out of the Bank of Tucson and Wells Fargo Accounts was accurately accounted for, and properly categorized by Mr. Johnson. (**Transcript, Vol. I, p. 136:8-19, p. 158:12-25**). Mr. Johnson testified that the mere fact that Mr. Alcaro was the only signer of the Bank of Tucson and Wells Fargo Accounts does not mean they are separate accounts. (**Transcript, Vol. II, pp. 225:17 to 227:24**).

Mr. Johnson found that money deposited into the Bank of Tucson and Wells Fargo Accounts was often transferred back and forth to the Alcaro's joint 9095 Wells Fargo over a substantial period of time. (***Id.*, p. 113:2-14, pp. 118:10 to 119:16, pp. 136:12 to 137:25**; *also*, **S-31, Exhibit 1, p.1 & Note A at fn.1**, noting that a net total of $7,931 flowed from the Alcaros' joint 9095 Wells Fargo into the Bank of Tucson Account). More money flowed from the Alcaros' joint 9095 Wells Fargo account into the Bank of Tucson and Wells Fargo Accounts (where commingling occurred), than was returned to the Alcaros' joint 9095 Wells Fargo account. (**Transcript, Vol. I, p. 137:5-25; Transcript Vol. II, pp. 213:2 to 222:1**).

Mr. Johnson generated a total of 3 reports that contain his expert, forensic analysis of the Alcaros' finances. (**S-3; S-4; S-31**). Mr. Johnson's expert accounting reports were admitted into evidence without an objection by Mrs. Alcaro. (**Transcript, Vol. I, pp. 115:15 to 117:3, p.132:2-14**).

First, Mr. Johnson's "preliminary" analysis of the Bank of Tucson and Wells Fargo Accounts is set forth in his Preliminary Report dated October 4, 2007 marked as S-3 (the, "Preliminary Report."). (**S-3**). Mr. Johnson's Preliminary Report concludes that: (1) there is no evidence that investor funds were placed in any of the Purported Investments sold by Alcaro or that that the purported investments even exist; (2) consequently, no money was earned or received from the Purported Investments; and (3) Mr. Alcaro used investor funds for the substantial and direct benefit of his marital community. (**S-3, pp. 7, 10;** *also*, **Transcript, Vol. I, pp. 121:9 to 122:11; Transcript, Vol. II, pp. 224:1 to 225:16,** discussing in part fact Final Report does not show any money going to, or from the Purported Investments; *also*, **S-4, p. 1**).

Second, after he created his Preliminary Report, Mr. Johnson reviewed additional Alcaro tax returns provided by Mrs. Alcaro (**S-10**), and his analysis of the same is set forth in his first "Supplement to Preliminary Report of LeRoy Johnson" dated October 9, 2007 was marked as S-4. (*See*, **S-4 & S-32; Transcript Vol. I, pp. 116:3-20**). The preliminary, yet detailed findings set forth in his Preliminary Report did not change with his first supplemental report marked as S-4. (**S-4, pp. 1-2; Transcript, Vol. I, pp. 116:3 to 117:4**).

Third, Mr. Johnson received and reviewed additional bank detail regarding the Wells Fargo Bank Account. (**S-31, p.1;** *also*, **Transcript, Vol. I, p. 114:10-25, p. 117:6-19,** discussing ramifications of these additional bank records). Because such records were the result of all previously outstanding bank detail requests, Mr. Johnson generated his final, forensic accounting of the receipts and disbursements regarding the Bank of Tucson and Wells Fargo Accounts dated February 5, 2008 (the, "Final Report") (*See*, **S-31, p.1;** *also*, **Transcript, Vol. I, p. 115:1-11**). As with his first supplemental report, Mr. Johnson's conclusions did not materially change from his Preliminary (S-3) to his Final Report (S-31). As Mr. Johnson stated:

> The request for the Additional Bank Records was outstanding at the time of the Preliminary Report. See footnote number 1 to Preliminary Report.

> The Additional Bank Records provided information that I have taken into consideration in finalizing the Summary of Receipts and Disbursements for Bank of Tucson (Exhibit "1" attached hereto) and Wells Fargo Bank (Exhibit "2" attached hereto).
>
> As I discussed in footnote number 1 to the Preliminary Report, it was not anticipated that when the Additional Bank Records were received that they would change any of the conclusions contained in the Preliminary Report. This has proven to be the case. Only classifications of certain receipts and disbursements have been modified in Exhibits "1" and "2".
>
> None of the conclusions reached in the Preliminary Report change as a result of the review of Additional Bank Records.

(**S-31, p.1; Transcript Vol. I, pp. 117:20 to 118:1**).

B. Analysis of the Bank of Tucson Account

Mr. Johnson's final analysis of the Bank of Tucson Account is set forth in Exhibit 1 to S-31. (**Transcript, Vol. I, p. 118:2-19**). Mr. Johnson analyzed Bank of Tucson Account records dated June 6, 1999 to November 30, 2001. (**S-3, p.6**). There is no dispute that Alcaro sold numerous investments to Arizona investors prior to 1999 beginning in July 1995. (**Decision, ¶¶2-3, & Order, p. 9;** *also*, **S-34; Transcript, Vol. II, pp. 225:17 to 227:24**). Although certain investors invested money with Mr. Alcaro prior to June 1999, the Bank of Tucson was unable to provide deposit detail prior to that date. The Division also requested the Alcaros' bank records from 1995 to 1999. (**S-1(a); S-1(b); S-2(a); S-2(b)**). The Alcaros failed to provide their bank records from 1995 to 1999. (**S-5; S-10; S-29**). Consequently, the financial analysis on this Account begins June 6, 1999 and ends November 30, 2001 when the Account was closed due to "suspicious activity." (**S-3, pp. 5-7; Transcript Vol. I, p. 113:15-23**).

Investor money constituted the primary receipts (approximately 3/4ths) deposited into the Bank of Tucson Account. (**Transcript, Vol. I, pp. 118:20 to 120:7;** *also*, **S-31, Exhibit 1, p.1, Note A**). A total of $229,249 in investor money was deposited into the Bank of Tucson Account. Thus, investor money, tracked by Mr. Johnson as to each investor, investment amount and date of deposit, actually constituted 74.4% of the total deposits into the Bank of Tucson from June 1999 to November 2001. (**S-31, Exhibit 1, p.1, Note A;** *also*, **S-3, Exhibit 1, p.1**).

There was no evidence of any receipts coming from the Purported Investments sold by Mr. Alcaro to investors. (**S-3, p.6;** *also*, **S-4, p.1; Transcript Vol. II, pp. 224:16 to 225:16**). Also, there was no evidence that any of the Bank of Tucson funds went towards the purchase of the Purported Investments sold by Mr. Alcaro. (**S-3, p.7; Transcript, Vol. I, pp. 121:9 to 122:11**). Yet, approximately $111,017 or 35.7% of the total Bank of Tucson receipts were returned to investors often designated as purported interest or principal. (**S-31, Exhibit 1, p.1, Note B**; *also*, **S-3, pp. 6-7; Transcript, Vol. I, pp. 120:24 to 121:8**).

A total of $164,666 or 53% of all Bank of Tucson receipts went to the benefit of Mr. Alcaro and his wife in the form of cash and other personal expenditures including, without limitation:

1. Department Stores: $8,106.84 total in stores such as Costco, Macys, Best Buy, Dillards, Casual Male, REPP, Ltd Big and Tall Shop, Wal-Mart, Thaku's Menswear, Sears, K-Mart and TJ Maxx.
2. Grocery Stores: $3,679.45 total at Abco, Albertson's, Bashas, and Safeway
3. Utilities: $17,220.50 total with U.S. West, Southern Arizona Gas, AOL On-line, Tucson Electric Power, Sprint, Waste Management, City of Tucson, Voice Stream, Direct TV and Qwest.
4. Personal Credit Card Payments: $5,195.96 total.
5. Personal Bank Fees: $2,115.49 regarding overdraft and insufficient funds charges.
6. Miscellaneous Personal Expenditures: $14,827.33 total on things like fitness club fees, optometrist and dentist bills, insurance premiums, restaurants, pet clinics, car repairs, jewelry stores, hotels and airlines.
7. House-Mortgage Payments: $3,468.95 total to RamDur, Federal National Bank and Countrywide Home Loans.

(**S-31, Exhibit 1, p. 12, Note C; S-3, pp. 6-7; Transcript, Vol. I, pp. 122:12 to 127:13, pp. 175:6 to 177:6, pp.188:3 to 192:16, pp. 194:7 to 195:21,** discussing "cash" benefits to the Alcaro marital community; **Transcript Vol. II, pp. 223:19 to 224:10**). As a limited example, Mr.

Johnson testified that even Mrs. Alcaro's dental bills were paid from the Bank of Tucson Account funds. (**Transcript, Vol. I, pp. 126:20 to 127:4,** re: payment to Smile Impressions).

The Alcaros also paid their monthly mortgage on their joint Mount Lemmon Residence with checks drawn on the Bank of Tucson Account. (*See e.g.*, **Transcript, Vol. I, p. 127:5-13; Transcript Vol. II, pp. 223:14 to 224:10; S-15, ACC003032, 003068**, regarding 2nd Trust Deed to Ram-Dur Enterprises; **S-31, Exhibit 1, at p. 12, Note C, Exhibit 2 at p.8, Note D**, re: house/mortgage payments made from the Bank of Tucson & Wells Fargo Accounts analyzed by Division expert witness LeRoy Johnson).

Also, large amounts of money were transferred back and forth from the Bank of Tucson Account to the Alcaros' joint 9095 Wells Fargo account. (**Transcript, Vol. I, pp. 118:10 to 120:23, pp. 192:24 to 193:10; Transcript Vol. II, pp. 213:19 to 217:21**; *also*, **S-31, Exhibit 1, p.1**, noting approximately $8,000 in net receipts from joint Alcaro Wells Fargo account). In one instance, one investor's check was deposited into the Alcaros' joint 9095 Wells Fargo account. Leonard Alcaro took $1,500 cash leaving a net deposit of $6,000 into the joint 9095 Wells Fargo Account. A transfer of $5,000 of this investor money was then made into the Bank of Tucson Account. The cash withheld, the investment amount and the transfer are accounted for in the Bank of Tucson account. (**S-31, Exhibit 1, Note A, fn.1; Transcript Vol. II, pp. 211:14 to 212:24**).

The Alcaros also commingled $80,581 in other community funds into the Bank of Tucson Account, including their federal and state tax refunds. (**S-31, Exhibit 1, p.1; Transcript, Vol. I, p. 120:8-23, pp. 176:5 to 177:6**).

As a result, Mr. Johnson testified that: (1) approximately 3/4ths of all deposits into the Bank of Tucson Account were investor funds; and (2) over half of all money deposited into the Bank of Tucson Account was used to directly benefit the Alcaros' marital community, while a substantial amount of the other available community money deposited therein was paid to investors as a partial return on their Purported Investments. (**Transcript, Vol. I, pp. 127:14 to 128:8;** *also*, **S-31, Exhibit 1, pp. 6-11, Note B**).

Conversely, at hearing, Mrs. Alcaro failed to provide the ALJ with any evidence how a single Bank of Tucson Account dollar was either obtained or spent, other than speculation. (**Transcripts Vol. I & II**).

C. Analysis of the Wells Fargo Account

Mr. Johnson analyzed Wells Fargo Account records dated November 23, 2001 to November 23, 2004. (**S-3, pp. 7-8**). This Account was opened in late November 2001, and was identified by Mr. Johnson as the primary account into which investor money was deposited immediately after the Bank of Tucson Account was closed for suspicious activity. (***Id.***; *also*, **Transcript Vol. I, p. 128:9-17**). Mr. Johnson's final accounting of the receipts and disbursements from the Wells Fargo Bank Account is set forth as Exhibit 2 to his Final Report marked S-31.

$42,825 of investor money was deposited into the Wells Fargo Account, which amounts to 27.9% of all deposits. Again, the investor deposits are precisely identified by investor, amount and date of deposit. (**S-31, Exhibit 2, p.1, Note A; Transcript, Vol. I, p. 128:18-23**).

Similar to his analysis of the Bank of Tucson Account, Mr. Johnson found no evidence in the Wells Fargo records to indicate that funds were received from, or disbursed to, the Purported Investments sold by Alcaro to investors. (**S-3, p.7**). Mr. Johnson also found that investor funds were commingled with other community funds, and were spent for the direct benefit of the Alcaros' marital community, and to pay investors a purported return on their investments. (***Id.***; *also*, **Transcript, Vol. I, p. 128:24 to 132:4**, discussing the patent commingling of large amounts of community funds like tax returns, and allegedly separate investor money in the Wells Fargo Account). All returns paid to investors from the Wells Fargo Account originated from the investors themselves or sources unrelated to the Investments purportedly sold by Alcaro. (**S-3, p.7**).

A substantial total of $123,083 or 79.5% of total Wells Fargo receipts went to the benefit of Alcaro and his marital community in the form of cash and personal expenditures including, without limitation:

1. Department Stores: $1,101.95 total in stores such as Dillards, REPP, Ltd Big and Tall Shop, Wal-Mart and/or Walmart, Sam Goody, Big 5 Sporting Goods and TJ Maxx.
2. Grocery Stores: $1,729.77 total at Albertson's, Bashas, and Safeway
3. Utilities: $7,594.67 total with U.S. West, AOL On-line, Tucson Electric Power, Waste Management, City of Tucson, Direct TV, MCI, Cricket and Qwest.
4. Personal Credit Card Payments: $1,780.85 total.
5. Personal Bank Fees: $3,786.35 for overdraft and insufficient funds charges.
6. Miscellaneous Personal Expenditures: $11,574.80 total.
7. Miscellaneous Loan Payments: $11,751.77 total to Aurora Home Loan and Mortgage Professionals
8. House-Mortgage Payments: $29,898.83 total to Ram Dur Home Equity Loan, Federal National Bank, and Countrywide Home Loans.
9. Title Company Fees: $1,000 total to Lawyers Title.

(**S-31, Exhibit 2, pp. 1, 8, at Note D;** *also*, **S-3, p.7**).

A total of only $22,508 or 14.5% of the Wells Fargo money was disbursed to investors as returns on their Purported Investments. (**S-31, Exhibit 2, p. 1, Note C**; **Transcript, Vol. I, pp. 129:24 to 130:7**). Thus, more investor money was deposited into the Wells Fargo Account than was distributed back to them from the Wells Fargo Account. (**S-31, Exhibit 2, p. 1**).

Large amounts of money were transferred back and forth from the Wells Fargo Account to the Alcaros' joint 9095 Wells Fargo account. (**S-31, Exhibit 2, p.1,** noting $18,252 in net receipts from joint Alcaro Wells Fargo account deposited into the Wells Fargo Account analyzed by Mr. Johnson; *also*, **Transcript, Vol. I, pp. 136:20 to 137:25**).

The Alcaros deposited/co-mingled substantial amounts of other community funds into the Wells Fargo Account. These community receipts totaled $111,981 or 72.1% of all deposits and included funds from the Alcaros' federal and state tax returns. (**S-31, Exhibit 2, p.1;** *also*, **S-3,**

p.7). Finally, at hearing, Mrs. Alcaro failed to provide the ALJ with any evidence how a single Wells Fargo Account dollar was either obtained or spent, other than speculation or pure conjecture (**Transcripts Vol. I & II**).

D. ARGUMENT.

1. Jurisdiction.

The Commission has jurisdiction to enforce the provisions of the Arizona Securities Act (the "Act"), A.R.S. § 44-1801 et seq. *See*, A.R.S. § 44-1971; Article XV of the Arizona Constitution.

The Act prohibits: (1) the sale or offer for sale of unregistered securities "within or from" Arizona under A R.S. § 44-1841; (2) offering or selling securities within or from Arizona by an unregistered salesman or dealer under A R.S. § 44-1842; and (3) committing fraud in the purchase or sale of securities under A R.S. § 44-1991. Thus, as an initial matter, "securities" must be offered or sold "within or from" Arizona for there to be subject matter jurisdiction.

At all times relevant, Mr. and Mrs. Alcaro resided in Tucson, Arizona together as husband and wife. (**Transcript, Vol. II, pp. 255:9 to 259:6; S-6 to S-13, S-15**). The Alcaro investors are Arizona residents. (*See e.g.*, **S-5, ACC000722, ACC000739-742; S-32(a); S-32(b); S-32(C); S-32(d)**; **Decision No. 69900,** ¶¶1-32). Further, the Alcaro investments constitute unregistered securities (**Decision at ¶¶2, 9, 13, 15, 18, 21, 24 & 27, and Conclusion of Law, ¶¶2-3; S-33(b); Transcript Vol. II, pp. 251:12 to 252:1,** Division expert also stating, "there's no question in my mind that these purported investment products were securities in various forms, including notes, investment contracts, commodity investment contracts."). Mr. Alcaro was not registered to offer or sell securities within or from Arizona. (**Ex. S-33(a); Decision at Conclusion of Law, ¶4**).

Thus, Mr. Alcaro sold unregistered "securities" within or from Arizona while not registered as a securities' salesman or dealer in violation of A.R.S. § 44-1841 and A.R.S. § 44-1842. (**S-**

33(A) & S-33(B); *also*, Decision at ¶2, 8, Conclusion of Law, ¶¶1-5; Transcript, Vol. II, pp. 251:13 to 252:2).[11]

Next, A.R.S. § 44-2031(C)[12] of the Act states:

> The commission may join the spouse in any action authorized by this chapter to determine the liability of the marital community.[13]

Subsection C was promulgated in 2002 as part of an omnibus bill proposed by the Division. The Division asked for this law to be passed so that in the pleading stage it could obtain jurisdiction over the non-participating spouse and the marital community in a Securities Act enforcement action like this one.[14] Naming both spouses is a prerequisite to obtaining an order of restitution against the marital community from which the judgment can be later collected. A judgment against one spouse does not bind and is not collectible from the community. *Spudnuts, Inc. v. Lane*, 139 Ariz. 35, 36, 676 P.2d 669, 670 (App. 1984)("if a plaintiff wants to hold a marital community accountable for an obligation, both spouses must be sued jointly. A judgment against one spouse does not bind the community."). If the Division wants a decision to be ultimately collectible from

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[11] Alternatively, Mrs. Alcaro offered no evidence, and elicited no cross-exam testimony that the investments at issue do not constitute unregistered securities. (**Transcripts at Vol. I & II**).

[12] The Preamble to the Act further states:

> The intent and purpose of this Act is for the protection of the public, the preservation of fair and equitable business practices, the suppression of fraudulent or deceptive practices in the sale or purchase of securities, and the prosecution of persons engaged in fraudulent or deceptive practices in the sale or purchase of securities. This Act shall not be given a narrow or restricted interpretation or construction, but shall be liberally construed as a remedial measure in order not to defeat the purpose thereof.

[13] This statute is unambiguous. There is no need to resort to any available legislative history to apply its plain meaning in this matter. *U.S. West Communications, Inc. v. City of Tucson*, 198 Ariz. 515, 520, 11 P.3d 1054, 1059 (App. 2000)(when statutory language is clear, unequivocal, and unambiguous, the court must give effect to the language and may not invoke the rules of statutory construction to interpret it); *Circle K Stores, Inc. v. Apache County*, 199 Ariz. 402, 406, 18 P.3d 713, 717 (App. 2001)(there is no magic in statutory construction and no legal legerdemain should be used to change the meaning of simple English words.).

[14] The Commission is one of few Arizona agencies that are able to directly join the non-participating spouse in its administrative proceedings. *See e.g.*, A.R.S. §§ 42-1108(B), 44-2031. In other agency actions, the final agency decision is likely only enforceable against the participating spouse.

community property, the Division has to initially name both spouses. *See*, A.R.S. § 25-215(D)("either spouse may contract debts and otherwise act for the benefit of the community. In an action on such a debt or obligation the spouses **shall be sued jointly**…"). In short, A.R.S. § 44-2031(C) merely allows the Commission to name a spouse as a respondent to determine the liability of the marital community if, like here, the circumstances warrant such joinder. This enables the non-participating spouse to appear and defend the liability of the marital community, in part, because one spouse cannot represent the other spouse in defending the marital community.

Mrs. Alcaro was named in the Notice to determine the liability of the Alcaros' marital Community. (**Notice,¶3**). Thus, the Commission has express jurisdiction to order restitution and administrative penalties against the Alcaros' marital community under A.R.S. § 44-2031(C).

The ALJ expressed a concern over whether he was obligated to "equitably" apportion or split the community liability among the Alcaros themselves, for instance, based on their level of culpability. (**Transcript, Vol. I, pp. 10:2 to 12:12**). The ALJ is not required to apportion community debt among the Alcaros because this is not a dissolution proceeding. *See* A.R.S. § 25-318(A). Also, the ALJ is not required to determine from which assets restitution should be collected from as this is not a collection case as contemplated by A.R.S. § 25-215(A) relating to existing marriages. *See*, *Community Guardian Bank v. Hamlin*, 182 Ariz. 627, 630, 898 P.2d 1005, 1008 (App. 1995)(A.R.S. § 25-215 did not apply to post-dissolution garnishment action; under A.R.S. § 25-318(A), "[a] divorce court has the statutory power to divide the community assets and obligations.").[15] Thus, the ALJ is not required to apportion the community debt between the

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[15] The *Community Guardian Bank* Court further noted that:

> However, the court's allocation of community obligations does not affect the rights of third party creditors. The allocation does fix responsibility between the parties for the debt and can be used by one spouse to sue the other for contribution, if necessary. Because third party creditors, including judgment creditors, cannot be bound by the divorce allocation, we are not concerned in this case with how the community obligations were allocated by the judgment of dissolution, we are concerned only with whether the Unjust Enrichment Judgment created a valid debt against the community for which Janice is jointly liable. We have already concluded that the express terms of the complaint and default judgment create a community obligation.

Alcaros themselves, or determine from exactly which Alcaro property restitution should be collected from.

Finally, Mrs. Alcaro's April 20, 2007 "Verified" Answer admits that the Commission has jurisdiction over this matter under Article XV of the Arizona Constitution and the Securities Act. (*See*, **April 20, 2007 Verified Answer, ¶1**). Based on the foregoing, the Commission has jurisdiction to issue an order holding that the Alcaros' marital community is liable for the restitution and penalty ordered by the Decision.

2. The Alcaros' Marital Community is Liable for the Restitution and Penalty Ordered by the Decision Because: (1) The Investor Money Was Acquired By Mr. Alcaro During his Marriage with Mrs. Alcaro; and (2) the Restitution and Penalty Was Ordered While the Alcaros were Married.

In Arizona, property acquired prior to marriage is separate property. A.R.S. § 25-213(A). Conversely, "[a]ll property acquired by either husband or wife during the marriage is the community property of the husband and wife except for property that is…[a]cquired by gift, devise or descent." A.R.S. § 25-211(1); *also*, *Barr v. Petzhold*, 77 Ariz. 399, 409, 273 P.2d 161, 167 (1954)(there is a, "strong presumption, rebuttable only by clear and convincing evidence, that all earnings [or wages acquired] during coverture are community in nature."); *Reese v. Cradit*, 12 Ariz.App. 233, 238, 469 P.2d 467, 472 (App. 1970)("The community property of the husband and wife as it existed at the time of the [husband's] fraud is liable for community debts contracted by the husband during coverture.").

This is true even if one spouse's name is not listed on the title to property acquired: (1) solely by the other spouse during marriage; and (2) even without the first spouse's knowledge. *King v. Uhlmann*, 103 Ariz. 136, 151-52, 437 P.2d 928, 943-44 (1968)(in Arizona, a spouse has constructive notice of conduct of other spouse's acquisition of property) (*See also*, **Transcript, Vol. II, p. 227:2-24**, Mr. Johnson testifying mere fact Mr. Alcaro was the signer on the Bank of Tucson and Wells Fargo accounts did not mean they were not community property).

Similarly, there is a presumption that property jointly held by the husband and wife is community property. *Eng. v. Stein*, 123 Ariz. 343, 346, 599 P.2d 796, 799 (1979)(grocery store business held by husband and wife as joint tenants was community property); *Law of Evidence* § 301.4(A), 1 Ariz. Prac., (4th Ed. Livermore)("when property is held jointly by a husband and wife, there is a presumption that it is community property, and 'the burden of proof is upon the party seeking to establish that the jointly held property is in fact separate.'").

Moreover, spouses, "have equal power to bind the community." *See*, A.R.S. § 25-214(B). Similarly, A.R.S. § 25-215(D) states:

> either spouse may contract debts and otherwise act for the benefit of the community. In an action on such a debt or obligation the spouses shall be sued jointly and the debt or obligation shall be satisfied: first, from the community property, and second, from the separate property of the spouse contracting the debt or obligation.

Applied here, it is undisputed that Mr. Alcaro obtained the investor money while the Alcaros lived and worked together in Tucson as husband and wife. (**S-5 to S-13**; **Transcript, Vol. I, p. 9:18-20, p. 17:13-20, p. 35:15-20, pp.40:9-20 to 41:15, pp. 57:4 to 60:23, pp.71:8 to 72:4; Transcript, Vol. II, pp. 255:11 to 259:6;** *also*, **S-15, at ACC002989-002990, ACC003161, 003217, 003247-003250; S-25**).[16] Thus, the investor money obtained by Mr. Alcaro is the community property of the Alcaros and debts arising from the investor money (restitution and penalty) are consequently their community debt. *Barr* 77 Ariz. at 409, 273 P.2d at 167; *Eng*, 123 Ariz. at 346, 599 P.2d at 799; *Reese*, 12 Ariz.App. at 238, 469 P.2d at 472; A.R.S. § 25-211(1).

To rebut this conclusion, Mrs. Alcaro had the high burden of proving by **clear and convincing** evidence that the restitution owed to Alcaro investors is the sole, separate debt of her husband Mr. Alcaro. *MacCollum v. Perkinson*, 185 Ariz. 179, 183, 913 P.2d 1097, 1101 (App.

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[16] The community continues to exist, together with its rights and obligations, even when the parties may be living separate and apart. *Jurek v. Jurek*, 124 Ariz. 596, 597, 606 P.2d 812, 813 (1980). The Alcaros provided the Judge with no evidence that they were living apart at all times relevant from July 1995 to at least 2006. The overwhelming evidence is that the Alcaros resided together at all times relevant. (**S-5 to S-13, S-15, S-19, S-21 to S-26**). Importantly, Mrs. Alcaro also stipulated that she and Mr. Alcaro lived together in Tucson as husband and wife from 1995 to 2006. (**Transcript, Vol. II, pp. 255:11 to 259:6**).

1996); *also*, *Kennedy v. Kennedy*, 93 Ariz. 252, 255, 379 P.2d 966, 969 (1963)(the presumption for a finding of community property can be rebutted only by strong, satisfactory, convincing, clear and cogent or "nearly conclusive evidence."); *Bainum v. Roundy*, 21 Ariz.App. 534, 536, 521 P.2d 633, 635 (1974)("It is well settled in this State that execution of a note by the husband, in the absence of any evidence that the obligation was not a community one, binds the community composed of the husband and wife."); *Hrudka v. Hrudka*, 186 Ariz. 84, 92, 919 P.2d 179, 187 (App. 1995)(court held that balance of $3.7 million dollars in loans obtained by husband during marriage to purchase and refurbish Gulfstream II jet were community obligations, despite fact that she did not sign promissory notes and was not a member of corporation (J & H Aircraft, Inc.) formed by husband to own aircraft , because substantial evidence presented that investment in jet was one made for *potential* benefit of the community); *Law of Evidence* § 301.4(A), 1 Ariz. Prac., (4th Ed. Livermore)(and cases therein, stating, "[s]imilarly, the presumption that property acquired during marriage is community property can be overcome only by clear and convincing evidence.").

Proof by clear and convincing evidence means that Mrs. Alcaro must persuade the ALJ with credible evidence that her claims are "highly probable." *State v. King*, 158 Ariz 419, 422, 763 P.2d 239, 242 (1988). This standard is more exacting than the standard of more probably true than not true. *State v. Renforth*, 155 Ariz. 385, 386, 746 P.2d 1315, 1316 (App. 1987)(citing U.S. Supreme Court precedent, court noted that, "[t]he clear and convincing standard is reserved for cases where substantial interests at stake require an extra measure of confidence by the fact finders in the correctness of their judgment, though not to such degree as is required to convict of crime.").

Applied here, Mrs. Alcaro did not meet her burden of proof because she did not prove, for instance, how a single investor dollar was spent. *Kennedy*, 93 Ariz. at 255, 379 P.2d at 969. Nevertheless, the Division provided the ALJ with uncontroverted proof that the Alcaros' marital community was directly, and substantially benefited by investor money, and that it was obtained during the Alcaros' ongoing marraige. (**S-3, pp. 5-7; S-31 at Exhibits 1 & 2, Notes C & D**). It is difficult to speculate how Mr. Alcaro's undisputed conduct in obtaining and keeping hundreds of

thousands of dollars in investor money could not directly, or indirectly benefit his marital community with spouse. (**S-31, Exhibits 1 & 2; S-3, pp. 5-7, 10**). This is especially true given the fact that Mr. Alcaro did not invest any of the investor money in the Purported Investments, which means he had hundreds of thousands of dollars to spend on himself and his marriage. (**S-3, pp. 6-8; S-4, p.1; Transcript, Vol. I, pp. 121:18 to 122:11; Transcript, Vol. II, pp. 224:16 to 225:16;** *also*, **S-6 to S-13,** joint Alcaro tax returns showing no investments in or returns from the Purported Investments).

Mrs. Alcaro also: (1) expressly acknowledged that investor debt is owed by the Alcaros jointly as husband and wife in her Bankruptcy schedules (**S-5; S-32(a)-(d)**);[17] and (2) she agreed to partially repay at least 3 investors from the proceeds from the sale of the Alcars' jointly purchased, owned and maintained community Mount Lemmon Residence. (**S-16; S-21; S-26**).

With respect to the Alcaros' joint 9095 Wells Fargo account, the evidence shows that $6,000 of investor Najera's investment check was deposited in the joint Alcaro account, while $1,500 in cash was withheld for the benefit of the Alcaros' marital community (**S-15, ACC003148; S-29, ACC00004186; Transcript, Vol. I, pp. 76:9 to 77:2; S-3, p. 4; S-31, Exhibit 1, p. 4, fn.1**). Mr. Alcaro also issued at least 7 separate repayment checks to at least 2 investors drawn on the Alcaros' joint 9095 Wells Fargo account (**S-17; Transcript, Vol. I, pp. 62:12 to 63:10; S-25; Transcript, Vol. I, pp.71:8 to 72:4**). The Alcaros also paid their monthly mortgage on their joint Mount Lemmon Residence with checks drawn on the Bank of Tucson Account into which substantial amounts of investor money were deposited. (*See e.g.*, **Transcript, Vol. I, p. 127:5-13; Transcript Vol. II, pp. 223:14 to 224:10; S-15, ACC003032, 003068; S-31, Exhibit 1, at p. 12, Note C, Exhibit 2 at p.8, Note D**).

[17] In Arizona, oral or written statements by an attorney, like the Bankruptcy records in this case, are binding on the client as admissions against interest by a party opponent. *See*, *Bogue v. Better-Bilt Aluminum Co.*, 179 Ariz. 22, 31 875 P.2d 1327, 1336 (App. 1994); *Henry v. Partners of Southern Arizona*, 203 Ariz. 393, 395-96, 55 P.3d 87, 89-90 (App. 2002).

This would also not be the first matter in which investor debt is held to be a debt owed by the Alcaros' marital community. For instance, Alcaro investors White and Haberman obtained judgments against the Alcaros as husband and wife in the amount of their investments. (**S-27, Transcript Vol. I, pp. 72:22 to 74:25; S-18; Transcript, Vol. I, pp.63:11 to 66:20; S-27, ACC004280-4281, ACC004342-4346**).[18]

In an attempt to "whittle down" marital community liability, Mrs. Alcaro next argued that the Division *only* proved that $272,074 of investor money was deposited into the Bank of Tucson and Wells Fargo Accounts. (**Transcript, Vol. I, pp. 195: 25 to 196:14; S-31, at Exhibits 1 & 2, Notes A**). Because Alcaro investors are owed $403,998.73 plus interest, the difference between the restitution amount and the investor money traced into the Bank of Tucson and Wells Fargo Accounts totals $131,924.73. (**S-34; Decision No. 69900, p.9**). However, the $131,924.73 is not unaccounted for as suggested by Mrs. Alcaro. (*See e.g.*, **Transcript Vol. II, pp. 224:16 to 226:12, p. 233:3-20**). It is undisputed that Mr. Alcaro began selling securities in July 1995, or approximately 4 years prior to the June 6, 1999 start date for the Division's Wells Fargo Account analysis. (**S-34; Decision, ¶2, p.9**). Because Wells Fargo bank records prior to 1999 were not available to the Division, or were not otherwise provided by the Alcaros, the forensic analysis of the Alcaros' finances could not be conducted starting in July 1995. (**S-3, p.6**).

However, because the Alcaros were married and residing together from July 1995 to 1999, the additional $131,924.73 in investor money raised by Mr. Alcaro during this time frame was community property and, consequently, a community debt. (**Transcript, Vol. I, pp. 179:2-21; Transcript Vol. II, pp. 224:16 to 226:12, p. 233:3-20,** Mr. Johnson also testifying that Mr. Alcaro raised this money from 1995 to 1999). *Barr* 77 Ariz. at 409, 273 P.2d at 167; *Eng*, 123 Ariz. at 346, 599 P.2d at 799; *Reese*, 12 Ariz.App. at 238, 469 P.2d at 472; A.R.S. § 25-211(1).

Again, it is Mrs. Alcaro had the burden of proving that this $131,924.73 was not

[18] Mrs. Alcaro was personally served with process in the White Lawsuit, and she was represented therein by counsel. (**S-27, ACC004298, ACC004307**). Thus, the Alcaros are estopped from arguing that the investor debt is not a community debt in this case under the established doctrine of collateral estoppel.

community property and/or did not benefit the Alcaros' marital community. *Hrudka*, 186 Ariz. at 92, 919 P.2d at 187; *MacCollum*, 185 Ariz. at 183, 913 P.2d at 1101. Mrs. Alcaro failed to meet her burden. (**Transcripts Vol. I & II**). Further, the Alcaros ignored the Division's request for their bank records from 1995 to 1999. (**S-1(a); S-1(b); S-2(a); S-2(b);** *also*, **S-5, S-10 & S-29** production cover letters identifying the records produced by the Alcaros). Importantly, the fact that the Alcaros specifically identified exactly $530,000 in investor debt in their 2005 Bankruptcy schedules is conclusive proof that Mr. Alcaro raised substantial amounts of investor money from July 1995 to June 1999 for the benefit of his marital community. (**S-5, ACC000739-742, 749.001; S-32(a)**).

Finally, Mr. Johnson correctly testified that the cash taken out of investor deposits by Mr. Alcaro is presumed to have benefited the Alcaros' marital community:

> you start with a presumption that in fact various receipts are for the benefit of the marital community, and that presumption has to be rebutted. In the analysis of this particular bank account, there was -- and the other bank account, there was substantial evidence that in fact disbursements were being made for the benefit of the community, including mortgage payments, utility payments, other types of payments. Cash is a fungible item. Once it turns into cash, obviously you don't know how that cash was utilized. You do in fact start with an underlying presumption that it benefited the marital community.

(**Transcript, Vol. I, pp. 123:9 to 124:17;** *also*, **Transcript Vol. II,** repeatedly and consistently testifying to same conclusion). Clearly, Mrs. Alcaro cannot defend her marital community interest on the basis that Mr. Alcaro withdrew investor cash from investor funds while depositing a portion of the same into the Bank of Tucson and Wells Fargo Accounts. To hold otherwise would be tantamount to saying that a marital community could never be liable for violations of the Securities Act so long as the participating spouse converted the investor money into cash, and then used such cash for the benefit of the community. Again, Mrs. Alcaro offered no proof of how any investor money was, or was not spent, despite the fact that the Alcaros are still married. (**Transcript Vol. I, p. 9:13-21).**

As a result, the Alcaros' marital community is liable for the full restitution and penalty set

forth in the Decision as a matter of undisputed fact and law.

2. <u>Allegedly Separate Investor Money Became Community Property Because It Was Commingled with Other Community Funds Over a Substantial Period of Time</u>.

Mrs. Alcaro argued that her marital community with Mr. Alcaro is not liable for restitution to investors because from June 1999 to November 2004: (1) the Alcaros deposited substantial amounts of non-investor community funds into the Bank of Tucson and Wells Fargo Accounts totaling $192,562; and (2) they each earned non-investor income as reflected in their tax returns. (**S-31, Exhibits 1 & 2, at p.1; Transcript, Vol. I, pp. 19:7 to 20:18, p.21:1-18, pp. 27:18 to 28:24; S-6 to S-13**, the Alcaros' tax returns).

Investor funds totaling $272,074 constitute the vast majority of the $464,636 deposited into the Bank of Tucson and Wells Fargo Accounts from June 6, 1999 to November 23, 2004. (**S-31, Exhibits 1 & 2**). Mrs. Alcaro is correct that non-investor funds were also deposited into the Bank of Tucson and Wells Fargo Accounts. For instance, the Alcaros deposited a total of $12,576 and $28,962 in tax refunds into the Bank of Tucson and Wells Fargo accounts respectively. (**S-31, Exhibits 1 & 2, p.1**). The Alcaros commingled a total of $80,581 in other non-investor funds into the Bank of Tucson Account. (**S-31, Exhibit 1, p.1; Transcript, Vol. I, p. 120:8-23, pp. 176:5 to 177:6**). The Alcaros commingled a total of $111,981 in other non-investor funds in the Wells Fargo Account. (**S-31, Exhibit 2, p. 1, Notes A & B**).

The Alcaros also owned their joint 9095 Wells Fargo account. (*See*, **S-15, ACC003148**; **S-29, ACC00004186; Transcript, Vol. I, pp. 76:9 to 77:2**). Mr. Johnson established that money deposited into the Bank of Tucson and Wells Fargo Accounts was often transferred back and forth to the Alcaro's joint 9095 Wells Fargo over a period of many years. (***Id.*, p. 113:2-14, pp. 118:10 to 119:16, pp. 136:12 to 137:25**; *also*, **S-31, Exhibit 1, p.1 & Note A at fn.1**, noting that a net-total of $7,931 from the Alcaros' joint 9095 Wells Fargo account was deposited into the Bank of Tucson Account; **S-31, Exhibit 2, p.1,** noting that a net-total of $18,252 from the joint 9095 Alcaro Wells Fargo account was deposited into the Wells Fargo Account; *also*, **Transcript, Vol. I, pp.**

136:20 to 137:25).

More money totaling $26,183 flowed from the Alcaros' joint 9095 Wells Fargo account into the Bank of Tucson and Wells Fargo Accounts (where commingling occurred), than was returned to the joint 9095 Wells Fargo account. (**S-31, Exhibits 1 & 2, at p. 1; S-3, pp. ;Transcript, Vol. I, pp. 118:10 to 120:23, p. 137:5-25, pp. 192:24 to 193:10; Transcript Vol. II, pp. 213:2 to 222:1**).

In summary, *substantial amounts* of Investor funds ($272,074) were commingled in the Bank of Tucson and Wells Fargo Accounts with other community funds ($192,534) from 1999 to 2004, such as those resulting from the Alcaros' tax returns and transferred from the Alcaros' other joint 9095 Wells Fargo account. (**S-31, Exhibits 1 & 2, at p. 1**).

When community and separate funds are commingled in a single account, the entire resulting fund becomes community property, unless the separate property can be explicitly traced and proved to have been kept separate by clear and convincing evidence. *Laughlin v. Laughlin*, 61 Ariz. 6, 18-19, 143 P2d 336, 341 (1943); *also*, *Cooper v. Cooper*, 130 Ariz. 257, 260, 635 P.2d 850, 853 (1981)(held that commingling of monies from husband's community salary into bank account in wife's name only that originally contained her separate property resulted in all funds contained in the wife's account being deemed as community property); *Moser v. Moser*, 117 Ariz. 312, 314, 572 P.2d 446, 448 (App. 1977)(fact that insurance policy was held in name of husband only did not matter in determining whether separate policy was transferred into community property; court looked at substance over the form of the policy and held it was a community asset because a number of loans were taken out on the policies and used for community purposes and interest on the loans was paid from community property); *Evans v. Evans*, 79 Ariz. 284, 287-88 P.2d 775, 777 (1955)(in case where husband owned a one-half interest in business prior to marriage, and who after marriage purchased the other half with community funds, and husband could not provide accounting differentiating profits from community labor and inherent nature of business purchased with separate funds, court held that the profits were so commingled that they

had become community).

Even assuming that the $272,074 in investor money deposited into the Bank of Tucson and Wells Fargo Accounts constituted Mr. Alcaro's separate property, those allegedly separate funds became community property when they were commingled, blended and confused for a substantial period of time lasting 5 ½ years with the other $192,562 in community funds deposited into those Accounts. Once they were deposited into the Accounts, the allegedly separate funds (investor money) became indistinguishable, and therefore, untraceable, such that they became community property as a matter of undisputed fact and law. *Laughlin*, 61 Ariz. at 18-19, 143 P2d at 341; *Cooper*, 130 Ariz. at 260, 635 P.2d at 853; *Moser*, 117 Ariz. at 314, 572 P.2d at 448; *Evans*, 79 Ariz. at 287-88 P.2d at 777. Mr. Johnson further testified that the mere fact that Mr. Alcaro was the only signer of the Bank of Tucson and Wells Fargo Accounts does not mean they constitute separate accounts. (**Transcript, Vol. II, pp. 225:17 to 227:24**). Finally, it is irrelevant that the Alcaros' had other non-investor income reported on tax returns because the Alcaros offered no evidence of how any of the investor and non-investor income was spent. (**Transcripts, Vol. I & II**). Thus, the ALJ should issue a proposed decision holding that the Alcaros' marital community is liable for the restitution and related penalty set forth in the Commission's September 6, 2007 Decision.

3. <u>Mrs. Alcaro's Reliance on Tort/Criminal Law Case Law Lacks Merit</u>.

Mrs. Alcaro next argued that because Mr. Alcaro committed torts and/or crimes, there is no presumption that her marital community is liable for investor restitution. Mrs. Alcaro is correct that that there is no *presumption* of a community obligation when tort liability is the basis for the claim against a community. However, this is not a tort or a criminal case. Mrs. Alcaro has failed cite any authority that holds that this regulatory enforcement action filed under administrative law standards is classified as a tort and/or a crime for purposes of determining community liability. Unlike a typical tort case, the registration and securities fraud claims established against Mr.

Alcaro did not require the Division to prove intent or damages.[19] Also, a tort claim generally involves a breach of a "duty" owed to another. *Phoenix Professional Hockey Club, Inc. v. Hirmer*, 108 Ariz. 482, 483, 502 P.2d 164, 165 (1972)("Appellant correctly states Arizona's position as to the traditional duty requirement: the existence of a duty to the plaintiff is a prerequisite to tort liability."). Here, the Division is a regulatory agency, not a tort victim. Indeed, several investors have already obtained un-appealed *"civil"* judgments against the Alcaros' marital community. (**S-18; S-27; S-28**). Thus, the investor money obtained by Mr. Alcaro is a community asset/liability.

Further, application of Mrs. Alcaro's inapplicable tort/crime case to the facts mandates a finding of community liability. In such cases, all that is required to be shown is a benefit to the community or a community purpose. *Cadwell v. Cadwell*, 126 Ariz. 460, 463, 616 P.2d 920, 923 (App. 1980)(divorce proceeding wherein the wife's debts relating to a criminal conviction for embezzlement were allocated as community debts as the community benefited from the proceeds of the embezzlement in the form of house payments); *Hays v. Richardson*, 95 Ariz. 64, 66-67, 386 P.2d 791, 792-93 (1964)(community was liable to injured party as a result of husband's conduct in recklessly driving drunk while engaged in community errand at time of automobile accident, despite the fact that such conduct was characterized as gross, willful and wanton); *McFadden v. Watson*, 51 Ariz. 110, 115, 74 P.2d 1181, 1183 (1938)(where financial interest of husband in partnership was a community interest, community property could be levied on to satisfy judgment for slander and libel of husband in accusing partnership employee of participating in faked robbery to obtain partnership funds).

In such cases, even punitive damages may be awarded against the community. *Smith v. Chapman*, 115 Ariz. 211, 216, 564 P.2d 900, 905 (1977)(punitive damages can be assessed against the community property based on claim arising from husband's drunk driving, if the husband's tort is committed on behalf of or in the interests of the community, or while on a community errand);

[19] The Division does not have to prove traditional elements like intent, causation, damages or reliance. *See e.g.*, *State v. Gunnison*, 127 Ariz. 110, 113, 618 P.2d 604 (1980); *Rose v. Dobras*, 128 Ariz. 209, 214, 624 P.2d 887 (App.1981); *Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 553, 733 P.2d 1131 (1986).

Rodgers v. Bryan, 82 Ariz. 143, 148, 309 P.2d 773, 776 (1957)(malicious assault and battery by one husband, "to protect the morals of his family, hotel guests, and his property against trespass" were "obviously community interests" and his "conduct and actions were intended to be performed in behalf of the community, and his separate property and that of the community are liable for the unfortunate results of his violent conduct;" thus, community was liable for compensatory and a like amount of punitive damages).

Applied here, there is no question that the Alcaros' marital community was directly and substantially benefited by investor money obtained by Mr. Alcaro. (**S-3, S-31, Exhibits 1-2**). Investors issued checks made payable to both Mr. and Mrs. Alcaro, one of which was signed by Mrs. Alcaro. (**S-14(a); S-14(b)**). Repayment checks issued to Alcaro investors were also drawn on joint checking accounts of both Mr. and Mrs. Alcaro. (**S-17; S-25**). Mrs. Alcaro signed notarized deeds of trust to make repayments to Alcaro investors secured by the Alcaros' joint Mount Lemmon Residence. (**S-16; S-21; S-26**). In contrast to the tort/crime cases discussed in part above, there can be no clearer community purpose than raising substantial amounts of finances to augment community funds and pay for community expenses. *See e.g.*, *American Express Travel Related Services Company*, Inc. v. Parameter, 186 Ariz. 652, 654, 652, 925 P.2d 1369, 1371 (App. 1996)(judgment was entered against wife and non-participating husband's interest in their community property based on wife's embezzlement of approximately $500,000 over a period of 6 years).

Further, under Arizona law, it is not very difficult to establish a community purpose or benefit. *See e.g.*, *Reckart v. Avra Valley Air, Inc.*, 19 Ariz. App. 538, 540, 509 P.2d 231, 233 (1973)(held that where student, who had been unaccompanied by his wife when he damaged aircraft, had rented aircraft for purpose of furthering his flying time so as to be able to obtain single pilot's license and thus be able to put flying to use for family recreational purposes on vacations and to increase the general welfare of the community, damages to aircraft were a community obligation, notwithstanding contention that community property could not be liable for a spouse's

tort unless spouse was engaged in activity which would financially benefit the community); *DePinto v. Provident Security Life Ins. Co.*, 374 F.2d 50, 53-54 (9th Cir. 1967)(in proceeding to determine whether judgment in derivative action against husband/doctor was a community obligation, the court disregarded the husband's testimony that he did not intend to benefit his community through his liability-creating service as director of an insurance company, because objective evidence supported an "inference" of a community purpose, for example, because such work provided the husband/doctor with ethical form of advertising for husband's practice as physician, it furthered friendship between husband and wife and persons promoting corporation, and because it afforded the husband the right to vote for and receive fees for performing services as director, even though he did not choose to do so); *Hays*, 95 Ariz. at 66-67, 386 P.2d at 792-94 (held that a marital community's assets were available to satisfy a debt resulting from a husband's conduct in causing automobile collusion on his way to pick up family from television studio through gross, willful and wanton conduct, despite the fact that the husband was charged with driving while intoxicated). Because this is not a tort or criminal case, there is a presumption that the investor money obtained by Mr. Alcaro is a community asset/debt as discussed above. Further, even under Mrs. Alcaro's inapplicable tort/crime argument, the Alcaros' marital community is liable for the restitution and related penalty set forth in the Decision.

4. <u>The Alcaros' Unknown, Subjective Intent is Irrelevant</u>.

Mrs. Alcaro argued that the ALJ must determine Mr. Alcaro's purported "intent" to benefit his marital community by raising investor money prior to finding the Alcaros' community liable to investors. (**Transcript, Vol. II, p. 240:4-9**). Here, both Mr. and Mrs. Alcaro's undisclosed or unknown, subjective intent is immaterial and has no impact, primarily because neither Mr. or Mrs. Alcaro testified or presented any evidence. (**Transcripts Vol. I & II**).

Further, courts only look to a spouse's intent to benefit the community when there is no actual or likely benefit to the community from the spouse's conduct. *See e.g.*, *Rodgers v. Bryan*, 82 Ariz. 143, 148, 309 P.2d 773, 776 (1957)(malicious assault and battery by one husband, "to protect

the morals of his family, hotel guests, and his property against trespass" were "obviously community interests" and his "conduct and actions were intended to be performed in behalf of the community); *McFadden v. Watson*, 51 Ariz. 110, 114, 74 P.2d 1181, 1182 (1938)(held that damages flowing from husband's libel and slander were binding on the community, and noting that, "[i]t is not necessary, however, in order to bind the community, that the act which gives rise to the obligation, though tortious in its nature, shall actually *benefit* the community. It is sufficient that it was committed by the spouse with the bona fide intention of protecting the interest of the community, and it makes no difference that the act was a mistake in judgment-a tort so far as it affected the rights of other people and ultimately detrimental to the interest of the community."). In contrast, this is not a malicious assault/tort or drunken driving case in which a possible benefit to the Alcaros' marital community is questionable. Unlike a tortuous physical assault, the quintessential community asset is money, and a primary way and accepted way to benefit a marital community is the procurement of money. Further, the Division provided the ALJ with undisputed evidence that the Alcaros' marital community was directly and substantially benefited by Mr. Alcaro's conduct. (**S-3; S-31, Exhibits 1 & 2**).

Further, a spouse's subjective, undisclosed intent cannot prevail over the objective expression of intent which may be fairly inferred from objective documents and their conduct at the time the money at issue was raised by Mr. Alcaro. *See also*, *DePinto*, 374 F.2d at 53-54(district court reasonably and properly, "disregarded as immaterial DePinto's statement that he did not intend to protect or benefit the marital community...by service as a director of United. The court [properly] held that the surrounding circumstances, rather than DePinto's present statement of his purpose at the time of the transactions in question, should be considered in determining whether a community purpose was involved."). The fact the Alcaros sought to discharge $530,000 in investor debt in their 2005 Bankruptcy to benefit their marital evidences an objective acknowledgement that Mr. Alcaro's procurement of investor money was intended to benefit his marital community. (**S-5; S-32**).

Finally, the best indicator of Mr. Alcaro's purported "intent" is the objective and undisputed conduct in raising and spending investor money for the marital community over a substantial period of time from July 1995 to November 2004, versus any alleged post-hoc intent. Nevertheless, because the Alcaros' undisclosed, post-hoc intent is irrelevant, the ALJ should find the Alcaros' marital community liable for the restitution and penalty set forth in the Decision.

5. <u>Mrs. Alcaros' Bankruptcy Arguments Lack Merit</u>.

Mrs. Alcaro's counsel has previously argued to undersigned counsel that Mrs. Alcaro merely followed the advice of her Bankruptcy counsel in identifying $530,000 of investor debt as joint, versus the separate debt of Mr. Alcaro. (*See*, **S-5; S-32**). This argument fails for several reasons. First, Mrs. Alcaro did not fairly raise this issue at hearing, nor did she file any motions regarding the same. Because there is no evidence of any purported reliance on any counsel in the record, the ALJ should ignore any arguments based on the alleged advice of the Alcaros' Bankruptcy counsel.

Second, advice of counsel is not a defense in enforcement action like this one. *See e.g.*, *People v. Hoover*, 165 P.3d 784, 790 (Col.App. 2007)(court properly excluded defendant's testimony regarding his attorney's advice that investments were not securities; "federal and state authority is uniform in concluding that proof of knowledge that an investment is a security is not required to convict a defendant for 'willful' securities fraud."); *State v. Brewer*, 932 S.W.2d 1, 17 (Tenn.App. 1996)(court properly prevented defendants from testifying to support purported defense of good-faith reliance on advice of counsel that business enterprise was not subject to securities laws). Further, the Division asked for the Alcaro's bankruptcy file but it was not produced. (**Tab 1**). Because the Alcaros did not testify at hearing, and they failed to provide any evidence that, in fact, their Bankruptcy Counsel "advised" them to do anything, the ALJ must ignore any post-hearing arguments regarding the purported, unknown advice of the Alcaros' Bankruptcy Counsel.

In a final attempt to downplay the relevancy of the Alcaros' Bankruptcy, Mrs. Alcaro asserted at hearing that:

> The argument is, very simply: You file a joint bankruptcy, those could be community debts, or they could be separate debts. It's not a designation of it in the bankruptcy proceeding. Two people that are husband and wife are required to file a bankruptcy together. One cannot file even if they're separate debts. The bankruptcy court requires that they both file. We don't designate in bankruptcy whether it's a community debt or a separate debt. If there's going to be a discharge proceeding concerning that, maybe we'll decide whether it's community or separate, but they all go in together as debts of this community, and they come out as discharged debts. **(Transcript, Vol. I, pp.22:16 to 23:3)**.

Mrs. Alcaro is not correct for several reasons. First, Mrs. And Mr. Alcaro had the express choice to list investor debt as the separate debt of Mr. Alcaro. **(S-5, ACC000739-742; S-32(a))**. Second, both spouses are not required to file bankruptcy together. *See e.g.*, *In re Morgan*, 286 B.R. 678, 680 (E.D.Wis. 2002)(adversary proceeding against debtor husband's non-debtor former spouse, who did not join or file with her husband's bankruptcy at time when spouses were still married); *In re Whitus*, 240 B.R. 705, 707 (W.D.Tex. 1999)(discussing claims against filing, and non-filing spouses in context of community property laws and creditor claims).

Finally, Mrs. Alcaro argues that the instant community liability issue is moot because investor debt was discharged in the Alcaros' joint 2005 Bankruptcy. It was not discharged as set forth in the Division's March 4, 2008 Notice of Provision of Applicable Bankruptcy Law to the ALJ incorporated herein. Thus, contrary to Respondent Mrs. Alcaro's arguments, the Respondents' Bankruptcy has no impact in this matter, other than the fact that it constitutes conclusive proof of the Respondents' community liability for violations of the Arizona Securities Act. [20]

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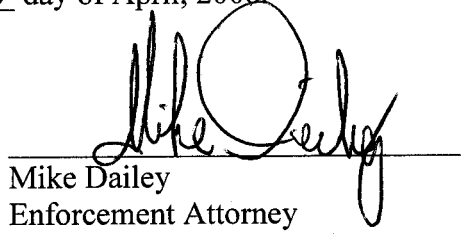
[20] Finally, Mrs. Alcaro's attorney also previously informed undersigned that he would argue that Mrs. Alcaro's interest in the marital community was not liable for restitution and the penalty set forth in the Decision because she is an "innocent spouse." Such concept set forth in 26 U.S.C.A. § 6015 is unique to IRS tax liability cases and, as noted above, it has no application in this case.

Based on the foregoing, the Division respectfully requests the ALJ to issue a recommended decision to the Commission find the Alcaros' marital community liable for the restitution and penalty set forth in the September 6, 2007 Decision.

RESPECTFULLY SUBMITTED this 18TH day of April, 2008.



Mike Dailey
Enforcement Attorney
Securities Division
1300 West Washington, Third Floor
Phoenix, Arizona 85007

ORIGINAL AND THIRTEEN (13) COPIES
of the foregoing filed this 21st day of April, 2008 with:

Docket Control
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Copy of the foregoing hand-delivered this 21st day of April, 2008 to:

Mr. Marc Stern
Administrative Law Judge
Arizona Corporation Commission
Hearing Division
1200 West Washington
Phoenix, Arizona 85007

Copy of the foregoing
Mailed this 21st day of April, 2008 to:

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Attorneys for Respondent Mary Alcaro

By: _____

Tab “1”

COMMISSIONERS
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ARIZONA CORPORATION COMMISSION

November 20, 2006

VIA U.S. MAIL & FACSIMILE
Anthony J. Abruzzo
33 North Stone Avenue, Suite 1800
Tucson, Arizona 85701

RE: In re Alcaro, File # 7749

Dear Mr. Abruzzo:

Thank you for your November 15 letter and documents. Given my understanding of the facts of this case, however, I expected to receive many documents relating to the various investments that Mr. Alcaro sold his investors. Instead, Mr. Alcaro merely provided some of his tax returns and some bankruptcy records recently printed from PACER.

I am aware that Mr. Alcaro identified several of his investors and their purported investment amounts in his bankruptcy schedules. However, debts resulting from violations of the Arizona Securities Act are expressly non-dischargeable under 11 U.S.C. § 523(a)(19). More importantly, it seems odd that although Mr. Alcaro was apparently able to list some of his investors and their purported investments amounts in his 2005 bankruptcy documents, he now claims to have no documents regarding his investors or their investments now. I would appreciate it if you could better inform me as to the basis for this apparent incongruity.

Based in part on the foregoing, I strongly urge your client to reconsider his document production efforts. In addition, please let me know in writing by November 27, 2006 whether your client will waive any applicable privilege with respect to his bankruptcy attorneys' files so that I may subpoena the same. As noted above, I assume that there are documents in the bankruptcy attorneys' files regarding the investors at issue in this matter. In the absence of such waiver, please advise why you believe that any privileges apply to such records as to this investigation in the first instance.

Thank you for your assistance, and please give me a call if you have any questions.

Sincerely,

Mike Dailey
Enforcement Attorney
(602) 542-0722 (Direct Line)

ANTHONY J. ABRUZZO
Attorney at Law

33 North Stone Avenue Ste. 1800
Tucson, Arizona 85701

Phone: (520) 623-6786
Fax: (520)623-9055

November 30, 2006

Arizona Corporation Commission
Attn: Michael Dailey
1300 W Washington, 3rd Floor
Phoenix, Az 85007

Via Facsimile and Regular Mail
(602)594-7470

Re: My Client- Leonard F. Alcaro
File #7749

Dear Mike:

As I previously indicated, Mr. Alcaro advised me that he has no documents concerning financial transactions with your alleged victims. The people listed on his Bankruptcy Petition were creditors or claimants and I would suggest that you review the Bankruptcy file to determine their status as a creditor, claimant, or investor. To characterize them as investors may be inappropriate at this stage of your investigation. As you can see from the Bankruptcy filing, Mr. and Mrs. Alcaro had many individuals and businesses that loaned them money and their tax returns indicate that his income fluctuated drastically.

We realize that debts resulting from violations of the Arizona Security Act are expressly non-dischargeable. We believe it is your burden to determine that the debts that were discharged in Bankruptcy were in fact violations of the Arizona Securities Act. Please advise me of the Arizona Security Act sections that you believe Mr. Alcaro violated or at the very least, what your alleged investors believe were violated. Your characterization that "it seems odd" that Mr. Alcaro cannot produce documents is without support because at this point, we do not know if there were any documents in the first place. You should obtain any documentation from your alleged investors to confirm the existence of any investments. If you do have those documents , we would appreciate receiving them and we will respond accordingly.

Finally, Mr. Alcaro will not waive his attorney client privilege with respect to his attorneys, his Bankruptcy attorney file, and notes. I would again refer you to the Bankruptcy file since we do not have any other documents pursuant to your request.

I look forward to hearing from you with any additional information.

Sincerely,

Tony Abruzzo

ANTHONY J. ABRUZZO

AJA/AC

Tab “2”

Division Expert LeRoy Johnson Qualifications

LeRoy Johnson is the Division's Chief Counsel of Enforcement. He is an attorney and certified public accountant licensed in Arizona. (**Transcript, Vol. I, pp. 99:22 to 100:10**).

Mr. Johnson obtained his accounting degree from the University of Arizona in 1974. Thereafter, he worked as an accountant and auditor at one of the then designated Big 8 accounting firm of Price-Waterhouse for approximately 5 years. (***Id.***, **p.100:21 to 101:3**). Mr. Johnson has been a CPA since 1975. (***Id.***, **p. 102:3-7**). To maintain his CPA license, Mr. Johnson completes 80 hours of continuing accounting education classes every two years and given his work for the Division, such classes are primarily related to forensic accounting. (***Id.***, **p. 102:10-17**).

Mr. Johnson joined the Division as a staff accountant in 1979. Inititally, Mr. Johnson was a Division staff accountant. Thereafter, Mr. Johnson became the Division's Chief Enforcement Accountant and eventually Director of Enforcement. (***Id.***, **p.100:21 to 101:3**).

Mr. Johnson worked in this capacity for the Division until 1988 when he matriculated at the Arizona State College of Law. Mr. Johnson obtained his J.D. degree in 1991 and while at law school, Mr. Johnson: (1) was Managing Editor of the Arizona State Law Journal; (2) a member of the Order of the Coif;[1] (3) clerked for the international law firm of Steptoe & Johnson, L.L.P.; and (4) he graduated in the top 10% of his class. (***Id.***, **p.100:13 to 101:15**). After graduation, Mr. Johnson worked for

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[1] "The Order of the Coif is an honorary scholastic society the purpose of which is to encourage excellence in legal education by fostering a spirit of careful study, recognizing those who as law students attained a high grade of scholarship, and honoring those who as lawyers, judges and teachers attained high distinction for their scholarly or professional accomplishments." *See*, www. orderofthecoif.org

Steptoe & Johnson and the related firm of Logan and Berman for several years practicing in the areas of securities, real estate transactions and litigation. (***Id.*, p. 101:16-22**).

In 1993, Mr. Johnson rejoined the Division as its Chief Counsel of Enforcement. (***Id.*, pp. 101:25 to 102:2**). Mr. Johnson's responsibilities include supervising attorneys, accountants and investigators and participating in the investigations of alleged violations of the Arizona Securities Act. As such, Mr. Johnson has extensive experience investigating securities violations and financial fraud. Mr. Johnson has previously testified approximately 50 times as an accounting, financial and securities expert in various capacities including depositions, interviews by defense counsel, administrative enforcement hearings like this one, grand jury proceedings and criminal trials. (***Id.*, pp. 102:18 to 104:4**). The ALJ designated Mr. Johnson as an expert without objection. (***Id.*, p. 104:6-10**).