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ARIZONA CORPORATION COMMISSION
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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

In the matter of:) DOCKET NO. S-20520A-07-0155
)
LEONARD FRANCIS ALCARO (a/k/a "LENNY)
ALCARO"), and) RESPONDENT MARY BRIGID
MARY BRIGID LAVIN ALCARO, husband and) LAVIN ALCARO'S LEGAL
wife,) MEMORANDUM RE A.R.S.
1140 West San Lucas Circle,) 44-2031(C) AND BANKRUPTCY
Tucson, Arizona 85704)
Respondents.)
)

COMES NOW, the Respondent, MARY BRIGID LAVIN ALCARO, and hereby submits the attached Legal Memorandum to the Commission on the issues of the Commission's authority to determine the liability of the marital community under A.R.S. § 44-2031(C), and the application of bankruptcy law to the instant action.

RESPECTFULLY SUBMITTED this 18 day of April, 2008.

Arizona Corporation Commission
DOCKETED

APR 23 2008

DOCKETED BY me

VINGELLI & ERRICO

Michael J. Vingelli, Esq.
Attorney for Respondent

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LEGAL MEMORANDUM

I Factual Background

1. Mary Brigid Lavin Alcaro was married to Mr. Leonard Alcaro during all times relevant to the instant action, although they have not lived together for more than one year.
2. There is no evidence before the Commission to indicate or establish that Mary Alcaro received any money from the alleged investors, nor did she deposit any funds from any of the investors.
3. The evidence is clear that Mary Alcaro worked continuously, had a substantial income during many of the years relevant to the instant action, and along with her husband filed joint tax returns because he also had substantial earnings during many of the critical years that the Commission alleges that the community benefited from Mr. Alcaro's investment schemes.
4. The State concedes that Mary Alcaro was joined solely for the purpose of determining community liability and not for any specific wrongdoing on her part.
5. The Alcaros filed a joint bankruptcy on May 10, 2005 in the United States Bankruptcy Court, District of Arizona Case # BK-02539-EWH, and the debts were discharged on September 19, 2005.
6. All of the investors were listed as creditors in the bankruptcy, and the bankruptcy file, which is exhibit S-5 in this proceeding, does not indicate that any of the investors filed any pleadings to have the debt declared as "nondischargeable".
7. The State commenced the current proceedings against the Alcaros, and before the Arizona Corporation Commission, on March 20, 2007.
8. The Commission's allegation is that between 1995 and July of 2002 Leonard Alcaro

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offered and sold unregistered securities in an amount in excess of \$400,000.00, but the forensic accountant's report indicates that a substantial amount of the revenues from this venture were either funds obtained by Leonard Alcaro from cashing investors' checks, obtaining cash by way of a less cash deposit, or were deposited in a separate account in his name alone.

9. The forensic accountant's report further indicates that although community expenses may have been paid from the community account and/or the separate account, the earnings, loans, tax refunds, and funds not related to investor monies were substantially more than the investor monies that went into the account.

II A.R.S. § 44-2031(C)

The primary rule of statutory interpretation is to determine and give effect to the legislative intent behind the statute. In this regard, the courts must consider the statute's content, the language used, the subject matter, the historical background, the statute's effect and consequences, and finally, its spirit and purpose. *State v. Korzep*, 165 Ariz. 490, 799 P.2d 831 (1990). The court's chief goal in interpreting a statute is "to fulfill the intent of the legislature that wrote it." *State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993). In determining the legislature's intent, we initially look to the language of the statute itself. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). If the language is clear, the court must "apply it without resorting to other methods of statutory interpretation," *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 268, 872 P.2d 668, 672 (1994), unless application of the plain meaning would lead to impossible or absurd results. *Marquez v. Rapid Harvest Co.*, 89 Ariz. 62, 64, 358 P.2d 168, 170 (1960). The court must give effect to each word of the statute. *Guzman v. Guzman*, 175 Ariz. 183, 187, 854 P.2d 1169, 1173 (App. 1993) ("A statute is to be given such an effect that no clause, sentence or word is rendered superfluous, void, contradictory or

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2 insignificant."). In giving effect to every word or phrase, the court must assign to the language
3 its "usual and commonly understood meaning unless the legislature clearly intended a different
4 meaning." *State v. Korzep*, 165 Ariz. 490, 493, 799 P.2d 831, 834 (1990).

5 In the instant case, the Commission can determine the legislature's intent from the
6 language of the statute itself, which is clear and unambiguous. A.R.S. § 44-2031(C) states:

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8 The commission may join the spouse in any action authorized by
9 this chapter to determine the liability of the marital community.

10 Before A.R.S. § 44-2031 was amended in 2002, the Commission, once a Judgment was entered,
11 could only reach sole and separate property of a perpetrator of violations of the Securities Act.
12 The legislature clearly intended that marital property should be reachable in order to dissuade
13 perpetrators of violations of the Securities Act from hiding their ill gotten gains by funneling
14 them through marital property. This intent on the part of the legislature to strengthen the
15 enforcement measures of the Arizona Corporation Commission is further evidenced by the
16 numerous amendments made to the Securities Act in 2001 and 2002, including an expansion of
17 the power of the Commission to seek civil remedies and to refer actions to a county attorney or
18 the United States attorney for criminal proceedings. It seems clear then, without the need for
19 further statutory construction, that the legislature intended the Commission to have the authority
20 pursuant to A.R.S. § 44-2031(C) to determine the liability of the martial community. The
21 quandary facing the Commission in the instant case, however, is that there is no guidance
22 provided either by the Arizona legislature or the Arizona courts on the issue of how liability of
23 the marital community is to be determined in a securities law matter. It is therefore necessary
24 for the Commission to look at community property law as applied by the courts of Arizona in
25 other instances to determine martial liability.
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In *Cosper v. Valley Bank*, 28 Ariz. 373, 237 P. 175 (1925) it was inferentially

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2 recognized that a fine for a crime committed by the husband, not committed in connection with
3 the management of community property, is a separate debt. *Shaw v. Greer*, 67 Ariz. 223, 229,
4 194 P.2d 430, 436 (1948). In *Newbury v. Remington*, 184 Wash. 665, 52 P.2d 312 (1935), it
5 was held that the marital community was not liable for an assault committed by a husband
6 motorist who was angered because he thought plaintiff ran through an arterial highway without
7 stopping. *Shaw, supra* at 229, 436. The Court reasoned that the malicious tort committed by
8 these defendants, not committed in connection with the management of the community
9 property, may be likened to a separate crime of one of the spouses. *Id.* Likening the
10 commission of a crime to the commission of a tort, the Court in *Shaw* determined that a
11 “malicious tort committed by one of the spouses without the knowledge, consent, or ratification
12 of the other and not resulting in a benefit to the community is not a community obligation, it
13 follows that the debt sued on was the separate obligation of the defendant husbands and that the
14 order quashing the writs of garnishment levied to collect salaries owing to the community was
15 correctly entered.” *Id.* The controlling question, in determining liability of the marital
16 community for the tort of the spouse, is whether the tort is calculated to be, is done for, or
17 results in a benefit to the community or is committed in the prosecution of community business.
18 *Howe v. Haught*, 11 Ariz. App. 98, 462 P.2d 395 (1970) (citing *Brink v. Griffith*, 65 Wash.2d
19 253, 396 P.2d 793(1964)).

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23 The Arizona rule is that the community is liable for the intentional torts of either spouse
24 if the tortious act was committed with the intent to benefit the community, regardless of whether
25 in fact the community receives any benefit. *Selby v. Savard*, 134 Ariz. 222, 655 P.2d 342
26 (1982); *Smith v. Chapman*, 115 Ariz. 211, 564 P.2d 900 (1977); *Donato v. Fishburn*, 90 Ariz.
210, 367 P.2d 245 (1961); *Rodgers v. Bryan*, 82 Ariz. 143, 309 P.2d 773 (1957); *Shaw v. Greer*,
67 Ariz. 223, 194 P.2d 430 (1948). As the Arizona Court of Appeal stated in *Garrett v.*

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2 *Shannon*, 13 Ariz.App. 332, 333, 476 P.2d 538, 539 (1970), "The law is settled in Arizona that
3 the community property of both spouses may be liable for an intentional tort committed by one
4 of the spouses where the intent and purpose of the activity leading to the commission of the tort
5 was to benefit the community interests. *Rodgers v. Bryan*, 82 Ariz. 143, 309 P.2d 773 (1957);
6 and *McFadden v. Watson*, 51 Ariz. 110, 74 P.2d 1181 (1938)." *Caldwell v. Caldwell*, 126 Ariz.
7 460, 616 P.2d 920 (App. 1980). Furthermore, in *Caldwell v. Caldwell, supra*, the Court found
8 that Arizona case law has recognized community liability for the fraud of one member. (See
9 *Reese v. Cradit*, 12 Ariz.App. 233, 469 P.2d 467 (1970)), and that embezzlement is a criminal
10 form of fraud. Therefore, to the extent that the community benefited from criminal acts of an
11 embezzler which were intended by the embezzler to benefit the community, so that spouse was
12 benefited even though spouse was without knowledge of the acts or the criminal character
13 thereof, spouse's share of the community estate thus enhanced would be liable. See also *Tinsley*
14 *v. Bauer*, 125 Cal.App.2d 724, 271 P.2d 116 (1954). Then in 1996, the Arizona Court of
15 Appeals decided *American Express v. Parmeter*, in which the Court explicitly stated that "the
16 community is not liable for a debt contracted by one spouse that is in no way connected with the
17 community and from which the community receives no benefit." 186 Ariz. 652, 654, 925
18 P.2d1369, 1371 (App. 1996).

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22 It follows from the reasoning in the above cited cases that when one spouse commits a
23 crime without the knowledge, consent, or ratification of the other spouse, and such a crime is
24 not for the purpose of benefiting the community and does not benefit the community, and such a
25 crime was not committed during the management of the community, the damages flowing from
26 the crime cannot be a debt of the community, but rather must be the separate debt of the spouse
who committed the crime. The foregoing cases, therefore, clarify when a community can be

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2 held liable for the criminal conduct of one spouse, but we are still left with the question as to
3 what degree is the community liable for the criminal acts of one spouse when the community
4 did receive benefits. Unfortunately, there is no case law directly on point. Based on the
5 language of Arizona's body of case law concerning community property one would imagine
6 that either the entire community is liable, or, in the case of only one offending spouse, one-half
7 of the community is liable. However, there is a bankruptcy case which suggests that the courts
8 have discretion in determining what portion of the community should be held liable: *In re*
9 *Maready*, United States Bankruptcy Appellate Panel Of The Ninth Circuit, 122 B.R. 378
10 (1991). In *Maready*, the Court reversed the decision of the lower court holding that community
11 property is not liable for a nondischargeable debt because judgment creditor failed to serve the
12 "innocent spouse" as a defendant in nondischargeability proceeding, and remanded so that the
13 creditor had an opportunity to attempt to establish that the claim was a "community claim" and
14 to what extent the community property was liable for the "community claim." *Supra* at 379.
15 The Court stated that whether a creditor holds a community claim will be determined by state
16 law, and if it is so determined, the court may then decide what portion of the community
17 property is liable. *Supra* at 381-382.

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20 Although, A.R.S. § 25-214 creates a statutory presumption in favor of community
21 obligation when either spouse incurs a debt during marriage for the benefit of the marital
22 community. *Johnson v. Johnson*, 131 Ariz. 38, 638 P.2d 705 (1981). The party who contends
23 otherwise may overcome the presumption with clear and convincing evidence that the debt is
24 the separate obligation of one spouse. *Hofman v. Meisner*, 17 Ariz.App. 263, 497 P.2d 83
25 (1972). Reading the above cited bankruptcy case in conjunction with the community property
26 presumption, it is Respondent's position that the Commission has the discretion, and to be

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2 equitable, the duty, to determine that only that portion of the community which demonstrably
3 benefited from Mr. Alcaro's criminal acts should be held liable for the judgment. The foregoing
4 case law clearly establishes that proceeds of criminal acts committed by one of spouse without
5 the knowledge or consent of the other spouse are not community property without establishing
6 that the proceeds in some way benefited the community, or that the spouse's intent while
7 gaining the proceeds was to benefit the community. The testimony presented at hearing was
8 that the funds Mr. Alcaro derived from his sale of unregistered securities were deposited into
9 two bank accounts listed in the sole and separate name of Mr. Alcaro. Therefore, the starting
10 position in the instant case is that the funds Mr. Alcaro derived from his sale of unregistered
11 securities are not community property, but rather the sole and separate property of Mr. Alcaro.

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14 The burden then shifts to the state to show that there was either a community benefit
15 received from those funds, or an intent to benefit the community at the time those funds were
16 received. The State's evidence that Mr. Alcaro's illegally gained funds became community
17 property is a detailed analysis of two of Mr. Alcaro's bank accounts and one of Mr. and Mrs.
18 Alcaro's joint accounts that demonstrates money flowing between the accounts, and monies
19 from Mr. Alcaro's accounts being used for community purposes. The State's evidence clearly
20 establishes community benefits received from Mr. Alcaro's criminal acts, and therefore, meets
21 the burden established in the above cited cases to hold the community liable. The Respondent's
22 position is that the burden then again shifts to the Respondent to show 1) either that the
23 community in fact did not benefit, or 2) what portion of the community was benefited by the ill-
24 gotten gains so that the Commission can make a determination as to what portion of the
25 community to hold liable for the debt. In order to make this determination the Commission
26 must decide at what point the separate funds of one spouse in his/her bank account become

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2 community funds in that same separate account.

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4 The rule in Arizona is that all property acquired by either husband or wife during the
5 marriage, except that which is acquired by gift, devise or descent, or earned by the wife or
6 minor children, while she has lived or may live, separate and apart from her husband, shall be
7 the community property of the husband and wife. See *Malich v. Malich*, 23 Ariz. 423, 204 P.
8 1020 (1922); *Horton v. Horton*, 35 Ariz. 378, 278 P. 370 (1929). The character of the property,
9 as to being separate or community, becomes fixed at the time it is acquired. See *Pendleton v.*
10 *Brown*, 25 Ariz. 604, 221 P. 213 (1923). When the status is once fixed, the property retains its
11 character until changed by agreement of the parties or by operation of law." *Porter v. Porter*, 67
12 Ariz. 273, 282, 195 P.2d 132, 138 (1948); See also *Horton v. Horton*, *supra*. Where community
13 property and separate property are commingled, the entire fund is presumed to be community
14 property unless the separate property can be explicitly traced. *Porter*, *supra* at 281. The mere
15 commingling of funds does not have the effect of destroying the identity of the husband's
16 separate property as long as it can be identified. *Id* at 282.

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18 In *Porter v. Porter* the Arizona Supreme Court definitively stated the nature of
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20 Comingled funds stating:

21 In *Blaine v. Blaine*, *supra*, we stated the correct rule of law,
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23 as applied to the facts in that case, when we said: "When, as here, separate and
24 community income and funds are commingled in one account and treated as
25 community property without segregation, the entire amount ordinarily becomes
26 community property. This rule is based upon the theory that the community
interest is paramount and is especially applicable where, as in this case, the
community funds constitute the major portion of the deposits." When separate
and community funds are mingled, the commingled funds are presumed to be
community, and the burden is upon the one claiming them or any portion thereof
to be separate to prove such fact and the amount by clear and satisfactory
evidence. Where separate and community property are confused or blended so
that the separate property cannot be identified, the presumption in favor of the
community casts the whole into the community. It has been held that this result is

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2 not entailed where the community component of the intermixture is
3 comparatively small. In any event, the loss of the separate property results from
4 the presumption in favor of the community in the absence of identification of the
5 separate property, and not from the mere fact of intermixture. The rule in effect
6 that the commingling alone is not sufficient to stamp the whole with the
7 community status, but only when the commingling results in confusion and to
8 loss of identity of separate items entering into the combined fund and the lack of
9 sufficient records or evidence from which the court may determine which portion
10 of the combined fund is separate and which is community is well stated in 31
11 C.J., Husband & Wife, sec. 1161; 41 C.J.S., Husband and Wife, § 495: "Mere
12 mutations of form do not of themselves work a transmutation of the character of
13 property, as being community or separate, after once it has been cast either into
14 the community, or to the separate estate of the husband or the wife; and the same
15 is true of the commingling of separate and community property, separate
16 property remaining separate as long as it can be identified. It is where, by such
17 processes, the identity of separate property is lost that, by the operation of the
18 presumption in favor of the community, a transmutation takes place."

19 At 282-283. In *Porter*, a husband maintained both a separate bank account and a joint
20 bank account with his wife, he periodically deposited both separate and community property
21 funds into his separate account, and he periodically paid community expenses from his separate
22 account. The Court in *Porter* ruled that:

23 Although there may have been commingling of funds (that) is to
24 say, the salary of defendant and his separate income, at various times in the
25 *Porter & Company* account), such commingling did not have the effect of
26 destroying the identity of defendant's separate property so as to work a
transmutation of the character of the property from separate to community. To
hold otherwise would be to disregard completely the admissions of the plaintiff
and the records in the case that at times the salary of defendant was insufficient
to meet the community needs and expenses and it was necessary for the
defendant to use his separate property to meet the expenses of the household.

27 At 284. In the matter at bar, the State presented the testimony of forensic accountant
28 LeRoy Johnson on March 4, 2008 at a hearing before the Commission. Mr. Johnson testified
29 that all of the investors' monies initially went into a separate account in the name of Mr. Alcaro:
30 \$229,249.00 into an account at the Bank of Tucson, and \$42,825.00 into an account at Wells
31 Fargo. *See Exhibit S-31*. Mr. Johnson testified that the total amount of investor funds that he

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2 could trace totaled \$272,074.00. *See Exhibit S-31.* Of this amount \$111,017.00 was distributed
3 back to investors from the Bank of Tucson account, and \$22,508.00 from the Wells Fargo
4 account for a total of \$133,525.00 being distributed back to investors. *See Exhibit S-31.* Mr.
5 Johnson also testified that monies went back and forth from Mr. Alcaro's separate account into
6 the Alcaros' joint account with a net result being that the joint account paid \$7,931.00 more into
7 the Bank of Tucson account than went into the account from Mr. Alcaro's separate account, and
8 \$18,252.00 more into the Wells Fargo account. *See Exhibit S-31.* Mr. Johnson further testified
9 that over 74% of the monies in Mr. Alcaro's Bank of Tucson account were from investors, and
10 therefore, Mr. Alcaro's sole and separate property; and almost 30% were investor funds in his
11 Wells Fargo account. *See Exhibit S-31.* Additionally, Mr. Johnson stated several times that he
12 could specifically identify and categorize all the monies going into and out of Mr. Alcaro's bank
13 accounts. *See Testimony of Leroy Johnson at p. 233 lines 16-20 and p. 250 lines 13-18.* In fact,
14 Mr. Johnson's entire testimony was based on his tracing the finds that were deposited into Mr.
15 Alcaro's separate accounts. Finally, Mr. Johnson testified that he did not analyses whether or
16 not the community expenses paid out of the separate accounts of Mr. Alcaro amounted to more
17 than the community funds that were deposited into those accounts. *Testimony of Leroy Johnson*
18 *at p. 151 line 9 to p. 152 line 19.*

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21 Pursuant to the above cited cases, the investor monies were separate property when they
22 were acquired and retained their separate character at all times because they could be traced.
23 Furthermore, at lease the Bank of Tucson account remained a separate account of Mr. Alcaro
24 because the community funds that were deposited into that account were small in comparison to
25 the total amount of monies in the account. Additionally, it does not matter that Mr. Alcaro used
26 his separate funds to pay community expenses, because the funds remained separate in nature.
The only relevance to the community under Arizona law, is that upon divorce, Mr. Alcaro

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2 would have a claim against the community for the amount of his separate funds used in
3 supporting the community. Therefore, it is Respondent's position that since the investor funds
4 maintained their nature as separate property, and that at least the Bank of Tucson account
5 remained Mr. Alcaro's sole and separate account, and that the State did not present evidence that
6 investor funds were actually used to pay investor expenses; the community cannot be held liable
7 on the Commission's Judgment. If, however, the Commission finds that the community is
8 liable, the community can only be held liable for the actual amount of the benefit to the
9 community as proven by the State. Respondent believes that this amount would equal the
10 investor deposits made into the Wells Fargo account because community property comprised a
11 majority of the funds in that account. This would mean that the community benefited to the
12 amount of \$42,825.00.

14 It is also clear, pursuant to the above cited cases, that the community cannot be held
15 liable on the entire amount of the Commission's judgment in excess of \$400,000.00. The State
16 presented no evidence whatsoever on community liable for any monies in excess of
17 \$272,074.00. Because the community presumption was overcome by Mr. Alcaro's criminal
18 acts, the State had the burden of proving community benefit to an extent that the Commission
19 could make a determination as to what portion of the community could be held liable. Any
20 consideration of community liability in excess of \$272,074.00 would be contrary to established
21 law and civil and evidentiary procedure.

24 **III Bankruptcy Law**

25 The Commission must also determine whether or not the debts incurred by Mr. Alcaro
26 were discharged in his prior bankruptcy proceeding. 11 U.S.C.

§ 523(a)(2) states in relevant part:

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(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--
(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

Further, 11 U.S.C. § 523(c)(1) states:

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

Additionally, 11 U.S.C. § 523(a)(19) states in relevant part:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
(19) that--
(A) is for-- (i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or
(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and
(B) results, before, on, or after the date on which the petition was filed, from--(i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;
(ii) any settlement agreement entered into by the debtor; or
(iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

In the instant case, Mr. Alcaro's creditors did not request a determination of dischargeability, and therefore, a finding of fraud as to the debts which are the subject of this proceeding was never made by the Court. For this reason, 11 U.S.C. § 523(a)(2) is irrelevant to Respondent's bankruptcy analysis. This leaves only the provisions of (a)(19) to consider. There is no Arizona case law on point interpreting the provisions of (a)(19), especially the amendment inserting "before, on, or after the date on which the petition was filed" after the enactment of the

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2 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Principles of statutory
3 construction as cited on page 2 of this memorandum dictate that the intent of the statute first be
4 determined from the language of the statute, if possible. Respondent contends that the language
5 of the statute is clear and unambiguous: debts are not dischargeable if they result from
6 violations of any State securities law, or common law fraud, if the debts result from any
7 judgment, order, consent order, decree, settlement agreement, or court or administrative order
8 for any fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost,
9 or other payment owed by the debtor whether the petition was filed on, before, or after the date
10 of such order, judgment, or agreement.
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12 The debts that the Alcaro's discharged in bankruptcy were debts to individual creditors,
13 and were not debts that resulted from an order, judgment, or agreement to pay damages, fines,
14 penalties, etc. for violations of securities laws. The individual creditors were entitled to file a
15 request to determine the dischargeability of these debts under 11 U.S.C. § 523(a)(2), but they
16 chose not to pursue this remedy. The creditors, having failed to prosecute their claims against
17 the Alcaros in a timely fashion pursuant to the statute, turned to the Commission to prosecute
18 their claims for them. Unfortunately, the debts had already been discharged and the
19 Commission does not have standing pursuant to the statute to prosecute these claims as it is
20 neither a creditor nor has it suffered any damages. If the Commission had prior to the Alcaros'
21 bankruptcy initiated proceedings against the Alcaros for securities law violations, the
22 Commission would most likely have standing at this time as a creditor under the language of
23 (a)(19), but such is not the situation. *See Sherman v. SEC (In re Sherman)*, 491 F.3d 948 (9th
24 Cir. 2005); Bankr. L. Rep. (CCH) P80,969, April 5, 2005 (2007 Amended). The provisions of
25 (a)(19) pertain solely to a debtor trying to escape the payment of a judgment by discharging the
26 debt resulting from that judgment in bankruptcy court.

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2 Because the language of the statute is clear and unambiguous further analysis is not
3 needed on the question of legislative intent, however, the State has cited to several cases that
4 they present as dispositive on this issue. Both *In re Dupree*, 336 B.R. 520 (M.D.Fla. 2005) and
5 *In re Weilein*, 328 B.R. 553 (N.D.Iowa 2005) are distinguishable from the present case because
6 the courts in these cases were called to address the situation of debts discharged in bankruptcy
7 after a creditor's action had already been initiated. Although the Court in *In re Weilein* stated:

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9 There is no doubt that Congress intended to make § 523(a)(19) applicable to all
10 securities fraud judgments, orders or settlement agreements which arose after the
11 enactment of the Sarbanes-Oxley Act, whether arising before or after the filing of the
12 bankruptcy petition. As such, the new version of § 523(a) (19) must be applied in this
13 case. Upon reconsideration of the December 29, 2004 Order, the Court must find that it
14 is not necessary that a judgment, order or settlement agreement to have arisen prior to
15 the bankruptcy filing in order for § 523(a)(19) to except a debt from discharge. The
16 effect of the statutory amendment is to allow Mr. Bowman's counterclaim raising
17 securities fraud issues in the state court action to be excepted from discharge and remain
18 viable in the state court action.

19 *Supra* at 555. Again, the Court is applying (a)(19) to a situation in which the debts were
20 discharged during a bankruptcy proceeding that occurred while creditor's claim for securities
21 fraud was still pending before a court. It seems clear that (a)(19) does not apply to the case at
22 bar, and therefore, it not necessary to address State's argument concerning the application of 11
23 U.S.C. § 362(b)(4).

24 Although Respondent's position is that these debts were successfully discharged, if the
25 Court finds that the discharge did not apply to these debts the only question that remains is
26 whether or not, by filing a joint bankruptcy which included Mr. Alcaro's sole debts, the
community became responsible for these debts. 11 U.S.C. § 302 states:

(a) A joint case under a chapter of this title is commenced by the filing with the
bankruptcy court of a single petition under such chapter by an individual that
may be a debtor under such chapter and such individual's spouse. The
commencement of a joint case under a chapter of this title constitutes an order
for relief under such chapter.

(b) After the commencement of a joint case, the court shall determine the extent,

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if any, to which the debtors' estates shall be consolidated.

It is evident from section (b) of this statute that separate debts do not become community debts simply by virtue of filing a joint bankruptcy. There is no case law finding that a filing of joint bankruptcy turns a separate debt into a community debt, although some states do allow the entire community to be reached to satisfy separate debts acquired during marriage. *See McIntyre v. United States (In re McIntyre)*, 222 F.3d 655 (9th Cir.2000). Respondent has found no case law, however, that supports the proposition that Arizona automatically allows community property to be used to satisfy separate debts. Respondent would contend, therefore, that the community did not become responsible for Mr. Alcaro's separate debts by virtue of the joint bankruptcy.

Conclusion

The Respondent is not responsible for the criminal actions of her spouse, Mr. Alcaro. To the extent that there is a community presumption that all property acquired during the marriage is community property, the presumption is overcome by a spouse's criminal conduct that does not benefit the community. The State must prove a benefit to the community in order to reach community property. The State's evidence proved that, at most, only \$42,825.00 of investor money is subject to the community property presumption, and therefore reachable to satisfy the Commission's Judgment against Mr. Alcaro. However, the debts which are the subject matter of this action, including the \$42,825.00 that are subject to the community property presumption, were definitively discharged in bankruptcy and the Commission does not have standing to bring this action on behalf of Mr. Alcaro's former creditors.

For the foregoing reasons, Respondent respectfully requests the Commission to find that the Alcaros' community property is not reachable to satisfy the Commission's Judgment against

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Mr. Alcaro, or in the alternative to find that the community is only liable on the Judgment to the amount of \$42,825.00.