

OPEN MEETING ITEM



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KRISTIN K. MAYES - Chairman  
GARY PIERCE  
PAUL NEWMAN  
SANDRA D. KENNEDY  
BOB STUMP



MICHAEL P. KEARNS  
Interim Executive Director

ARIZONA CORPORATION COMMISSION

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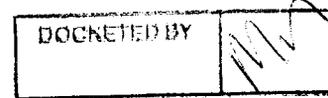
Arizona Corporation Commission

DOCKETED

DATE: MAY 21, 2009

DOCKET NOS: S-20520A-07-0155

MAY 21 2009



TO ALL PARTIES:

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

MARY BRIGID LAVIN ALCARO  
(NOTICE OF OPPORTUNITY)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

JUNE 1, 2009

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

JUNE 11, 2009

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

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**BEFORE THE ARIZONA CORPORATION COMMISSION**

COMMISSIONERS

KRISTIN K. MAYES - Chairman  
GARY PIERCE  
PAUL NEWMAN  
SANDRA D. KENNEDY  
BOB STUMP

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, AZ 85704  
  
Respondents.

DOCKET NO. S-20520A-07-0155

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

OPINION AND ORDER

DATES OF PREHEARING CONFERENCES: May 7, and June 29, 2007  
DATES OF HEARING: March 4 and 5, 2008  
PLACE OF HEARING: Phoenix, Arizona  
ADMINISTRATIVE LAW JUDGE: Marc E. Stern  
APPEARANCES: Mr. Michael J. Vingelli, VINGELLI & ERRICO, on behalf of Mary Brigid Lavin Alcaro; and  
Mr. Michael Daley, Enforcement Attorney on behalf of the Securities Division of the Arizona Corporation Commission.

**BY THE COMMISSION:**

On March 20, 2007, the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") filed a Notice of Opportunity for Hearing ("Notice") against Leonard Francis Alcaro and Mary Brigid Lavin Alcaro, husband and wife (collectively the "Respondents"), in which the Division alleged multiple violations of the Arizona Securities Act ("Act") in connection with the offer and sale of investment contracts and/or promissory notes.

Respondents were duly served with copies of the notice.

On April 9, 2007, Mary Brigid Lavin Alcaro filed a request for a hearing.

1 Leonard Francis Alcaro did not file a request for hearing.

2 On April 12, 2007, by Procedural Order, a pre-hearing conference was scheduled on May 7, 2007.

3 On May 7, 2007, the Division and Respondent Mary Alcaro appeared through counsel. The  
4 attorney appearing for Mrs. Alcaro indicated that he was substituting for Mrs. Alcaro's attorney of  
5 record because her attorney of record was out of the country until June 11, 2007. The Division's  
6 counsel agreed that another pre-hearing conference should be scheduled in late June.

7 On May 10, 2007, by Procedural Order, another pre-hearing conference was scheduled on  
8 June 28, 2007.

9 On June 4, 2007, Respondent Mary Alcaro filed a Motion to Dismiss ("Motion").

10 On June 19, 2007, the Division filed a Response to the Motion by Mrs. Alcaro.

11 On June 28, 2007, the Division and Respondent Mary Alcaro appeared through counsel.  
12 After discussions concerning the pending Motion by Mrs. Alcaro being taken under advisement, the  
13 parties agreed that a hearing should be scheduled in the event that the matter was not resolved. Due  
14 to scheduling conflicts, it was determined that the proceeding should be scheduled in the fall. The  
15 respective counsel agreed that the Division would file its witness list and copies of exhibits 60 days  
16 before the hearing and Respondent Mary Alcaro would file her witness list and copies of exhibits 30  
17 days prior to the hearing date.

18 On July 2, 2007, by Procedural Order, a hearing was scheduled on December 11, 2007.

19 On September 6, 2007, the Commission issued Decision No. 69900, a Default Order, which  
20 ordered Respondent Leonard Francis Alcaro to cease and desist from violating the Act, ordered him  
21 to pay restitution of \$403,998.73 and ordered him to pay \$100,000 as an administrative penalty.

22 On November 16, 2007, the Division filed a Motion for a Continuance due to the  
23 unavailability of a witness for the Division. Respondent, Mrs. Alcaro, did not object to the  
24 Division's Motion.

25 On November 27, 2007, the respective counsel telephonically agreed to a continuance until  
26 March 4, 2008.

27 On December 4, 2007, by Procedural Order, the hearing was continued until March 4, 2008.

28 On February 21, 2008, Respondent Mary Alcaro filed a Motion to Continue ("Motion") the

1 hearing. Her Motion argued that Mr. Alcaro had been indicted and would not be able to testify in this  
2 proceeding until his criminal case was resolved. Mrs. Alcaro requested a continuance for six months  
3 or until Mr. Alcaro's criminal case was concluded.

4 On February 26, 2008, the Division filed its objections to Mrs. Alcaro's Motion stating that  
5 Mrs. Alcaro's purported reliance on Mr. Alcaro's testimony lacked merit since neither Mrs. Alcaro  
6 nor the marital community was a defendant in the criminal proceeding. Further, the Division pointed  
7 out that Mrs. Alcaro would be the witness best qualified to testify concerning whether her portion of  
8 the marital community benefited from Mr. Alcaro's past actions.

9 On February 27, 2008, by Procedural Order, Mrs. Alcaro's Motion to Continue the  
10 proceeding was denied.

11 On March 4, 2008, the hearing was convened before a duly authorized Administrative Law  
12 Judge of the Commission at its offices in Phoenix, Arizona. The Division and Mrs. Alcaro were  
13 represented by counsel. After the close of the Division's case, Mrs. Alcaro did not appear as a  
14 witness and did not present any evidence. At the conclusion of the hearing, the matter was taken  
15 under advisement pending issuance of a Recommended Opinion and Order to the Commission.

16 On April 18, 2008, the Division filed its Post Hearing Brief, which addresses the evidence  
17 presented by the Division and recites the law which the Division believes is applicable with respect to  
18 Mr. Alcaro's violations of the Act as found in Decision No. 69900. The Division's brief further  
19 argues for the application of A.R.S. § 44-2031(C) as it relates to the charge that the Alcaros' marital  
20 community should be liable for the order of restitution and for the payment of an administrative  
21 penalty as ordered in Decision No. 69900.

22 On April 23, 2008, Respondent Mary Alcaro's counsel filed a Legal Memorandum which  
23 argues for restraint by the Commission with respect to the applicability of A.R.S. § 44-2031(C) due  
24 to what is termed "a lack of clear legislative intent" when A.R.S. § 44-2031 was amended in 2002 to  
25 authorize the Commission to join a spouse to determine the liability of the marital community arising  
26 from violations of the Act and also due to a lack of case law. Alternatively, Mrs. Alcaro's counsel  
27 argues that the marital community is liable for less than the amounts ordered in Decision No. 69900  
28 or that the Commission lacks standing to bring the action on behalf of investors/creditors who were

1 discharged in the Alcaros' joint bankruptcy proceeding filed by the Alcaros in 2005.

2 \* \* \* \* \*

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

5 **FINDINGS OF FACT**

6 1. Leonard Francis Alcaro is an individual whose last known address was 1140 West San  
7 Lucas Circle, Tucson Arizona 85704.

8 2. Mary Brigid Lavin Alcaro is an individual and the former of Leonard Francis Alcaro.  
9 Her last known address was 1140 West San Lucas Circle, Tucson Arizona 85704.

10 3. On March 20, 2007, the Division filed a Notice against Mr. and Mrs. Alcaro in which  
11 the Division alleged multiple violations of the Act in connection with the offer and sale of securities  
12 in the form of investment contracts and/or promissory notes.

13 4. Mrs. Alcaro was joined in this proceeding, pursuant to A.R.S. § 44-2031(C), solely for  
14 the purpose of determining the liability of the marital community.

15 5. On April 9, 2007, Mrs. Alcaro filed a request for hearing.

16 6. Mr. Alcaro did not request a hearing and as a result, on September 6, 2007, the  
17 Commission issued Decision No. 69900, a Default Order, which found Mr. Alcaro had committed  
18 multiple violations of the Act.

19 7. In the Commission's Default Order which resulted in Decision No. 69900, the  
20 Commission concluded that Mr. Alcaro was in violation of the Act by offering and selling securities  
21 within the meaning of the Act in the following manner: by offering and selling securities that were  
22 neither registered nor exempt from registration pursuant to A.R.S. § 44-1841; by offering and selling  
23 securities while neither registered as a dealer or salesman pursuant to A.R.S. § 44-1842; and by (i)  
24 employing a device, scheme or artifice to defraud; (ii) making untrue statements and misleading  
25 omissions of material facts; and (iii) engaging in transactions, practices and courses of business  
26 which operated as a fraud or deceit on his offerees and investors pursuant to A.R.S. § 44-1991.

27 8. In Decision No. 69900, the Commission ordered the following: that Mr. Alcaro  
28

1 permanently cease and desist from violations of the Act; that Mr. Alcaro make restitution in the  
2 amount of \$403,998.73; and that Mr. Alcaro pay an administrative penalty in the amount of  
3 \$100,000.

4 9. In support of the allegations raised in the Notice with respect to a determination  
5 whether the Respondent Mrs. Alcaro's portion of the marital community should be liable pursuant to  
6 A.R.S. § 44-2031(C), the Division called two witnesses as follows: Ronald Clark, the Division's  
7 Chief Investigator; and Mr. Leroy Johnson, the Division's Chief Counsel of its Division of  
8 Enforcement, who was qualified as an expert witness without objection.

9 10. As found in Decision No. 69900, Mr. Alcaro committed multiple violations of the Act,  
10 commencing in 1995 when he began selling securities to the investors in his various purported  
11 offerings,<sup>1</sup> and that he had received a total of \$472,779 by 2004. The total amount owed to investors  
12 was reduced in part by repayments by Mr. Alcaro of \$68,780.27, as purported returns on the  
13 investors' investments, reducing the amount owed to investors to \$403,998.73, as found in Decision  
14 No. 69900.

15 11. According to Mr. Johnson's analysis, substantial amounts of investor funds, totaling  
16 \$272,074, were commingled in two separate accounts controlled solely by Mr. Alcaro. One was at  
17 the Bank of Tucson and the other was at Wells Fargo National Bank ("Wells Fargo"). Funds from  
18 the marital community totaling \$192,534 were deposited into the two accounts controlled solely by  
19 Mr. Alcaro from June of 1999 to 2004. The funds deposited into Mr. Alcaro's separate accounts  
20 consisted of joint tax refunds and cash that was transferred from Mr. and Mrs. Alcaro's joint  
21 checking account with Wells Fargo.

22 12. The Division presented evidence that investor checks were, in some instances, made  
23 out to both Mr. and Mrs. Alcaro, and on at least one occasion, she endorsed a check.

24 13. The Division also presented evidence that investors received payments from the joint  
25 Wells Fargo account.

26 14. The record further established that Mr. and Mrs. Alcaro filed joint tax returns during  
27 the relevant time frame in this proceeding.

28 <sup>1</sup> Mr. Johnson testified that he saw no evidence that the securities sold by Mr. Alcaro existed. (Tr. Vol. II, p. 225.)

1           15.     The evidence also established that Mr. and Mrs. Alcaro purchased and owned homes  
2 jointly together.

3           16.     According to Mr. Clark, some investors who made investments with Mr. Alcaro  
4 provided the Division with copies of signed deeds of trust for one of the Alcaro's marital homes  
5 which had been signed by the Alcaros and recorded with the Pima County Recorder.

6           17.     There is evidence that several investors sued to recover their investments and obtained  
7 civil judgments against both Mr. and Mrs. Alcaro. These judgments were not appealed, but the  
8 amounts awarded were subsequently listed in a joint bankruptcy filed by Mr. and Mrs. Alcaro.<sup>2</sup>

9           18.     During the proceeding, Mr. Johnson testified that monies deposited into Mr. Alcaro's  
10 separate accounts with the Bank of Tucson and Wells Fargo were often transferred back and forth to the  
11 joint account of Mr. and Mrs. Alcaro at Wells Fargo over a period of time. (Tr. Vol. I, pp. 113, 118, 119.)

12           19.     Mr. Johnson found that investor funds totaling \$229,249, or three-quarters of the funds  
13 deposited into the Bank of Tucson account, came from investors and of that sum approximately  
14 53 percent, or \$164,666, was expended for the benefit of Mr. and Mrs. Alcaro in the form of cash and  
15 other personal expenditures such as: department store payments; grocery store payments; utility  
16 payments; credit card payments; banking fees; miscellaneous personal expenditures, including Mrs.  
17 Alcaro's dental bills; and home mortgage payments.

18           20.     Mr. Johnson also found \$80,581 in community funds from the Alcaros' joint Wells  
19 Fargo account being commingled with the funds in Mr. Alcaro's Bank of Tucson account.

20           21.     Mr. Johnson's analysis of Mr. Alcaro's Wells Fargo account found that \$123,083, or  
21 79.5 percent of the deposits, were similarly expended for the benefit of Mr. Alcaro and the marital  
22 community as follows: payments to department stores; payments to grocery stores; payments for  
23 utilities; payments for personal credit cards; payments for bank fees; miscellaneous personal  
24 expenditures; miscellaneous loan payments; home mortgage payments; and title company fees.

25  
26 \_\_\_\_\_  
27 <sup>2</sup> On May 10, 2005, a voluntary petition for joint bankruptcy was filed by Mr. and Mrs. Alcaro pursuant to Chapter 7 of the  
28 Bankruptcy Act in the United States Bankruptcy Court for the District of Arizona in Tucson, Arizona in Case No. 4-05-bk-02539-  
EWH. The Alcaros petitioned to have total debt of \$580,379 discharged of which a total of \$530,000 was investor debt described as  
"joint debt" in their petition. The investor debt constituted 91 percent of the total joint debt listed in their bankruptcy. The Alcaros  
were discharged from bankruptcy on September 19, 2005.

1           22.     Mr. Johnson also found a total of \$111,981 was transferred from the joint Wells Fargo  
2 account of Mr. and Mrs. Alcaro and commingled with Mr. Alcaro's Wells Fargo account.

3           23.     Although Mrs. Alcaro requested a hearing in this proceeding, she did not testify or  
4 present clear and convincing evidence in the proceeding to rebut the testimony and evidence  
5 presented by the Division that the marital community was benefited by Mr. Alcaro's violations of the  
6 Act as found in Decision No. 69900.

7           24.     Additionally, with respect to the Alcaros' discharge in bankruptcy as against their  
8 unsecured creditors, many of whom were investors with Mr. Alcaro, we find that the discharge is  
9 inapplicable to debts arising from violations of the Act, as were found in Decision No. 69900. As  
10 argued by the Division in its March 4, 2008 filing, the case of *In re Dupree*, 336 B.R. 520,  
11 531(M.D.Fla. 2005) held that, pursuant to 11 U.S.C. § 523(a)(19), a discharge in bankruptcy does not  
12 discharge the debtor who violates Federal and State securities laws involving fraud and results in an  
13 order from any court or administrative proceeding before, on, or after the date the petition in  
14 bankruptcy was filed by the debtor.

15 **Legal Analysis**

16           25.     The Commission's role in the enforcement of the Act is set forth in the Division's  
17 brief which recites the applicable statute, A.R.S. § 44-2031(C), that states that "[t]he commission  
18 may join the spouse in any action authorized by this chapter to determine the liability of the marital  
19 community."<sup>3</sup>

20           26.     The Division pointed out that the statute is clear and unambiguous citing *U.S. West*  
21 *Communications, Inc. v. City of Tucson*, 198 Ariz. 515, 520, 11 P.3d 1054, 1059 (App. 2000)(when  
22 statutory language is clear, unequivocal, and unambiguous, the court must give effect to the language  
23 and may not invoke the rules of statutory construction to interpret it). In order to obtain an order of  
24 restitution against the marital community, the Division was required to name Mrs. Alcaro in the  
25

26 <sup>3</sup> To further its argument for the application of A.R.S. § 44-2031(C), the Division cites the preamble to the Act:  
27 "The intent and purpose of this Act is for the protection of the public, the preservation of fair and  
28 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."

1 Notice along with Mr. Alcaro since an Order by the Commission against Mr. Alcaro would not bind  
2 the marital community. A.R.S. § 25-215(D) requires that in an action on a debt or obligation, both  
3 spouses must be sued jointly and a judgment is first satisfied from the community and second from  
4 the property of the spouse who incurs the obligation. By joining Mrs. Alcaro in the proceeding, her  
5 due process rights are preserved and she is able to appear and defend the marital community.

6       27. In its brief, the Division points out that, pursuant to A.R.S. § 25-211, all property  
7 acquired by either spouse during marriage is community property of the husband and wife except that  
8 acquired by gift, devise or descent. The Division further cites *Barr v. Petzhold*, 77 Ariz. 399, 409,  
9 273 P.2d 161, 167 (1954), a leading Arizona case which holds there is a “strong presumption,  
10 rebuttable only by clear and convincing evidence, that all earnings [or wages acquired] during  
11 coverture are community in nature.” This case also holds that “where separate and community funds  
12 have become commingled, the commingled funds are presumed to be community in nature, and  
13 burden is upon the one claiming them or any portion of them, to be separate, to prove such fact and  
14 the amount by clear and satisfactory evidence.” *Id.* In further support of its argument, the Division  
15 cites *Laughlin v. Laughlin*, 61 Ariz. 6, 18-19, 143 P.2d 336, 341 (1943), which held that the  
16 commingling of community and separate funds in a single account results in the fund becoming  
17 community property unless the separate property can be explicitly traced and proved to have been  
18 kept separate by clear and convincing evidence.

19       28. The Respondent argued that Mr. Alcaro’s actions amounted to either torts or crimes,  
20 and the presumption would not exist for the marital community to be liable for restitution. However,  
21 this is neither a case founded in tort or criminal law, but a regulatory enforcement action brought by  
22 the Commission exercising its regulatory authority pursuant to Arizona law. Further, Respondent’s  
23 argument failed to cite any authority that the Commission’s action is classified as a tort or criminal  
24 action to mitigate the liability of the marital community, and in the present case, the Commission is  
25 neither the victim of a tort nor a crime.

26       29. The Division argues that community liability is established if there is a benefit shown  
27 to the marital community as the result of a criminal act, citing *Cadwell v. Cadwell*, 126 Ariz. 460,  
28 463, 616 P.2d 920, 923 (App. 1980), where in a divorce proceeding, the wife’s debts arising from a

1 criminal conviction for embezzlement were allocated as debts of the marital community because it  
2 benefited from the embezzlement in the form of house payments. The Division claims that there is  
3 no requirement to examine Mr. Alcaro's intent in an administrative action by the Commission. In  
4 support of this argument, the Division cited *Rodgers v. Bryan*, 82 Ariz. 143, 148, 309 P.2d 773, 776  
5 (1957), which involved a malicious assault and battery by a husband "to protect the morals of his  
6 family, hotel guests, and his property against trespass" where the actions by the husband were  
7 performed for the benefit of the community.

8         30. In response to the argument posed by Mrs. Alcaro, with respect to the discharge of  
9 debts to investors listed as joint unsecured creditor debt in the Alcaros' joint bankruptcy (which was  
10 discharged on September 19, 2005), the Division contends that the debts owed to investors arising  
11 from violations of the Act are non-dischargeable pursuant to 11 U.S.C. § 523(a)(19)(a)(A) & (B).  
12 The Division cites *In re Dupree*, 336, B.R. 520, 531(M.D.Fla. 205), ("523(a)(19) allows a securities  
13 claim to be prosecuted through final judgment, order or settlement agreement despite the filing of  
14 bankruptcy, and provides that such claim (or arbitration award) would be non-  
15 dischargeable...Accordingly, in this case, although an order had not been entered by the State Court  
16 confirming the [NASD] arbitration award, the Debtor's motion for summary judgment as to  
17 Count III should be denied."); *also*, 11 U.S.C. 523(a)(2)(A)(debts incurred through fraud are  
18 non-dischargeable).

19         31. Further, the Division cites *In re Weilen*, 328 B.R. 553, 555 (N.D. Iowa 2005), which  
20 held that a debtor's obligations on securities fraud claims did not have to be reduced to judgment,  
21 order or settlement prior to commencement of debtor's bankruptcy case in order for such obligations  
22 to be excepted from discharge under the special securities-fraud non-dischargeability provision, as  
23 amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

24         32. Lastly, the Division argues that the joint filing of the Alcaros' petition for bankruptcy  
25 constitutes the best evidence that the marital community should be held liable for Mr. Alcaro's  
26 violations of the Act as found in Decision No. 69900.

27         33. Although she did not present any evidence at the hearing, the Respondent argues "that  
28 the Commission has the discretion, and to be equitable, the duty, to determine that only that portion

1 of the community which demonstrably benefited from Mr. Alcaro's criminal acts should be held  
2 liable for the judgment." (Respondent's Legal Memorandum at 8-9.) According to the Respondent,  
3 there is no clear legislative intent provided with the amendment of A.R.S. § 44-2031(C), and there is  
4 no definitive Arizona case law which establishes a standard for the determination of the extent to  
5 which the marital community should be held liable with respect to violations of the Act. In order to  
6 determine the extent of the community's liability in the instant case, Respondent argued for the  
7 application of community property law as applied by the courts in Arizona in other instances.

8         34. Citing *Howe v. Haught*, 11 Ariz. App. 98, 462 P.2d 395 (1970) (citing *Brink v.*  
9 *Griffith*, 65 Wash. 2d 253, 396 P.2d 793 (1964)), Respondent asserts that the primary factor to be  
10 considered in determining the liability of the marital community, with respect to the commission of a  
11 tort by one spouse, is "whether the tort is calculated to be, is done for, or results in a benefit to the  
12 community or is committed in the prosecution of community business."

13         35. Similarly, Respondent described the situation which arises when one spouse commits  
14 a criminal act and points out that the controlling issue centers on the degree to which the marital  
15 community benefits from the criminal action of one spouse. In this case, the Respondent argues:

16             "Unfortunately, there is no case law directly on point. Based on the language of  
17             Arizona's body of case law concerning community property one would imagine that  
18             either the entire community is liable, or, in the case of only one offending spouse,  
19             one-half of the community is liable." (Respondent's Legal Memorandum at 8.)

20         36. Respondent cites *In re Maready*, United States Bankruptcy Appellate Panel of the  
21 Ninth Circuit, 122 B.R. 378 (1991), positing that the case is illustrative of the fact that courts have  
22 discretion in determining what portion of the community should be held liable for the acts of only one  
23 spouse. In *Maready*, the Court held that the community property was not liable for a non-  
24 dischargeable debt because a judgment creditor failed to serve the "innocent spouse" as a defendant  
25 in a non-dischargeability proceeding. The court remanded the case to allow the creditor an  
26 opportunity to establish that the claim was a "community claim" and to what extent the community  
27 property was liable for the "community claim." *Id* at 379.

28         37. Respondent acknowledges that, pursuant to A.R.S. § 25-214, a statutory presumption  
arises in favor of a community obligation when either spouse incurs a marital debt that benefits the

1 community, but argues that the presumption may be overcome with clear and convincing evidence  
2 that the debt is the separate obligation of one spouse, citing *Hofman v. Meisner*, 17 Ariz. App. 263,  
3 497 P.2d 83 (1972). Respondent also concedes that the marital community is liable stating "The  
4 State's evidence clearly establishes community benefits received from Mr. Alcaro's criminal acts,  
5 and therefore, meets the burden established in the above cited cases to hold the community liable."  
6 (Respondent's Legal Memorandum at 9.)

7 38. However, Respondent contends that the character of the property, and whether it is  
8 separate or community, controls the issue until changed by agreement of the parties or operation of  
9 law, citing *Porter v. Porter*, 67 Ariz. 273, 282, 195 P.2d 132, 138 (1948). It was found in the *Porter*  
10 case that where community property and separate property are commingled, the entire fund is  
11 presumed to be community property unless the separate property can be explicitly traced. *Porter*,  
12 *supra* at 281. This case found further that mere commingling of funds did not destroy the identity of  
13 the husband's separate property as long as it could be identified. *Id.* at 282.

14 39. The Respondent argued that, based on the testimony of the Division's expert witness,  
15 Mr. Johnson, a substantial portion of the investor funds were traceable to Mr. Alcaro's separate  
16 accounts. According to Mr. Johnson, Mr. Alcaro's separate account at the Bank of Tucson received  
17 \$229,249 of investor funds, and his separate account at Wells Fargo received \$42,825 of investor  
18 funds, for a total of \$272,825. The Respondent contends that because Mr. Johnson was able to  
19 identify funds flowing between Mr. Alcaro's separate accounts and the Alcaros' joint account at  
20 Wells Fargo, the Division effectively traced the investor funds and the funds in the separate accounts,  
21 and therefore, at least a portion of investor funds retained their separate character. Alternatively, the  
22 Respondent argues that there is "no evidence whatsoever" that the community should be liable for  
23 any amount in excess of the \$272,074, despite the Commission's findings and order of restitution  
24 made in Decision No. 69900. With respect to the Alcaros' discharge from bankruptcy, the  
25 Respondent claims that 11 U.S.C. § 523(a)(2) is irrelevant since the investors did not contest the  
26 discharge of their claims in the bankruptcy proceeding, and a finding of fraud was not made by the  
27 Court.

28 40. The Respondent also asserts that the Commission may not now bring an action related

1 to Mr. Alcaro's violations of the Act after the discharge in bankruptcy on September 19, 2005, due to  
2 the amendment of the language of the federal statute by the Bankruptcy Abuse Prevention and  
3 Consumer Protection Act of 2005, where the words "before, on or after the date on which the petition  
4 was filed," were added to describe when the fraudulent violations took place. The Respondent urges  
5 the Commission to find that it is unable to bring an enforcement action because the investors failed to  
6 challenge the discharge of the Alcaros' debts, and therefore, the Commission now lacks "standing" to  
7 bring its action herein.

8 41. Lastly, the Respondent argues that she is not responsible for the criminal actions of  
9 Mr. Alcaro. We note, however, that Mr. Alcaro had not been convicted for any crimes related to this  
10 proceeding at the time of the hearing, but has only been found liable with respect to the  
11 Commission's findings of Mr. Alcaro's violations of the Act in the Commission's administrative  
12 proceeding.

13 **Conclusion**

14 42. Under the circumstances, and after reviewing the arguments made by the Division and  
15 counsel for Mrs. Alcaro with respect to the application of A.R.S. § 44-2031(C), we believe that the  
16 intent of the legislature was made clear with the citation of the Preamble to the Act by the Division.  
17 Clearly, the intention of the legislature was to protect the State's citizens from fraudulent practices in  
18 the sale of securities and the legislature intended the Act to be interpreted liberally to further this  
19 cause. The Division's argument, particularly with respect to the extent of the commingling of the  
20 Alcaros' funds for a lengthy period of time benefiting the community, lead us to conclude that the  
21 marital estate should be held liable for restitution pursuant to A.R.S. § 44-2031(C) to the investors  
22 who invested their monies with Mr. Alcaro.

23 43. There is ample evidence in the record that establishes that, at all time relevant to the  
24 violations of the Act by Mr. Alcaro, he and his wife were married and living together in furtherance  
25 of the marital community. Evidence in the record establishes the commingling of hundreds of  
26 thousands of dollars, including investor funds and joint tax refunds deposited into separate accounts  
27 maintained by Mr. Alcaro, which were also infused with funds from the Alcaros' joint account.  
28 Additionally, evidence was presented of payments made to investors from the Alcaros' joint account.

1 Further, during the relevant timeframe, there is evidence that the Alcaros jointly purchased and  
2 owned two homes together. Evidence of further involvement of the marital community in Mr.  
3 Alcaro's fraudulent activities consists of the deeds of trust executed by Mr. and Mrs. Alcaro and  
4 given to investors. As a capstone to the involvement of the marital community in Mr. Alcaro's  
5 activities, the record supports our finding of significant amounts of investor funds from Mr. Alcaro's  
6 separate accounts expended on community expenses such as mortgage payments, grocery bills, utility  
7 bills, and dental expenses for Mrs. Alcaro.

8       44. Likewise, we find that the Alcaros' discharge from bankruptcy does not discharge the  
9 debts owed to investors arising from Mr. Alcaro's fraudulent activities, because these debts were  
10 rendered non-dischargeable with the passage of the Bankruptcy Abuse Prevention and Consumer  
11 Protection Act of 2005. In conclusion, Mrs. Alcaro had an opportunity to rebut by "clear and  
12 convincing evidence" that the marital community did not benefit from Mr. Alcaro's violations of the  
13 Act as found in Commission Decision No. 69900, but she has failed to present any evidence in this  
14 regard. As a result, we must conclude that the marital community should be held liable for the  
15 restitution ordered as a result of Mr. Alcaro's violations of the Act.

16       45. However, on the issue of whether Mrs. Alcaro's interest in the marital community  
17 should be held liable for the administrative penalty ordered in Decision No. 69900, the Default Order  
18 against her husband, the Division has presented no evidence that Mrs. Alcaro was actively or even  
19 passively engaged in activities that violated the Act or any rules of the Commission. Nor did the  
20 Division present any evidence that Mrs. Alcaro knew or should have known that her husband's  
21 activities violated the Act or the rules of the Commission, or that she was complicit in any way. Due  
22 to this lack of evidence and with no clear case law requiring an "innocent spouse" to pay an  
23 administrative penalty based upon conduct of the other spouse, we do not believe that it is equitable  
24 or reasonable that any portion of Mrs. Alcaro's interest in the marital community should be assessed  
25 for any portion of the \$100,000 administrative penalty previously ordered against Mr. Alcaro for his  
26 fraudulent actions, as described in Decision No. 69900.

27

28

**CONCLUSIONS OF LAW**

1  
2 1. The Commission has jurisdiction over this matter pursuant to Article XV of the  
3 Arizona Constitution, A.R.S. § 44-1801, *et seq.*

4 2. Decision No. 69900 found the following: that Mr. Alcaro committed multiple  
5 violations of the Act in the offer and sale of securities that were neither registered nor exempt from  
6 registration; that he was neither registered as a dealer nor as a salesman; and that he also violated the  
7 anti-fraud provisions of the Act.

8 3. Decision No. 69900 ordered Mr. Alcaro to permanently cease and desist from  
9 violations of the Act, to make restitution of \$403,998.73, and to pay an administrative penalty of  
10 \$100,000.

11 4. The marital community should be jointly and severally liable for restitution arising  
12 from Decision No. 69900 pursuant to A.R.S. § 44-2031(C).

13 5. The interest in the marital community of Mrs. Alcaro should not be held liable for the  
14 administrative penalty arising from Decision No. 69900.

**ORDER**

15  
16 IT IS THEREFORE ORDERED that pursuant to the authority granted to the Commission  
17 under A.R.S. § 44-2032, and pursuant to A.R.S. § 44-2031(C), the marital community of  
18 Respondents Mary Brigid Lavin Alcaro and Leonard Francis Alcaro, to the extent allowable pursuant  
19 to A.R.S. § 25-215, jointly and severally, shall make restitution in an amount not to exceed  
20 \$403,998.73, which restitution shall be made pursuant to A.A.C. R14-4-308, subject to legal set-offs  
21 by the Respondents and confirmed by the Director of Securities, said restitution to be made within  
22 60 days of the effective date of this Decision.

23 IT IS FURTHER ORDERED that the restitution ordered hereinabove shall bear interest at the  
24 rate of 10 percent per year for the period from the dates of investment to the date of payment of  
25 restitution by the Respondents.

26 IT IS FURTHER ORDERED that all restitution payments ordered hereinabove shall be  
27 deposited into an interest-bearing account(s), if appropriate, until distributions are made.

28 ...

1 IT IS FURTHER ORDERED that the interest in the marital community of Mary Brigid Lavan  
2 Alcaro shall not be held liable for any portion of the administrative penalty ordered in Decision No.  
3 69900.

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

5 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.  
6  
7

8 CHAIRMAN \_\_\_\_\_ COMMISSIONER

9  
10 COMMISSIONER \_\_\_\_\_ COMMISSIONER \_\_\_\_\_ COMMISSIONER

11 IN WITNESS WHEREOF, I, MICHAEL P. KEARNS, Interim  
12 Executive Director of the Arizona Corporation Commission,  
13 have hereunto set my hand and caused the official seal of the  
14 Commission to be affixed at the Capitol, in the City of Phoenix,  
15 this \_\_\_\_ day of \_\_\_\_\_, 2009.

16 \_\_\_\_\_  
17 MICHAEL P. KEARNS  
18 INTERIM EXECUTIVE DIRECTOR

19 DISSENT \_\_\_\_\_  
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21 DISSENT \_\_\_\_\_  
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SERVICE LIST FOR:

LEONARD FRANCIS ALCARO (a/k/a "LENNY ALCARO")  
and MARY BRIGID LAVIN ALCARO

DOCKET NO.:

S-20520A-07-0155

Michael J. Vingelli  
VINGELLI & ERRICO  
33 North Stone Avenue, Suite 1800  
Tucson, Arizona 85701-1415  
Attorney for Mary Brigid Lavin Alcaro

Matt Neubert, Director  
Securities Division  
ARIZONA CORPORATION COMMISSION  
1300 West Washington Street  
Phoenix, Arizona 85007-2929