

ORIGINAL

OPEN MEETING AGENDA ITEM



0000098539

EXCEPTION

BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

COMMISSIONERS

2009 JUN -1 A 10: 08

Arizona Corporation Commission

DOCKETED

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

AZ CORP COMMISSION
DOCKET CONTROL

JUN - 1 2009

DOCKETED BY

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 EXCEPTIONS TO RECOMMENDED OPINION AND ORDER

Pursuant to R14-3-110(B) of the Arizona Administrative Code, the Securities Division ("Division") of the Arizona Corporation Commission submits its exceptions to the Administrative Law Judge's May 21, 2009, Recommended Opinion and Order ("Opinion"). The Opinion concludes that while respondents' marital community is liable for the restitution ordered in Decision No. 69900, it should not be liable for the administrative penalty because Mrs. Alcaro is an innocent spouse.

ANALYSIS

Findings of Fact number 45 that states:

[O]n the issue of whether Mrs. Alcaro's interest in the marital community should be held liable for the administrative penalty ordered in Decision No. 69900, the Default Order against her husband, the Division has presented no evidence that Mrs. Alcaro was actively or even passively engaged in activities that violated the Act or any rules of the Commission. Nor did the Division present any evidence that Mrs. Alcaro knew or should have known that her husband's activities violated the Act or the rules of the Commission, or that she was complicit in any way. Due to this lack of evidence and with no clear case law requiring an "innocent spouse" to pay an administrative penalty based upon conduct of the other spouse, we do not believe that it is equitable or reasonable that any portion of Mrs. Alcaro's interest in the marital community should be assessed for any portion of the \$100,000

1 administrative penalty previously ordered against Mr. Alcaro for his fraudulent
2 actions, as described in Decision No. 69900.

3 The Opinion seeks to impose the penalty obligation against only Mr. Alcaro's portion of
4 the marital community. However, a judgment is not collectible against a marital community if it is
5 only entered against a single spouse. *See, Spudnuts, Inc. v. Lane*, 139 Ariz. 35, 36, 676 P.2d 669,
6 670 (App. 1984)("A judgment against one spouse does not bind the community."); A.R.S. § 25-
7 215(D)(both spouses must be sued jointly to collect debt or obligation from community).¹ To hold
8 that the penalty obligation is payable from only Mr. Alcaro's "interest" in his marital community
9 would effectively preclude the penalty from being collectable from any aspect of marital
10 community assets.²

11 Further, the Arizona Supreme Court holds that punitive sanctions are properly awarded
12 against a marital community based solely on the misconduct of a husband despite the fact that a
13 wife was not aware of, did not consent to, or participate in or ratify such misconduct. *Smith v.*
14 *Chapman*, 115 Ariz. 211, 216, 564 P.2d 900, 905 (1977) (punitive damages awarded against
15 community for accident caused solely caused by drunk driving husband); *McFadden v. Watson*, 51
16 Ariz. 110, 115, 74 P.2d at 1181, 1183 (1938) (family car could be levied against to satisfy punitive
17 damages award against community based solely on husband's libel and slander of his employee).

18 Applied here, hundreds of thousands of dollars of investor money was used to benefit the
19 Alcaro marital community. Conversely, the record is devoid of evidence that Mr. Alcaro ever
20 maintained any separate property from which the administrative penalty can be satisfied.³ The
21 Opinion also finds that the Alcaros treated investor money and debts as community assets and
22 liabilities. (Opinion, at Findings of Fact, ¶¶9-24, 42-44). Because Arizona law allows sanctions to

23 ¹ Each spouse owns an *undivided*, one-half interest in the community property. *See, e.g., Garn v. Garn*, 155
24 Ariz. 156, 159, 745 P.2d 604, 607 (App. 1987)(also noting that because Arizona is a community property
25 state, "most, if not all," of a married couple's assets are in the form of community, not separate property.).

26 ² Although a judgment creditor cannot prospectively/equitably allocate a judgment against only certain
portion(s) of a marital community, such allocation can be made by a Judge in a dissolution proceeding, or
sought by a spouse in a civil suit against the other. *See e.g., Community Guardian Bank v. Hamlin*, 182 Ariz.
627, 630, 898 P.2d 1005, 1008 (App. 1995)(under A.R.S. § 25-318(A), "[a] divorce court has the statutory
power to divide the community assets and obligations.").

³ Mr. and Mrs. Alcaro did not testify, and Mrs. Alcaro provided no contraverting evidence at hearing.

1 be assessed against the Alcaro marital community, and because the penalty may not be collectible
2 from any possible, separate assets of Mr. Alcaro, the Division recommends that the Opinion be
3 modified to state that the administrative penalty be assessed against the Alcaro marital community.

4 CONCLUSION

5 Based on the foregoing, the Division respectfully requests that Findings of Fact,
6 Conclusions of Law, and Order paragraphs be amended as follows:

7 1. Findings of Fact

8 (a) DELETE: Paragraph 44, page 13, lines 14-15.

9 INSERT: "As a result, we conclude that Respondents' marital
10 community is liable for the restitution and administrative penalty amounts
11 ordered in Decision No. 69900."

12 (b) DELETE: Paragraph 45, page 13, lines 16-26.

13 2. Conclusions of Law

14 (a) DELETE: Paragraphs 4 and 5, page 14, lines 13-14.

15 INSERT: "Mr. Alcaro acted for the benefit and in furtherance of his
16 marital community with Mrs. Alcaro and, pursuant to A.R.S. §§ 25-214 and 25-
17 215, the order of restitution and administrative penalties set forth in Decision
18 No. 69900 are the debts of Mr. and Mrs. Alcaro's marital community."

19 3. Order

20 (a) DELETE: Page 14, line 16 to page 15, line 3.

21 INSERT: IT IS FURTHER ORDERED, pursuant to A.R.S. § 44-
22 2032, that Mr. and Mrs. Alcaro's marital community shall, jointly and severally
23 with Mr. Alcaro under Decision No. 69900, pay restitution to the Commission in
24 the amount of \$403,998.73. Payment shall be made in full within 60 days of the
25 date of this Order. Any amount outstanding shall accrue interest at the rate of
26 10% per annum from the date of this Order until paid in full. Payment shall be
made to the "State of Arizona" to be placed in an interest-bearing account
controlled by the Commission. The Commission shall disburse the funds on a
pro-rata basis to investors shown on the records of the Commission. Any
restitution funds that the Commission cannot disburse because an investor
refuses to accept such payment, or any restitution funds that cannot be disbursed
to an investor because the investor is deceased and the Commission cannot
reasonably identify and locate the deceased investor's spouse or natural children

1 surviving at the time of the distribution, shall be disbursed on a pro-rata basis to
2 the remaining investors shown on the records of the Commission. Any funds
3 that the Commission determines it is unable to or cannot feasibly disburse shall
4 be transferred to the general fund of the state of Arizona.

5 IT IS FURTHER ORDERED, pursuant to A.R.S. § 44-2036, that Mr.
6 and Mrs. Alcaro's marital community shall, jointly and severally with Mr.
7 Alcaro under Decision No. 69900, pay an administrative penalty in the amount
8 of \$100,000. Payment shall be made to the "State of Arizona." Any amount
9 outstanding shall accrue interest at the rate of 10% per annum from the date of
10 this Order until paid in full. The payment obligations for these administrative
11 penalties shall be subordinate to any restitution obligations ordered herein and
12 shall become immediately due and payable only after restitution payments have
13 been paid in full or upon respondents' default with respect to their restitution
14 obligations.

15 IT IS FURTHER ORDERED that if any of the respondents fail to
16 comply with this Order, any outstanding balance shall be in default and shall be
17 immediately due and payable without notice or demand. The acceptance of any
18 partial or late payment by the Commission is not a waiver of default by
19 Commission.

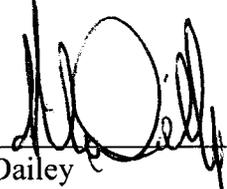
20 IT IS FURTHER ORDERED that default shall render respondents liable
21 to the Commission for its costs of collection and interest at the maximum legal
22 rate.

23 IT IS FURTHER ORDERED, that if any of the respondents fail to
24 comply with this order, the Commission may bring further legal proceedings
25 against the respondent(s), including application to the superior court for an order
26 of contempt.

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

Respectfully submitted this 1st day of June 2009.

By:



Mike Dailey
Attorney for the Securities Division of
the Arizona Corporation Commission

1
2 ORIGINAL AND TEN (10) COPIES of the foregoing
filed this 1st day of June 2009 with:

3 Docket Control
4 Arizona Corporation Commission
1200 West Washington
5 Phoenix, AZ 85007

6 COPY of the foregoing hand-delivered this
7 1st day of June 2009 to:

8 ALJ Marc Stern
Arizona Corporation Commission/Hearing Division
9 1200 West Washington
Phoenix, AZ 85007

10 COPY of the foregoing mailed this
11 1st day of June 2009 to:

12 Mr. Michael J. Vingelli, Esq.
13 Vingelli & Errico, P.C.
Bank of America Plaza
14 33 North Stone Avenue, Suite 1800
Tucson, Arizona 85701
15 Attorneys for Respondent Mary Alcaro

16 By: Veronica Sandoval
17

18
19
20
21
22
23
24
25
26