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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

AZ CORP COMMISSION
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- KRISTIN K. MAYES, Chairman
- GARY PIERCE
- PAUL NEWMAN
- SANDRA D. KENNEDY
- BOB STUMP

In the matter of:)
)
 Robert W. Mangold and Michelle M. Mangold,)
 husband and wife;)
)
 One Source Mortgage & Investments, Inc., an)
 Arizona corporation;)
)
 Strategic Equity Investments, LLC, an Arizona)
 limited liability company;)
)
)
 Respondents.)

DOCKET NO. S-20669A-09-0187

SECURITIES DIVISION'S POST-HEARING BRIEF

Hearing Dates: January 25 and 28, 2010

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 April 21, 2009, the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") filed a Notice of Opportunity for Hearing regarding a Proposed Order to Cease and Desist, Order for Restitution, for Administrative Penalties, and Other Affirmative Action ("Notice") against Robert W. Mangold ("Mangold") and Michelle M. Mangold ("M. Mangold" or "Respondent Spouse"), husband and wife, One Source Mortgage & Investments, Inc. ("OSMI") and Strategic Equity Investments, LLC ("SEI") in which the Division alleged multiple violations of the Arizona Securities Act ("Act") in connection with the offer and sale of securities in the form of notes and/or investment contracts.

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1 Robert W. Mangold, Michelle M. Mangold, OSMI, and SEI were duly served with copies of
2 the Notice.

3 On May 4, 2009, a request for hearing was filed by Respondent Mangold. This request for
4 hearing was titled, "From: Robert Mangold; Michelle Mangold; One Source Mortgage &
5 Investments; and Strategic Equity Investments."

6 On September 17, 2009, at the status conference, the Division appeared with counsel and
7 Mangold appeared on his own behalf and on behalf of the remaining Respondents. The Division and
8 Mangold indicated that they were continuing to negotiate a form of consent. In the interim, the
9 Division requested that a hearing be scheduled.

10 On September 17, 2009, by Procedural Order, a Hearing was scheduled for January 25, 2010,
11 at 10:00 a.m. at the Commission's offices, 1200 West Washington Street, Hearing Room 1, Phoenix,
12 Arizona. It was further ordered that the parties shall reserve January 26, 27, and 28, 2010, for
13 additional days of hearing, if necessary. Administrative Law Judge Marc E. Stern ("ALJ Stern")
14 presided over the hearing.

15 On January 25, 2010, a hearing was conducted. The Division was represented by counsel
16 and Respondent Mangold appeared on his own behalf and on behalf of OSMI and SEI. By
17 agreement between the Division and Respondents Mangold, OSMI and SEI, Respondents Mangold,
18 OSMI and SEI stipulated to the admission of certain facts only for purposes of this proceeding and
19 any other administrative proceeding before the Commission or any other state agency. The
20 stipulation of facts ("S.O.F.") were filed with the Commission and admitted into evidence as an
21 exhibit¹. (Ex. S-54). The S.O.F. includes, but is not limited to, the following facts: From at least July
22 2006 to December 2007 (the "relevant time frame"), Mangold, individually or through his entities
23 OSMI and SEI, offered and/or sold various investment opportunities, within or from Arizona,
24 through personal or website solicitations. (S.O.F. p.3¶22-¶24). The investments were in the form of
25 unregistered notes and unregistered investment contracts. At all times relevant, OSMI and SEI

26 _____
¹ See R14-3-109(J)

1 were not registered as dealers and Mangold was not registered as a salesman with the Commission.
2 (S.O.F. p.6¶24-¶26; p.9¶3-¶5; p.11¶6-¶8; p.13¶9-¶11). Respondents failed to disclose to investors
3 that they could lose all or a substantial amount of their investments since their security interests
4 were not perfected, were subordinate in priority, or that real estate valuations could depreciate
5 below the purchase price of the notes. The amount of restitution and interest outstanding to
6 investors on record with the Division is \$6,224,453. (S.O.F. p13¶12-¶13).

7 In addition, ALJ Stern admitted the following exhibits into evidence: S-1 through S-28b, S-
8 29 through S-33b, S-33c, the cover letter from the attorney was excluded, but the documentation
9 and notes that followed that cover letter were admitted, S-34 through S-53. (Hr'g Tr. Vol. I, p.
10 41¶20-42¶4). S-54 through S-60 were later admitted into evidence². (Hr'g Tr. Vol. II, p.65 and
11 p.74). Finally, Mangold requested a brief continuance to allow M. Mangold and her attorney to
12 appear and present evidence contesting the liability of the marital community. Mangold stated that M.
13 Mangold was not present due to a required appearance for a nursing class but that M. Mangold would
14 probably have separate counsel and would like to appear and contest the liability of the marital
15 community. ALJ Stern granted a brief recess until January 28, 2010. (Hr'g Tr. Vol. I, p. 30¶14-31¶7;
16 42¶14-45¶16)

17 On January 28, 2010, a hearing was conducted before ALJ Stern. The Division was
18 represented by counsel and Respondents Mangold and M. Mangold appeared on their own behalf.
19 Mangold also appeared on behalf of OSMI and SEI. At the conclusion of the hearing, the Division
20 was ordered to file its post hearing brief by March 19, 2010 and Respondents and Respondent
21 Spouse were ordered to file their post hearing briefs thirty days thereafter.

22 The January 28, 2010 hearing was conducted to allow the Division and the Mangolds to
23 contest the liability of the marital community and this post-hearing brief will only address the
24 matters relating to the liability of the marital community. The Division incorporates by reference
25

26 ² Admitted into evidence on January 28, 2010.

1 facts numbered 1 through 71 and their subsections, as docketed on January 25, 2010 and as detailed
2 in the S.O.F. and Exhibit S-54, as admitted.

3 **B. JURISDICTION.**

4 The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona
5 Constitution and the Securities Act of Arizona, A.R.S. § 44-1801 *et seq.*.

6 **C. FACTS.**

7 From at least July 2006 to December 2007 (the “relevant time frame”), Mangold,
8 individually or through his entities OSMI and SEI, offered and/or sold various investment
9 opportunities, within or from Arizona, through personal or website solicitations. The investments
10 were in the form of unregistered notes and unregistered investment contracts. At all times relevant,
11 OSMI and SEI were not registered as dealers and Mangold was not registered as a salesman with
12 the Commission. Respondents failed to disclose to investors that they could lose all or a substantial
13 amount of their investments since their security interests were not perfected, were subordinate in
14 priority, or that real estate valuations could depreciate below the purchase price of the notes. The
15 amount of restitution and interest outstanding to investors on record with the Division is
16 \$6,224,453.

17 Mangold is married to M. Mangold (collectively referred to as the “Mangolds”) and both
18 have been Arizona residents for all relevant time. (S.O.F. p.2¶26-p.3¶2; Hr’g Tr. Vol. II, p.84¶19-
19 p.85¶12). Mangold and M. Mangold were married during the relevant periods of July 2006 to
20 December 2007 and are still married. *Id.*

21 **D. LEGAL ARGUMENTS.**

22 **I. Robert Mangold and Michelle Mangold were still married between the**
23 **periods of July 2006 through December 2007 and thus maintained a marital community for**
24 **all relevant time.**

25 During the relevant time frame, Mangold and M. Mangold were married, residents of
26 Arizona, and maintained a marital community. Mangold and M. Mangold have been married for

1 nineteen years, have been residents of Arizona for 13 years, and are still married to date. Id. Also,
2 no prenuptial agreement exists between Mangold and M. Mangold. (Hr'g Tr. Vol. II, p.91¶23-¶25).

3 Pursuant to A.R.S. § 25-211, all property acquired by either husband or wife during the
4 marriage is the community property of the husband and wife except for property that is acquired by
5 gift, devise, descent or is acquired after service of a petition for dissolution of marriage, legal
6 separation or annulment if the petition results in a decree of dissolution of marriage, legal
7 separation or annulment. During marriage, "the spouses have equal management, control and
8 disposition rights over their community property and have equal power to bind the community."
9 A.R.S. § 25-214(B). In addition, "[...], either spouse may contract debts and otherwise act for the
10 benefit of the community. [...]" A.R.S. § 25-215(D). During the relevant time frame, Mangold
11 was acting for his own benefit and for the benefit of OSMI and SEI. (S.O.F. p.3¶3-¶4). Such
12 actions were for the benefit of the Mangolds' marital community.

13
14 **II. The January 28, 2010, hearing provided the Mangolds an opportunity to**
15 **contest and prove by clear and convincing evidence that Mangold was not acting in**
16 **furtherance of the community, that the debt is not a community debt and that the community**
17 **did not benefit; however, they failed to do so.**

18 The community property laws of the state of Arizona apply to Mangold and M. Mangold
19 for all property or debt acquired during marriage. Since the actions of one spouse can create a
20 binding community obligation, a debt acquired by either Mangold or M. Mangold during the
21 periods of July 2006 through December 2007 is presumed to be a debt of the community.

22 On January 28, 2010, a hearing was conducted to allow the Mangolds an opportunity to
23 refute all applicable community property presumptions and provide clear and convincing evidence
24 that Mangold was not acting in furtherance of the community, that the debt was not incurred during
25 marriage and that the martial community did not benefit. The burden is on the Mangolds to
26 overcome the community property presumptions, which they failed to do because they did not
present any reliable evidence, let alone clear and convincing evidence to overcome each applicable
community property presumption. The clear and convincing standard is the standard of proof that

1 a spouse must meet to rebut each community property presumption. The Arizona Supreme Court
2 has stated that, “the clear and convincing standard is an intermediate standard, between proof
3 beyond a reasonable doubt and proof by a preponderance of the evidence, and that clear and
4 convincing evidence is evidence that makes the existence of the issue propounded ‘highly
5 probable.’” State v. King, 158 Ariz. 419, 426, 763 P.2d 239, 246 (1988). The Mangolds failed to
6 meet this standard.

7 First, the Mangolds failed to provide clear and convincing evidence that Mangold was not
8 acting in furtherance of the community. “(T)he presumption of law is, in the absence of the
9 contrary showing, that all property acquired and **all business done and transacted during**
10 **coverture, by either spouse, is for the community.**” Johnson v. Johnson, 131 Ariz. 38, 45, 638
11 P.2d 705, 712 (1981) (*emphasis added*). Therefore, the presumption is Mangold was acting in
12 furtherance of the community and intended to benefit the community since he transacted business
13 during marriage. M. Mangold did not present evidence or even contest the fact that Mangold was
14 acting in furtherance of the community during the relevant time frame. By stipulation, Mangold
15 stated he was acting for his own benefit and for the benefit of OSMI and SEI. (S.O.F. p3¶3-¶4). In
16 addition, Mangold testified that on certain investment transactions, a servicing agreement was also
17 executed that would pay Mangold, OSMI or SEI a fee. (e.g. Ex. S-38, M000788; S.O.F.)
18 Therefore, based on the presumption in law and the evidence presented, the Division established
19 that Mangold was conducting business, acting in furtherance of the marital community, intended to
20 benefit the marital community and the Mangolds failed to refute the evidence or overcome the
21 presumption with clear and convincing evidence.

22 Second, the Mangolds failed to rebut the presumption that a debt incurred during marriage
23 is a community obligation. The Arizona Court of Appeals has stated, “[a] debt incurred by a
24 spouse during marriage is presumed to be a community obligation; a party contesting the
25 community nature of a debt bears the burden of overcoming that presumption by clear and
26 convincing evidence.” Hrudka v. Hrudka, 186 Ariz. 84, 91, 919 P.2d 179, 186 (Ariz. Ct. App.

1 1995). Furthermore, “[...] a debt is incurred at the time of the actions that give rise to the debt.
2 [Citations omitted].” Arab Monetary Fund v. Hashim, 219 Ariz. 108, 111, 193 P.3d 802, 806 (Ariz.
3 Ct. App. 2008). Here, the actions giving rise to the debt occurred July 2006 through December
4 2007, while Mangold and M. Mangold were married. The Mangolds did not present evidence to
5 rebut the presumption that the debt was a community obligation. (Hr’g Tr. pp. 127¶7-¶8, 139¶4-
6 ¶12). Since either spouse may contract debts and otherwise act for the benefit of the community,
7 As detailed in the S.O.F., the Respondents’ offer and sale of an unregistered security while being
8 unlicensed as a dealer or salesman, resulted in a benefit and debt to the community. The debt was
9 incurred during marriage and is presumed to be a community debt. Since the Mangolds failed to
10 overcome this presumption, the debt remains a liability of the community.

11 Third, the Mangolds failed to produce any reliable evidence that the community did not
12 benefit or that Mangold’s actions were not intended to benefit the community. As part of the
13 Mangolds’ burden, they were required to provide evidence refuting the community property
14 presumption of benefit to the community and if applicable, refute the Division’s evidence of
15 community benefit. The hearing transcript and records are void of any material evidence refuting
16 the presumption or the Division’s evidence. The failure by the Mangolds to overcome this
17 community property presumption and the Division’s evidence means that the liability of the
18 community is for the full amount of the debts incurred.

19 Based on the foregoing, any restitution and/or administrative penalty ordered will be a
20 community debt. The Commission and the Administrative Law Judge need not determine whether
21 the non-participating spouse had knowledge, participation, or intent, in order to bind the
22 community for the debt incurred. The presumption of Mangold’s intent to benefit the community is
23 enough to bind the community, even if M. Mangold was unaware or did not approve of Mangold’s
24 actions. The Ellsworth court stated, “[i]f the husband acts with the object of benefiting the
25 community, a fact not questioned here, the obligations so incurred by him are community in nature,
26 whether or not the wife approved thereof.” Ellsworth v. Ellsworth, 5 Ariz. App. 89, 92, 423 P.2d

1 364, 367 (1967) citing Donato v. Fishburn, 90 Ariz. 210, 367 P.2d 245 (1961). Since the Mangolds
2 failed to meet their burden and present “highly probable” evidence to rebut the presumptions or the
3 Division’s evidence, the debt is a joint and several liability of Mangold’s and M. Mangold’s
4 marital community.

5
6 **III. Even though Arizona law clearly affirms that no actual benefit need be**
7 **proven by the Division to bind the marital community, the Division’s evidence and the**
8 **Mangolds’ testimony established that there was actual benefit to the community.**

9 Arizona case law affirms that actual benefit is not a standard or requirement that the
10 Division must meet. As noted earlier, Arizona community property law presumes that all debts
11 incurred, whether by Mangold or M. Mangold, during marriage are community debts, unless
12 rebutted by clear and convincing evidence. Neither Mangold nor M. Mangold has overcome this
13 presumption. Though not required, the Division provided examples of actual benefit to refute any
14 anticipated evidence or defense. First, Mangold and M. Mangold own a joint checking account,
15 Chase# 3024. At the hearing, the Division established that at least some investor funds were
16 deposited into Chase# 3024, those funds were under the power of the community to control and
17 therefore became a community benefit. (Hr’g Tr. Vol. II, p.87¶17-p.89¶19; Ex. S-56 ACC002257,
18 S-57 ACC002426). A second example of actual benefit was established by the Division regarding
19 two personal residences located at 22626 N 43rd Place and 23251 N 38th Place, respectively, that
20 were purchased by Mangold and M. Mangold, titled as husband and wife and at least some
21 mortgage payments for each respective residence were derived from Mangold’s income from
22 OSMI. (Hr’g Tr. Vol. II, p.89¶20-p.91¶19; Ex. S-59; Ex. S-60). Mortgage payments that allowed
23 the Mangolds to reside at those two residences are direct community benefits. Finally, upon
24 examination by ALJ Stern, Mangold testified that during the relevant timeframe, M. Mangold was
25 a housewife and that monies that came into the community resulting from OSMI business were
26 used to pay for personal expenses, like utility bills, groceries, credit cards and department stores.

1 (Hr'g Tr. Vol. II, p.99¶10-p.100¶20). Therefore, a marital community debt was further confirmed
2 by the above examples of actual benefit to the community.

3 The hearing is devoid of any reliable testimony or evidence of sole and separate property
4 of Mangold or M. Mangold. The Mangolds each testified that they did not have any documentation
5 that detailed the sole and separate property of each spouse. (Hr'g Tr. Vol. II, p.92¶9-¶12; p.108¶14-
6 ¶18). The burden is upon the party claiming a separate property interest in the funds to prove it,
7 together with the amount, by clear and satisfactory evidence. Cooper v. Cooper, 130 Ariz. 257, 635
8 P.2d 850 (1981). Because there was no evidence of sole and separate property and no delineation
9 of sole and separate property, all funds are still presumed to be community funds. These funds
10 resulted from the business operated by Mangold and that business resulted in a debt of the
11 community.

12
13 **IV. The Commission was required to join Michelle Mangold and provide her**
14 **the opportunity to be heard at the administrative level; otherwise the Commission cannot**
15 **impose liability on the marital community, either administratively or in a later judicial**
16 **action.**

17 To obtain personal jurisdiction, an enforceable judgment³, and comport with due process,
18 M. Mangold, included in the Notice as a Respondent Spouse, must be provided an opportunity to
19 be heard in the administrative proceeding. ALJ Stern has posed the questions of whether the
20 Superior Court is the proper forum in which to make a determination on the liability of the marital
21 community since A.R.S. § 44-2031(C) is a permissive joinder statute and whether the Commission is
22 empowered to make a determination on the liability of the marital community. (Hr'g Tr. Vol. II,
23 pp.113¶11 – 118¶2). The Division asserts that the Commission is empowered to make such a
24 determination due to the express language of the statute. In addition, res judicata and judicial
25 efficiency favor that the Commission and/or the ALJ, as applicable, determine the liability of the
26 marital community here at the administrative level.

³ Pursuant to A.R.S. § 25-215(D), “[e]xcept as prohibited in section 25-214, 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 [...]” (*emphasis added*).

1 The plain language of A.R.S. § 44-2031(C)⁴ provides the Commission with authority to
2 determine the liability of the marital community. A.R.S. § 44-2031(C) states “[t]he commission may
3 join the spouse in any action authorized by this chapter **to determine the liability of the marital**
4 **community.**” (*emphasis added*). The Arizona Court of Appeals has stated that “[w]hen statutory
5 language is clear, unequivocal, and unambiguous, this court must give effect to the language and may
6 not invoke the rules of statutory construction to interpret it.” US West Communications, Inc. v. City
7 of Tucson, 198 Ariz. 515, 520, 11 P.3d 1054, 1059 (Ariz. Ct. App. 2000). The plain reading of the
8 statute is unambiguous and clearly empowers the Commission to join the spouse and determine the
9 liability of the martial community. This liability could be determined by concluding that a debt
10 incurred is a debt of the community and that Respondent and Respondent Spouse are jointly and
11 severally liable. Such a determination has the same effect as if the determination and/or judgment was
12 made in superior court because A.R.S. § 44-2036(C) further states that any Commission “order
13 requiring the payment of restitution or administrative penalties may be filed in the office of the clerk
14 of the superior court in any county of this state. The clerk shall treat the commission order in the same
15 manner as a judgment of the superior court.” The enactment of A.R.S. §§ 44-2031(C) and 44-
16 2036(C) confirms that the superior court does not have exclusive jurisdiction to make such a
17 determination of marital liability. It should be noted that a determination by the Commission that the
18 debt or liability is a community debt or liability does not require the Commission to apportion the
19 liability amongst the spouses for the debt incurred nor is the Division requesting such an
20 apportionment.

21 Requiring the Commission to determine the liability of the marital community in the
22 administrative level is not only authorized, but required to obtain a binding judgment. A.R.S. § 25-
23 215(D) states, “spouses **shall be sued jointly** and the debt or obligation satisfied: first, from the
24 community property, and second, from the separate property of the spouse contracting the debt or
25

26 ⁴ See also A.R.S. 44-3291(C).

1 obligation.” (*emphasis added*). A failure to comply with these statutes will impact the Commission’s
2 ability to enter or enforce a binding judgment for multiple reasons.

3 First, if M. Mangold is not included in the administrative action, the Commission would be
4 barred from obtaining a binding judgment subsequently against the community by *res judicata*. The
5 “doctrines of *res judicata* and collateral estoppel may apply to decisions of administrative agencies
6 acting in a quasi-judicial capacity. [*Citations omitted*].” Hawkins v. State, Dept. of Economic Sec.,
7 183 Ariz. 100, 104, 900 P.2d 1236, 1240 (Ariz. Ct. App. 1995). In Hawkins, the court defined *res*
8 *judicata* as:

9
10 Under the doctrine of *res judicata*, a judgment on the merits in a prior suit involving the
11 same parties or their privies bars a second suit based on the same cause of action. **This**
12 **doctrine binds the same party standing in the same capacity in subsequent litigation**
on the same cause of action, not only upon facts actually litigated but also upon those
points which might have been litigated....

13 Id. (*emphasis added*). The Arizona Corporation Commission is one of the few
14 administrative agencies to which the legislature has given specific statutory authority to join a
15 spouse in an administrative action. Prior to August 22, 2002, the Commission entered orders
16 against only the respondent who had violated the Securities Act or Investment Management Act. If
17 the respondent was married, then the Attorney General’s Office of Bankruptcy, Collections and
18 Enforcement (“BCE”) initiated a subsequent proceeding in the superior court of Arizona to join the
19 respondent spouse to obtain a binding judgment on the community. The 2002 amendment to
20 A.R.S. § 44-2031 made clear that the Division could properly join such a spouse. A.R.S.
21 § 44-2031(C). The amended statute does not create community liability, rather it simply
22 establishes a procedure for the Commission to exercise jurisdiction over the spouse and thereby
23 determine the community liability under Arizona law. The enactment of A.R.S. § 44-2031(C),
24 required a change in the practice of joining the respondent spouse. Since A.R.S. § 44-2031(C)
25 provides the Commission with authority to join the spouse to determine the liability of the marital
26 community, this determination of liability is a point that could be litigated at the administrative

1 level and thus, should be addressed at the administrative level to secure a binding judgment against
2 the community. Though not dispositive or binding, the Division has included an arbitration
3 decision filed in the superior court of the state of Arizona and for the county of Apache (the
4 “arbitration decision”). See Exhibit PH-1. The arbitration decision is illustrative of the effect of
5 res judicata on a Commission order if a spouse is not joined pursuant to A.R.S. § 44-2031(C) and a
6 subsequent action is attempted against the marital community. Specifically, the arbitrator ruled
7 that, “[b]ecause the statute applies to administrative proceedings, the Arizona Corporation
8 Commission should have joined [the respondent spouse] in the original proceedings pursuant to
9 Rule 19 of the Arizona Rules of Civil Procedure if it had any interest in pursuing the marital
10 community. Because it did not, it cannot now re-litigate this case in Superior Court seeking
11 enforcement against the marital community when it should have sought joinder of the marital
12 community when it had the opportunity to do so in the administrative proceedings.” (Ex. PH-1,
13 p.4¶23-p.5¶3).

14 Second, the inclusion of a respondent spouse pursuant to A.R.S. § 44-2031(C) and
15 providing a respondent spouse the opportunity to request a hearing, present evidence and litigate
16 the liability of the community before the Commission also satisfies due process. Since each spouse
17 has equal interest in the community property, they may not be denied that interest without due
18 process of law. National Union Fire Ins. Co. of Pittsburgh, Pa. v. Greene, 195 Ariz. 105,110, 985
19 P.2d 590, 595 (Ariz. Ct. App. 1999); See also U.S. Const., Amends. V, XIV; Ariz. Const., art. 2, §
20 4). M. Mangold “must be given ‘the opportunity to be heard at a meaningful time and in a
21 meaningful manner’ before she can be deprived of her interest in the community property.”
22 National Union Fire Ins., 195 Ariz. at 110, 985 P.2d at 595. M. Mangold was provided a
23 meaningful opportunity to be heard at the pre-hearing conference held on May 27, 2009. Mangold
24 and M. Mangold were jointly named in the Notice, properly served and each was provided with an
25 opportunity to answer. The Mangolds were also provided an opportunity at hearing to protect their
26 interests by testifying, submitted evidence or refuting the community property presumptions. The

1 Division's inclusion of M. Mangold as a respondent spouse in the Notice, the proper service of M.
2 Mangold, and M. Mangold's opportunity to answer and litigate the liability of the marital
3 community obligation all prove that that the Division complied with M. Mangold's procedural due
4 process rights. Therefore the administrative action was proper and in the proper forum for
5 determining the liability of the marital community.

6 Finally, requiring multiple suits would unnecessarily duplicate every aspect of the
7 proceedings, waste judicial resources, and cause unneeded expenses for the parties. Judicial
8 economy is best served by deciding in one suit the liability of the community. The Arizona Court
9 of Appeals has stated:

10 The wife contends that Flexmaster must first obtain a judgment against her husband
11 individually. Then, she argues, Flexmaster must either file a second action against both
12 spouses to obtain a judgment against the community or execute on the debtor-spouse's
13 contribution to community property without obtaining a judgment against the community.
14 We reject both arguments.

15 We must construe statutes so as to give them reasonable meaning. [*Citations omitted*]. We
16 held above that the wife's community interest gives her a due process right to litigate the
17 premarital debt in this lawsuit. It is unreasonable to construe A.R.S. section 25-215(B) to
18 require a second suit to establish the limited liability of the community for such premarital
19 debt. Requiring multiple suits would necessarily duplicate every aspect of the proceedings,
20 waste judicial resources, and cause unneeded expense for the parties. Judicial economy is
21 best served by deciding in one suit in which both spouses are parties, both the debtor-
22 spouse's liability for the separate premarital debt and the value of "that spouse's
23 contribution to the community property which would have been such spouse's separate
24 property if single.

25 Flexmaster Aluminum Awning Co., Inc. v. Hirschberg, 173 Ariz. 83, 88, 839 P.2d 1128, 1133
26 (Ariz. Ct. App. 1992). The permissive language of A.R.S. § 44-2031(C), that "the commission **may**
join the spouse..." should not be construed as permitting the Commission to enter a binding
judgment on the marital community by initiating a later action. Rather, this permissive language
recognizes that there may exist an instance where the Division and/or Commission is voluntarily
waiving its right to secure a judgment against the community property interest of the spouse (i.e. a
spouse is able to provide evidence that shows that the spouses were legally separated for all

1 relevant times and/or that she has sufficient sole and separate property to rebut the presumption of
2 community benefit or intent to benefit).

3 The Commission has proper authority and jurisdiction to establish the liability of the
4 community and thus requiring the Division or a collection agent to initiate a subsequent suit to
5 execute on the judgment would be barred as a matter of law, as well as inappropriate, a waste of
6 administrative resources and would cause unneeded expenses.

7
8 **V. Public policy favors that the burden should be placed on the community
since the public's interest outweighs the respondents' interests.**

9
10 Public policy favors that the respondents and their marital community should bear the
11 burden for the full extent of the harm caused. "It is the capacity for harm and danger to the public
12 as well as accomplished fraudulent transactions to which the Securities Act is directed. The Act is
13 designed to be prophylactic if possible, remedial only if necessary." State v. Baumann, 125 Ariz.
14 404, 411, 610 P.2d 38, 45 (1980). Securities laws reflect the public policy that respondents who
15 engage in violations of the Securities Act or Investment Management Act should be held liable for
16 the full extent of the harm caused. Public policy supports the view that respondents and those
17 around them who benefit or participate in the harm caused are in a better position to prevent or
18 limit the harm caused. Investors who trusted and gave money to the respondents are usually
19 unaware of the violations, frauds and misrepresentations that are perpetrated. Unless there is clear
20 community property authority to the contrary, the interest of a spouse, who benefits innocently and
21 unaware from the violations of the bad actor spouse, does not outweigh the interests of the
22 investors or the state of Arizona in addressing and preventing the harm. The legislature enacted the
23 Securities Act and Investment Management Act with the intent that public interest and protection
24 be greater than the interest of those that do harm. The Securities Act, Intent and Construction,
25 states "[t]he intent and purpose of this Act is for the protection of the public, the preservation of
26 fair and equitable business practices, the suppression of fraudulent or deceptive practices in the sale

1 or purchase of securities, and the prosecution of persons engaged in fraudulent or deceptive
2 practices in the sale or purchase of securities. This Act shall not be given a narrow or restricted
3 interpretation or construction, but shall be liberally construed as a remedial measure in order not to
4 defeat the purpose thereof.” (1951 Ariz. Sess. Laws ch. 18, § 20 or the “1951 Statement of Intent”).
5 The Arizona courts have acknowledged this policy in Bullard, where the court stated, “[g]enerally,
6 statutes of this nature providing a remedy for those who may have been taken advantage of have
7 been liberally construed in favor of the persons whom they are designed to protect.” Bullard v.
8 Garvin, 1 Ariz. App. 249, 251, 401 P.2d 417, 419 (1965).

9 Similarly, community property laws were developed by the legislature and enacted with
10 certain presumptions. The community property presumptions were also a result of weighing the
11 interest of the community against those of the public. Either spouse may contract debts that bind
12 the community. In the case of a debt incurred during marriage, the interest of the public is weighed
13 against the interest of the community and thus the community is saddled with the burden of
14 providing clear and convincing evidence to rebut the presumption that the debt is not a community
15 debt. The Mangolds’ decision to be married residents of Arizona confers to them the benefits and
16 obligations of the community property laws of this state.

17 In light of the legislative intent and liberal construction in favor of the public, it is proper
18 and consistent with public policy to join the spouse at the administrative level pursuant to A.R.S. §
19 44-2031(C) and place the burden on M. Mangold to provide to this Commission supporting
20 evidence in statute or case law to shift the protection of interest from the public to the bad actor and
21 that actor’s spouse. The interpretive guidance of the 1951 Statement of Intent is best achieved by
22 favoring the interest of the public, whom the act is designed to protect. Thus, entering a binding
23 judgment against the marital community of Mangold and M. Mangold advances the legislature’s
24 prophylactic and remedial intent and goal of deterring fraud and protecting the public.

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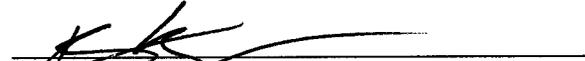
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E. CONCLUSION.

Based on the foregoing, the Division respectfully requests the ALJ to submit a recommended order consistent with the stipulated findings of facts, order restitution in the amount of \$6,224,453, order an administrative penalty in the amount of \$150,000, order any additional relief the Commission deems appropriate and determine that Respondents Mangold, OSMI, and SEI and the marital community of Mangold and M. Mangold are jointly and severally liable for the full amount of restitution and administrative penalty.

Respectfully submitted this 18th day of March, 2010

By:


Phong (Paul) Huynh
Attorney for the Securities Division of the
Arizona Corporation Commission

1 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
filed this 18th day of March, 2010 with:

2
3 Docket Control
4 Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

5
6 COPY of the foregoing hand-delivered this
18th day of March, 2010 to:

7 Mr. Marc E. Stern
8 Administrative Law Judge
Arizona Corporation Commission/Hearing Division
1200 W. Washington St.
9 Phoenix, AZ 85007

10
11 TWO COPIES of the foregoing mailed this
18th day of March, 2010 to:

12 Robert W. Mangold and Michelle Mangold
13 23251 N 38th Place
Phoenix, AZ 85050

14 By: Vernia S. Sand
15 Legal Assistant

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EXHIBIT PH-1

1 DEFUSCO & UDELMAN, P.L.C.
 2 Andrew J. DeFusco, SBN 013200
 3 Randall S. Udelman, SBN 014685
 4 Scottsdale Financial Center III
 5 7272 E. Indian School Rd., Suite 206
 6 Scottsdale, Arizona 85251
 7 Telephone: (480) 970-5600
 8 Facsimile: (480) 970-5626
 9 Randall Udelman, Arbitrator

MICHAEL A. JEANES, CLERK
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 BY L. JURY, DEP CIVIL COURT ADMIN

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF APACHE

8	STATE OF ARIZONA ex rel.,)	
	ARIZONA STATE CORPORATION)	
9	COMMISSION,)	
)	
10	Plaintiff,)	NO. CV2004-023494
)	
11	vs.)	NOTICE OF DECISION OF
)	ARBITRATOR
12	NEIL DENNIS LEWIS and SHARON LEWIS,)	
	individually and as husband and)	
13	wife)	
)	
14	Defendants.)	

15 As Arbitrator for this cause, I have reviewed Plaintiff's
 16 Motion for Summary Judgment, Defendant's Response and Cross-Motion
 17 for Summary Judgment, Plaintiff's Reply, and Defendant's Reply
 18 together with the accompanying exhibits and Statement of Facts and
 19 Objections to Statement of Facts from all parties. I have also
 20 considered the arguments raised at the hearing held on June 23,
 21 2005. For the reasons set forth below, I rule as follows:

- 22 DENYING Plaintiff's Motion for Summary Judgment;
- 23 GRANTING Defendant's Motion for Partial Summary Judgment as to
- 24 Defendant Sharon Lewis;

25 On the Arbitrator's Own Motion after reviewing the arguments
 26 and evidence presented, the undersigned arbitrator finds that an
 27 arbitration award against the separate property of Defendant NEIL
 28

1 DENNIS LEWIS is proper and Plaintiff is directed to prepare a
2 proposed form of Arbitration Award including an award of costs and
3 fees if requested to be submitted to the undersigned within ten
4 days of the date listed on this Notice of Decision.

5 DISCUSSION

6 Plaintiff in the underlying action attempts to transform an
7 administrative penalty against Defendant NEIL DENNIS LEWIS into a
8 judgment against the community of Defendants NEIL DENNIS and SHARON
9 LEWIS. Mrs. LEWIS was never joined as a party in the underlying
10 administrative proceeding. Plaintiff argues that it had no power
11 to join her in any administrative proceedings which commenced
12 before the Corporation Commission in February, 2002 and concluded
13 with entry of a consent decree on or about September 30, 2002.
14 Plaintiff suggests that because it never had power to Join Mrs.
15 Lewis, it has the power to transform a consent to entry of an order
16 and decree into a Judgment against the marital community on the
17 basis of a benefit conferred to the community and on the basis of
18 general community property principles outlined in A.R.S. section
19 25-214(B).

20 In the midst of the administrative proceedings against Mr.
21 Lewis, on August 22, 2002, the legislature amended A.R.S. section
22 44-2031(C) which allows joinder of a spouse in any administrative
23 proceeding. Plaintiff argues that this statute does not apply to
24 the Lewis matter because it was pending at the time of the
25 statutory modification. The statute is silent with respect to its
26 applicability to pending actions. Plaintiff concedes that if this
27 statute applied to the administrative action, it cannot now file a
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1 separate action against the marital community because it is bound
2 by *res judicata*.

3 Plaintiff is generally correct in stating that unless a
4 statute provides otherwise, it will not govern events which occur
5 before its effective date. If a statute is silent concerning its
6 applicability to pending actions, the starting point to determine
7 whether the statute applies retroactively rests in A.R.S. section
8 1-244 which states, "No statute is retroactive unless expressly
9 declared therein." However, the inquiry does not end here. An
10 exception exists to this rule. "The exception to this rule,
11 however, is that statutory changes in procedures or remedies may be
12 applied to proceedings already pending except where the statute
13 effects or impairs vested rights." *Wilco Aviation v. Garfield*, 123
14 Ariz. 360, 362, 599 P.2d 813, 815 (App. 1979). The cases cited by
15 Plaintiff do not change this exception. *Gulf Homes v. Goubeaux*,
16 136 Ariz. 33, 39, 664 P.2d 183, 188 (1983) related to a statute
17 which was not silent and actually contained express language
18 limiting applicability of the attorneys fee statute solely to
19 actions filed after its effective date. See *Bouldin v. Turek*, 125
20 Ariz. 77, 78, 607 P.2d 954, 955 (1979). Likewise, the cases *State*
21 *v. Gonzales*, 141 Ariz. 512, 513, 687 P.2d 1267, 1268 (1984), and
22 *State v. Griffin*, 203 Ariz. 574, 578, 58 P.3d 516, 520 (App. 2002)
23 each involved applicability of different criminal penalties
24 affecting substantive rights as well as a wholly different
25 statutory analysis of rights pursuant to A.R.S. section 1-246.
26 Lastly, *Mejia v. Industrial Comm'n*, 202 Ariz. 31, 33, 39 P.3d 1135,
27 1137 (App. 2002) cited by the Plaintiff, confirms that

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1 modifications to statutes may be retroactively applied if the
2 statutes involve procedural functions or rights which have not yet
3 vested.

4 A careful reading of the cases suggests that without
5 legislative guidance, statutory changes to procedural rights or
6 non-vested substantive rights may be applied retroactively even
7 without legislative guidance. See *Hall v. A.N.R. Freight System,*
8 *Inc.* 149 Ariz. 130, 138, 717 P.2d 434, 441 (1986) ("The rule is
9 that any right conferred by statute may be taken away by statute
10 before it has become vested.") (citation omitted).

11 The question before this arbitrator then becomes whether
12 requiring joinder of a spouse affects procedural or non-vested
13 substantive rights. I conclude it does. "[S]ubstantive law
14 creates, defines and regulates rights while a procedural one
15 prescribes the method of enforcing such rights or obtaining
16 redress." *Id.* Allowing joinder of spouses in administrative
17 proceedings "prescribes the method of enforcing such rights or
18 obtaining redress" and therefore relates to procedural matters.
19 Because this statute relates to procedural matters and because the
20 statute is silent with respect to its effective date, I find that
21 it can be applied retroactively to matters pending before its
22 effective date.

23 Because the statute applies to the administrative proceeding,
24 the Arizona Corporation Commission should have joined Mrs. Lewis in
25 the original proceedings pursuant to Rule 19 of the Arizona Rules
26 of Civil Procedure if it had any interest in pursuing the marital
27 community. Because it did not, it cannot now re-litigate this case

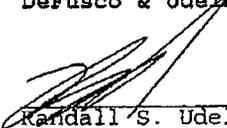
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1 in Superior Court seeking enforcement against the marital community
 2 when it should have sought joinder of the marital community when it
 3 had the opportunity to do so in the administrative proceedings.

4 FOR THESE REASONS, I grant Defendants' Motion for Partial
 5 Summary Judgment.

6 DATED this 23rd day of June, 2005.

7 DeFusco & Udelman, P.L.C.

8
 9 
 10 _____
 11 Randall S. Udelman
 12 Scottsdale Financial Center III
 13 7272 E. Indian School, Suite 206
 14 Scottsdale, Arizona 85251
 15 (480) 970-5600
 16 Arbitrator

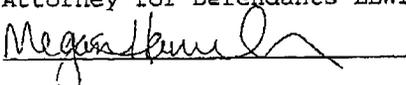
13 ORIGINAL of the foregoing
 14 filed this 23rd Day of
 15 June, 2005 with:

16 Arbitration Clerk of the
 17 Superior Court

18 COPIES of the foregoing
 19 transmitted by facsimile and
 20 mailed on this 23rd Day of
 21 June, 2005 to:

22 David J. Dir, Esq.
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 24 1275 W. Washington
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 26 Attorneys for Plaintiff
 27 ARIZONA CORPORATION COMMISSION

28 David T. Bonfiglio, Esq.
 4422 N. Civic Center Plaza, Suite 101
 Scottsdale, Arizona 85251-3622
 Attorney for Defendants LEWIS

29 
 30 _____