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COMMISSIONERS

KRISTIN K. MAYES, Chairman
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2010 MAY -6 A 9:46
ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

Arizona Corporation Commission
DOCKETED

MAY - 6 2010

DOCKETED BY	
<i>KL</i>	<i>MM</i>

BEFORE THE ARIZONA CORPORATION COMMISSION

In the matter of:

Richard Bradford (CRD# 2706290) and
Cindy Bradford (a.k.a. Cindy White),
husband and wife;

Respondents.

DOCKET NO. S-20605A-08-0377

EXCEPTIONS

Respondent Cindy White (formerly known as Cindy Bradford) ("White"), by and through counsel undersigned, hereby submits these Exceptions to the Recommended Opinion and Order ("RO&O") filed on April 27, 2010. The only basis on which the Securities Division's ("Division") Notice of Opportunity for Hearing ("Notice") alleged White would be liable was A.R.S. § 25-215. However, the Arizona Court of Appeals has interpreted A.R.S. § 25-215 as only being a possible basis for liability of a spouse during the term of a marriage. Because the marital community of White and Richard Bradford ("Bradford") had been severed before the Division filed its Notice, the Notice stated no legally cognizable basis for the Commission to find White liable for either restitution or an administrative penalty for Bradford's violations.

I. INTRODUCTION

Arizona Corporation Commission ("Commission") Decision No. 70545 found that Bradford violated the Securities Act and the Investment Management Act, and ordered restitution of \$1,298,416.36 and an administrative penalty of \$100,000.00. White was formerly married to

1 Bradford during the time of his fraudulent conduct that is the subject of Decision No. 70545.
2 Though White was married to Bradford at the time of the underlying conduct, White was not
3 involved in the conduct. In fact, the Division's Notice did not allege a single act or any
4 violations by White. Rather, the Division only named White in the Notice because it believed it
5 was required to do by A.R.S. § 44-2013.

6 White, believing she was being granted immunity and that the matter would be fully
7 resolved as to her, signed a Consent Order, which the Commission accepted in Decision No.
8 70544. When White was subsequently contacted by the Attorney General's office to collect,
9 White filed a letter requesting that the Commission reconsider Decision No. 70544. Pursuant to
10 the direction by the Commission at an executive session on March 16, 2009, the Division
11 requested a procedural conference to discuss the matter. A hearing was held on July 7, 2009.
12 The RO&O filed on April 27, 2010 proposes to vacate Decision No. 70544, but nonetheless
13 orders that the restitution and administrative penalty ordered against Bradford by Decision No.
14 70545 "be paid jointly and severally by" both Bradford and White.¹

15
16 **II. THE LEGAL BASIS FOR WHITE'S LIABILITY ASSERTED IN THE NOTICE**
17 **DID NOT APPLY AS OF THE TIME THE NOTICE WAS ISSUED OR**
18 **THEREAFTER.**

19 In its Notice, the Division named White "solely for the purposes of determining the
20 liability of the marital community."² Further, the only relief the Notice sought from White was
21 that "the marital communities (sic) of [Bradford] and [White] be subject to any order of
22 restitution, rescission, administrative penalties, or other appropriate affirmative action pursuant
23 to A.R.S. § 25-215."³ White should be dismissed from this proceeding, because as a matter of
24 law, the Notice does not state a legally cognizable basis for her to be liable for an administrative

25 ¹ RO&O at 16.

26 ² Notice at paragraph 4.

³ Notice at paragraph 59.

1 penalty or restitution.

2 As of the date of the Notice, there was no “marital community” which the Commission
3 could ultimately determine to be liable for an administrative penalty or restitution. At the time a
4 divorce decree is entered, the marital community is severed, and all community assets and
5 liabilities are transmuted to separate assets and liabilities. A.R.S. § 25-318(A) (“In a proceeding
6 for the dissolution of the marriage...the court...shall divide the community... property
7 equitably...”); A.R.S. § 25-318(D) (“[t]he community...property...for which no provision is
8 made in the decree shall be from the date of the decree held by the parties as tenants in
9 common...”). This is true even if property or debt were intentionally omitted from a stipulated
10 divorce decree. *Thomas v. Thomas*, 220 Ariz. 290, 292-93 ¶ 10, 205 P.3d 1137, 1139-40
11 (App.2009).

12 The marital community of Bradford and White was severed on March 2, 2008, when the
13 superior court entered the divorce decree. Exh. S-2. As of that date, all assets and liabilities
14 formerly of the community were transmuted to separate property. When the Division filed its
15 Notice on July 23, 2008, there was no “marital community” to be held liable.

16 The Division’s Notice alleges that A.R.S. § 25-215 is the basis for the marital
17 community’s liability. Notice at para. 59. The Notice does not allege any other basis for liability
18 of the community other than A.R.S. § 25-215.⁴ However, Arizona case law is clear that A.R.S. §
19 25-215 cannot serve as the basis for a determination of and ex-spouse’s liability after a divorce
20 decree has been entered. Therefore, the only legal basis for White’s liability on which the
21 Division’s Notice was based was, and is, legally insufficient to impose liability on White.

22 A.R.S. § 25-215(D) provides:

23 Except as prohibited in section 25-214, either spouse may contract debts and
24

25 ⁴ Paragraph 4 of the Notice cites A.R.S. § 44-2031(C), which speaks to the Commission’s jurisdiction to enter an
26 order against marital community. The Notice does not allege (nor could it properly allege) that A.R.S. §44-2031(C)
is the basis for liability.

1 otherwise act for the benefit of the community. In an action on such a debt or
2 obligation the spouses shall be sued jointly and the debt or obligation shall be
3 satisfied: first, from the community property, and second, from the separate
4 property of the spouse contracting the debt or obligation.

5 The Arizona Court of Appeals has confirmed that A.R.S. § 25-215 only governs the
6 spouses' liability for community and separate debts for spouses who are still married and for
7 debts collected while the spouses remain married. *Community Garden Bank v. Hamlin*, 182
8 Ariz. 627, 630, 898 P.2d 1005, 1008 (App.1995). In *Hamlin*, the plaintiff had pled unjust
9 enrichment as a basis for finding the marital community liable. *Id.* at 629, 898 P.2d 1006. The
10 Court found that A.R.S. § 25-215 only "governs the liability of community and separate debts of
11 spouses who are still married" and therefore did not apply to the case at hand. *Id.* at 630, 898
12 P.2d 1008.

13 Had the Division issued its Notice prior to White's divorce decree being entered, it would
14 have put her on notice of a legally cognizable basis for her alleged liability. However, after
15 White's divorce from Bradford, A.R.S. § 25-215 cannot serve as the basis for imposing on White
16 liability for the Commission's post-divorce restitution or penalty order against Bradford. The
17 Division's Notice did not provide White with notice of a valid basis for her alleged liability.
18 Therefore, the Commission should modify the RO&O to dismiss White from this matter.

19 **III. EVEN IF THE DIVISION HAD PLED UNJUST ENRICHMENT AS A BASIS**
20 **FOR WHITE TO BE HELD LIABLE, THE EVIDENCE DOES NOT SUPPORT A**
21 **FINDING THAT WHITE WAS ENRICHED IN THE AMOUNT OF THE**
22 **RESTITUTION AND ADMINISTRATIVE PENALTY ORDERS.**

23 In *Hamlin*, the Court went on to find that both former spouses could be found liable,
24 based on the theory of unjust enrichment that the plaintiff had pled. Here, however, the Division
25 has not pled unjust enrichment as a basis for finding White liable, and therefore is should not be
26 a basis on which the Commission now attempts to impose liability on White.

Even if the Notice had pled that White was unjustly enriched, however, the Division has
not proven the elements required to show that White be liable for the entire amount of the

1 restitution and administrative penalty ordered by Decision No. 70545. The five elements of
2 unjust enrichment are (1) an enrichment; (2) an impoverishment; (3) a connection between the
3 enrichment and impoverishment; (4) absence of justification for the enrichment and the
4 impoverishment and (5) an absence of a remedy provided by law. *Hamlin*, 182 at 630, 898 P.2d
5 1008. The Division's evidence established that \$1,001,243 of the investors' funds were lost
6 through securities trading activity. Transcript at 84. Neither Bradford nor White was enriched
7 by this loss of investor funds.⁵ In fact, the Division only presented evidence of \$21,000 that was
8 transferred to White. Transcript at 83-84. White herself, however, had invested \$42,000 of her
9 sole and separate property proceeds from the sale of a house she purchased prior to the marriage.
10 Transcript at 118-19. In addition, White transferred over \$124,000 to Bradford over the period
11 2005 to 2008. Transcript at 97. Any funds that White received, then, were merely a return of
12 funds she had previously transferred to Bradford. Transcript at 140.

15 White maintained an extremely frugal lifestyle while married to Bradford. White and
16 Bradford's close friend Karen Mandarino confirmed that White and Bradford lived paycheck to
17 paycheck. Transcript at 154-55. Further, White's own income was sufficient to support the
18 meager lifestyle White and Bradford maintained. Transcript at 123. Additionally, nearly half of
19 the funds (\$10,000) which White received from the Scottrade account, was immediately
20 transferred to serve as a down payment on the house for which the sale never closed. Transcript
21 at 106-107, 127-28.

24 ⁵ Because the Commission found Bradford liable based on his violations of the Securities Act and Investment
25 Management Act, it was not necessary for the Division to have shown Bradford was enriched as a predicate to the
26 Commission imposing restitution and an administrative penalty against him. But where White herself has not been
found to have violated the Securities Act or Investment Management Act, unjust enrichment would be a necessary
predicate to imposing a penalty or restitution.

1 The Division has not shown that White was enriched at all from the proceeds of
2 Bradford's wrongful conduct. The Division has not proven even the first element of White's
3 liability under a theory of unjust enrichment (which it did not even plead as a basis for her
4 liability). The Commission should not enter an order imposing any liability on White for
5 Bradford's restitution and administrative penalty orders.

6 **IV. THE PRINCIPLE OF EQUITY SUGGESTS THAT WHITE SHOULD NOT BE**
7 **HELD LIABLE FOR BRADFORD'S CONDUCT.**

8 White was not a participant in the fraudulent activity of Bradford, nor was she aware that
9 Bradford's claims to potential investors were in fact misrepresentations. Rather, White herself
10 was a victim of Bradford's misconduct. White invested \$42,000 of her sole and separate property
11 proceeds from the sale of a house she purchased prior to the marriage. Transcript at 118-19. She
12 transferred over \$124,000 to Bradford over the period 2005 to 2008. Transcript at 97. She
13 maintained an extremely frugal lifestyle while married to Bradford, lived paycheck to paycheck,
14 and her own income was sufficient to support the meager lifestyle she maintained. Transcript at
15 123, 154-55. Finally, from the moment she learned that Bradford's actions were not on the up
16 and up, White has cooperated with authorities in their investigations. Immediately upon learning
17 of Bradford's possible illegal conduct, White turned Bradford's laptop over to the City of Mesa
18 Police Department. Transcript at 143; Exh. R-4 at 12 (not admitted). Further, from the outset of
19 this proceeding, White attempted to cooperate with the Division.

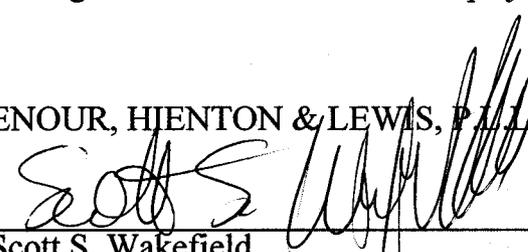
20 **V. CONCLUSION**

21 White cannot be found liable for restitution or an administrative penalty under A.R.S. §
22 25-215, as that statute only establishes liability of a spouse during the pendency of a marriage.
23 The Division has alleged no other basis for White to be liable for the restitution or administrative
24 penalty imposed on Bradford. Even if the Division had alleged unjust enrichment as a basis for
25 finding White liable, it has not proven the White was enriched. And, White's conduct
26

1 demonstrates that based on principles of equity, she should not be held responsible for Bradford's
2 restitution and administrative penalty orders. Therefore, White requests that the Commission
3 vacate Decision No. 70544 and issue an order dismissing White from this docket with prejudice.

4 Dated this 6th day of May, 2010.

5 RIDENOUR, HENTON & LEWIS, P.L.L.C.

6
7 By 

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15 ORIGINAL AND THIRTEEN (13) COPIES of the
16 foregoing filed this 6th day of May, 2010 with:

17 Docket Control
18 Arizona Corporation Commission
19 1200 W. Washington Street
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21 COPY of the foregoing hand-delivered
22 this 6th day of May, 2010 to:

23 Mr. Marc E. Stern
24 Administrative Law Judge
25 Arizona Corporation Commission/Hearing Division
26 1200 W. Washington Street
Phoenix, AZ 85007

COPY of the foregoing mailed
this 6th day of May, 2010 to:

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