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1 WILLIAM A. MUNDELL
2 Chairman
3 JIM IRVIN
4 Commissioner
5 MARC SPITZER
6 Commissioner

6 **In the matter of:**)

Docket No. S-03438A-00-0000

7)
8 **THE CHAMBER GROUP, INC.,**)
9 an Arizona Corporation, a/k/a)
10 **CHAMBER FINANCIAL GROUP** and)
11 **CHAMBER FINANCIAL**)
12 1060 Sandretto Drive, Suite A)
13 Prescott, Arizona 86305; and)
14 1550 South Alma School, Suite #103)
15 Mesa, Arizona 85210)

**SECURITIES DIVISION'S
EXCEPTIONS TO RECOMMENDED
OPINION AND ORDER**

13 **JOSEPH L. HILAND**)
14 135 South Summit)
15 Prescott, Arizona 86304)

16 **TYSON J. HILAND**)
17 3094 Shoshone Place)
18 Prescott, Arizona 86301)

Arizona Corporation Commission
DOCKETED

DEC 14 2001

19 **TRAVIS D. HILAND**)
20 4801 North Meixner Road)
21 Prescott Valley, Arizona 86314,)

DOCKETED BY *me*

22 Respondents.)
23)
24)
25)
26)

22 Pursuant to R14-3-110(B) of the Arizona Administrative Code, and based on the recommended
23 Opinion and Order ("Opinion") issued by the Administrative Law Judge in this matter on December 4,
24 2001, the Securities Division ("Division") of the Arizona Corporation Commission hereby submits its
25 Exceptions to certain portions of the Opinion on the grounds that the Opinion misconstrues Arizona
26

1 securities law, fails to address an investment adviser fraud count, and lacks a measure of clarity with
2 respect to the proposed order of restitution.

3
4 **I.**
5 **DISCUSSION**

6 The Division takes exception to the Opinion on three distinct grounds: 1) the Opinion fails to
7 render a finding of fraud against Respondents despite the fact that its Findings of Fact establish a clear
8 basis for fraud under Arizona law; 2) the Opinion omits any disposition on the charge of investment
9 advisory fraud against Respondents despite the fact that its Findings of Fact establish a clear basis for
10 investment advisory fraud under Arizona law; and 3) the Opinion’s remedial Order fails to identify
11 any definitive amounts of restitution due to investors, an ambiguity that could prevent the Division
12 from reducing the resulting Order to a judgment in Superior Court. Each of these exceptions is
13 discussed separately below.¹

14 **A. The Opinion’s Findings of Fact Compel a Ruling of Securities Fraud**
15 **Against Respondents as Matter of Law**

16 Even while reciting a series of findings in this case outlining the “excessive negligence,” the
17 “breach of fiduciary duties” and the “almost total lack of due diligence” on the part of Respondents in
18 connection with their sale of a number of different securities (*Findings of Fact, (FOF), ¶ 290*), the
19 Opinion remarkably arrives at the conclusion that the evidence does not support a finding of securities
20 fraud against the Respondents under A.R.S. § 44-1991. *FOF, ¶ 290*. This conclusion is indefensible in
21 light of applicable Arizona law on securities fraud.

22 ...
23 ...

24
25 ¹ Attached hereto as Exhibit “A” is the Division’s Proposed Amendment No. 1 (“Proposed
26 Amendments”) to the Opinion. A portion of these Proposed Amendments relate to misspellings or
typographical errors. These particular corrections are self-explanatory and are not discussed herein. The
remainder of the Proposed Amendments directly relate to three aforementioned exceptions.

1 **1. ‘Scienter’ is not a prerequisite for Securities Fraud Under Arizona law**

2 Arizona Revised Statutes § 44-1991 was enacted to define fraud in the purchase of sale of
3 securities. Under this provision:

4 A. “It is a fraudulent practice and unlawful for a person, in connection with a transaction
5 or transactions within or from this state involving an offer to sell or buy securities, or
6 a sale or purchase of securities, including securities exempted under §§ 44-1843 or
7 44-1843.01 and including transactions exempted under § 44-1844, 44-1845 or 44-
8 1850, directly or indirectly to do any of the following:

- 9 1. Employ any device, scheme or artifice to defraud.
- 10 2. ***Make any untrue statement of material fact, or omit to state any
11 material fact necessary in order to make the statements made, in the
12 light of the circumstances under which they were made, not misleading.***
- 13 3. Engage in any transaction, practice or course or business which operates or
14 would operate as a fraud or deceit.

15 (*Emphasis added.*) *A.R.S. Section 44-1991(A).* Arizona courts have had many occasions to interpret this
16 statute, eventually tackling the mental state necessary for liability to attach under this provision.

17 This requisite mental state under this statute was squarely addressed by the Arizona Supreme
18 Court in the case of *State v. Gunnison*, 127 Ariz. 110 (1980), *en banc*. In *Gunnison*, the Supreme Court
19 held that there simply is no prerequisite for ‘scienter’ to establish a violation under A.R.S. § 44-1991(2).
20 *Id.* at 607. In doing so, the Supreme Court recognized that for this misrepresentation/omission section of
21 the fraud statute,² not even evidence of ‘awareness’ by the seller of securities, let alone ‘evil intent,’ was
22 necessary to establish liability against the sellers for securities fraud. (*See Gunnison, FN 2*). In large
23 part, the Supreme Court rested its opinion on the case of *Aaron v. Securities and Exchange Commission*,
24 446 U.S. 680, 100 S.Ct. 1945 (1980), an earlier U.S. Supreme Court decision interpreting the federal
25 securities fraud counterpart to A.R.S. § 44-1991. In *Aaron*, the U.S. Supreme Court held that “the
26 language of § 17(a)(2), which prohibits any person from obtaining money or property by means of any

² The Court in *Gunnison* reserved a decision on whether section (1) of § 44-1991(A) was also devoid
of a scienter requirement, preferring to defer a determination on that issue.

1 untrue statement of a material fact or any omission to state a material fact, is devoid whatsoever of a
2 scienter requirement.” *Aaron*, 446 U.S. at 696, 100 S.Ct. at 1955.

3 The *Gunnison* mental state standard for securities fraud in Arizona has since been routinely
4 applied. In *Rose v. Dobras*, 128 Ariz. 209 (App.1981), for instance, a seller of securities contended that
5 there was insufficient evidence to support a trial court’s findings that the seller had misstated or omitted
6 material facts in connection with the sale of securities. The Court disagreed, stating that it was not
7 necessary for the seller to have intentionally misstated material facts or to have intentionally omitted any
8 material facts in order for A.R.S. § 44-1991(2) to apply. The Court continued that “scienter is not even
9 an element of this section.” *Id.* at 892. Other decisions have provided a further understanding in terms of
10 reconciling and applying this “no scienter” requirement. The recent decision of *Aaron v. Fromkin*, 196
11 Ariz. 224 (App.2000), is one such example.

12 In *Aaron*, the defendant sold stock interests in a business known as ARG after assuring the
13 investor-plaintiff that assets transferred from a second entity, Autobotics, Inc., would secure the ARG
14 investment. Autobotics then fell into bankruptcy, and the bankruptcy court subsequently determined that
15 the prior transfer of Autobotics’ assets to ARG was defective and void. As a result, ARG lost the
16 Autobotics assets and became insolvent itself. Plaintiff later brought suit against the defendant alleging,
17 *inter alia*, a claim for securities fraud. In addressing this charge, the Court first noted that the legislature
18 made the task of proving securities fraud much simpler than proving common-law fraud, noting that the
19 nine elements of the latter fraud have no bearing on securities fraud. *Id.* at 1042. The Court then
20 recognized that the seller’s knowledge of the falsity of the statements is not a required element to proving
21 fraud under A.R.S. § 44-1991(A)(2), and that “the statute instead imposes only an *affirmative duty not to*
22 *mislead.*” (Emphasis added). The Court concluded that Plaintiff’s burden of proof required only that he
23 demonstrated that the subject statements were material and misleading. *Id.*

24 The import of these decisions is readily apparent: in an administrative case alleging securities
25 fraud, the Division does not have a burden of proving that respondents committed securities fraud with an
26 evil intent, with malice, with awareness, or even with a level of indifference. All that § 44-1991(A)(2)

1 demands is that the evidence shows that respondents' statements to prospective investors were material
2 and misleading. Under Arizona law, it does not matter whether the security salesman's material
3 misstatements and/or omissions occurred intentionally or negligently; the single relevant point is whether
4 or not they occurred.

5 Without any recognition of these legal principals, the Opinion in this matter focuses on the *causes*
6 of Respondents' failings in the sale of their securities products, rather than the fact of the failings
7 themselves. The Opinion suggests that these sales violations were borne not out of an evil intent, but
8 rather out of ignorance, negligence, a lack of due diligence, ineptitude and misinformation, or some
9 combination thereof. See *FOF*, ¶ 290. This reasoning simply ignores the nature of the securities fraud
10 statute under Arizona law – that the seller's intent or level of knowledge is irrelevant to a securities fraud
11 allegation. See *Gunnison; Dobras; Aaron, supra*. Ironically, the fact that Respondents were found to be
12 negligent, inept, careless and misinformed in disseminating and omitting material information to
13 investors is nothing short of a compelling case for a finding of securities fraud under applicable law.
14 Instead, the Opinion curiously intimates that 'ignorance' is a cognizable defense to securities fraud under
15 the Arizona securities fraud statute; such a holding would set a new precedent and would invite an
16 insidious strain of "excusable" securities fraud upon the public.

17
18 **2. Respondents' negligence, carelessness and ineptitude in the sale of
securities resulted in recurring acts of securities fraud**

19 Applying the proper legal standard, the Findings of Fact included in the Opinion readily
20 substantiate the Division's allegations of securities fraud against Respondents. As previously mentioned,
21 the Opinion recognizes that Respondents were excessively negligence, inept, and exhibited almost a total
22 lack of due diligence in offering and selling their securities. It is not surprising that this negligence,
23 ineptitude and carelessness bore directly upon the deficiencies in the material representations made to
24 investors.

25 ...

26 ...

1 a. Brokered CDs

2 On the matter of brokered CDs, Respondents' negligence, ignorance and carelessness inevitably
3 impacted upon Respondents' representations to investors in connection with their sale of this security.
4 As an example, Respondents could not explain why their advertising literature promoted high yield "One
5 year CDs," when in fact their maturity dates ranged anywhere between 15 to 20 years. When alerted this
6 inconsistency, Respondent Joseph Hiland ("Joe Hiland") quizzically answered "it may be imcomplete...
7 but this is an advertisement." *FOF*, ¶¶ 239-240; *See also Hearing transcript ("H.T."), pp. 733-734,*
8 *lines 12-25 & 1-25, respectively.* The representations included in Respondents' investment literature
9 were equally misleading. Brochures disseminated by the Respondents to prospective investors similarly
10 touted the "safe and guaranteed" nature of their "one year" CDs. *FOF*, ¶¶ 70, 71, 121 & 238. In
11 practice, investors found themselves paying "MVA" (market value adjustment) penalties up to 15% of
12 their principal for liquidating their CDs after one year. *FOF*, ¶¶ 42, 57, 82, 106 & 131. A similar
13 material misrepresentation was demonstrated in a letter from the Respondents to a prospective CD
14 investor. In this letter outlining the terms of Respondents' brokered CD program, Joe Hiland makes no
15 mention as to the CD's actual 20 year maturity term, makes no mention of a potential MVA penalty,
16 makes no mention of the fractionalization of the brokered CD, and makes no mention as to the mechanic
17 of the issuing bank's "call feature" for these CDs. Quite to the contrary, Joe Hiland merely describes
18 these brokered CD investments as "one year CDs, with an annual interest rate of 8.25%." *FOF*, ¶ 39 &
19 *248; See also H.T., Exhibit S-8.*

20 The Opinion found nothing of substance to indicate that the Respondents did in fact make the
21 necessary disclosures to prospective investors. Even the Respondents' two investor-witnesses
22 corroborated the testimony of the Division's witnesses by demonstrating that the requisite information
23 disclosed for this particular investment was either omitted, misrepresented, or equivalently bungled. *See*
24 *FOF*, ¶ 217; *See also H.T., pp. 678-79, lines 15-25 & 1-16, respectively.*

25 ...

26 ...

1 *b. The Tax Lien Investment Program*

2 The factual findings with respect to Respondents' "TLC" tax lien investment program again
3 compel the conclusion that Respondents' negligence and/or ignorance resulted in additional material
4 misrepresentations and omissions to investors. Investors uniformly recount how Respondents
5 represented the TLC program as a "safe and guaranteed" investment promising a 12 to 14 percent annual
6 return. *FOF*, ¶¶ 87, 89 & 144. As ample corroboration, Respondents' promotional literature reiterates
7 these same guarantees in various brochures. *FOF*, ¶¶ 91 & 142. Noticeably absent from both
8 Respondents' sales representations and from the Respondents' TLC promotional brochures, however, is
9 any reference to the element of risk. As the term "guaranteed" would suggest, Respondents apparently
10 believed, in error, that there simply was no risk to this investment program. In fact, Respondents were
11 not able to articulate any risks to this program even at hearing. Remarkably, Respondents still held the
12 position that no risks pertained to this investment program even after listening to testimony indicating
13 that the TLC program had been shut down for securities fraud, a receiver had been appointed to retrieve
14 the remaining TLC assets, and that the issuers of this program had squandered investor funds on race
15 horses, greyhounds, extravagant trips and other personal uses. *FOF*, ¶¶ 148, 149 & 170.

16 The depth of Respondents' lack of understanding for this TLC investment program was further
17 demonstrated upon cross-examination at hearing. Asked how the TLC investment program could ever
18 guarantee a 14 percent return on investments in speculative tax liens, Respondent Tyson Hiland replied:
19 "I don't know." *FOF*, ¶ 281. If Respondents could not even address basic questions about the TLC
20 investment program at hearing, the inescapable conclusion is that the information provided to prospective
21 TLC investors was just as the Division's investor-witnesses alleged - woefully deficient.

22 *c. The Viatical Investment*

23 On account of this same excessive negligence, ignorance and/or indifference, Respondents'
24 disclosures to investors in connection with their viatical investment program resulted in a similar pattern
25 of material misrepresentations and omissions. As with their other investment "programs," Respondents
26 routinely represented these viatical investments as "risk-free" investments with guaranteed high rates of

1 return. *FOF*, ¶ 113. When asked by his own counsel what he believed the risks involved with this
2 particular investment were, Joe Hiland responded: "The time. And our explanation often would be let's
3 say that somebody went to South America and ate a magic lily and lived forever. Then you would have to
4 wait till that person passes away to get your return." *H.T.*, pp. 652-653, lines 21-25 and 1-16,
5 *respectively*.

6 Similar testimony was echoed during cross-examination. The Division posed a similar question
7 to Joe Hiland concerning his understanding of the risks associated with the Respondents' viatical
8 investment program. The response given once again evidenced the egregious lack of awareness by this
9 seller as to the risks associated with this investment.

10 Q. (Division) Now, I believe you testified that you provided investors with a Carrington brochure
11 and also told them about the return of viatical investments and how they might change, depending
12 on the life span of the insured, is that correct?

13 A. (Joe Hiland) Yeah.

14 Q. You didn't tell them anything else about the risks of this investment, did you?

15 A. Other than the life expectancy?

16 Q. Right.

17 A. I didn't see any other significant risk.

18 *H.T.*, p. 799, lines 7-20. When asked by the Division what would happen if the viatical issuer decided
19 not to pay the premiums on the various insurance policies, a second Respondent, Travis Hiland, simply
20 responded: "I don't know." *H.T.*, pp. 889-890, lines 20-25 and 1, *respectively*. See also *FOF*, ¶ 282.

21 It is readily apparent that Respondents' clients were getting the same hopelessly deficient information
22 in connection with their viatical investments.

23 In actuality, Respondents' viatical investment contained a multitude of risks far beyond the mere
24 element of time. As addressed in the Division's Post Hearing Brief in this matter, some of the prevalent
25 risks associated with viatical investments include the potential lapsing of premium payments on
26 insurance policies (particularly if the viator far outlives his prognosticated life span), errant or fraudulent
viator life span predictions, the solvency and legitimacy of the viatical issuer, the solvency and
legitimacy of the associated insurance companies, and the possibility of contestable insurance policies
that were originally purchased on the basis of intentional misrepresentations.

1 Respondents' fundamental lack of understanding about these and other viatical risks necessarily
2 resulted in a number of material omissions to investors about the many perils associated with their
3 investments. These omissions constituted securities fraud under A.R.S. § 44-1991(A)(2) as a matter of
4 law. *See, e.g., Nutek Information Systems, Inc. v. Arizona Corporation Commission*, 194 Ariz. 104
5 (App.1998) (the failure to inform investors about the risks of investing constitutes securities fraud).

6 *d. The Money Voucher Machine Investment*

7 Because of negligence or carelessness, Respondents' disclosures to investors in connection with
8 their money voucher (or "MVP") investment program resulted in another all too familiar pattern of
9 material misrepresentations and omissions. At hearing, an MVP investor could not recall that the issue
10 of commissions was ever discussed. *H.T., p. 490, lines 1-25*. In fact, Respondents were receiving a
11 portly 13% commission on these sales. *H.T., p. 816, lines 3-10*. Joe Hiland subsequently admitted that
12 he omitted disclosing any of these commissions to investors. *H.T., p. 816, lines 3-12*.

13 Concerning risk disclosures, investors were once again told that these investments were risk-
14 free, and that investors could expect a guaranteed 16% annual rate of return, with a potential for even
15 higher returns. *FOF, ¶ 137*. Respondent Tyson Hiland reiterated this risk-free position at hearing,
16 testifying that the investors essentially could not lose any of their investments. *FOF, ¶ 264; See also*
17 *H.T., pp. 652-653, lines 21-25 and 1-16, respectively*. A similar position was adopted by still another of
18 the Respondents. When asked, Joseph Hiland was unable to articulate any legitimate risk factors
19 associated with this MVP program, and he even appeared to have difficulty in understanding the whole
20 concept of risk:

21 Q. (Division) And what risks do you normally present? What risks are you talking about?

22 A. (Joe Hiland) Didn't I just say that?

23 Q. With the Money Voucher program, what risks are you talking about?

24 A. That as long as there are the transactions of people needing and using ATM cards, credit cards,
and debit cards, that there would be a return and that anytime it fell below a certain point, they
would find another merchant for their machine.

25 Q. That doesn't sound like a risk, though, does it?

26 A. I don't know if we're communicating here, so I don't understand.

1 Q. I asked if you mentioned any risks, and you said you did. And I asked you to explain what
type of risks you mentioned.

2 A. The risk of what?

3 Q. What risks --

4 A. Risk -- I'm sorry.

5 Q. What risks to this program did you disclose to investors?

6 A. I'm having a difficult time when you say "risk." To me -- to me, that's a very broad issue. Risk
of what? And I'm not trying to be evasive. I just don't know what risk you mean. Risk to principal
or risk to interest?

7 Q. Risk of loss. Did you ever provide any information to potential investors in the Money
Voucher program as to the risk of loss?

8 A. Loss of principal?

9 Q. Yes.

10 A. Loss to their purchase?

11 Q. Loss of principal. Let's start with that.

12 A. Loss of their purchase. \$4,000 machine, it is insured for theft. It is serialized.

13 Q. Right. I understand that. But my question is did you ever discuss any risks, not
any qualities about them, but any risks?

14 A. Yes.

15 Q. Please tell me what risks of loss to principal you discussed.

16 A. I was.

17 Q. Please continue.

18 A. The machine is insured. That protects the risk of it being stolen.

19 Q. Is that your answer?

20 A. It's part of it. And the risk to their interest is that it will always be placed in a retail firm that
has transactions. So the risk of not getting your interest is being in a place where there are no
transactions.

21 Q. Now, how can you guarantee a return if there's a risk that there might be a place where there's
no transactions?

22 A. Because the servicing organization will move it to where there is transactions.

23 *H.T., pp. 812-814, lines 6-25, 1-25, and 1-14, respectively.*

24 The MVP money voucher investment literature that Respondents disseminated to investors was
25 equally devoid of any disclosures touching on the issue of risk. *See H.T., Exhibit S-173(c).* This
26 brochure (as well as the accompanying "DNE" voucher machine servicing brochure) essentially touts
the MVP money voucher program as an investment with tremendous income potential without any
concomitant risk. Undercover Division investigator Kirst inquired about this particular investment
program at the Respondent's branch office in Mesa, Arizona. Both Joseph Hiland and a second
representative at this office discussed this MVP investment with Mr. Kirst at some length. Investigator

1 Kirst testified that he did not recall either of these individuals ever addressing the issue of risk with
2 respect to this investment option. *H.T.*, pp. 440-441, lines 24-25 and 1-2, respectively.

3 Despite this rosy depiction, the reality of this investment is just beginning to unfold. Asked
4 about the current status of the MVP investment she made with Respondents approximately one year
5 ago, an MVP investor testified that she did not know the status of her investment, she did not know the
6 location of "her" machines, she had no idea how many transactions her machines were processing, and
7 that she had received her first interest check four months late only after complaining to the servicing
8 company. *FOF*, ¶ 140; *See also H.T.*, pp. 495-496, lines 8-25 and 1-7, respectively. Irrespective of
9 whether this program ends in collapse, it is patently obvious that a number of prominent risk factors are
10 associated with this MVP program, including whether the issuers of this company will legitimately
11 operate the program, whether the money voucher machines will ever generate a viable income to
12 support the program, and whether MVP and its servicing company will remain solvent and in operation
13 for the duration of the investors' investment terms.

14 Respondents did not inform investors in the MVP money voucher investment program about
15 any of these essential risk factors. Only time will tell whether, like with the TLC tax lien investment,
16 these risk factors ultimately become realized and Respondents' investors are once again faced with
17 substantial losses in what they were promised was a fully guaranteed investment.

18 **3. *The Opinion must reconcile its Factual Findings with an***
19 ***appropriate Legal Conclusion***

20 The Opinion's Findings of Fact provide compelling evidence supporting the Division's
21 allegations of securities fraud against the Respondents. Despite this fact, the Opinion subsequently
22 makes an untenable determination to deny each and every count of securities fraud. There simply is no
23 legal basis to make such a determination. The Opinion's author certainly has discretion in making factual
24 findings and in recommending administrative penalties, but in the context of employing the proper legal
25 standard, the Opinion's author is constrained to comply with applicable law. There are simply no valid
26 grounds, equitable or otherwise, to justify abrogating legislative authority.

1 To rectify the Opinion's errant legal application, the Respondents must be held accountable for
2 material misrepresentations and omissions for each of their securities programs in accordance with
3 applicable law. Under the Securities Act of Arizona, Respondents' misrepresentations and omissions
4 constituted multiple counts of securities fraud, and an appropriate order reflecting such legal conclusions
5 is mandated. Revisions to the Opinion to include such securities fraud violations are subsequently both
6 warranted and necessary.

7 **B. Despite Substantial Evidence at Hearing and Supportive Factual**
8 **Findings, the Opinion Omits any Conclusions of Law Referencing**
9 **the Charge of Investment Adviser Fraud**

10 The Opinion also fails to address a count of investment adviser fraud brought against the
11 Respondents. As the Opinion includes Findings of Fact that directly substantiate such a charge, it
12 follows that a finding of investment adviser fraud against the Respondents should be included as a
13 necessary supplement to the Opinion.

14 Under the Arizona Investment Management Act ("IMA"), it is a fraudulent practice and
15 unlawful for a person, in connection with a transaction or transactions within or from this state
16 involving the provision of investment advisory services, directly or indirectly, to do any of the
17 following:

- 18 1) Employ any device, scheme or artifice to defraud.
- 19 2) Make any untrue statement of material fact, or fail to state any material fact necessary in
20 order to make the statement made, in the light of the circumstances under which it was
21 made, not misleading.
- 22 3) ***Misrepresent any professional qualifications with the intent that the client rely on the***
misrepresentation.
- 23 4) Engage in any transaction, practice or course of business that operates or would operate
24 as a fraud or deceit.

25 (*Emphasis added*). A.R.S. §44-3241(A). As the evidence at hearing demonstrated, Respondents
26 violated the third provision of this statute with particular indifference.

1 The most strikingly evidence of these violations was illustrated through various promotional
2 materials, company pamphlets, and correspondence disseminated by the Respondents to potential
3 investors. For instance, Respondents' brochures routinely held Respondents out to the public as "a
4 professional firm specializing in financial services." *H.T., Exhibit S-18; H.T., Exhibit S-173.* Another
5 brochure, entitled "Certificate Profile," was distributed to yet other potential investors. In one version,
6 this pamphlet described Respondents as "a financial advisory firm specializing in investment and estate
7 planning for mature investors needing a combination of added safety to principal, above market yields,
8 and asset preservation." *H.T., Exhibit S-25(c).* In another Certificate Profile version, the pamphlet
9 described the Respondents as "a financial services firm providing specialized products and funds to
10 retirees, business owners and executives." *H.T., Exhibit S-129.*

11 Based on this and other similar evidence elicited at hearing, the Opinion included a factual
12 finding directly substantiating the investment adviser fraud count brought by the Division. In paragraph
13 292 of the Findings of Fact, the Opinion explicitly states: "it is clear that the evidence establishes that
14 Respondents violated the IMA by representing CGI [the Chamber Group, Inc.] as either an investment
15 advisor (*sic*) or themselves as investment advisor representatives (*sic*)." This finding is fully
16 consistent with the legal conclusion that Respondents committed fraud under the IMA pursuant to §
17 44-3241(A)(3) as outlined above.

18 Notwithstanding these findings, the Opinion does not address the issue of Respondents'
19 culpability for investment adviser fraud. Regardless of whether the Opinion's omission on this issue was
20 intended or a mere oversight, the resulting final order nevertheless requires appropriate amendments to
21 address and to make a disposition of this charge. In light of the evidence educed at hearing, as well as the
22 subsequent factual finding referenced above, an amendment to the Opinion holding Respondents liable
23 for investment adviser fraud is again justified.

24 ...

25 ...

26 ...

1 **C. The Opinion's Order of Rescission and/or Restitution Should be Augmented by**
2 **Including Known Investment Figures Elicited During the Course of the Hearing**

3 In its proposed order, the Opinion sets forth the requirement for Respondents to make a rescission
4 offer or to pay restitution to all investors in their programs who purchased one or more of the four
5 different securities implicated in this matter. Although this order ostensibly provides an adequate remedy
6 to investors in these programs, the fact that no specific dollar figures are included makes the Order
7 unavoidably ambiguous. Inserting a definitive restitution figure into the Opinion while omitting any
8 concomitant rescission options would alleviate the potentially troublesome implications of this
9 ambiguity.

10 Remedial ambiguity can obviously arise when insufficient evidence is available to reach any
11 determination as to the actual investment figures implicated in a particular case. In this matter, however, a
12 less problematic situation exists. Evidence introduced at hearing provided a listing of the amount of
13 investment funds collected by the Respondents in the course of selling the four different securities that
14 make up the core of this case. This particular dollar figure, although perhaps not fully representative of
15 the ultimate amounts raised by Respondents in the sale of these securities, is nevertheless a tangible
16 figure necessary to enforce this remedy in Superior Court in the event that final investment records are
17 not provided to the Director of Securities as provided in the Opinion's Order. Including such an
18 amendment avoids the potential pitfall of being unable to reduce the Commission's final Order to an
19 enforceable judgment for the sole reason that the Order contains an indeterminate amount of restitution.

20 The aforementioned investor/investment records, listing the amount of investor funds and the
21 names of the investors making these investments in Respondents' various securities programs, was
22 admitted at hearing as Exhibit S-175. This particular exhibit was initially disclosed by the Respondents
23 in March, 2001, and it provides the investment amounts raised by Respondents in each of the four
24 investment programs during the period from January, 1999, to December, 2000.³ Incorporating these

25 ³ As listed in Exhibit S-175, the total investment amounts received by Respondents for the four
26 relevant investment programs are as follows: 1) Brokered CDs: \$7,847,000; 2) TLC tax lien program:
\$3,643,000; 3) Viatical program: \$3,991,000; and 4) MVP Money Voucher program: \$476,000.

1 figures into the Opinion as a concrete restitution amount, subject to modification from updated
2 investment information, would be both effortless and instructive to the parties concerned, while also
3 dramatically enhancing the ability to enforce the ultimate Order. This being the case, such an
4 amendment can only clarify and improve the Opinion.

5 **II.**

6 **CONCLUSION**

7 For the reasons outlined above, the Division hereby requests that the Commission modify the
8 Opinion by adopting and incorporating herein the Proposed Amendments specified in the attached
9 Exhibit "A," together with any other relief that the Commission, in its discretion, deems appropriate and
10 authorized by law.

11 RESPECTFULLY SUBMITTED this 14th day of December, 2001.

13 JANET NAPOLITANO
14 Attorney General
15 Consumer Protection & Advocacy Section

16 BY: 

17 JAMIE B. PALFAI
18 Special Assistant Attorney General
19 MOIRA McCARTHY
20 Assistant Attorney General
21 Attorneys for the Securities Division
22 Arizona Corporation Commission
23
24
25
26

1 ORIGINAL AND TEN (10) COPIES of the foregoing
filed this 14th day of December, 2001, with

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

5
6 COPY of the foregoing hand-delivered this
7 14th day of December, 2001, to:

8 Mr. Marc Stern
9 Hearing Officer
Arizona Corporation Commission/Hearing Division
10 1200 West Washington
Phoenix, AZ 85007

11
12
13 COPY of the foregoing mailed
this 14th day of December, 2001, to:

14 David Jordan, Esq.
15 TITUS BRUECKNER & BERRY, P.C.
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16 Scottsdale, AZ 85253-3527
17 Attorney for Respondents

18
19 By: Tomse Pal/Sa

THIS AMENDMENT:			
_____ Passed	_____ Passed as amended by _____		
_____ Failed	_____ Not Offered	_____ Withdrawn	

SECURITIES DIVISION PROPOSED AMENDMENT # 1

TIME/DATE PREPARED: 5:00 p.m., 12/12/01

MATTER: The Chamber Group, Inc., et al

AGENDA ITEM NO. 5

DOCKET NO: S-03438A-00-0000

OPEN MEETING DATE 12/18/01 - 12/19/01

Page 7, line 15:

INSERT (after "June 2000,"): "one or more of "

Page 7, lines 20-21:

DELETE (after "witnesses including:"): "Mrs. Gloria Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

Page 7, line 26:

DELETE: "Mrs. Gloria Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

Page 7, line 28:

DELETE (after "bank issued CDs."): "Mrs. Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

Page 8, line 7:

DELETE: "Mrs. Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

**SECURITIES DIVISION PROPOSED AMENDMENTS # 1
(CONT')**

Page 8, line 9:

DELETE: "Mrs. Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

Page 8, line 12:

DELETE: (after "It was") "Mrs. Peragenie's"

INSERT: "Ms. Gloria Perry Peragine's"

Page 8, line 16:

DELETE: "Mrs. Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

Page 8, line 19:

DELETE: (after "disclose to") "Mrs. Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

Page 8, line 22:

DELETE: "Mrs. Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

Page 8, line 27:

DELETE: "Mrs. Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

**SECURITIES DIVISION PROPOSED AMENDMENTS # 1
(CONT')**

Page 9, line 1:

DELETE: "Mrs. Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

Page 9, line 4:

DELETE: (after "After one year,") "Mrs. Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

Page 9, line 10:

DELETE: (after "September 6, 2000,") "Mrs. Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

Page 30, line 14:

DELETE: "Mrs. Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

Page 30, line 16:

DELETE: "Kathryn Smith"

INSERT: "Ms. Catherine Smith"

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**SECURITIES DIVISION PROPOSED AMENDMENTS # 1
(CONT')**

Page 35, line 16:

INSERT: (new paragraph prior to "283. Upon the conclusion..")
"282.1. Based upon the evidence presented at hearing, Respondents received at least the following investment amounts through the four aforementioned investment programs: 1) Brokered CDs: \$7,847,000; TLC tax lien program: \$3,643,000; Viatical program: \$3,991,000; and MVP Money Voucher program: \$ 476,000."

Page 36, line 24:

DELETE: (After "With respect") "the violations of"

INSERT: "to the fraud violations under"

Page 36, line 25:

DELETE: (after "that there") "is insufficient"

INSERT: "may in fact be sufficient"

Page 36, line 26:

INSERT: (after "meaning of A.R.S. § 44-1999.") "However, because the preponderance of the evidence educed at hearing established the primary liability of Respondent Travis Hiland as a seller of the various referenced securities, a determination on the issue of control person liability is not required in this matter."

Page 36, line 28:

DELETE: (after "named Respondents.") "while"

**SECURITIES DIVISION PROPOSED AMENDMENTS # 1
(CONT')**

Page 37, line 1:

DELETE: (after "violations of the Act") ", because of the"
(the remainder of the paragraph).

INSERT: "." (a period).

Page 37, line 2:

INSERT: (new paragraph 290.1) "We also believe that the evidence establishes that the Respondents displayed a lack of knowledge due to an almost total lack of due diligence so that the offerings could be offered and sold with full disclosure of the risks involved. The record further establishes that the Respondents breached their fiduciary duties by displaying an excessive level of negligence and ineptitude in the offer and sale of these programs. Under the circumstances, we find substantial evidence to establish a violation of A.R.S. § 44-1991 by the Respondents in this matter.

Page 37, lines 15-16:

DELETE: (after " that Respondents violated the") "the IMA by representing CGI" (the remainder of the paragraph).

INSERT: "registration provisions of the of IMA under A.R.S. § 44-3151 by providing investment advisory services to the public while not duly licensed."

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**SECURITIES DIVISION PROPOSED AMENDMENTS # 1
(CONT')**

Page 37, line 17:

INSERT: (new paragraph 292.1) "We also find it clear that the evidence establishes that Respondents violated the fraud provisions under A.R.S. § 44-3241 of the IMA by performing investment advisory services while representing CGI as an Investment Adviser firm and by representing the remaining Respondents as Investment Advisers or Investment Adviser Representatives with the intent that Respondents' clients would rely on these misrepresentations."

Page 37, line 20+:

DELETE: "294. We believe that the Division's..." (The entire paragraph).

INSERT: "We believe that the Division's recommended restitution is reasonable with respect to Respondents CGI and Messrs. Hiland as well as with respect to the restitution being made equal to the amount of any principal lost to any investor who invested in any of the aforementioned programs since January 1, 1998."

Page 37, lines 27-28:

DELETE: (after "the number of registration") "violations alone, the Division's recommendation that the Respondents be")

INSERT: "and fraud violations, the Respondents should be"

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**SECURITIES DIVISION PROPOSED AMENDMENTS # 1
(CONT')**

Page 38, line 1:

DELETE: (after "if the restitution") "/rescission"

Page 38, lines 4-5:

DELETE: (after "that for the licensing") "violations alone, the Division's recommendation that the Respondents be")

INSERT: "and fraud violations, the Respondents should be"

Page 38, line 6:

DELETE: (after "if the restitution") "/rescission"

Page 38, line 25:

DELETE: (after "securities within") "the"

Page 38, line 27:

INSERT: (new paragraph 8.1) "Respondents CGI, Mr. Joseph Hiland, Mr. Travis Hiland and Mr. Tyson Hiland committed fraud in connection with the offer and sale of securities within or from Arizona in violation of A.R.S. § 44-1991."

Page 39, line 1

DELETE: (after "44-1841") "and 44-1842 and"

INSERT: ",44-1842 and 44-1991, as well as"

**SECURITIES DIVISION PROPOSED AMENDMENTS # 1
(CONT')**

Page 39, line 3

DELETE: (after "liable to make restitution") "and/or rescission"

Page 39, line 4

DELETE: (after "R14-4-308") "subject to any legal set-offs."

Page 39, lines 5-6

DELETE: "The restitution should be paid" (the remainder of the sentence.)

INSERT: "The restitution should be paid to all investors who suffered a loss of principal as a result of their investments with the Respondents and should include the lawful interest thereon from the date of the loss. This restitution amount should total the investment amounts currently known, subject to upward modifications in the event updated information is received, but subject to any legal set-offs."

Page 39, line 9

DELETE: (after "§ 44-1841") (delete the remaining sentence)

INSERT: ", A.R.S. § 44-1842 and A.R.S. § 44-1991, the sum of \$113,000."

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**SECURITIES DIVISION PROPOSED AMENDMENTS # 1
(CONT')**

Page 39, line 17:

INSERT: (new paragraph 13.1) "With respect to the offerings described above, Respondents CGI, Mr. Joseph Hiland, Mr. Travis Hiland and Mr. Tyson Hiland, while performing investment advisory services, misrepresented their professional qualifications as investment advisers and/or investment adviser representatives with the intent that their clients rely on such qualifications in violation of A.R.S. §44-3241."

Page 40, line 1

DELETE: "and 44-1842."

INSERT: "44-1842, and 44-1991."

Page 40, line 5

INSERT: (after "3151") "and 44-3241."

Page 40, line 9

DELETE: (after "A.R.S. § 44-1841,") "\$56,500; and for the violation of § 44-1842, \$56,500"

INSERT: ", A.R.S. § 44-1842 and A.R.S. § 44-1991, the sum of \$113,000."

Page 40, line 20

DELETE: (after "and severally pay as") "and for"

**SECURITIES DIVISION PROPOSED AMENDMENTS # 1
(CONT')**

Page 40, line 20

DELETE: (after "administrative penalty, for") "the violation"

INSERT: "violations"

Page 40, line 21

DELETE: (after "A.R.S. §§") "44-3151 the sum of \$20,000."

INSERT: "44-3151 and 44-3241, the sum of \$20,000."

Page 40, lines 24-27

DELETE: (after "jointly and severally make") "an offer of restitution..." (the remainder of the sentence).

INSERT: "a payment of restitution to investors for all the monies invested in the above-described investment programs, subject to any legal set-offs by any third party, said restitution to be made within 60 days of the effective date of this Decision."

Page 40, line 28:

INSERT: (new paragraph) "IT IS FURTHER ORDERED that this restitution amount shall constitute the following payment amounts: For the brokered CD investments, the sum of \$7,847,000; for the TLC tax lien investments, the sum of \$3,643,000; for the viatical investments, the sum of \$3,991,000; and for the MVP money voucher investments, the sum of \$476,000. These sums are each subject to the aforementioned set-offs by third parties, and are further subject to upward modifications based on updated investor/investment information detailing additional investment activities concerning these securities."

**SECURITIES DIVISION PROPOSED AMENDMENTS # 1
(CONT')**

Page 40, line 28:

INSERT: (new paragraph) "IT IS FURTHER ORDERED that the Respondents prepare and make available to the Director of Securities the most updated information concerning the Respondents' sales records for each of the four investment programs outlined above, together with updated investment totals and investor names, both in accordance with ACC R14-4-308(C)(4).

Page 40, line 28

DELETE: (after "that the restitution") "and/or rescission"

Page 41, line 1

DELETE: (after "of payment of restitution") "and/or rescission"

Page 41, line 2

DELETE: (after "that all restitution") "and/or rescission"

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