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AZ CORP COMMISSION  
DOCKET CONTROL

**EXCEPTION**

**BEFORE THE ARIZONA CORPORATION COMMISSION**

In re:

**MICHELLE LEE WAGNER,**  
(CRD No. 2403647),

Respondent.

DOCKET NO. S-20916A-14-0328

**RESPONDENT'S EXCEPTIONS TO  
THE RECOMMENDED OPINION  
AND ORDER OF THE  
ADMINISTRATIVE LAW JUDGE**

Pursuant to R14-3-110(B) of the Arizona Administrative Code, Respondent, Michelle Lee Wagner ("Wagner"), through her undersigned counsel, submits her exceptions to the Administrative Law Judge's March 24, 2016, recommended Opinion and Order ("Opinion"). The Opinion concludes, *inter alia*, that Respondent be ordered to pay restitution and, in doing so, the Opinion usurps the constitutional authority of the United States Bankruptcy Court to determine if a debt is nondischargeable in a bankruptcy proceeding and provides an unwarranted financial windfall to the "investor," ("Pritchard").

...

...

Arizona Corporation Commission  
**DOCKETED**

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ANALYSIS

**EXCEPTION:        Imposition of restitution.**

**A.        A Restitution Order Deprives the Bankruptcy Court of its Power and Duty to Determine Dischargeability of a Debt.**

“The Congress shall have power . . . To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;” *U.S. Const. art. I, § 8*. United States bankruptcy courts have subject-matter jurisdiction over bankruptcy cases. The federal district courts have original and exclusive jurisdiction over all cases arising under the bankruptcy code. 28 U.S.C. § 1334(a). The Bankruptcy Court has exclusive jurisdiction to determine dischargeability of debts as a "core" proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

The Opinion states, in pertinent part;

IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under A.R.S. §§ 44-1962 and 44-2032, Respondent Michelle Lee Wagner shall make restitution in the amount of \$98,666.76, payable to the Arizona Corporation Commission within 90 days of the effective date of this Decision. Such restitution shall be made pursuant to A.A.C. R14-4-308 subject to legal setoffs by the Respondent and confirmed by the Director of Securities.

...

IT IS FURTHER ORDERED that the Commission shall disburse the restitution funds to the investor shown on the records of the Commission.  
*Opinion pages 21-22.*

The Opinion seeks to impose restitution against Respondent in favor of Pritchard for an alleged debt owed by Respondent to Pritchard. However, the “debt” to Pritchard, if any, was discharged in Respondent’s prior Chapter 7 bankruptcy proceeding. Restitution restores an injured party to a prior position based on the debt or claim owed to the injured party. Restitution cannot be given to a party where no debt or claim exists.

1 Pritchard has filed an Adversary Proceeding in Respondent's bankruptcy case  
2 seeking to have his claim against Respondent excepted from the Discharge Order  
3 pursuant to 11 U.S.C. § 523(a)(2), (a)(4) and (a)(6). The Adversary Proceeding is  
4 currently pending before the Bankruptcy Court where the matter of "restitution" or  
5 payment of the claim will be determined. If, however, the proposed Opinion is  
6 adopted by the Commission, the restitution order becomes automatically  
7 nondischargeable in the bankruptcy proceeding pursuant to 11 U.S.C. § 523(a)(19).<sup>1</sup>

8 Addressing the issue of imposition of restitution in terms of determining  
9 dischargeability of the debt in bankruptcy, the Opinion states:

10 We note that this conclusion is not in discord with the  
11 Respondent's contention that the question of dischargeability of a  
12 debt is a matter for the bankruptcy court. By ordering restitution,  
13 the Commission exercises only that authority granted to it by  
14 statute, and **we express no opinion regarding the issue of  
15 dischargeability.** As noted by the Division, collection matters are  
16 beyond the scope of this administrative proceeding.

17 *Opinion page 11 lines 9-13. (Emphasis supplied.)*

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18 <sup>1</sup> (a) A discharge under section 727, 1141, 1228 (a), 1228 (b), or 1328 (b) of this title does not discharge  
19 an individual debtor from any debt—

20 ...

21 (19) that—

22 (A) is for—

(i) the violation of any of the Federal securities laws (as that term is defined in  
section 3(a)(47) of the Securities Exchange Act of 1934), any of the State  
securities laws, or any regulation or order issued under such Federal or State  
securities laws; or

(ii) common law fraud, deceit, or manipulation in connection with the  
purchase or sale of any security; and

(B) results, before, on, or after the date on which the petition was filed, from—

(i) any judgment, order, consent order, or decree entered in any Federal or  
State judicial or administrative proceeding;

(ii) any settlement agreement entered into by the debtor; or

(iii) any court or administrative order for any damages, fine, penalty, citation,  
restitutionary payment, disgorgement payment, attorney fee, cost, or other  
payment owed by the debtor.

1 Clearly that is not the case. Merely by ordering restitution the Commission  
2 makes the debt to Pritchard nondischargeable in bankruptcy and divests the  
3 Bankruptcy Court of its authority and duty to determine whether the debt should  
4 survive the discharge. Both the suspension of Respondents license and the imposition  
5 of an administrative fine are within the exercise of the Commission's regulatory  
6 authority and police power and any debt created thereby should not be  
7 dischargeable in bankruptcy. However, where there is no allegation or finding of  
8 fraud or criminal activity, a bankruptcy has been filed and imposition of restitution is  
9 discretionary, the Commission should defer to the jurisdiction of the Bankruptcy  
10 Court in determining whether the debt should be excepted from a bankruptcy  
11 discharge. Congress' inclusion of 11 U.S.C. § 523(a)(19) was "meant to prevent  
12 wrongdoers from using the bankruptcy laws as a shield and to allow **defrauded**  
13 investors to recover as much as possible." *Legislative History of Title VIII of HR 2673:*  
14 *The Sarbanes-Oxley Act of 2002, 148 Cong. Rec. S7418 (July 26, 2002). (Emphasis supplied.)*

13 **B. Imposition of Restitution Will Provides an Unwarranted Financial**  
14 **Windfall to Pritchard.**

14 In calculating the amount of restitution to be ordered, the Opinion states;

15 We find it appropriate, pursuant to A.R.S. § 44-1962, to  
16 correct the conditions of the Respondent's action by ordering  
17 restitution in the amount of \$98,666.76 (the \$400,000 loaned to the  
18 Respondent less \$121,333.24 already paid by the Respondent and  
19 the \$180,000 recovered by the sale of the property).

18 *Opinion, page 19, paragraph 1.*

19 The Opinion discusses the fact that Pritchard financed the subsequent sale of  
20 the real property and is currently receiving income from that transaction.

21 Additionally, the Opinion notes that Pritchard has also sued Respondent's broker  
22 and is seeking monetary damages also warranting a reduction or elimination of any  
restitution. See *Opinion page 13, paragraphs 12-13 and page 14, paragraph 1.* Given these

1 facts it is possible, if not probable that Pritchard will receive a financial windfall from  
2 these events to the detriment of Respondent. Yet, while these facts are mentioned, the  
3 Opinion does not consider these facts when calculating the restitution amount.  
4 Respondent asserts these facts warrant the Commission *not* order Respondent to pay  
5 restitution or, alternatively, to delay imposition of restitution and the amount of  
6 restitution pending conclusion of the bankruptcy proceedings and Pritchard's  
7 lawsuit against Respondent's broker.

7 C. Even if the Alleged Debt to Pritchard is Declared Dischargeable,  
8 Pritchard Will Still Share in Distribution from Respondent's Bankruptcy  
9 Estate.

9 A number of Respondent's assets held at the time she filed her bankruptcy  
10 proceeding were nonexempt pursuant to Arizona law. These assets include a parking  
11 space at her residence and commissions she earned but had not been paid when the  
12 bankruptcy petition was filed. Consequently, the assets were liquidated for the  
13 benefit of Respondent's creditors. Additionally, the Chapter 7 Trustee has instituted  
14 adversary proceedings against a third party which may lead to a substantial amount  
15 of money being paid into Respondent's bankruptcy estate. Once these proceedings  
16 have been concluded, the net proceeds held by the bankruptcy estate will be  
17 disbursed to creditors who have filed a Proof of Claim on a pro rata basis.

17 The deadline for creditors to file a Proof of Claim has passed. Besides  
18 Pritchard, only one other unsecured creditor filed a Proof of Claim. Pritchard's claim  
19 comprises 95% of all claims against the estate. Thus, even if the debt to Pritchard is  
20 held to be dischargeable, Pritchard will nevertheless receive 95% of the net funds  
21 held by the bankruptcy estate. If the Commission adopts the Opinion's  
22 recommendation that restitution be ordered against Respondent in the amount of  
\$98,666.76, Pritchard will receive another financial windfall. Although the exact

1 amount of net estate proceeds is currently unknown, the current gross amount of  
2 proceeds held by the estate *exceeds* \$32,600.00. In her adversary proceeding against  
3 the third party mentioned above, the Chapter 7 Trustee is seeking payment in the  
4 additional amount of \$215,500.00. Once the Trustee's fees and expenses are paid,  
5 Pritchard will share in the distribution from Respondent's bankruptcy estate up to  
6 the full amount of his Proof of Claim of \$274,033.00. A restitution Order against  
7 Respondent, if any, must be offset by the amount Pritchard will receive from  
8 Respondent's bankruptcy estate.

### 9 CONCLUSION

10 Based on the foregoing, Respondent respectfully requests that the Findings of  
11 Fact and Order paragraphs be amended as follows:

#### 12 1. Findings of Fact

13 (a) INSERT:

14 20. Respondent filed a petition for relief pursuant to Chapter 7 of the  
15 united State Bankruptcy Code on November 14, 2013.

16 21. Respondent received a discharge of her debts under section 727  
17 of title 11, United States Code on February 27, 2014.

18 22. Mr. Pritchard commenced an Adversary Proceeding against  
19 Respondent on February 14, 2014 in U.S. Bankruptcy Court seeking an order  
20 to deny dischargeability of the debt owed to him.

21 23. The Adversary Proceeding is currently pending and no  
22 determination has been made regarding dischargeability of the debt.

23 24. Mr. Pritchard has commenced a lawsuit against Respondent's  
broker seeking monetary damages related to Respondent's actions giving rise  
to this proceeding.

1 **2. Order**

2 (a) DELETE: On pages 22 and 23;

3 IT IS FURTHER ORDERED that pursuant to the authority granted to  
4 the Commission under A.R.S. §§ 44-1962 and 44-2032, Respondent Michelle  
5 Lee Wagner shall make restitution in the amount of \$98,666.76, payable to the  
6 Arizona Corporation Commission within 90 days of the effective date of this  
7 Decision. Such restitution shall be made pursuant to A.A.C. R14-4-308 subject  
8 to legal setoffs by the Respondent and confirmed by the Director of Securities.

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

12 IT IS FURTHER ORDERED that the ordered restitution shall bear  
13 interest at the rate of the lesser of 10 percent *per annum*, or at a rate *per annum*  
14 that is equal to one percent plus the prime rate as published by the Board of  
15 Governors of the Federal Reserve System of Statistical Release H. 15, or any  
16 publication that may supersede it on the date that the judgment is entered.

17 IT IS FURTHER ORDERED that the Commission shall disburse the  
18 restitution funds to the investor shown on the records of the Commission. Any  
19 restitution funds that the Commission cannot disburse because the investor  
20 refuses to accept such payment or because the investor is deceased and the  
21 Commission cannot reasonably identify and locate the deceased investor's  
22 spouse or natural children surviving at the time of distribution, shall be  
transferred to the general fund of the State of Arizona. Any funds that the  
Commission determines it is unable to or cannot feasibly disburse shall be  
transferred to the general fund of the State of Arizona.

...

IT IS FURTHER ORDERED that the payment obligation for the  
administrative penalty shall be subordinate to the restitution obligation  
ordered herein and shall become immediately due and payable only after  
restitution payments have been paid in full or upon Respondent's default with  
respect to Respondent's restitution obligation.

**ALTERNATIVELY**

1 (a) DELETE: On pages 22 and 23;

2 IT IS FURTHER ORDERED that pursuant to the authority granted to  
3 the Commission under A.R.S. §§ 44-1962 and 44-2032, Respondent Michelle  
4 Lee Wagner shall make restitution in the amount of \$98,666.76, payable to the  
5 Arizona Corporation Commission within 90 days of the effective date of this  
6 Decision. Such restitution shall be made pursuant to A.A.C. R14-4-308 subject  
7 to legal setoffs by the Respondent and confirmed by the Director of Securities.

8 ADD:

9 IT IS FURTHER ORDERED that pursuant to the authority granted to  
10 the Commission under A.R.S. §§ 44-1962 and 44-2032, Respondent Michelle  
11 Lee Wagner shall make restitution in an amount to be determined following  
12 resolution of Respondent's bankruptcy proceedings and Mr. Pritchard's  
13 lawsuit against Respondent's broker, Crown Capital. Such restitution, if any,  
14 shall be payable to the Arizona Corporation Commission within 90 days of  
15 issuance of the supplemental Order. Such restitution shall be made pursuant  
16 to A.A.C. R14-4-308 and is subject to legal setoffs by the Respondent and  
17 confirmed by the Director of Securities.

18 (b) DELETE: On page 23;

19 IT IS FURTHER ORDERED that the ordered restitution shall bear  
20 interest at the rate of the lesser of 10 percent *per annum*, or at a rate *per annum*  
21 that is equal to one percent plus the prime rate as published by the Board of  
22 Governors of the Federal Reserve System of Statistical Release H. 15, or any  
23 publication that may supersede it on the date that the judgment is entered.

24 ADD:

25 IT IS FURTHER ORDERED that any ordered restitution shall bear  
26 interest at the rate of the lesser of 10 percent *per annum*, or at a rate *per annum*  
27 that is equal to one percent plus the prime rate as published by the Board of  
28 Governors of the Federal Reserve System of Statistical Release H. 15, or any  
29 publication that may supersede it on the date that the supplemental judgment  
30 is entered.

31 (c) DELETE: On page 23;

1 IT IS FURTHER ORDERED that the payment obligation for the  
2 administrative penalty shall be subordinate to the restitution obligation  
3 ordered herein and shall become immediately due and payable only after  
4 restitution payments have been paid in full or upon Respondent's default with  
5 respect to Respondent's restitution obligation.

6 ADD: On page 23;

7 IT IS FURTHER ORDERED that the payment obligation for the  
8 administrative penalty shall become immediately due and payable upon entry  
9 of this Order.

10 RESPECTFULLY SUBMITTED this 4th day of April 2016.

11 ZEIGLER LAW GROUP, PLC

12 

13 /s/ J. Murray Zeigler

14 J. Murray Zeigler

15 Attorney for Respondent

16 I hereby certify that I have this day served the foregoing document on all parties of record in  
17 this proceeding by hand delivery to the following:

18 DOCKET CONTROL  
19 ARIZONA CORPORATION COMMISSION  
20 1200 W. WASHINGTON  
21 PHOENIX, AZ 85007-2927  
22 (Original + 13 copies)

I hereby certify that I have this day served the foregoing document on the following via email  
at the listed email address:

Ryan J. Millicam  
[RMillicam@azcc.gov](mailto:RMillicam@azcc.gov)

Dated at Tempe, Arizona, this 4<sup>th</sup> day of April 2016.

/s/ J. Murray Zeigler

J. Murray Zeigler

