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BEFORE THE ARIZONA CORPORATION COMMISSIONCOMMISSIONERS

Arizona Corporation Commission

DOCKETED

TOM FORESE – Chairman
 BOB BURNS
 ANDY TOBIN
 BOYD DUNN
 JUSTIN OLSON

JAN 3 2018

DOCKETED BY

IN THE MATTER OF:

BART J. ELLIS and COLLEEN ELLIS, husband and wife,

OAK CAPITAL PARTNERS, LLC, an Arizona Limited Liability Company,

Respondents.

DOCKET NO. S-20949A-16-0002

DECISION NO. 76541**OPINION AND ORDER**

DATE OF PRE-HEARING CONFERENCE: March 7, 2016

DATE OF HEARING: September 12, 2016

PLACE OF HEARING: Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE: Mark Preny¹

APPEARANCES: Mr. Lawrence I. Kazan, DEBUS, KAZAN & WESTERHAUSEN, LTD, on behalf of Respondent Colleen Ellis; and

Mr. Ryan J. Millecam, Staff Attorney, Securities Division of the Arizona Corporation Commission.

BY THE COMMISSION:**I. Procedural History**

On January 8, 2016, the Securities Division (“Division”) of the Arizona Corporation Commission (“Commission”) filed a Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, for Restitution, for Administrative Penalties, and for Other Affirmative Action (“Notice”) against Oak Capital Partners, LLC (“Oak Capital”), and Bart J. Ellis and Colleen Ellis, husband and wife (the “Ellises”) (collectively “Respondents”), in which the Division alleged violations

¹ The Recommended Opinion and Order was prepared by Administrative Law Judge Brian D. Schneider.

1 of the Arizona Securities Act ("Securities Act") in connection with the offer and sale of securities in
2 the form of stocks, notes and mutual funds, and violations of the Arizona Investment Management Act
3 ("IM Act") in connection with transactions involving the provision of investment advisory services.

4 The spouse of Respondent Bart J. Ellis, Colleen Ellis ("Respondent Spouse"), is joined in the
5 action pursuant to A.R.S. § 44-2031(C) solely for the purpose of determining the liability of the marital
6 community.

7 The Respondents were duly served with copies of the Notice.

8 On February 16, 2016, Respondent Bart J. Ellis filed a Request for Hearing pursuant to Arizona
9 Administrative Code ("A.A.C.") R14-4-306.

10 On February 19, 2016, by Procedural Order, a pre-hearing conference was scheduled to
11 commence on March 7, 2016.

12 On February 23, 2016, Respondent Spouse filed a Request for Hearing pursuant to A.R.S. § 44-
13 3212 and A.A.C. R14-4-306.

14 On February 24, 2016, by Procedural Order, the scheduled pre-hearing conference was
15 affirmed, with notice provided to Respondent Spouse.

16 On March 7, 2016, the pre-hearing conference was held as scheduled. The Division appeared
17 through counsel, as did Respondent Spouse. Respondent Bart J. Ellis did not appear. The scheduling
18 of a hearing date was discussed.

19 Also on March 7, 2016, by Procedural Order, a hearing was scheduled to commence on August
20 30, 2016.

21 On August 12, 2016, the Division filed a Motion to Allow Telephonic Testimony, stating that
22 Mr. Steve Stone works outside of Arizona for much of the year, and the remaining witnesses, J. Barbara
23 Miller and Candace Salazar, reside outside of Arizona and requiring them to appear in Phoenix,
24 Arizona, would be prohibitively burdensome.

25 On August 19, 2016, Respondent Spouse filed a Motion to Continue. Respondent Spouse
26 requested that the commencement of the hearing be delayed by one day, from August 30, 2016, to
27 August 31, 2016, due to counsel's involvement in a matter in Maricopa County Superior Court for
28 which jury selection will take place on August 29 and 30, 2016.

1 On August 22, 2016, a Procedural Order was issued granting Respondent Spouse's Motion to
2 Continue and continuing the start of the hearing by one day, until August 31, 2016.

3 Also on August 22, 2016, the Division filed a Response to Respondent Spouse's Motion to
4 Continue, stating that the hearing should be continued to September 1, 2016, at 1:00 p.m.

5 On August 24, 2016, by Procedural Order, the hearing was rescheduled to commence on
6 September 12, 2016.

7 On September 12, 2016, the hearing was held as scheduled. The Division appeared through
8 counsel, as did Respondent Spouse. Respondent Bart J. Ellis did not appear. At the conclusion of the
9 proceeding, the matter was taken under advisement pending the submission of closing briefs.

10 On November 10, 2016, the Division filed a Post-Hearing Brief.

11 On December 9, 2016, Respondent Spouse filed a Post-Hearing Memorandum.

12 On December 30, 2016, the Division filed a Reply Brief.

13 **II. Summary**

14 This is an enforcement action brought against Respondents for alleged violations of the
15 registration and anti-fraud provisions of the Securities Act and IM Act. The Division contends that
16 Respondents sold securities and acted as investment advisers without being registered by the
17 Commission, in violation of A.R.S. §§ 44-1842 and 44-3151. Further, the Division contends that
18 Respondents committed fraud by making misrepresentations to their investors, in violation of A.R.S.
19 §§ 44-1991 and 44-3241. The Division requests that the Respondents be ordered to pay restitution in
20 the amount of \$1,098,851, plus interest, and an administrative penalty of at least \$100,000.

21 Respondents Bart J. Ellis and Oak Capital did not respond, appear at the hearing, or otherwise
22 contest the matter. Respondent Spouse is joined in this action solely for the purpose of determining
23 the liability of the marital community. Respondent Spouse appeared and did not contest the allegations
24 against the Respondents. Rather, Respondent Spouse argues that the Division was wrong in requesting
25 that she be held financially accountable for the wrong doings of her husband and requests that the
26 marital community not be held liable for these alleged violations.

27 ...

28 ...

1 **III. Testimony**

2 A. Michael Brokaw

3 Mr. Brokaw testified that he is a senior special investigator for the Commission assigned to this
4 case.² In that capacity, Mr. Brokaw's investigation of Mr. Ellis included collecting evidence,
5 interviewing involved parties and obtaining documents.³ Mr. Brokaw testified that Mr. Ellis resided
6 in Arizona from 2012 to 2015, and that he listed, at least for some period of time, addresses in Paradise
7 Valley and on the street Via De La Siesta.⁴ Mr. Brokaw further testified that Mr. Ellis was married
8 during this time period and that Mr. Ellis had filed for bankruptcy.⁵

9 Mr. Brokaw testified that Mr. Ellis was registered to sell securities in Arizona from October 5,
10 2009, through October 26, 2012, and that he was last registered as a securities broker on October 26,
11 2012.⁶ Mr. Ellis was registered with Ameriprise Financial Services ("Ameriprise") from October 5,
12 2009, through October 8, 2012, and he was discharged and terminated for company policy violations
13 related to accepting transaction requests and the use of discretion.⁷ Mr. Brokaw testified that from
14 October 27, 2012, through July 8, 2016, neither Mr. Ellis nor Oak Capital were registered with the
15 Commission as a securities salesman or dealer.⁸

16 Mr. Brokaw testified that in response to a subpoena for documents, Mr. Ellis provided an
17 account statement from Interactive Brokers; closing documents for Oak Capital; and a cover letter.⁹ In
18 the letter, Mr. Ellis stated that "Oak Capital Partners LLC was open, nothing was done and since been
19 closed."¹⁰ Mr. Ellis also stated in the letter that he held no joint accounts with Respondent Spouse
20 "since the sale of the condo in Chicago, IL."¹¹

21 Mr. Brokaw testified that the articles of organization for Oak Capital, filed on October 22, 2012,
22 list Mr. Ellis as the statutory agent and manager of the LLC.¹² Mr. Brokaw further testified that the

23 ² Tr. 18:12-23.

24 ³ Tr. 19:2-10.

25 ⁴ Tr. 20:8-19.

26 ⁵ Tr. 20:20-21:2; Exh. S-6.

27 ⁶ Tr. 23:14-24:7; Exh. S-5.

28 ⁷ Tr. 24:18-25:5; Exh. S-5.

⁸ Tr. 25:18-26:7; Exh. S-1; Exh. S-2.

⁹ Tr. 30:3-25; Exh. S-4.

¹⁰ Tr. 30:16-18; Exh. S-4.

¹¹ Tr. 30:22-25; Exh. S-4.

¹² Tr. 32:1-33:12; Exh. S-12(a).

1 articles of termination for Oak Capital were filed on November 20, 2014.¹³

2 Mr. Brokaw testified that he received documentation from FirstBank in Colorado,¹⁴ Wells
3 Fargo Bank,¹⁵ Interactive Brokers, LLC,¹⁶ and Ameriprise¹⁷ regarding Oak Capital.¹⁸ Mr. Brokaw
4 further testified that he reviewed documentation of Merrill Lynch accounts for Barbara Miller.¹⁹

5 Mr. Brokaw identified Ms. Miller, Steve Stone, and Ruth Richter as making deposits into Oak
6 Capital accounts.²⁰ Mr. Brokaw testified that he was able to confirm that Thomas Gelhar was a client
7 of Mr. Ellis.²¹

8 Mr. Brokaw testified that Mr. Ellis was Ms. Miller's investment advisor and broker and that
9 Mr. Brokaw received an investment report from Oak Capital regarding Ms. Miller.²²

10 Mr. Brokaw testified that Ms. Richter is deceased and that he interviewed Candy Salazar, Ms.
11 Richter's daughter and executor of her estate.²³ Ms. Salazar gave Mr. Brokaw documentation from
12 Ameriprise regarding Ms. Richter's account, listing Mr. Ellis as her financial advisor, and a portfolio
13 review for Ms. Richter for December 2012, which includes handwritten notes signed by Mr. Ellis.²⁴

14 Mr. Brokaw testified that he interviewed Mr. Stone.²⁵ Mr. Stone invested with Mr. Ellis and
15 lost a little over \$300,000.²⁶ Mr. Brokaw testified that Mr. Stone's investment funds were to be invested
16 in stocks and that Mr. Stone did not expect his funds to be used for day-trading or Mr. Ellis' salary.²⁷

17 Mr. Brokaw testified that he interviewed Becky Youman, the landlady of the house on Via De
18 La Siesta in Scottsdale.²⁸ Ms. Youman confirmed that the Ellises were her tenants and gave Mr.
19 Brokaw a copy of a residential lease agreement listing Ms. Ellis as the tenant on the lease.²⁹

20 ¹³ Tr. 33:22-34:8; Exh. S-12(b).

21 ¹⁴ Exhs. S-14-18.

22 ¹⁵ Exhs. S-19-22.

23 ¹⁶ Exhs. S-23-24; Exh. S-31.

24 ¹⁷ Exh. S-7.

25 ¹⁸ Tr. 35:1-45:23.

26 ¹⁹ Tr. 46:6-13; Exhs. S-8(a) to (h).

27 ²⁰ Tr. 48:3-14.

28 ²¹ Tr. 48:21-49:7.

29 ²² Tr. 50:3-24; Exh. S-9.

²³ Tr. 52:17-53:8.

²⁴ Tr. 53:9-55:24; Exh. S-10; Exh. S-11.

²⁵ Tr. 56:21-22.

²⁶ Tr. 57:11-58:4.

²⁷ Tr. 58:17-25.

²⁸ Tr. 59:4-9.

²⁹ Tr. 59:17-61:2; Exh. S-30.

1 Mr. Brokaw testified that he served Mr. Ellis a copy of the Notice at Mr. Ellis' office in
2 Scottsdale.³⁰

3 Mr. Brokaw testified that the Ellises no longer live at the last known apartment complex.³¹ Mr.
4 Brokaw was aware the Ellises had been living separate for some time and that there are pending
5 dissolution of marriage proceedings.³²

6 Mr. Brokaw testified that Mr. Ellis filed for bankruptcy in the State of Illinois and that Ms. Ellis
7 was not a party to the bankruptcy proceeding.³³ Mr. Brokaw did not find any joint accounts in existence
8 with respect to Ms. Ellis and Mr. Ellis.³⁴ Mr. Brokaw testified that Mr. Ellis is listed as the statutory
9 agent on Oak Capital's articles of organization and that Mr. Ellis is the sole organizer and the only
10 manager of Oak Capital.³⁵ Mr. Brokaw further testified that Ms. Ellis is not listed on any bank accounts
11 pertaining to Oak Capital and that Ms. Ellis did not have any participation with Oak Capital.³⁶

12 Mr. Brokaw testified that Mr. Ellis was a licensed securities dealer in Illinois prior to the time
13 he initiated Oak Capital, and that Oak Capital had only four clients; Mr. Stone, Ms. Miller, Ms. Richter,
14 and Mr. Gelhar.³⁷

15 Mr. Brokaw testified that Mr. Stone was a person with a great deal of knowledge about trading,
16 and continued to invest with Mr. Ellis after he lost \$300,000.³⁸

17 Mr. Brokaw testified that some checks from Oak Capital were used to pay the rent for the
18 residence in Scottsdale and that Ms. Ellis was listed as a tenant and the lone signer on the lease.³⁹

19 B. Rebecca Ciscel

20 Ms. Ciscel testified that she is a forensic accountant for the Division and that as part of the
21 investigation she examined FirstBank and Wells Fargo bank account statements for Oak Capital and
22 Mr. Ellis.⁴⁰

23 ³⁰ Tr. 63:5-23.

24 ³¹ Tr. 65:15-19.

25 ³² Tr. 65:20-66:3.

26 ³³ Tr. 66:9-67:3; Exh. S-6.

27 ³⁴ Tr. 68:25-69:16.

28 ³⁵ Tr. 70:8-71:20.

³⁶ Tr. 71:25-73:25.

³⁷ Tr. 74:14-75:11.

³⁸ Tr. 75:14-76:15.

³⁹ Tr. 76:20-77:25.

⁴⁰ Tr. 81:12-83:14; Exhs. S-14-22.

1 Ms. Ciscel testified that she prepared a summary of Oak Capital's receipts and disbursements
 2 from the FirstBank and Wells Fargo bank accounts for the period October 31, 2012, through March 23,
 3 2015.⁴¹ The majority of the receipts were listed under the title "clients" and totaled \$1.1 million.⁴² Ms.
 4 Ciscel testified that the summary shows net disbursements of \$567,916 to Interactive Brokers,
 5 consisting of deposits from the Wells Fargo and FirstBank accounts totaling \$709,000 and withdrawals
 6 totaling \$141,084.⁴³ Ms. Ciscel further testified that Bart J. Ellis was the only person she saw with
 7 signatory authority on these accounts.⁴⁴

8 Ms. Ciscel testified that the category "Various Expenses" made up 26.2% of the total
 9 disbursements from Oak Capital, totaling \$294,780.⁴⁵ Note 3 of Exhibit S-25 shows a breakdown of
 10 the categories listed as various expenses.⁴⁶ Ms. Ciscel testified that \$57,000 was spent in rent, including
 11 \$49,000 to Ms. Youman.⁴⁷ Ms. Ciscel testified that, during the investigation, she saw the lease
 12 agreement with Ms. Youman's name on it.⁴⁸ Ms. Ciscel further testified that Oak Capital's Wells Fargo
 13 and FirstBank accounts show Colleen Ellis on the line item bank statement transaction.⁴⁹

14 Ms. Ciscel testified that a \$34,050.00 cashier's check from FirstBank, made out to Becky
 15 Youman, with Bart Ellis as remitter, was included in the category of "Rent" in Exhibit S-25, page 2,
 16 note 3.⁵⁰ An outgoing wire of \$26,500, dated June 27, 2014, listed Becky L. Youman or Bryan Estep
 17 as the beneficiary and Oak Capital as the originator.⁵¹ Ms. Ciscel testified that this wire was included
 18 in the category of "Rent" in Exhibit S-25, page 2, note 3.⁵²

19 Ms. Ciscel testified that a FirstBank check disbursement on the Oak Capital account, dated
 20 January 30, 2014, in the amount of \$24,747.24 and made payable to Earnhardt Scottsdale Lexus, was
 21 included in the category of "Automobile and Repairs" in Exhibit S-25, page 2, note 3.⁵³

22 ⁴¹ Tr. 83:19-85:17; Exh. S-25.

23 ⁴² Tr. 86:3-10; Exh. S-25.

24 ⁴³ Tr. 86:14-87:2; Exh. S-25.

25 ⁴⁴ Tr. 87:13-18; Exh. S-25.

26 ⁴⁵ Tr. 87:22-24; Exh. S-25.

27 ⁴⁶ Exh. S-25 at 2.

28 ⁴⁷ Tr. 88:1-4; Exh. S-25.

⁴⁸ Tr. 88:5-10.

⁴⁹ Tr. 88:11-20; Exh. S-25.

⁵⁰ Tr. 90:2-6; Exh. S-15 at ACC000173.

⁵¹ Tr. 90:15-20; Exh. S-15 at ACC000250.

⁵² Tr. 90:21-24.

⁵³ Tr. 91:6-12; Exh. S-15 at ACC000229.

1 Ms. Ciscel testified that a \$4,992 transfer on February 24, 2014, to Shaw Center 4 Aesthetic
2 En, which based on an internet search appears to be a plastic surgery center, was included in the
3 category of "Medical" in Exhibit S-25, page 2, note 3.⁵⁴

4 Ms. Ciscel testified that a FirstBank check disbursement on the Oak Capital account, dated
5 April 19, 2014, in the amount of \$8,014.64 and made payable to A Vacation By the Bay, which based
6 on an internet search appears to be vacation or rental vacation homes in the San Diego area, was
7 included in the category of "Lodging" in Exhibit S-25, page 2, note 3.⁵⁵

8 Ms. Ciscel testified that she prepared a summary of receipts and disbursements of Mr. Ellis's
9 personal accounts from FirstBank and Wells Fargo for the period of October 31, 2012, through March
10 11, 2015.⁵⁶ Bart J. Ellis was the authorized signer for the three personal accounts.⁵⁷ Ms. Ciscel testified
11 that \$56,000 worth of receipts came from Oak Capital.⁵⁸

12 Ms. Ciscel testified that there are 104 disbursements, totaling \$81,798, unaccounted for from
13 the Oak Capital accounts.⁵⁹ Ninety of these unknown disbursements were check disbursements, the
14 largest of which was \$2,700, and the average was \$748.⁶⁰ Ms. Ciscel testified that none of the unknown
15 disbursements were used for certificates of deposit ("CDs").⁶¹

16 Ms. Ciscel testified that there are 108 disbursements, totaling \$40,533, unaccounted for from
17 Bart J. Ellis's three personal accounts, which was 48% of the total disbursements.⁶² The largest
18 disbursement was \$2,500, and the average was \$748.⁶³ Ms. Ciscel testified that none of the unknown
19 disbursements were used for CDs.⁶⁴

20 Ms. Ciscel testified that she prepared a summary of the Interactive Brokers statements for Oak
21 Capital for the period of October 31, 2012, through March 23, 2015.⁶⁵ Ms. Ciscel further testified that
22

23 ⁵⁴ Tr. 91:18-92:3; Exh. S-15 at ACC000226.

24 ⁵⁵ Tr. 92:9-20; Exh. S-15 at ACC000245.

25 ⁵⁶ Tr. 92:25-94:19; Exh. S-26.

26 ⁵⁷ Tr. 95:5-7; Exh. S-26.

27 ⁵⁸ Tr. 95:15-18; Exh. S-26.

28 ⁵⁹ Tr. 95:23-96:3; Exh. S-25.

⁶⁰ Tr. 96:8-18; Exh. S-25.

⁶¹ Tr. 96:4-7; Tr. 96:19-23.

⁶² Tr. 96:24-97:12; Exh. S-26.

⁶³ Tr. 97:12-14; Exh. S-26.

⁶⁴ Tr. 97:15-18.

⁶⁵ Tr. 99:6-17; Exh. S-27.

1 most of the withdrawals from the Interactive Brokers account for Oak Capital ended up in Oak Capital's
2 FirstBank and Wells Fargo accounts.⁶⁶ The ending balance on February 15, 2015, was \$9,679, and the
3 estimated ending balance on March 23, 2015, was \$5,480.82.⁶⁷

4 Ms. Ciscel testified that she prepared a client list for Oak Capital.⁶⁸ The client list shows that
5 Mr. Stone was the only client who received an amount returned on his investment, specifically
6 \$23,649.⁶⁹

7 Ms. Ciscel testified that the unknown disbursements for the Oak Capital accounts, totaling
8 \$81,798, consisted of 90 check disbursements, five wire disbursements, and nine Visa debit card
9 disbursements.⁷⁰ Ms. Ciscel further testified that she doesn't know where any of these funds, or any
10 of the \$40,533 unknown disbursements for Mr. Ellis's personal accounts, ended up.⁷¹

11 Ms. Ciscel testified that withdrawals totaling \$134,000 from the Interactive Brokers account
12 were deposited into the Oak Capital accounts, but that she can't say what specifically happened to these
13 particular funds.⁷² Of the \$67,000 of ATM withdrawals from the Oak Capital accounts, \$23,000 were
14 deposited into Mr. Ellis's personal FirstBank account.⁷³ Ms. Ciscel testified that she did not know how
15 the \$56,773 in total withdrawals from the Oak Capital accounts were spent.⁷⁴

16 Ms. Ciscel testified that the \$84,000 in disbursements from Mr. Ellis's personal account were
17 used for the items listed in Exhibit S-26, including \$8,835 for elementary school tuition/daycare.⁷⁵ Ms.
18 Ciscel further testified that a personal bank account is typically not used for business purposes.⁷⁶

19 Ms. Ciscel testified that the ending balance in the checking account for Oak Capital is \$54.⁷⁷

20 C. Jadwiga Barbara Miller⁷⁸

21 Ms. Miller testified that she lives in Crystal Lake, Illinois, and met Mr. Ellis while he was

22 ⁶⁶ Tr. 100:22-101:5.

23 ⁶⁷ Tr. 102:3-12; Exh. S-27.

24 ⁶⁸ Tr. 103:1-7; Exh. S-28.

25 ⁶⁹ Tr. 104:23-105:4; Exh. S-28.

26 ⁷⁰ Tr. 106:14-23; Exh. S-25.

27 ⁷¹ Tr. 106:24-107:14; Exh. S-25; Exh. S-26.

28 ⁷² Tr. 111:9-112:1; Exh. S-25.

⁷³ Tr. 113:7-24; Exh. S-25; Exh. S-26.

⁷⁴ Tr. 113:25-114:9.

⁷⁵ Tr. 117:19-118:22; Exh. S-26.

⁷⁶ Tr. 119:2-6.

⁷⁷ Tr. 125:6-12.

⁷⁸ Ms. Miller was represented by counsel and appeared telephonically at the hearing.

1 working at Morgan Stanley.⁷⁹ Mr. Ellis was her broker and invested money on her behalf.⁸⁰ When
 2 Mr. Ellis moved to Ameriprise, Ms. Miller signed an agreement for him to be her broker on March 19,
 3 2009.⁸¹ Ms. Miller testified that she paid Ameriprise directly for Mr. Ellis's services.⁸²

4 Ms. Miller testified that she kept Mr. Ellis as her broker when he moved from Ameriprise to
 5 Merrill Lynch.⁸³ Ms. Miller invested \$589,000 with Merrill Lynch.⁸⁴ Ms. Miller testified that Tim
 6 Kiley was her financial advisor at Merrill Lynch and that Mr. Ellis worked under him.⁸⁵

7 Ms. Miller testified that she decided to invest in CDs with Oak Capital based on Mr. Ellis's
 8 advice.⁸⁶ Ms. Miller transferred money from Merrill Lynch and used some savings to invest \$905,000
 9 in CDs with Oak Capital.⁸⁷ Ms. Miller testified that she understood that Mr. Ellis was still working at
 10 Merrill Lynch as her financial advisor and that she met with him regularly for updates on her CDs.⁸⁸

11 Ms. Miller testified that she understood from her March 2014, Portfolio Summary with Oak
 12 Capital, that she received \$1,643 in income from her CDs, but testified that she never received any
 13 check, cash, or other payment.⁸⁹ Ms. Miller further testified that she understood from her March 2014,
 14 Portfolio Summary with Oak Capital, that her investment principal was \$415,000.⁹⁰

15 Ms. Miller testified that in May 2014, she invested an additional \$391,742 with Oak Capital to
 16 be used for CDs.⁹¹

17 Ms. Miller testified that she understood from her October 2014, Portfolio Summary with Oak
 18 Capital, that she received \$4,660 in income from her CDs.⁹² Ms. Miller further testified that she
 19 understood Mr. Ellis to be her financial advisor with Merrill Lynch and that he just worked with Oak
 20 Capital.⁹³ Ms. Miller further testified that Mr. Ellis told her that CDs were not for everyone but that

21 ⁷⁹ Tr. 130:2-131:18.

22 ⁸⁰ Tr. 132:11-14.

23 ⁸¹ Tr. 132:15-133:22; Exh. S-7.

24 ⁸² Tr. 135:8-12.

25 ⁸³ Tr. 136:14-137:11.

26 ⁸⁴ Tr. 137:25-138:7; Exh. S-8(c).

27 ⁸⁵ Tr. 138:8-19.

28 ⁸⁶ Tr. 139:18-140:22.

⁸⁷ Tr. 140:23-143:6.

⁸⁸ Tr. 143:13-25.

⁸⁹ Tr. 145:5-146:3; Exh. S-9 at ACC003901.

⁹⁰ Tr. 146:4-19; Exh. S-9 at ACC003903.

⁹¹ Tr. 147:7-23; Exh. S-9 at ACC003905.

⁹² Tr. 148:3-14; Exh. S-9 at ACC003909.

⁹³ Tr. 148:15-149:6.

1 since she was an “old customer” he preferred she invest her money with the CDs.⁹⁴

2 Ms. Miller testified that she was surprised to see in her October 2014, Portfolio Summary with
3 Oak Capital, that her investment was in funds and not CDs.⁹⁵ Ms. Miller further testified that Mr. Ellis
4 never told her that a portion of her funds were deposited in an account with Interactive Brokers and
5 never discussed any day-trading of stocks or mutual funds with her.⁹⁶

6 Ms. Miller testified that of the \$905,000 she invested with Oak Capital, Mr. Ellis only gave her
7 back \$7,700.⁹⁷

8 Ms. Miller testified that she never met Ms. Ellis.⁹⁸

9 Ms. Miller testified that Mr. Ellis filled out her investor’s account application and that she did
10 not give him any information that is included in the application.⁹⁹ Ms. Miller met Mr. Ellis quite a few
11 times over the years and believed him to be living in Chicago, Illinois.¹⁰⁰ Ms. Miller believed she had
12 authorized Mr. Ellis to invest her money in CDs but that she doesn’t have anything in writing indicating
13 that.¹⁰¹

14 Ms. Miller testified that she received monthly investment reports from Mr. Ellis when they
15 would meet in person.¹⁰²

16 Ms. Miller testified that Mr. Ellis sent her a Federal Express envelope to invest in a CD that
17 was going fast and that she mailed her check to him in Arizona.¹⁰³

18 Ms. Miller testified that she understood Oak Capital to be a financial company that she could
19 invest with and that Mr. Ellis worked for both Merrill Lynch and Oak Capital.¹⁰⁴

20 **IV. Legal Argument**

21 The Division’s allegations in its Notice are uncontested. Respondent Oak Capital failed to
22 request a hearing, file an answer, or appear at the hearing. Respondent Bart Ellis failed to file an answer

23 ⁹⁴ Tr. 149:6-8.

24 ⁹⁵ Tr. 150:3-24; Exh. S-9 at ACC003912.

⁹⁶ Tr. 150:25-151:6.

25 ⁹⁷ Tr. 151:14-19.

⁹⁸ Tr. 152:24-25.

26 ⁹⁹ Tr. 153:11-154:1; Exh. S-7.

¹⁰⁰ Tr. 155:19-157:6.

27 ¹⁰¹ Tr. 158:8-17.

¹⁰² Tr. 159:9-16; Exh. S-9.

28 ¹⁰³ Tr. 160:6-21.

¹⁰⁴ Tr. 161:7-22.

or appear at the hearing. Respondent Spouse is the only Respondent that participated in this matter. Respondent Spouse does not contest the allegations in the Notice, rather she argues that the marital community should not be held liable for the conduct of Respondents Ellis and Oak Capital.

A. The Violations

The Division contends that the Respondents violated the registration and license requirements of A.R.S. §§ 44-1842¹⁰⁵ and 44-3151¹⁰⁶ and the anti-fraud provisions of A.R.S. §§ 44-1991¹⁰⁷ and 44-

¹⁰⁵ A.R.S. § 44-1842 provides:

A. It is unlawful for any dealer to sell or purchase or offer to sell or buy any securities, or for any salesman to sell or offer for sale any securities within or from this state unless the dealer or salesman is registered as such pursuant to the provisions of article 9 of this chapter.

B. A person violating this section is guilty of a class 4 felony.

¹⁰⁶ A.R.S. § 44-3151 provides:

A. A person shall not transact business in this state as an investment adviser or investment adviser representative unless any of the following applies:

1. The person is licensed under this article.
2. The person is a federal covered adviser and has made a notice filing under this article.
3. The person is exempt from licensure.
4. The person is a federal covered adviser and is not subject to the notice filing requirements prescribed in section 44-3153.

B. The licensure requirements of this article do not apply to any federal covered adviser or a person that is excluded from the definition of an investment adviser under section 202(a)(11) of the investment advisers act of 1940.

C. An investment adviser that is required to be licensed shall not employ an investment adviser representative unless the investment adviser representative is licensed under this article. The licensure of an investment adviser representative is not effective during any period of time that the investment adviser representative is not employed by a licensed investment adviser or by a federal covered adviser that has made a notice filing pursuant to section 44-3153, subsection E. A licensed investment adviser shall promptly notify the commission when an investment adviser representative begins or terminates employment with the investment adviser by filing a completed form U-4 or form U-5 or any other form as the director may designate.

D. An investment adviser representative shall not conduct business on behalf of a federal covered adviser unless that investment adviser representative is licensed under this article. A federal covered adviser shall notify the commission if any investment adviser representative begins or terminates employment with that federal covered adviser by filing a completed form U-4, form U-5 or any other form the director designates for that purpose.

E. A person who knowingly violates this section is guilty of a class 1 misdemeanor.

¹⁰⁷ A.R.S. § 44-1991 provides:

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

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

B. In a private action brought pursuant to subsection A, paragraph 2 of this section or section 44-1992, if the person who offered or sold the security proves that any portion or all of the amount

3241.¹⁰⁸ Because Respondents Bart Ellis and Oak Capital did not contest the allegations in the Division's Notice, those allegations against these Respondents are deemed admitted pursuant to A.A.C. R14-4-305(D). Accordingly, we find that Respondents Bart Ellis and Oak Capital have violated A.R.S. §§ 44-1842, 44-1991, 44-3151, and 44-3241.

Although Respondents Bart Ellis and Oak Capital have effectively admitted the allegations in the Notice, the Division asserts that the evidence of record at the hearing also established the allegations.

1. The IM Act

The Division asserts that Respondents Bart Ellis and Oak Capital violated the licensure requirements of the IM Act because they received compensation when engaging in the business of providing securities advice. The Division argues that because Respondents Bart Ellis and Oak Capital were acting as investment advisers, as defined by A.R.S. § 44-3101(5),¹⁰⁹ and Respondent Bart Ellis

recoverable under subsection A, paragraph 2 of this section or section 44-1992 represents an amount other than the depreciation in value of the subject security resulting from the part of the prospectus or oral communication, with respect to which the liability of the person is asserted, not being true or omitting to state a material fact required to be stated or necessary to make the statement not misleading, then the amount shall not be recoverable. This subsection does not apply to any actions based on allegations of activities constituting dishonest or unethical practices in the securities industry.

¹⁰⁸ A.R.S. § 44-3241 provides:

A. It is a fraudulent practice and unlawful for a person, in connection with a transaction or transactions within or from this state involving the provision of investment advisory services, directly or indirectly, to do any of the following:

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

B. A person who violates this section is liable to any person for all losses incurred by that person as a result of the violation, together with interest on losses incurred, court costs and reasonable attorney fees. A civil action under this section is barred unless it is brought within three years after the violation or within two years after discovery of the facts constituting the violation, whichever occurs first.

C. A person who violates this section is guilty of a class 4 felony.

¹⁰⁹ A.R.S. § 44-3101(5) provides:

"Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. Investment adviser includes financial planners and other persons who, as an integral component of other financially related services, provide the foregoing investment advisory services to others for

1 was acting as an investment adviser representative, as defined by A.R.S. § 3101(6),¹¹⁰ they were

2
3 compensation and as part of a business or who hold themselves out as providing the foregoing
4 investment advisory services to others for compensation. Investment adviser does not include:

5 (a) An investment adviser representative.

6 (b) A depository institution.

7 (c) A lawyer, law firm, certified public accountant or accounting firm whose performance
8 of the investment advisory services is solely incidental to the practice of the person's
9 profession or who does not do any of the following:

10 (i) Exercise investment discretion with respect to the assets of clients or maintain
11 custody of the assets of clients for the purpose of investing the assets, except if
12 the person is acting in a bona fide fiduciary capacity such as an executor, trustee,
13 personal representative, estate or trust agent, guardian or conservator.

14 (ii) Accept or receive directly or indirectly any commission, fee or other
15 remuneration contingent on the purchase or sale of any specific security by a client
16 of the person.

17 (iii) Give advice on the purchase or sale of specific securities other than advice
18 about specific securities that is based on financial statement analysis or tax
19 considerations that are reasonably related to and in connection with the person's
20 profession.

21 (d) A publisher, employee or columnist of any newspaper, news column, newsletter, news
22 magazine or business or financial publication or service, whether communicated in hard
23 copy form, by electronic means or otherwise, that does not consist of the rendering of
24 advice on the basis of the specific investment situation of each client.

25 (e) An insurance company or insurance producer that is licensed or authorized by the
26 department of insurance to transact the business of insurance, including the sale of
27 annuities, whose performance of the investment advisory services is solely incidental to
28 the conduct of business as an insurance company or insurance producer and that receives
no special compensation for providing investment advisory services.

(f) A real estate salesperson or real estate broker who is licensed or authorized by the state
real estate department to transact the business of real estate, whose performance as an
investment adviser is solely incidental to the conduct of the individual's business as a
broker or salesman and who receives no special compensation for providing investment
advisory services.

(g) Any officer, director, partner or employee of an entity engaged in selling interest in
entities that invest in real property, including partnerships, corporations or sole
proprietorships, if such transactions are otherwise subject to the securities laws of the
United States or this state.

(h) Mortgage brokers or mortgage bankers who are licensed by the department of financial
institutions to transact the business of a mortgage broker or mortgage banker, and their
employees, whose performance of any investment advisory service is solely incidental to
the conduct of the business of a mortgage broker or mortgage banker and who receives no
special compensation for providing investment advisory services.

¹¹⁰ A.R.S. § 44-3101(6) provides:

"Investment adviser representative" means any partner, officer or director of an investment adviser,
any individual who occupies a status or performs functions similar to a partner, officer or director
of an investment adviser or any other individual who is employed by or associated with an
investment adviser, except clerical or ministerial personnel, and who does any of the following:

(a) Makes any recommendations or otherwise renders advice regarding securities.

(b) Manages accounts or portfolios of clients.

(c) Determines which recommendation or advice regarding securities should be given to a
client if the individual is a member of the investment adviser's investment committee that
determines general investment advice to be given to clients or the individual determines
general client advice if the investment adviser has no investment committee, except that if
an investment adviser has more than five individuals who make recommendations or give
advice, only the supervisors of those individuals are investment adviser representatives.

1 required to be licensed by the Commission.

2 The Division contends that the element that Respondents be “in the business” of providing
3 investment advice was shown by the evidence of record in three ways. First, Respondent Bart Ellis
4 held himself and Oak Capital out as financial advisors by providing the same services as he did when
5 he was a registered investment adviser representative at Ameriprise.¹¹¹ Second, Respondents Bart Ellis
6 and Oak Capital selected investment advisers for their clients when they referred Ms. Miller, Ms.
7 Richter, and Mr. Gelhar to Mr. Kiley at Merrill Lynch.¹¹² Third, they were financial planners to their
8 clients. Ms. Miller testified that she expected Respondent Bart Ellis to perform the same services for
9 her after he left Ameriprise and he gave her a “Financial Plan Proposal” and two “Investment Reports”
10 which list him as her “Financial Advisor.”¹¹³ Mr. Brokaw testified that Ms. Richter and Mr. Stone
11 expected Respondent Bart Ellis to perform the same functions as he did at Ameriprise.¹¹⁴ Emails from
12 Respondent Bart Ellis to Merrill Lynch show that Mr. Gelhar and Ms. Richter were clients of his and
13 that he referred them to Merrill Lynch.¹¹⁵

14 In addition, the Division contends that because Oak Capital was an investment advisor,
15 Respondent Bart Ellis meets the definition of “investment adviser representative” and therefore needed
16 to be registered with the Commission. The Division argues that the evidence of record shows that
17 Respondent Bart Ellis recommended that clients sell their securities and transfer funds to Merrill Lynch
18 and Oak Capital for him to invest; managed accounts and portfolios; and solicited clients to come to
19 Oak Capital.¹¹⁶

20 The Division further contends that Respondents Bart Ellis’s and Oak Capital’s advice involved
21 “securities” as defined by A.R.S. § 44-1801(26).¹¹⁷ First, Respondent Bart Ellis told Ms. Miller and

22 (d) Solicits, offers or negotiates for the sale of or sells investment advisory services.

23 (e) Directly supervises employees who perform any of the acts described in this paragraph.

24 ¹¹¹ Tr. at 136-38; Exh. S-9.

25 ¹¹² Tr. at 138; Exhs. S-8(f) and (g).

26 ¹¹³ Tr. at 134-35 and 138-39; Exhs. S-5, S-7 at ACC003962, S-8 at ACC004722, and S-9 at ACC003906 and 3909.

27 ¹¹⁴ Tr. at 49, 52-53, and 57-58.

28 ¹¹⁵ Exhs. S-8(f) and (g).

¹¹⁶ Tr. at 140-43; Exhs. S-8(f) and (g), S-11.

¹¹⁷ A.R.S. § 44-1801(26) provides:

“Security” means any note, stock, treasury stock, bond, commodity investment contract, commodity option, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, viatical or life settlement investment contract, voting-trust

Ms. Richter to move assets to Merrill Lynch and Oak Capital that included securities in the forms of stocks, futures, and mutual funds.¹¹⁸ Second, Respondents Bart Ellis and Oak Capital used investor funds to buy and sell securities in the Interactive Brokers trading platform.¹¹⁹

Finally, the Division contends that Respondents Ellis's and Oak Capital's use of client funds for personal expenses satisfies the "for compensation" requirement. The Division argues that Respondent Bart Ellis received significant economic benefit from advising his clients and that nearly his entire income came from the clients' principal.¹²⁰ Additionally, the Division argues that Respondent Ellis used nearly half of the investor funds to eat at restaurants, pay car expenses, pay for healthcare, go on vacation, and pay rent.¹²¹

Based on the weight of the evidence, we find that Respondents violated the IM Act.

2. The Securities Act

The Division asserts that Respondents Bart Ellis and Oak Capital violated the Securities Act because they acted as dealers and salesmen.

The Division argues that because Respondents Bart Ellis and Oak Capital meet the definition of "dealer,"¹²² they needed to be registered with the Commission. The Division contends that Respondent Bart Ellis described Oak Capital's purpose as buying, selling, and dealing in securities and

certificate, certificate of deposit for a security, fractional undivided interest in oil, gas or other mineral rights, real property investment contract or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

¹¹⁸ Tr. at 140-43; Exhs. S-7, S-8(f) and (g), S-10 and S-11.

¹¹⁹ Exhs. S-29 and S-30.

¹²⁰ Exhs. S-25 and S-26.

¹²¹ *Id.*

¹²² A.R.S. § 44-1801(9) provides:

"Dealer":

(a) Means a person who directly or indirectly engages full-time or part-time in this state as agent, broker or principal in the business of offering, buying, selling or otherwise dealing or trading in securities issued by another person, and who is not a salesman for a registered dealer or is not a bank or savings institution the business of which is supervised and regulated by an agency of this state or the United States.

(b) Means an issuer, other than an investment company, who, directly or through an officer, director, employee or agent who is not registered as a dealer under this chapter, engages in selling securities issued by such issuer.

(c) Does not include a person who sells or offers to sell securities exclusively to dealers registered under this chapter, and who has no place of business within this state.

(d) Does not include a person who buys or sells securities for his own account, either individually or in a fiduciary capacity, but not as part of a regular business.

1 to manage investment portfolios. The Division further contends that Respondent Bart Ellis told
 2 investors he would continue what he did at Ameriprise.¹²³ Additionally, the Division notes that
 3 Respondent Bart Ellis had no other significant income;¹²⁴ engaged at least part-time in this business;
 4 and was a principal for Oak Capital's investment/finance business because he was Oak Capital's sole
 5 manager and sole member.

6 The Division also argues that Respondent Bart Ellis meets the definition of a broker under the
 7 Federal Securities Exchange Act.¹²⁵ The Division contends that Respondents Bart Ellis's and Oak
 8 Capital's business consisted of managing client investments, which included regular participation in
 9 securities transactions by both advising clients to sell their investments or by using client funds for
 10 trading securities.

11 Based on the weight of the evidence, we find that Respondents violated the Securities Act.

12 3. Anti-Fraud Provisions of the Securities Act and the IM Act

13 The Division asserts that Respondents Bart Ellis and Oak Capital violated the anti-fraud
 14 provisions of the Securities Act and the IM Act by using investor funds to day-trade and for personal
 15 expenses; by failing to disclose Respondent Bart Ellis's bankruptcy and termination from Ameriprise;
 16 and by creating fake account statements.

17 The Division contends that Respondents Bart Ellis and Oak Capital made misrepresentations to
 18 their clients about how they would manage their investments. Specifically, the Division contends that
 19 Ms. Miller and Ms. Richter expected their funds to be invested in CDs and that Mr. Stone expected his
 20 funds to be invested in the purchase of stocks. The Division argues, however, that the clients' funds
 21 were used for day-trading and for Respondent Bart Ellis's personal expenses.

22 The Division further contends that Respondents Bart Ellis and Oak Capital made
 23 misrepresentations to Ms. Miller by sending her fake reports about her investments. The October 2014,
 24 Investment Report shows that Ms. Miller's account included stock in Tesla Motors, Inc., Intel

25 ¹²³ Exh. S-5.

26 ¹²⁴ Exhs. S-25 and S-26.

27 ¹²⁵ 15 U.S.C. § 78c provides:

(a) Definitions

(4) BROKER.-

(A) IN GENERAL. – The term “broker” means any person engaged in the business
 of effecting transactions in securities for the account of others.

Corporation, and Lululemon Athletica Inc., with a total value of \$320,360.¹²⁶ The Division argues, however, that bank records show that Respondent Oak Capital did not own such stock and that Respondent Bart Ellis either spent Ms. Miller's funds on personal expenses or deposited them into a trading account with Interactive Brokers that did not include such stock. Respondent Oak Capital's assets for October 2014 consisted of \$117,240.91¹²⁷ cash in its Interactive Brokers account and \$322.77 cash in its Wells Fargo account.¹²⁸

Lastly, the Division contends that Respondents Bart Ellis and Oak Capital failed to make at least two disclosures to clients that were material to assessing Respondent Bart Ellis's qualifications to be an investment adviser or to purchase and sell securities. First, the Division contends Respondents Bart Ellis and Oak Capital failed to inform clients that Ameriprise fired Respondent Bart Ellis for violating company rules and instead told them he was setting out on his own or going to work for another firm. Second, Respondent Bart Ellis did not tell investors that on March 7, 2012, he filed for Chapter 13 bankruptcy in the Northern District of Illinois Federal Court or that his unsecured liabilities included \$31,833 in credit card debt and a \$215,000 judgment against him.

Based on the weight of the evidence, we find that Respondents violated the anti-fraud provisions of the Securities Act and the IM Act.

B. Liability of the Marital Community

The Division contends that the liabilities incurred by Respondent Bart Ellis from his violations of the Securities Act and the IM Act are liabilities of his and Respondent Spouse's marital community.

The Commission has the authority to join a spouse in an action to determine the liability of the marital community.¹²⁹ With limited exceptions, all property acquired by either the husband or the wife

¹²⁶ Exh. S-9 at ACC003912.

¹²⁷ Exhs. S-27 and S-31.

¹²⁸ Exh. S-20.

¹²⁹ A.R.S. § 44-2031(C) provides:

The commission may join the spouse in any action authorized by this chapter to determine the liability of the marital community. This subsection does not authorize the commission to join any individual who is divorced from the defendant at the time an action authorized by this chapter is filed.

A.R.S. § 44-3291(C) provides:

The commission may join the spouse in any action authorized by this chapter to determine the liability of the marital community. This subsection does not authorize the commission to join any individual who is divorced from the defendant at the time an action authorized by this chapter is filed.

1 during marriage is the community property of both husband and wife.¹³⁰ The Arizona Supreme Court
 2 has found that “the presumption of law is, in the absence of the contrary showing, that all property
 3 acquired and all business done and transacted during coverture, by either spouse, is for the
 4 community.”¹³¹

5 Under A.R.S. § 25-214(B), the spouses have “equal management, control and disposition rights
 6 over their community property and have equal power to bind the community.”¹³² Either spouse may
 7 contract debts or otherwise act for the benefit of the community except as prohibited under A.R.S. §

14 ¹³⁰ A.R.S. § 25-211 provides:

15 A. All property acquired by either husband or wife during the marriage is the community property
 16 of the husband and wife except for property that is:

1. Acquired by gift, devise or descent.
2. Acquired after service of a petition for dissolution of marriage, legal separation or
 17 annulment if the petition results in a decree of dissolution of marriage, legal separation or
 18 annulment.

B. Notwithstanding subsection A, paragraph 2, service of a petition for dissolution of marriage, legal
 19 separation or annulment does not:

1. Alter the status of preexisting community property.
2. Change the status of community property used to acquire new property or the status of
 20 that new property as community property.
3. Alter the duties and rights of either spouse with respect to the management of community
 21 property except as prescribed pursuant to section 25-315, subsection A, paragraph 1,
 22 subdivision (a).

¹³¹ *Johnson v. Johnson*, 131 Ariz. 38, 45, 638 P.2d 705, 712 (1981), citing *Benson v. Hunter*, 23 Ariz. 132, 134-35, 202 P.
 233, 233-34 (1921).

¹³² A.R.S. § 25-214 provides:

23 A. Each spouse has the sole management, control and disposition rights of each spouse's separate
 24 property.

B. The spouses have equal management, control and disposition rights over their community
 25 property and have equal power to bind the community.

C. Either spouse separately may acquire, manage, control or dispose of community property or bind
 26 the community, except that joinder of both spouses is required in any of the following cases:

1. Any transaction for the acquisition, disposition or encumbrance of an interest in real
 27 property other than an unpatented mining claim or a lease of less than one year.
2. Any transaction of guaranty, indemnity or suretyship.
3. To bind the community, irrespective of any person's intent with respect to that binder,
 28 after service of a petition for dissolution of marriage, legal separation or annulment if the
 petition results in a decree of dissolution of marriage, legal separation or annulment.

25-214.¹³³ “[A] debt is incurred at the time of the actions that give rise to the debt.”¹³⁴ “In an action on such a debt or obligation the spouses shall be sued jointly and the debt or obligation shall be satisfied: first, from the community property, and second, from the separate property of the spouse contracting the debt or obligation.”¹³⁵ “A debt incurred by a spouse during marriage is presumed to be a community obligation; a party contesting the community nature of a debt bears the burden of overcoming that presumption by clear and convincing evidence.”¹³⁶

The Division argues that Respondents presented no evidence at the hearing rebutting the presumption of community liability. Furthermore, while it contends it had no obligation to do so, the Division asserts it presented evidence that some of the acquired funds directly benefitted the community by paying rent for a home that Respondent Spouse was leasing and living in and by paying for credit cards in Respondent Spouse’s name.

Respondent Spouse contends that the Division was wrong to request that she be held financially accountable for the wrong doing of her husband solely because she was married to him at the time he engaged in the conduct that gave rise to this proceeding. Respondent Spouse notes that she did not know about or consent to her husband’s conduct and that they kept separate bank accounts and maintained separate employment. Furthermore, relying on the language of A.R.S. § 25-215(D) that a spouse may contract debts and otherwise act for the benefit of the community, Respondent Spouse argues that the obligations weren’t contracted for and thus not presumed to be community obligations. Finally, Respondent Spouse argues that the allegations against Respondents are tortious in nature and that there is no presumption of community liability. Thus, she argues that the community is not liable

¹³³ A.R.S. § 25-215 provides:

A. The separate property of a spouse shall not be liable for the separate debts or obligations of the other spouse, absent agreement of the property owner to the contrary.

B. The community property is liable for the premarital separate debts or other liabilities of a spouse, incurred after September 1, 1973 but only to the extent of the value of that spouse’s contribution to the community property which would have been such spouse’s separate property if single.

C. The community property is liable for a spouse’s debts incurred outside of this state during the marriage which would have been community debts if incurred in this state.

D. Except 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 and the debt or obligation shall be satisfied: first, from the community property, and second, from the separate property of the spouse contracting the debt or obligation.

¹³⁴ *Arab Monetary Fund v. Hashim*, 219 Ariz. 108, 111, 193 P.3d 802, 805 (Ct. App. 2008).

¹³⁵ A.R.S. § 25-215(D).

¹³⁶ *Hrudka v. Hrudka*, 186 Ariz. 84, 91-92, 919 P.2d 179, 186-87 (Ct. App. 1995).

1 for one spouse's malicious acts unless there is a showing the other spouse consented to them.

2 The Ellises were married during the time Respondents violated the Securities Act and the IM
3 Act.¹³⁷ Any debt created by an order of restitution and administrative penalties arising from these
4 violations would be considered as having been incurred at the time of the violations. We concur with
5 the Division that Respondent Spouse did not overcome the presumption of a community obligation by
6 clear and convincing evidence. Rather, the evidence of record supports the Division's argument that
7 some of the acquired funds directly benefited the community in the form of rent. Furthermore, we
8 disagree with Respondent Spouse that the term "contract" in A.R.S. § 25-215(D) necessitates a written
9 document. As cited by the Division, the phrase "contract debt" in A.R.S. § 25-215(D) has a broader
10 interpretation to include any debt incurred by either spouse during the marriage. Finally, we are not
11 persuaded by Respondent Spouse's argument that the Respondents' violations of the Securities Act
12 and the IM Act are considered tortious in nature, which would shift the burden to require a malicious
13 act that the other spouse consented to in order to bind the community. Respondent Spouse fails to cite
14 any authority that equates a statutory violation to an intentional tort claim. Accordingly, we find that
15 the marital community of the Ellises is subject to liability resulting from this proceeding.

16 C. Remedies

17 The Division contends that the Respondents should be ordered to pay restitution and
18 administrative penalties for violations of the Securities Act and the IM Act.

19 1. Restitution

20 The Division asserts that the Respondents should pay restitution in the amount of \$1,098,851.
21 The Commission has the authority to order restitution pursuant to A.R.S. § 44-2032.¹³⁸ The evidence
22

23 ¹³⁷ Respondent Spouse Answer.

24 ¹³⁸ A.R.S. § 44-2032 provides, in pertinent part:

25 If it appears to the commission, either on complaint or otherwise, that any person has engaged in, is
engaging in or is about to engage in any act, practice or transaction that constitutes a violation of
this chapter, or any rule or order of the commission under this chapter, the commission, in its
discretion may:

26 1. Issue an order directing such person to cease and desist from engaging in the act, practice
or transaction, or doing any other act in furtherance of the act, practice or transaction, and
27 to take appropriate affirmative action within a reasonable period of time, as prescribed by
the commission, to correct the conditions resulting from the act, practice or transaction
28 including, without limitation, a requirement to provide restitution as prescribed by rules of
the commission. ...

of record supports the Division's assertion that the Respondents should pay restitution in the amount of \$1,098,851.¹³⁹ Accordingly, the Respondents, including the marital community of the Ellises, should be liable to jointly and severally pay restitution in the amount of \$1,098,851, plus interest from the date judgment is entered in this matter to the date of repayment.¹⁴⁰

2. Administrative Penalties

Under A.R.S. § 44-2036(A), the Commission has authority to assess an administrative penalty of no more than \$5,000 for each violation of the Securities Act committed.¹⁴¹ The Division asserts that the Respondents engaged in 14 unregistered transactions by unregistered dealers.¹⁴² The Division contends that each transaction involved fraud, resulting in another 14 violations. As such, the Division argues that the Commission could order up to \$140,000 in penalties for the Respondents' violations of the Securities Act.

Under A.R.S. § 44-3296(A), the Commission has authority to assess an administrative penalty of no more than \$1,000 for each violation of the IM Act committed.¹⁴³ The Division asserts the 14 transactions also constitute violations of the registration and anti-fraud provisions of the IM Act. As such, the Division argues that the Commission could order up to \$28,000 in penalties for the Respondents' violations of the IM Act.

The Division recommends that the Commission assess at least a \$100,000 penalty against the Respondents. Based on the evidence of record, we find an administrative penalty of \$100,000 to be appropriate.

* * * * *

Having considered the entire record herein and being fully advised in the premises, the Commission finds, concludes, and orders that:

¹³⁹ Tr. 105:5-10; Exh. S-28.

¹⁴⁰ Interest rate to be calculated at the time of judgment pursuant to A.R.S. § 44-1201.

¹⁴¹ A.R.S. § 44-2036(A) provides:

A person who, in an administrative action, is found to have violated any provision of this chapter or any rule or order of the commission may be assessed an administrative penalty by the commission, after a hearing, in an amount of not to exceed five thousand dollars for each violation.

¹⁴² Exh. S-28.

¹⁴³ A.R.S. § 44-3296(A) provides:

A person who, in an administrative action, is found to have violated this chapter or any rule or order of the commission may be assessed an administrative penalty by the commission, after a hearing, of not more than one thousand dollars for each violation.

FINDINGS OF FACT

1
2 1. Oak Capital is a manager-managed, Arizona limited liability company formed by Bart
3 J. Ellis on October 22, 2012. Mr. Ellis is Oak Capital's sole listed member, manager, and statutory
4 agent. Oak Capital lists in its articles of organization an address on Chaparral Road in Paradise Valley,
5 Arizona, as its place of business.¹⁴⁴ Oak Capital has not been registered by the Commission as a
6 securities salesman or dealer.¹⁴⁵

7 2. From October 2012, through April 2015, Mr. Ellis was a married man and a resident of
8 the state of Arizona.¹⁴⁶ Mr. Ellis has not been registered by the Commission as a securities salesman
9 or dealer.¹⁴⁷

10 3. The Ellises married on August 28, 2004, and were still married at the time of the
11 hearing.¹⁴⁸ Respondent Spouse was joined in this action under A.R.S. §§ 44-2031(C) and 44-3291(C)
12 solely for the purpose of determining the liability of the marital community.

13 4. From October 2012, through April 2015, Mr. Ellis was acting for his own benefit and
14 for the benefit and/or furtherance of his and Respondent Spouse's marital community.

15 5. From October 1999, through October 2012, Mr. Ellis worked for Ameriprise as a
16 financial adviser.¹⁴⁹

17 6. On March 3, 2012, Mr. Ellis filed for bankruptcy in Illinois.¹⁵⁰ The liabilities that Mr.
18 Ellis listed in his bankruptcy included \$31,833 of credit card debt and a \$215,000 judgment from
19 Morgan Stanley.¹⁵¹

20 7. On October 8, 2012, Ameriprise terminated Mr. Ellis for violating company policy.¹⁵²

21 8. On October 22, 2012, Mr. Ellis formed Oak Capital.¹⁵³

22 9. Upon moving to Arizona in October 2012, the Ellises first lived in a residence on
23

24 ¹⁴⁴ Exh. S-12(a).

25 ¹⁴⁵ Exh. S-2.

26 ¹⁴⁶ Respondent Spouse Answer.

27 ¹⁴⁷ Exh. S-1.

28 ¹⁴⁸ Respondent Spouse Answer.

¹⁴⁹ Tr. 24:21-23; Exh. S-5.

¹⁵⁰ Tr. 20:24-21:9; Exh. S-6.

¹⁵¹ Exh. S-6, Schedule F.

¹⁵² Exh. S-5 at 3.

¹⁵³ Exh. S-12(a).

1 Chaparral Road in Paradise Valley. Around March 2013, they moved to a rental home in Scottsdale.
 2 Respondent Spouse is listed as the tenant on the lease for the Scottsdale property.¹⁵⁴

3 10. In a business charter signed by Mr. Ellis, Mr. Ellis describes Oak Capital's business as
 4 that of a broker or investment adviser.¹⁵⁵

5 11. Based on Mr. Ellis's representations and advice, from November 2012, through April
 6 2014, Barbara Miller wrote eight checks and made two wire transfers to Oak Capital's bank accounts
 7 totaling \$905,000.¹⁵⁶ Ms. Miller believed that her funds would be invested in CDs.¹⁵⁷

8 12. Based on Mr. Ellis's representations and advice, on February 19, 2014, Steve Stone
 9 invested \$27,500 with Oak Capital.¹⁵⁸ Mr. Stone received \$23,649 as a return on his investment.¹⁵⁹

10 13. Based on Mr. Ellis's representations and advice, in January and June 2013, Ruth Richter
 11 wrote two checks to Oak Capital totaling \$120,000.¹⁶⁰ Ms. Richter believed that her funds would be
 12 invested in CDs.¹⁶¹

13 14. Based on Mr. Ellis's representations and advice, on February 28, 2013, Thomas Gelhar
 14 wrote a \$70,000 check to Oak Capital.¹⁶²

15 15. Mr. Ellis failed to disclose to his investors that he was terminated from Ameriprise for
 16 violating company rules and that on March 7, 2012, he filed for Chapter 13 bankruptcy in Illinois,
 17 listing liabilities that included \$31,833 of credit card debt and a \$215,000 judgment from Morgan
 18 Stanley.¹⁶³

19 16. From October 2012, through March 2015, Mr. Ellis deposited a total of \$1,127,146 into
 20 Oak Capital's FirstBank and Wells Fargo accounts, with all but \$4,646 of the deposits coming from
 21 the investors described above.¹⁶⁴ About half of the deposits from Oak Capital's bank accounts went to
 22 a trading account with Interactive Brokers, which was controlled by Mr. Ellis to trade in stocks, options,

23 ¹⁵⁴ Respondent Spouse Answer.

24 ¹⁵⁵ Exh. S-24 at ACC000413.

¹⁵⁶ Exh. S-25; Exh. S-28.

25 ¹⁵⁷ Tr. 139:18-143:6.

¹⁵⁸ Exh. S-15 at ACC000230.

26 ¹⁵⁹ Tr. 104:23-105:4; Exh. S-28.

¹⁶⁰ Exh. S-28.

27 ¹⁶¹ Exh. S-11.

¹⁶² Exh. S-28.

28 ¹⁶³ Exh. S-6.

¹⁶⁴ Exh. S-25.

warrants, Forex, futures, and future options.¹⁶⁵ Over a period of 28 months, Mr. Ellis lost a total of \$538,239 from trading activities and paid \$78,341 in fees and other expenses.¹⁶⁶

17. Mr. Ellis spent the remaining half of the investors' funds on personal expenses, including:

- \$57,104 in rent, including \$49,999 to Becky Youman, the landlord of the house Respondent Spouse was leasing;
- \$46,300 on retail purchases;
- Credit card payments totaling \$36,126, including \$10,477 to Respondent Spouse's account;
- \$32,534 on automobiles and repairs;
- \$9,068 on medical expenses;
- \$19,723 on travel and entertainment;
- \$12,358 on lodging;
- Utilities bills totaling \$19,723; and
- \$31,183 on restaurants.¹⁶⁷

18. Ms. Miller never received any money back from her \$905,000 investment. Ms. Richter never received any money back from her \$120,000 investment. Mr. Gelhar never received any money back from his \$70,000 investment. Mr. Stone received all but \$3,851 of his \$27,500 investment. In total, \$1,098,851 of investment funds were not returned to Mr. Ellis's investors.¹⁶⁸

19. These findings of fact are based upon the Discussion above, and those findings are also incorporated herein.

CONCLUSIONS OF LAW

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

2. The findings contained above are incorporated herein.

¹⁶⁵ Exh. S-24; Exh. S-25; Exh. S-28.

¹⁶⁶ Exh. S-27; Exh. S-31.

¹⁶⁷ Exh. S-25; Exh. S-26.

¹⁶⁸ Tr. 104:23-105:4; Exh. S-28.

1 3. The Respondents offered and sold securities within the meaning of A.R.S. § 44-1801.

2 4. The Respondents violated A.R.S. § 44-1842 by offering and selling securities in Arizona
3 while not registered as dealers or salesmen.

4 5. The Respondents committed fraud in the offer and sale of securities, in violation of
5 A.R.S. § 44-1991.

6 6. The Respondents violated A.R.S. § 44-3151 by transacting business in Arizona as
7 investment advisers or investment adviser representatives while not licensed.

8 7. The Respondents committed fraud in transacting business as investment advisers or
9 investment adviser representatives, in violation of A.R.S. § 44-3241.

10 8. The Respondents' conduct is grounds for a cease and desist order pursuant to A.R.S. §§
11 44-1962(B), 44-2032, and 44-3292.

12 9. Respondents' conduct is grounds for an order of restitution pursuant to A.R.S. §§ 44-
13 1962(B), 44-2032, and 44-3292, and A.A.C. R14-4-308, for which the marital community of the Ellises
14 should be jointly and severally liable subject to the limitations of A.R.S. § 25-215.

15 10. Respondents' conduct is grounds for an administrative penalty pursuant to A.R.S. §§
16 44-1962(B), 44-2036, and 44-3296, for which the marital community of the Ellises should be jointly
17 and severally liable subject to the limitations of A.R.S. § 25-215.

18 **ORDER**

19 IT IS THEREFORE ORDERED that pursuant to the authority granted to the Commission under
20 A.R.S. §§ 44-1962, 44-2032, and 44-3296, Respondents Oak Capital Partners, LLC and Bart J. Ellis
21 shall cease and desist from their actions, as described above, in violation of A.R.S. §§ 44-1842, 44-
22 1991, 44-3151, and 44-3241.

23 IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under
24 A.R.S. §§ 44-1962, 44-2032, and 44-3296, Respondents Oak Capital Partners, LLC and Bart J. Ellis,
25 individually, and (to the extent allowable pursuant to A.R.S. § 25-215) the marital community of Bart
26 J. Ellis and Colleen Ellis, jointly and severally, shall make restitution in the amount of \$1,098,851,
27 payable to the Arizona Corporation Commission within 90 days of the effective date of this Decision.
28 Such restitution shall be made pursuant to A.A.C. R14-4-308 subject to legal setoffs by the

1 Respondents and confirmed by the Director of Securities.

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

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

8 IT IS FURTHER ORDERED that the Commission shall disburse the restitution funds on a *pro*
9 *rata* basis to the investors shown on the records of the Commission. Any restitution funds that the
10 Commission cannot disburse because the investor refuses to accept such payment, or because the
11 investor is deceased and the Commission cannot reasonably identify and locate the deceased investor's
12 spouse or natural children surviving at the time of distribution, shall be dispersed on a *pro rata* basis
13 to the remaining investors shown on the records of the Commission. Any funds that the Commission
14 determines it is unable to or cannot feasibly disburse shall be transferred to the general fund of the State
15 of Arizona.

16 IT IS FURTHER ORDERED that Respondents Oak Capital Partners, LLC and Bart J. Ellis,
17 individually, and (to the extent allowable pursuant to A.R.S. § 25-215) the marital community of Bart
18 J. Ellis and Colleen Ellis, jointly and severally shall pay to the State of Arizona an administrative
19 penalty in the amount of \$100,000 for multiple violations of the registration and anti-fraud provisions
20 of the Securities Act and the IM Act, pursuant to A.R.S. §§ 44-1962(B), 44-2036, and 44-3296. Said
21 administrative penalty shall be payable by either cashier's check or money order payable to "the State
22 of Arizona" and presented to the Arizona Corporation Commission for deposit in the general fund for
23 the State of Arizona.

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

28 IT IS FURTHER ORDERED that if Respondents fail to pay the administrative penalty ordered

1 hereinabove, any outstanding balance plus interest, at the rate of the lesser of ten percent *per annum* or
2 at a rate *per annum* that is equal to one percent plus the prime rate as published by the Board of
3 Governors of the Federal Reserve System in Statistical Release H.15, or any publication that may
4 supersede it on the date that the judgment is entered, may be deemed in default and shall be immediately
5 due and payable, without further notice.

6 IT IS FURTHER ORDERED that if any of the Respondents fail to comply with this Order, any
7 outstanding balance shall be in default and shall be immediately due and payable without notice or
8 demand. The acceptance of any partial or late payment by the Commission is not a waiver of default
9 by the Commission.

10 IT IS FURTHER ORDERED that default shall render Respondents liable to the Commission
11 for its cost of collection and interest at the maximum legal rate.

12 IT IS FURTHER ORDERED that if any of the Respondents fail to comply with this Order, the
13 Commission may bring further legal proceedings against the Respondents including application to the
14 Superior Court for an order of contempt.

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IT IS FURTHER ORDERED that pursuant to A.R.S. § 44-1974, upon application, the Commission may grant a rehearing of this Order. The application must be received by the Commission at its offices within twenty (20) calendar days after entry of this Order. Unless otherwise ordered, filing an application for rehearing does not stay this Order. If the Commission does not grant a rehearing within twenty (20) calendar days after filing the application, the application is considered to be denied. No additional notice will be given of such denial.

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

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.


CHAIRMAN FORESE


COMMISSIONER DUNN


COMMISSIONER TOBIN


COMMISSIONER OLSON


COMMISSIONER BURNS

IN WITNESS WHEREOF, I, TED VOGT, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 3rd day of January 2018.


TED VOGT
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____
BDS:sa(rt)

SERVICE LIST FOR:

BART J. ELLIS

DOCKET NO.:

S-20949A-16-0002

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