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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2022-000130-001 DT 01/12/2023

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
P. McKinley
Deputy

ARIZONA CORPORATION COMMISSION

ELIZABETH MARIE SCHMITT

v.

RONALD F STEVENSON (001)
AMERICAN FINANCIAL SECURITY L L C (001)
AMERICAN FINANCIAL INVESTMENTS L L C (001)

ROBERT D MITCHELL

JUDGE KILEY
REMAND DESK-LCA-CCC
ARIZONA CORPORATION COMMISSION
1300 W WASHINGTON ST
PHOENIX AZ 85007-2996

RECORD APPEAL RULING / AFFIRMED AS MODIFIED

Arizona Corporation Commission Decision No. 78528

Appellants Ronald F. Stevenson ("Stevenson"), individually and as successor in interest to his late spouse Barbara Stevenson, American Financial Security, LLC ("AFS") and American Financial Investments, LLC ("AFI") (collectively, "Appellants") appeal from the April 28, 2022 Opinion and Order (the "Final Decision") of Appellee Arizona Corporation Commission ("Appellee" or the "Commission"). For the following reasons, this Court affirms the Final Decision as modified herein.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

Viewed in the requisite light most favorable to sustaining the administrative decision, *see Shorey v. Ariz. Corp. Comm'n*, 238 Ariz. 253, 258 ¶ 14 (App. 2015), the relevant facts can be summarized as follows:

Prior to these proceedings, Stevenson had been licensed by the Commission as an insurance producer since 2002, and as an investment advisor since 2016. Index of Record ("I.R.") A-40, Final Decision, at pp. 56-57, 96. Stevenson has never been registered as a salesman or dealer of securities. *Id*. at p. 96; I.R. C-1, Certification.

Stevenson and Barbara Stevenson were married from May 2012 until she passed away in September 2020. I.R. A-40, Final Decision, at p. 96.

AFS is a limited liability company that was in the business of selling insurance products and tax preparation services. Stevenson and Barbara Stevenson were AFS's only members. I.R. A-40, Final Decision, at pp. 56-58, 96; I.R. C-56, AFS's Articles of Organization; I.R. C-57, AFS's Articles of Amendment. AFS is not registered as a securities salesman or dealer. I.R. A-40, Final Decision, at p. 96; I.R. C-3, Certification.

AFI is a limited liability company that offers retirement planning and investment advisory services. Prior to these proceedings, AFI was licensed as an investment advisor, and had been since 2016. I.R. A-40, Final Decision, at pp. 57-58, 96-97. AFI is not registered as a securities salesman or dealer. I.R. C-4, Certification.

AFS and AFI shared a website and jointly advertised their services in print and broadcast media in the Prescott area. Additionally, Stevenson conducted presentations and seminars that resulted in new clients for AFS and AFI. I.R. A-40, Final Decision, at p. 57; I.R. A-23, Respondents' Answer to [Amended Notice of Opportunity for Hearing], at p. 4; I.R. B-2, Reporter's Transcript of Proceedings on April 19, 2021 ("R.T. 4/19/21"), at pp. 81-82 (testimony of investor Agnes Mason); I.R. B-3, Reporter's Transcript of Proceedings on April 20, 2021 ("R.T. 4/20/21"), at p. 122 (testimony of investor Jodie Ballard); I.R. B-5, Reporter's Transcript of Proceedings on April 22, 2021 ("R.T. 4/22/21"), at pp. 390-91 (testimony of investor Sylvia Schulz); I.R. B-6, Reporter's Transcript of Proceedings on April 23, 2021 ("R.T. 4/23/21"), at p. 510 (testimony of investor Gerald Winters); I.R. C-41, Promotional Material for AFI and AFS, at p. AF0010895; I.R. C-42, Newspaper Advertisement and Promotional Materials for AFI and AFS; I.R. C-43, Promotional Materials for AFI.

In 2011, Barry Rybicki ("Rybicki") of EquiAlt, LLC ("EquiAlt") met with Stevenson to discuss investment opportunities with EquiAlt. Rybicki explained that EquiAlt was in the business of purchasing, fixing, and re-selling financially distressed properties. I.R. A-40, Final Decision, at pp. 58-59.

Beginning in June 2012, and continuing until July 2019, Stevenson and AFS offered clients and prospective clients investments in debentures (the "EquiAlt Debentures") issued by companies associated with EquiAlt. I.R. A-40, Final Decision, at pp. 59-60, 97.

When he met with clients and prospective clients, Stevenson would explain that EquiAlt was in the business of using investor funds to purchase financially distressed properties for subsequent re-sale or lease. He also provided them with a brochure containing information about EquiAlt. He gave at least some of the investors assurances that they would receive a return of 8% to 9% on their investment, I. I.R. A-40, Final Decision, at pp. 59-60, 97, 99-100. *See also* I.R. B-2, R.T. 4/19/21, at p. 27 (testimony of investor Rosemarie Vedda); I.R. B-3, R.T. 4/20/21, at pp. 237, 247 (testimony of investor Terri Metzler); I.R. B-4, Reporter's Transcript of Proceedings on April 21, 2021 ("R.T. 4/21/21"), at p. 277 (testimony of investor Erna Frank); I.R. B-4, R.T. 4/21/21, at p. 302 (testimony of investor Ron Frank).

Stevenson also told at least some investors that he and his wife had personally invested in the EquiAlt Debentures. I.R. B-4, R.T. 4/21/21, at p. 313 (testimony of investor Ron Frank); I.R. B-6, R.T. 4/23/21, at p. 560 (testimony of investor Robin Thomas).

Once a client decided to make an investment, Stevenson would meet with him or her and provide documentation, including a Private Placement Memorandum, Subscription Agreement, and Prospective Purchaser Questionnaire. After the documents were signed, Stevenson would send them to EquiAlt. EquiAlt would subsequently send the documentation to Stevenson and AFS to distribute to investors. I.R. B-2, R.T. 4/19/21, at p. 34 (testimony of investor Rosemarie Vedda).

The Subscription Agreement states, *inter alia*, that "[t]he Units are being sold through [EquiAlt] without commissions." I.R. C-8, Subscription Agreement, at p. ACC000633; I.R. C-29, Subscription Agreement, at p. ACC005089. Stevenson affirmatively told some of the investors that neither he nor AFS were receiving commissions. I.R. B-4, R.T. 4/21/21, at p. 277 (testimony of investor Erna Frank); *id*. at pp. 305, 313 (testimony of investor Ron Frank). *See also* I.R. A-40, Final Decision, at p. 99; I.R. B-4, Information obtained by the Division during its investigation, however, establishes that AFS received commissions totaling $2,010,802.56 for

the sale of EquiAlt Debentures. I.R. A-40, Final Decision, at p. 98. *See also* I.R. C-16, 1099s from 2015 through 2019 reflecting "nonemployee compensation" to AFS; A-23 at 7:8-10.

Many of those who invested through Stevenson were 65 years of age or older, with little to no investment experience, and little risk tolerance. I.R. A-40, Final Decision, at p. 98. *See also* I.R. B-4, R.T. 4/21/21, at p. 302 (testimony of investor Ron Frank); I.R. B-2, R.T. 4/19/21, at p. 84 (testimony of investor Agnes Mason). Investor Agnes Mason ("Mason"), for example, was 90 years old when she invested in EquiAlt in 2012, and had "[n]ever" invested "in the stock market or anything risky." I.R. B-2, R.T. 4/19/21, at pp. 84, 112.

Between 2012 and 2019 Stevenson and AFS sold 254 EquiAlt Debentures to investors in an amount totaling $19,459,875.00, for which they were paid commissions totaling $2,010,802.56. I.R. A-40, Final Decision, at p. 98.

During the administrative proceedings, Stevenson testified that, in March 2013, he received a phone call from Mason stating that she had received a phone call from attorneys with the Division. I.R. B-7, R.T. 4/26/21, at pp. 653-55. "[A] few days" later, he stated, two representatives of the Division called him. *Id*. at p. 656. According to Stevenson, he "asked them" if "everything" was "okay with EquiAlt" and whether he "need[ed] additional licensing to represent this company." *Id*. He testified that they replied, "[I]f there's anything wrong we will get back to you." *Id*. at p. 657. He "did not hear anything further from the Division representatives." *Id*. at pp. 662-63. Stevenson further testified that he let Rybicki know that he had been contacted by the Division, and that Rybicki responded by stating that "the State of Arizona does not understand the deal structure." *Id*. at p. 661. Rybicki then urged Stevenson to reassure his clients about EquiAlt, stating,

> If your investors are in doubt, please feel free to mention that the company is represented by a national law firm that timely filed the securities exemption required under Arizona law.

Id. at 661-62. When asked why he did not seek legal advice from an independent attorney instead of relying on the legal opinion of EquiAlt's attorney, Stevenson replied, "I felt like I didn't need to," noting that EquiAlt's attorney was with "a big law firm" and had "tremendous accolades behind his name." *Id*. at p. 665.

Stevenson further testified that "he asked the Commission about EquiAlt again in 2016" when he was seeking licensure as an investment advisor. I.R. A-40, Final Decision, at p. 62. According to Stevenson, "the Commission representative did not point out any issues or

concerns about EquiAlt at that time." *Id*. If he had been told "that there was a problem with EquiAlt," he testified, "he would have walked away" from it. *Id*. at p. 61 (internal quotations omitted).

Following an investigation, the Securities and Exchange Commission ("SEC") filed an enforcement action in 2020 against EquiAlt, Rybicki and others. I.R. C-80, Amended Complaint for Injunctive and Other Relief in *S.E.C. v. Brian Davison, Barry Rybicki, et al*., Federal District Court Case No. 8:20-cv-325-MSS-AEP, at p. RS20235 – p. RS20238. *See also* I.R. B-2, R.T. 4/19/21, at pp. 48-49; *id*. at p. 110; I.R. B-3, R.T. 4/20/21, at pp. 247-48; I.R. B-7, R.T. 4/26/21, at pp. 590-91, 673;

In 2020, the Commission's Securities Division (the "Division") brought an enforcement action against Appellants alleging violations of A.R.S. §§ 44-1801 – 2126, the Arizona Securities Act ("ASA"), and A.R.S. §§ 44-3296 and -3201, the Investment Management Act.

A six-day administrative hearing was held on April 19, 20, 21, 22, 23, and 26, 2021. I.R. A-40, Final Decision, at p. 1. Appellants were represented by counsel. Following the conclusion of the hearing and the filing of post-hearing briefing, Administrative Law Judge Yvette Kinsey issued a Recommended Opinion and Order on or about March 29, 2022. ROA A-37, Recommended Opinion and Order.

On April 28, 2022, the Commission adopted the Recommended Opinion and Order as its Final Decision. *See* ROA A-40, Final Decision. In its Final Decision, the Commission found, inter alia, that the EquiAlt Debentures constitute "securities" within the meaning of the ASA, that the EquiAlt Debentures were neither registered nor exempt from registration requirements, and that Stevenson and AFS violated A.R.S. § 44-1991(A)(2) by means of misleading statements and material omissions in connection with the sale of the EquiAlt Debentures. *Id*. at pp. 74, 75, 79, 82, 84, 86. The Commission ordered the revocation of the licenses of Stevenson and AFI as an investment advisor representative and investment advisor, respectively, and further ordered Appellants to pay restitution of $19,459,875.00 along with other administrative penalties. *Id*. at pp. 102-103.

Appellants filed a timely Notice of Appeal. This Court has jurisdiction pursuant to Ariz. Const. art. 6, § 14 and A.R.S. §§ 12-124(A), 12-905(A), and 44-1981.

ISSUES PRESENTED

After reviewing the parties' briefing, the Court finds that this case presents the following issues:

1. Did the Commission Abuse Its Discretion and/or Commit an Error of Law in Rejecting Appellants' "Equitable Estoppel" Defense?

2. Did the Commission Abuse Its Discretion and/or Commit an Error of Law in Finding that Stevenson and AFS Violated A.R.S. § 44-1991(A)(2)?

3. Did the Commission Abuse Its Discretion and/or Commit an Error of Law in Ordering Appellants to Pay Restitution of $19,459,875?

4. Did the Commission Abuse Its Discretion and/or Commit an Error of Law in Ordering Appellants to Pay Administrative Penalties of $250,000 Pursuant to A.R.S. § 44-2036?

5. Did the Commission Abuse Its Discretion and/or Commit an Error of Law in Ordering Appellants to Pay Administrative Penalties of $25,000 Pursuant to A.R.S. §§ 44-3296 and -3201?

6. Did the Commission Abuse Its Discretion and/or Commit an Error of Law in Ordering the Revocation of Stevenson's Investment Advisor Representative License and AFI's Investment Advisor License?

STANDARD OF REVIEW & APPLICABLE LEGAL PRINCIPLES

The Court's review of a final decision by the Commission is limited to "whether the administrative action was illegal, arbitrary, capricious or involved an abuse of discretion." *Hirsch v. Ariz. Corp. Comm'n*, 237 Ariz. 456, 461-62 ¶ 18 (App. 2015) (citation and internal quotations omitted). An abuse of discretion will be found if the record does not provide substantial support for the agency's decision, or if the agency committed an error of law in making its decision. *See Carey v. Soucy*, 245 Ariz. 547, 552 ¶ 19 (App. 2018) ("A court abuses its discretion where the record fails to provide substantial support for its decision or the court commits an error of law in reaching the decision."). The party challenging the Commission's decision has the "burden" of "show[ing] by clear and satisfactory evidence that the Commission's decision was unreasonable or unlawful." *Ariz. Corp. Comm'n v. Pacific Motor Trucking Co.*, 116 Ariz. 465, 467 (App. 1977).

"In reviewing the facts determined by" the Commission, the reviewing court does not "reweigh the evidence," and will affirm the decision "if substantial evidence supports" it. *Nutek Info. Sys., Inc. v. Ariz. Corp. Comm'n*, 194 Ariz. 104, 107 ¶ 15 (App. 1998). *See also DeGroot v. Ariz. Racing Comm'n*, 141 Ariz. 331, 336 (App. 1984) ("[I]n order to reverse the agency's decision, the trial court must find that there was no substantial evidence to support the agency decision."). The "substantial evidence" required to affirm an agency decision will be found to exist "if either of two inconsistent factual conclusions are supported by the record." *Eastern Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n*, 206 Ariz. 399, 409 ¶ 35 (App. 2003). *See also Wales v. Ariz. Corp. Comm'n*, 249 Ariz. 263, 268 ¶ 19 (App. 2020) ("Substantial evidence exists if the evidentiary record supports the decision, even if the record would also support a different conclusion."). Moreover, a court reviewing a decision by the Commission "view[s] the evidence in the light most favorable to upholding the Commission's decision." *Shorey*, 238 Ariz. at 258 ¶ 14.

Courts review questions of law *de novo*. A.R.S. § 12-910(F).

An administrative agency's decision will be affirmed if it is correct for any reason, even a reason not relied upon by the agency itself. *See Lewis v. Ariz. St. Personnel Bd.*, 240 Ariz. 330, 334 ¶ 15 (App. 2016) (administrative agency's decision "will [be] affirm[ed] if any reasonable interpretation of the record supports the decision"); *BNSF Ry. Co. v. Ariz. Corp. Comm'n*, 228 Ariz. 481, 485 ¶ 12 (App. 2012) ("The court of appeals will affirm the trial court's decision if it is correct for any reason[].") (citation and internal quotations omitted).

DISCUSSION

1. The Commission Did Not Abuse Its Discretion in Determining that Appellants Failed to Establish the Elements of Their Equitable Estoppel Defense.

Appellants assert that the Commission abused its discretion in rejecting their "equitable estoppel" defense, which was based on their contention that Division representatives failed to inform Stevenson of "any problem with…EquiAlt." O.B. at pp. 18, 21. Citing Stevenson's testimony about his purported conversations with Division representatives in 2013 and 2016, they assert that the failure of the Division's representatives to "mention…any concern about EquiAlt" led Stevenson and AFS to "justifiably continue[] working with EquiAlt." *Id*. at p. 22. "It was entirely unjust," Appellants argue, "for the Division, eight full years later,…to reverse its prior position on these registration issues and claim that [Stevenson] and AFS were in violation of the registration statutes." *Id*. at p. 23. "The Division's claims under Sections 44-1841(A) and 44-1842(A)," Appellants conclude, "should have been denied as estopped." *Id*.

In response, Appellee asserts that "[e]quitable estoppel, in general, may not be invoked against the government" and that, in any event, "Appellants failed to" present evidence sufficient to "prove" the elements of equitable estoppel. Appellee's Answering Brief ("Answering Brief" or "A.B.") at pp. 22, 23.

As Appellee correctly asserts, equitable estoppel generally cannot be asserted against the government, *Freightways, Inc. v. Ariz. Corp. Comm'n*, 129 Ariz. 245, 247 (1981), and a party that seeks to do so bears a heavy burden. *See U.S. v. Lancaster*, 898 F.Supp. 320, 322 (E.D.N.C., Aug. 14, 1995) ("An equitable estoppel defense against the government is rarely successful," and "a party seeking equitable estoppel against the government carries a heavy burden."). This is because estoppel is an equitable doctrine that is not applied "to the detriment of the public interest." *Valencia Energy Co. v. Ariz. Dep't of Revenue*, 191 Ariz. 565, 576 ¶ 32 (1998). *See also Spur Indus., Inc. v. Del E. Webb Dev. Co*., 108 Ariz. 178, 184 (1972) (a court has "a special responsibility to the public when acting as a court of equity."). Equitable estoppel will not be applied, therefore, when doing so would leave the government helpless to enforce laws enacted to protect the public. *See Thomas and King, Inc. v. City of Phoenix*, 208 Ariz. 203, 210 ¶ 27 (App. 2004) ("[T]he government generally can enforce a law even if its employees have not always correctly applied it in the past.").

The defense of equitable estoppel will not apply against the government based on mere negligence of government employees. *See Valencia Energy*, 191 Ariz. at 576-77 ¶ 35 ("In general, the state may not be estopped due to the casual acts, advice, or instructions issued by nonsupervisory employees."). *See also U.S. v. Hatcher*, 922 F.2d 1402, 1410 (9th Cir. 1991) ("One who invokes the doctrine of estoppel against the government must first establish affirmative misconduct going beyond mere negligence.") (citations and internal quotations omitted). Indeed, Appellants themselves concede that "[c]ourts do not apply equitable estoppel when the state's action involves mere negligence or oversight." Defendants/Appellants' Reply Brief ("Reply Brief" or "R.B.") at p. 19.

Further, for equitable estoppel to be asserted against the government, the governmental conduct that allegedly gives rise to the detrimental reliance must "bear some considerable degree of formalism under the circumstances." *Valencia Energy*, 191 Ariz. at 577 ¶ 36. The requisite degree of formalism will generally not be found based solely on verbal communications. *See id.* ("It is rare that satisfactory evidence of an absolute, unequivocal, and formal state action will be found unless it is in writing."). *See also U.S. v. Vanhorn*, 20 F.3d 104, 112 n.19 (4th Cir. 1994) ("The Government is simply not bound by the negligent, unauthorized acts of its agents," and

"estoppel against the Government cannot be premised on oral representations.") (citations and internal quotations omitted).

Appellants' "equitable estoppel" defense is based entirely on their allegations about verbal statements purportedly made by representatives of the Division. Even accepting Appellants' assertions as true, such verbal statements are insufficient, as a matter of law, to establish equitable estoppel. *Valencia Energy*, 191 Ariz. at 576-77 ¶ 35.

Even if mere verbal statements by government representatives could be enough to support an equitable estoppel defense, the Commission cannot be said to have abused its discretion in determining that "the imposition of estoppel in this case" is unwarranted because it "would cause a serious injustice for EquiAlt investors and the public interest in protecting such investors." I.R. A-40, Final Decision, at p. 72. *See Valencia Energy*, 191 Ariz. at 576 ¶ 32. *See also DS Waters of Am., Inc. v. Commonwealth*, 150 A.3d 583, 592 (Pa.Cmwlth. 2016) ("It is a fundamental legal principle that a State or other sovereignty cannot be estopped by any acts or conduct of its officers or agents in the performance of a governmental as distinguished from proprietary function."; "No administrative officer or body…is vested with the power to abrogate the statute law…or to grant individuals an exemption from the general operation of the law.") (citations and internal quotations omitted).

Moreover, the record supports the Commission's determination that the evidence presented is insufficient to establish equitable estoppel in any event.

"The three elements of equitable estoppel are traditionally stated as: (1) the party to be estopped commits acts inconsistent with a position it later adopts; (2) reliance by the other party; and (3) injury to the latter resulting from the former's repudiation of its prior conduct." *Valencia Energy*, 191 Ariz. at 576-77 ¶ 35. To make the requisite showing of reliance, a party claiming estoppel must establish that the other party's actions caused a prejudicial change in the claimant's conduct. *Thomas and King*, 208 Ariz. at 210 ¶ 28 ("Detriment necessary for estoppel requires a positional change not compelled by law.") (citation and internal punctuation omitted). *See also Cruz v. City of Columbia*, 877 S.E.2d 479, 483 (S.C. App. 2022) ("A successful equitable estoppel claim clearly requires [a party] to show a prejudicial change in position."); *Sandel v. Sandel*, 463 P.3d 510, 522-23 ¶ 32 (N.M. App. 2020) ("The party relying on a claim of equitable estoppel…must demonstrate," *inter alia*, "that he or she…acted upon [the other party's conduct] in a way that prejudicially altered his position.") (citations and internal quotations omitted). Reliance cannot be established where the conduct of the party that seeks to assert estoppel predates the actions of the party that purportedly gave rise to the estoppel claim.

Here, by Appellants' own admission, Stevenson began marketing EquiAlt Debentures before his alleged conversations with Division representatives about EquiAlt in 2013 and 206. *See* O.B. at p. 22 ("When the Division did not follow up with any concerns…[Stevenson] and AFS justifiably *continued* working with EquiAlt…") (emphasis added). Because Appellants concede that the marketing of EquiAlt Debentures by Stevenson and AFS predated Stevenson's alleged conversations with Division representatives, Appellants have failed to establish that they changed their conduct due to statements made by Division representatives. In the absence of a showing of a prejudicial change in conduct, Appellants' "equitable estoppel" defense must fail.

The party seeking to invoke equitable estoppel must establish, *inter alia*, that he or she acted with reasonable diligence and in good faith. *See*, *e.g.*, *Suburban Pump & Water Co. v. Linville*, 60 Ariz. 274, 284-85 (1943) ("One relying on an estoppel must have exercised such reasonable diligence as the circumstances of the case required. If he conducts himself with a careless indifference to means of information reasonably at hand or ignores highly suspicious circumstances which should warn him of danger or loss he cannot invoke the doctrine of estoppel.") (citation and internal quotations omitted).

Here, the requisite good faith is absent in light of the misrepresentations and material omissions of Stevenson, *see infra*, in promoting the EquiAlt investment. Further, Stevenson's testimony that he relied on the legal opinions of EquiAlt's attorneys, and "felt like [he] didn't need to" seek advice from independent counsel, I.R. B-7, R.T. 4/26/21, at p. 665, shows that he acted with a lack of reasonable diligence. *See S.E.C. v. Hasho*, 784 F.Supp. 1059, 1107 (S.D.N.Y. 1992) (securities salesmen or representatives "have certain duties that they cannot avoid by reliance on…an issuer[,]" and "may not rely blindly upon the issuer for information concerning a company.").

For the foregoing reasons, the Court concludes that the Commission did not abuse its discretion or commit an error of law in rejecting Appellants' "equitable estoppel" defense.

2. The Commission Did Not Abuse Its Discretion or Commit an Error of Law in Concluding that Appellants Engaged in Fraudulent Practices in Violation of A.R.S. § 44-1991(A)(2).

A.R.S. § 44-1991(A) provides in part that "[i]t is a fraudulent practice and unlawful for a person," in connection with the sale, or offer to engage in the sale, of securities, to

1. [e]mploy any device, scheme or artifice to defraud[;]

> 2. [m]ake 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[; or]
>
> 3. [e]ngage in any transaction, practice or course of business which operates or would operate as a fraud or deceit.

A.R.S. § 44-1991(A). In its Final Decision, the Commission found that Stevenson and AFS violated A.R.S. § 44-1991(A)(2) by "misrepresent[ing]" and "fail[ing] to disclose" to investors the "commissions" they "received for the sale of EquiAlt Debentures," and by "omitting to disclose to investors the civil lawsuits and judgments against them." I.R. A-40, Final Decision, at pp. 99, 100-01. The Commission further found that Stevenson and AFS violated A.R.S. § 44-1991(A)(2) by means of "untrue statements or misleading omissions" about "the level of risk involved in the EquiAlt investment" and about "their ability to liquidate the EquiAlt Debentures prior to term and penalties related to early withdrawal." *Id*. at pp. 84, 86.

Appellants challenge these findings. In support of their position, Appellants argue, first, that the testimony of investors shows that "there was no actual substantive misstatement or omission" about the commissions received by Stevenson and AFS. O.B. at p. 26.

Appellants' assertion on this point is refuted by the record, as Appellee correctly points out in response. *See* A.B. at p. 16. As noted above, the Subscription Agreements that Stevenson gave to investors and prospective investors expressly states that no commissions were being paid. *See also* I.R. C-8, EquiAlt Subscription Agreement, at p. ACC000633 ("The Units are being sold through the Company without commissions."). Moreover, at least some investors unequivocally testified that Stevenson affirmatively denied that he was being paid commissions. *See*, *e.g*., I.R. B-4, R.T. 4/21/21, at p. 277 (testimony of investor Erna Frank); *id*. at pp. 305, 313 (testimony of investor Ron Frank). Contrary to Appellants' contention, therefore, the Court finds that the record provides ample evidentiary support for the Commission's determination that Stevenson and AFS "misrepresent[ed]" and "fail[ed] to disclose" to investors the "commissions" they "received for the sale of EquiAlt Debentures." I.R. A-40, Final Decision, at p. 99.

Appellants go on to argue, in the alternative, that "the commissions issue" and the "prior civil actions" involving Stevenson and AFS were "not material" to the investors. O.B. at pp. 26, 29. In support of their position, they assert that, *inter alia*, "[t]hough some of" the investors testified that they "did not recall discussions on the subject with commissions with [Stevenson] and AFS," "these individuals assumed that [Stevenson] and AFS were being compensated." *Id*. at p. 26. Appellants contend, in other words, that the investors assumed that Stevenson and AFS

were being paid commissions, and that the lack of disclosure of such payment could not, therefore, be considered a material omission. *See id*. Appellants further assert that the "prior civil actions" involving Stevenson and AFS "were not material" because "[t]here is nothing in the record to suggest that any of [their] clients would not have entered into the EquiAlt Debentures had they known about the civil actions[.]" *Id*. at p. 29.

Appellants' assertion that the investors correctly assumed, without inquiring, that Stevenson and AFS were being compensated for their part in the EquiAlt Debentures is contrary to the record. As noted above, at least some investors testified that Stevenson affirmatively denied that he or AFS were receiving any commissions. I.R. B-4, R.T. 4/21/21, at pp. 277, 305, 313.

In any event, the premise of Appellants' argument on this point - - *i.e*., that "materiality" is determined by reference to the subjective understanding and beliefs of particular investors - - is contrary to case law, which makes clear that "materiality" is assessed under an objective standard. *See, e.g., Caruthers v. Underhill*, 230 Ariz. 513, 524 ¶ 43 (App. 2012) ("The standard of 'materiality' in securities cases contemplates a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder or a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.") (citations and internal quotations omitted). *See also Hirsch v. Ariz. Corp. Comm'n*, 237 Ariz. 456, 463 ¶ 27 (App. 2015) ("Materiality is based upon an objective standard."). Moreover, "[m]ateriality" is "generally a question of fact." *Caruthers*, 230 Ariz. at 524 ¶ 43.

Here, the Commission made a factual finding that "a reasonable buyer would have considered significant the commissions received by" Stevenson and AFS, noting that Stevenson "may have had a financial incentive to recommend higher investment amounts because commissions were derived from a percentage of the amount each investor invested." I.R. A-40, Final Decision, at p. 79. Likewise, the Commission made a factual finding that "the existence of the judgments and garnishments against [Stevenson] and AFS would have been significant to a reasonable buyer in their [*sic*] deliberation process to invest and would have been material to the decision-making process." *Id*. at p. 82. This Court must, of course, defer to these factual findings by the Commission. *See, e.g., Simms v. Round Valley Light & Power Co*., 80 Ariz. 145, 154 (1956) ("[T]he courts cannot disturb the commission's ultimate conclusion or findings of facts in arriving at such conclusion when the same is supported by substantial evidence, is not arbitrary or is not otherwise unlawful.").

Moreover, the Commission's finding that the payment of commissions on the EquiAlt Debentures is material is consistent with the well-established principle that "the disclosure of commissions and other compensation is fundamental to securities laws." *S.E.C. v. Alliance Leasing Corp*., 2000 WL 35612001 at *9 (S.D.Cal., Mar. 20, 2000). *See also Affiliated Ute Citizens of Utah v. U.S.*, 406 U.S. 128, 153 (1972) ("The sellers had the right to know that the defendants were in a position to gain financially from their sales…"); *S.E.C. v. Capital Gains Research Bureau*, 375 U.S. 180, 198 (1963) (citing with approval case law holding that the "suppression of information material to an evaluation of the disinterestedness of investment advice operated as a deceit on purchasers.") (citation and internal quotations omitted). The Commission's finding that the prior judgments obtained against Stevenson and AFS were material is likewise consistent with case law. *See, e.g., Wilson v. Great Am. Indus., Inc*., 855 F.2d 987, 991-92 (2nd Cir. 1988) (failure to disclose existence of judgment against subsidiary was material omission).

Appellants further argue that they never "misled" investors "in any way" about the risks associated with the EquiAlt Debentures or about "their ability to withdraw funds from the EquiAlt Debtures" should they later choose to do so. O.B. at pp. 26-28. Accordingly, they contend, the Final Decision's contrary findings are unsupported by the record and should be "overturn[ed]." *Id*. at pp. 27-28.

In the Final Decision, the Commission made factual findings that Stevenson and AFS "made untrue statements and material omissions" about "the level of risk involved in the EquiAlt investment" and about investors' "ability to liquate the EquiAlt Debentures prior to term." I.R. A-40, Final Decision, at pp. 84, 86. As Appellee correctly asserts, these findings are supported by "substantial evidence in the record." A.B. at p. 19. Investor Rosemarie Vedda ("Vedda"), for example, testified that, in deciding to invest $150,000 in EquiAlt Debentures, she relied on Stevenson's assurance that the investment was "guaranteed." I.R. B-2, R.T. 4/19/21, at p. 27. "The enticing part of making the investment," she testified, "was a guaranteed return of 8 percent," as well as Stevenson's statement that he and his wife "personally had" invested in the EquiAlt Debentures. *Id*. According to Vedda, Stevenson "kept saying it was 100 percent safe" and that she "couldn't lose any money." *Id*. at p. 28. Investor Rodney Colburn ("Colburn") similarly testified that Stevenson assured him that EquiAlt "was a safe, secure investment" with a "straight 6 percent" rate of return, I.R. B-3, R.T. 4/20/21, at pp. 164, 167, while investor Terri Metzler testified that Stevenson told her that EquiAlt "was not a risk" and offered an "8 percent return." *Id*. at pp. 237, 247. Even investor William Franklin, a witness called by Appellants, testified that, based on his conversations with Stevenson, "[t]he risk factor" of the EquiAlt Debentures "seemed to be very minimal." I.R. B-6, R.T. 4/23/21, at pp. 464-65.

As the Commission correctly found, Stevenson's assurances to these investors were "contrary to language in EquiAlt's Subscription Agreement, which described the EquiAlt Debentures as a 'highly speculative' investment." I.R. A-40, Final Decision, at p. 84. *See also* I.R. C-8, EquiAlt Subscription Agreement, at p. ACC000633 ("The Subscriber recognizes that…an investment in the Company is highly speculative, and only investors who can afford the loss of their entire investment should consider investing in the Company[.]").

The Commission's findings with respect to Appellants' misrepresentations about the liquidity of the EquiAlt investment are likewise supported by the record. Investor Colburn testified that Stevenson assured him that, if he wanted to withdraw his principal, he "could have it in one to two weeks," and that Stevenson never mentioned any kind of penalty or other fees associated with a withdrawal of principal. I.R. B-3, R.T. 4/20/21, at p. 166. Investor Jodie Ballard similarly testified that Stevenson advised her she "could liquidate" her investment and that "many of" his "other clients had done just that." *Id*. at pp. 125-26. When asked if Stevenson informed her of "any penalties or caveats" to "being able to liquidate [her] investment," Ballard replied, "No. I do not remember any penalties at all." *Id*. at p. 126. Investor Sylvia Schulz testified that, before she invested in EquiAlt, Stevenson told her she "can take out as much as [she] want[ed] any time [she] want[ed]" with "[n]o problems, no penalties, no nothing." I.R. B-5, R.T. 4/22/21, at p. 387.

Stevenson's assurances of the liquidity of the investment is contrary to the language in the EquiAlt Subscription Agreement that "the Subscriber may not be able to liquidate his, her or its investment[.]"). I.R. C-8, EquiAlt Subscription Agreement, at p. ACC000633. Further, Stevenson's assurances of the liquidity of the investment proved to be false. Investor Jodie Ballard testified that she sent Stevenson an email on January 15, 2020 asking to liquidate her investment; she never heard back from him, and never received her funds back. I.R. B-5, R.T. 4/22/21, at pp. 137-38. These false statements to investors about the liquidity of the EquiAlt Debentures supports the Commission's determination that Stevenson and AFS violated A.R.S. § 44-1991(A)(2). *See, e.g., S.E.C. v. Conrad*, 354 F.Supp.3d 1330, 1358 (N.D.Ga. 2019) (false statements regarding ease with which invested funds could be withdrawn were material, since "[a]ny reasonable investor would attach importance to these representations").

For the foregoing reasons, the Court finds that Appellants have failed to meet their burden of establishing that the Commission abused its discretion in finding the Section 1991(A)(2) violations. *See Shorey*, 238 Ariz. at 260 ¶ 24 ("Appellants have not shown by clear and satisfactory evidence that the Commission's decision is unreasonable or unlawful. We therefore find no error in the conclusion that [defendant] violated A.R.S. § 44-1991(A)(2).") (citations and internal punctuation omitted).

3. **The Commission's Did Not Abuse Its Discretion and/or Commit an Error of Law in Ordering Appellants to Pay Restitution of $19,459,875.**

a. The Amount of the Commission's Restitution Award Does Not Violate the Eighth Amendment to the United States Constitution or Article 2 § 15 of the Arizona Constitution.

Appellants assert that the Commission's "restitution order" should be vacated because it is "unconstitutional on multiple grounds." O.B. at pp. 30-31. In support of their position, they assert, first, that "the Commission's $19,459,875 restitution order is an excessive fine which violates both the United States and Arizona Constitutions." *Id*. at p. 32. "[A]t most," they explain, Stevenson and AFS "were only paid $2,010,802.56 from fees/commission on referrals for the EquiAlt Debentures." *Id*. "To hold [them] financially responsible for EquiAlt's covert conduct," they contend, "would be grossly disproportiona[te] to the unknowing violations which the Commission has found against Appellants." *Id*. This is particularly true, they add, because Stevenson "is sixty-three years old," a fact which, coupled with the "harm[]" he has suffered to "his professional reputation," will "mak[e] repayment of any such restitution difficult." *Id*. If the Court finds any restitution award appropriate, they conclude, "the Court should at a minimum…reduce such restitution order…to the $2,010,802.56 that the Commission actually found was paid to" Stevenson and AFS "in relation to the EquiAlt Debentures." *Id*.

In response, Appellee asserts that the Commission's restitution order cannot possibly constitute "an unconstitutional excessive fine" because it is not a "fine" at all. A.B. at p. 33. By definition, a "fine" is imposed "as punishment," whereas a restitution award "is a remedial measure to restore the victims to their prior positions." *Id*. Even if the restitution award were a fine, Appellee goes on, it cannot be said to be disproportionate to the losses suffered by the investors. *Id*. at pp. 33-34. In support of its position, Appellee cites case law holding that, "[w]here the amount of restitution is geared directly to the amount of the victim's loss caused by the defendant's illegal activity, proportionality is already built into the order." *Id*. at p. 34, *citing U.S. v. Dubose*, 146 F.3d 1141, 1145 (9th Cir. 1998) (citation and internal quotations omitted).

The Eighth Amendment and its identically-worded counterpart in the Arizona Constitution prohibit the imposition of excessive "fines."[1] By definition, a "fine" is a form of

[1] *See* U.S. Const., Amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); Ariz. Const. art. II § 15 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.").

punishment. *See State v. Sheaves*, 155 Ariz. 538, 541 (App. 1987) (App. 1987) ("A fine is defined in law be a pecuniary punishment imposed by a lawful tribunal upon a person convicted of a crime or misdemeanor.") *(emphasis,* citation, and internal quotations omitted). Indeed, Appellants themselves admit as much. *See* R.B. at p. 9 ("The word 'fine' is understood to mean a payment to a sovereign as punishment for some offense.") (citation omitted).

An award of restitution is intended "not to punish," but "to make the victim whole." *State v. Ellis*, 172 Ariz. 549, 550 (App. 1992). Case law supports Appellee's position that a restitution award entered in favor of a victim and that is fixed at the amount of the victim's loss is not punitive and is, therefore, outside the scope of the constitutional prohibition on excessive fines. *See Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc*., 492 U.S. 257, 268 (1989) ("[T]he Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government."); *U.S. ex rel. Drakeford v. Tuomey,* 792 F.3d 364, 387 (4th Cir. 2015) ("Civil fines serving remedial purposes do not fall within the reach of the Eighth Amendment."); *U.S. v. Newell*, 658 F.3d 1, 35 (1st Cir. 2011) ("We have never held that the Excessive Fines Clause of the Eighth Amendment applies to restitution."; courts "that have considered challenges to restitution orders under the Excessive Fines clause have held that where the restitution order reflects the amount of the victim's loss no constitutional violation has occurred" and citing cases); *U.S. Commodity Futures Trading Comm'n v. Parrilla*, 2013 WL 6979587 at *5 (D.Mass., Sept. 30, 2013) ("The Excessive Fines Clause…applies only to fines paid directly to the government and not to fines or amounts to be paid to investors or others. Moreover, the Excessive Fines Clause does not apply to restitution or disgorgement.").

Pursuant to this case law, the Court agrees with Appellee that the Commission's restitution award does not violate the "excessive fine" provisions of the U.S. and Arizona Constitutions.

b. A.R.S. § 44-2032(1) and Ariz. Admin. Code R-14-4-308 Are Not Unconstitutionally Vague.

A.R.S. § 44-2032(1) provides in pertinent part that, upon finding a violation of the Arizona Securities Act ("ASA"), the Commission may, *inter alia,*

> [i]ssue an order directing [the violator] 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, or 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 including, without

> limitation, a requirement to provide restitution as prescribed by rules of the commission.

A.R.S. § 44-2032(1). Ariz. Admin. Code R-14-4-308 provides in part that,

> If restitution is ordered by the Commission,…[t]he amount payable as damages to each purchaser shall include:
>
> a. Cash equal to the fair market value of the consideration paid, determined as of the date such payment was originally paid by the buyer; together with
>
> b. Interest at a rate pursuant to A.R.S. § 44-1201 for the period from the date of the purchase payment to the date of repayment; less
>
> c. The amount of any principal, interest, or other distributions received on the security for the period from the date of purchase payment to the date of repayment.

Ariz. Admin. Code R-14-4-308(C)(1).

Appellants assert that A.R.S. § 44-2032(1) and Ariz. Admin. Code R-14-4-308, the statute and rule on which the Commission relied in ordering restitution in this case, are impermissibly "vague about the scope of restitution," and are, therefore, unconstitutional. O.B. at p. 33. They explain that neither the statute nor the rule give notice to "an intermediary referral source" that "it could be required to pay a harmed investor a drastically larger sum of money" in restitution "than the intermediary referral source received." *Id*. at p. 34. After reading the statute and rule, they assert, an intermediary referral source "would be completely unaware that" it could be required to pay, as restitution, "the entire amount paid to the third party," rather than "simply the amount that the referral source had received in connection with the referral." *Id*.

In response, Appellee asserts that A.R.S. § 44-2032(1) and Ariz. Admin. Code R-14-4-308 "provide a reasonable person notice" that an award of restitution for a securities violation will be based on "the investor's principal investment," and is not "limited to the ill-gotten gains" received by "a wrongdoer." A.B. at pp. 30, 31 (citation and internal quotations omitted).

Under the "void for vagueness" doctrine, "[a] statute is unconstitutionally vague if it does not give persons of ordinary intelligence a reasonable opportunity to learn what it prohibits and does not provide explicit instructions for those who will apply it*." Batty v. Ariz. Medical Bd*., 253 Ariz. 151, 156 ¶ 19 (App. 2022) (citation and internal quotations omitted). "To avoid

unconstitutional vagueness, a statute need not be drafted with absolute precision," but need "only convey a definite warning of the proscribed conduct." *Id*. at 157 ¶ 21 (citation and internal quotations omitted). The party challenging a statute on the grounds that it is unconstitutionally vague "has a heavy burden of overcoming" the presumption of constitutionality. *Id*. at 156 ¶ 19 (citation and internal quotations omitted).

The Court sees nothing in either A.R.S. § 44-2032(1) and Ariz. Admin. Code R-14-4-308 that leaves room for doubt about the scope of restitution that may be ordered. On the contrary, the statute and rule, taken together, establish the formula for calculating restitution, *i.e*., the fair market value of the consideration paid by the investor as of the investment date.

No reasonable reader of A.R.S. § 44-2032(1) and Ariz. Admin. Code R-14-4-308 could reasonably conclude that a respondent's restitution award would be limited to the benefit received by the respondent. As the Arizona Court of Appeals has held,

> [t]he plain language of A.R.S. § 44-2032 grants the Commission authority to order actions to correct the conditions resulting from the violation of the ASA[,] including, without limitation, a requirement to provide restitution. Nothing in A.R.S. § 44-2032 limits the amount of restitution that can be ordered to the benefits "pocketed" by the wrongdoer; on the contrary, the statute specifically states the relief is "without limitation," and grants the Commission abundant discretion in fashioning a remedy that may "include" restitution - - but not to the exclusion of any other type of relief appropriate to "correct" the results of the violations…Notably, the language of both A.R.S. § 44-2032(1) and [Ariz. Admin. Code R-14-4-308] has remained unchanged for at least thirty years, despite sweeping revisions to other areas of the ASA, negating any suggestion the legislature had concerns regarding the Commission's definition of restitution.

Hirsch, 237 Ariz. at 466 ¶ 39 (citations and internal quotations omitted). The *Hirsch* concluded that awarding restitution based on "the loss to the investor" rather than the "profits earned by the violator" is "consistent with the plain language of A.R.S. § 44-2032(1). Id.

The Court therefore finds that Appellants have failed to meet their heavy burden of showing that A.R.S. § 44-2032(1) and Ariz. Admin. Code R-14-4-308 are unconstitutionally vague.

c. Ariz. Admin. Code R-14-4-308 Does Not Exceed the Authority Granted by A.R.S. § 44-2032(1).

Appellants argue, next, that Ariz. Admin. Code R-14-4-308 "is invalid" because "it is contrary to, or otherwise exceeds, the authority provided by A.R.S. § 44-2032(1). O.B. at p. 38. Noting that A.R.S. § 44-2032(1) authorizes the Commission to adopt rules requiring the payment of "restitution," Appellants contend that Ariz. Admin. Code R-14-4-308 exceeds the scope of the authority that A.R.S. § 44-2032(1) conferred on the Commission because Ariz. Admin. Code R-14-4-308 purports to expand the definition of "restitution" under Arizona law. *Id*. According to Appellants, "restitution" has always been "understood under Arizona law to be tethered to the equitable principle that a violator should only be made to pay restitution for what he or she actually received from the victim." *Id*. A.R.S. § 44-2032(1) is invalid, they conclude, because it purports to give effect to a definition of "restitution" that is broader than that intended by the Legislature when it enacted A.R.S. § 44-2032(1). Id. at pp. 37-38.

With commendable candor, Appellants acknowledge that their position is contrary the holding of *Hirsch, supra*. They assert that they "have a good faith challenge [to] the *Hirsch* opinion on this issue," and that they raise it herein "so that [they] may later bring such challenge before the Court of Appeals, and potentially the Supreme Court of Arizona, for further review so as to modify or overrule *Hirsch*." O.B. at p. 39.

Because this Court is, of course, bound by the Court of Appeals' decision in *Hirsch, see, e.g., State v. Patterson,* 222 Ariz. 574, 580 ¶ 20 (App. 2009), the Court rejects Appellants' argument on this point.

d. Ariz. Admin. Code R-14-4-308 Does Not Exceed the Authority Granted by A.R.S. § 44-2032(1).

Appellants argue that "the $19,459,875 restitution award includes at least $265,000" that Stevenson and his wife "invested in EquiAlt Debentures," and asks that the Court "reduce" the restitution award by this amount. O.B. at p. 39. After all, they reason, "Appellants cannot be made to pay restitution for their own…losses[.]" *Id*.

In response, Appellee "agrees that it would be appropriate to modify the decision to remove [Appellants'] own investments from the restitution total." A.B. at p. 36. They assert, however, that Appellants' "claimed $265,000 figure" is "incorrect." *Id*. It explains that "[t]he investor list that the Commission credited" reflects that Stevenson and his wife invested "only

$254,367." *Id*. Accordingly, it asserts, "the restitution order" should be "reduc[ed]" by $254,367, and "Appellants should be excluded from any restitution distribution." *Id*.

In their Reply Brief, Appellants do not dispute Appellee's assertion that the proper amount by which the restitution award should be reduced is only $254,367, rather than $265,000. *See generally* R.B. Accordingly, the Court will modify the Final Decision to reduce the restitution award to $19,205,508.00 ($19,459,875 - $254,367 = $19,205,508) and to exclude Appellants from any restitution distribution.

4. **The Commission Did Not Abuse Its Discretion and/or Commit an Error of Law in Ordering Appellants to Pay Administrative Penalties of $250,000.**

Appellants assert that the Final Decision's assessment of administrative penalties of $250,000 must be "overturn[ed]" because, they contend, the Commission "did not delineate…the actual number of violations upon which it based these penalties, or exactly which violations and which clients the Commission attributed the penalties to." O.B. at pp. 40-41.

A.R.S. § 44-2036 authorizes the Commission to assess administrative penalties upon one found to have violated the ASA or "any rule or order of the [C]ommission" in an amount "not to exceed five thousand dollars." A.R.S. § 44-2036(A). As Appellee correctly points out, the Commission found that Appellants "committed 254 separate" violations of the ASA. A.B. at pp. 36-37. *See also* I.R. A-40, Final Decision, at pp. 76, 98 (finding that "the EquiAlt Debentures are securities, which are not exempt from registration requirements," and that Stevenson and AFS "sold at least 254 EquiAlt Debentures to their clients[.]"). Pursuant to A.R.S. § 44-2036, therefore, the Commission could have imposed administrative penalties of up to $1,270,000.00 ($5,000 x 254 = $1,270,000). Appellants can hardly claim to be aggrieved by the fact that the Commission decided to impose administrative penalties in an amount less than one-fifth of the amount that it could have imposed. Because Appellants are not aggrieved by the Commission's decision to impose penalties in an amount far lower than the amount authorized by statute, Appellants are entitled to no relief, even if the Commission did not identify, out of the total of 254 violations, the particular violations for which it imposed an administrative penalty. *Cf. Chambers v. United Farm Workers Organizing Committee*, 25 Ariz.App. 104, 107 (1975) ("In Arizona, a party to [an] action may not appeal from a judgment or order unless he is 'aggrieved' by the judgment or order."; "A court's ruling which is favorable to a party may not be appealed by that party[.]").

5. The Commission Did Not Abuse Its Discretion and/or Commit an Error of Law in Ordering Appellants to Pay Administrative Penalties of $25,000, and in Revoking the Licenses of Stevenson and AFI, for Their Violations of the Arizona Investment Management Act.

Appellants assert that the Commission abused its discretion and/or committed an error of law in ordering them to "pay a total of $25,000 for violations of the Investment Management Act," and in "revoking the licenses of [Stevenson] and AFI." O.B. at pp. 39, 42. In support of their position, they assert, first, that Stevenson and AFI were not on notice that they were alleged to have violated the Investment Management Act, insisting that "Division had not placed an actual violation of the Investment Management Act at issue for the administrative hearing." *Id*. at pp. 39-40.

The record does not bear out this assertion. The original Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order for Administrative Penalties, Order of Revocation, and Order for Other Affirmative Action ("Notice of Opportunity for Hearing") that was issued on or about June 29, 2020, alleges violations of the Investment Management Act. Specifically, the Notice of Opportunity for Hearing alleges that the conduct of Stevenson and AFI "is grounds to revoke their licenses with the Commission as an investment advisor representative and investment advisor, respectively, pursuant to A.R.S. § 44-3201" and "grounds to assess restitution, penalties, and/or take appropriate affirmative action pursuant to A.R.S. § 44-3201." I.R. A-1, Notice of Opportunity for Hearing, at pp. 10, 11. The Notice of Opportunity for Hearing further includes requests that the Commission "[o]rder [Stevenson] and [AFI] to permanently cease and desist from violating the IM Act pursuant to A.R.S. § 44-3201," order them to pay "administrative penalties of up to one thousand dollars ($1,000) for each violation of the IM Act, pursuant to A.R.S. §§ 44-3296 and 44-3201," and "[o]rder the revocation or suspension" of their "licenses as an investment advisor representative and investment advisor, respectively, pursuant to A.R.S. § 44-3201." *Id*. at pp. 11, 12.

The Amended Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order for Administrative Penalties, Order of Revocation, and Order for Other Affirmative Action ("Amended Notice of Opportunity for Hearing") that was issued after the passing of Barbara Stevenson likewise includes allegations of violations of the Investment Management Act. I.R. A-22, Amended Notice of Opportunity for Hearing, at pp. 11-12. Like the original Notice of Opportunity for Hearing, the Amended Notice of Opportunity for Hearing includes requests that the Commission "[o]rder [Stevenson] and [AFI] to permanently cease and desist from violating the IM Act pursuant to A.R.S. § 44-3201," order them to pay "administrative penalties of up to one thousand dollars ($1,000) for each violation of the IM Act,

pursuant to A.R.S. §§ 44-3296 and 44-3201," and "[o]rder the revocation or suspension" of their "licenses as an investment advisor representative and investment advisor, respectively, pursuant to A.R.S. § 44-3201." *Id*. at p. 12.

In their Answer to the Notice of Opportunity for Hearing, Appellants expressly denied that "they have engaged in acts, practices, and transactions that constitute violations of the Securities Act of Arizona, A.R.S. §§ 44-1801 *et seq*…and/or the Arizona Investment Management Act, A.R.S. §§ 44-3101 *et seq*…." I.R. A-9, Respondents' Answer to [Notice of Opportunity for Hearing], at p. 2. Insisting that "[a]t no time have [they] violated the Securities Act and/or IM Act," Appellants went on to "deny" that the "alleged conduct" of Stevenson and AFI "is grounds to revoke their licenses…as an investment advisor representative and investment advisor, respectively, pursuant to A.R.S. § 44-3201" or to "take" other "action pursuant to A.R.S. § 44-3201." *Id*. at pp. 13, 14. These same denials and allegations can be found in Appellants' Answer to the Amended Notice of Opportunity for Hearing. I.R. A-23, Respondents' Answer to [Amended Notice of Opportunity for Hearing], at pp. 2, 13, 14. The denials and assertions in Appellants' filings make clear that Appellants understood that the allegations against them included allegations of violations of the Investment Management Act. *See id*.

In Procedural Orders that it issued during the course of the administrative proceedings, the Commission expressly noted that Appellants were alleged to have violated both the ASA and the Investment Management Act. I.R. A-4, Procedural Order Set[ting] a Telephonic Pre-Hearing Conference, at p. 1 (reciting that, in its Notice of Opportunity for Hearing, "the Division alleged violations of the Securities Act of Arizona, A.R.S. §§ 44-1801 *et seq*…and/or the Arizona Investment Management Act, A.R.S. §§ 44-3101 *et seq*…."); I.R. A-8, Procedural Order Approving Consent to Email Service, at p. 1 (same); I.R. A-14, Procedural Order Grant[ing] Motion, at p. 1 (same); I.R. A-18, Procedural Order Den[ying] Motion to Stay and Set[ting] a Hearing, at p. 1 (same); I.R. A-21, Procedural Order Grant[ing] Motion to Amend Notice, at p. 1 (same).

Similarly, in various filings over the course of the administrative proceedings, Appellants made clear that they were on notice that they were alleged to have violated the Investment Management Act. *See*, *e.g*., I.R. A-10, Respondents' Motion to Stay Pending S.E.C. Federal Action With Court-Appointed Receiver, at p. 2 (stating that "[t]he Division seeks various relief and remedies against Respondents, including," *inter alia*, "to permanently cease and desist from violating the…Arizona Investment Management Act…pursuant to A.R.S. § 44-3201," to "pay administrative penalties of up to…$1,000 for each violation of the IM Act pursuant to A.R.S. §§ 44-2036, 44-3296 and 44-3201," and "to revoke or suspend [Stevenson's] investment advisor representative license and AFI's investment advisor license pursuant to A.R.S. § 44-3201.").

The record thus refutes Appellants' suggestion that violations of the Investment Management Act by Stevenson and AFI were never "placed…at issue for the administrative hearing." O.B. at pp. 39-40.

In the alternative, Appellants argue that the Final Decision "did not provide an analysis in support of any violations of the Investment Management Act," and therefore that the "finding that Appellants Stevenson, Mrs. Stevenson, an AFI violated the Investment Management Act" should be "reverse[d]." O.B. at p. 40.

Again, the record does not support Appellants' argument. In the Final Decision, the Commission determined that violations of the Investment Management Act were established by evidence "that [Stevenson] and [AFS] engaged in unethical and dishonest behavior that created material conflicts for AFI related to commissions and management of [Rybicki's] personal financial portfolio." I.R. A-40, Final Decision, at p. 95. Ample evidence in the record supports the Commission's determination on this point; Stevenson admitted, in his testimony, that he never disclosed, to any Equi Alt investors, the compensation that AFI received for managing Rybicki's portfolio. I.R. B-7, R.T. 4/26/21, at pp. 733-34. Moreover, the Commission's determination on this point is consistent with Arizona statute, which provides that "engag[ing] in dishonest or unethical practices in the securities industry" is grounds for the imposition of administrative penalties under the Investment Management Act. A.R.S. § 44-3201(A)(13), (B). The Court finds that the Final Decision adequately sets forth the basis for the Commission's determination that Stevenson and AFI violated the Investment Management Act, and that the Commission's determination is supported by the record.

In their Reply Brief, Appellants assert that the Commission erred in determining that Stevenson and AFS were "salesmen as defined under A.R.S. § 44-1801(23)." R.B. at p. 4. They re-urged this argument at Oral Argument on December 19, 2022. Because Appellants raised no such argument in their Opening Brief, *see generally* O.B., the Court deems it waived. *University Med. Ctr. of So. Nev. v. Health Choice Ariz.*, 253 Ariz. 524, 529 n.2 (App. 2022).

CONCLUSION & ORDERS

In accordance with the foregoing,

IT IS ORDERED modifying Decision No. 78528 of the Arizona Corporation Commission to reduce the restitution award from $19,459,875.00 to $19,205,508.00 and to provide that Appellants are excluded from any restitution distribution.

IT IS FURTHER ORDERED affirming Decision No. 78528 of the Arizona Corporation Commission in all other respects.

IT IS FURTHER ORDERED remanding this matter to the Arizona Corporation Commission for such further proceedings, if any, as may be appropriate.

No matters remain pending in connection with this appeal. This is a final order pursuant to JRAD 13 and Ariz.R.Civ.P. 54(c).

/s/ Daniel J. Kiley
THE HON. DANIEL J. KILEY
Judge of the Superior Court

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