

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CONCORDIA FINANCING COMPANY LTD, *Plaintiff/Appellant*,

v.

ARIZONA CORPORATION COMMISSION, *Defendant/Appellee*.

No. 1 CA-CV 20-0163
FILED 2-23-2021

Appeal from the Superior Court in Maricopa County
No. LC2019-000109-001
The Honorable Douglas Gerlach, Judge (Retired)

AFFIRMED

COUNSEL

Baskin PLC, Scottsdale
By Alan S. Baskin
Counsel for Plaintiff/Appellant

Arizona Corporation Commission, Phoenix
By James D. Burgess
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Kent E. Cattani and Judge Cynthia J. Bailey joined.

H O W E, Judge:

¶1 Concordia Financing Company appeals the Arizona Corporation Commission’s decision finding that it had committed multiple violations of the Arizona Securities Act and the Commission’s imposition of restitution and administrative penalties. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 For more than 20 years, Concordia purchased and serviced sales contracts for used “big rig” trucks. Concordia made subprime loans primarily to first-time owner/operators with bad credit. Concordia raised capital by taking in investors. Concordia was not a registered securities dealer or salesperson and it never registered its securities (subprime loans) with the Commission. In 2012, an investor complained to the Commission.

¶3 After an investigation, the Commission’s Securities Division filed a notice of opportunity for hearing (“Notice”) against Concordia in 2014. The original Notice and 2015 Amended Notice alleged numerous violations arising from the offer and sale of securities in the form of investment contracts and promissory notes between 1998 and 2008. *See* A.R.S. §§ 44-1841, -1842, -2031(1).

¶4 The Commission found that Concordia had committed 278 violations of the Securities Act over a ten-year period. *See* A.R.S. § 44-1841 (sale of unregistered securities) and -1842 (transactions by unregistered dealers and salesmen). The Administrative Law Judge’s 285-page recommendation summarized the evidence and made detailed findings of fact and proposed conclusions of law. The resulting Recommended Opinion and Order (“ROO”) found that Concordia owed 58 investors a collective \$2,607,986.56 in restitution and recommended imposing administrative penalties in the amount of \$1,390,000.

¶5 In February 2019, four of the five Commissioners met in an Open Meeting to address the ROO. Commissioner Burns had previously

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recused himself because of an ongoing attorney-client relationship with Concordia's counsel in an action against Commissioners Tobin and Dunn. Concordia asserted that Commissioners Tobin and Dunn should, likewise, recuse themselves. After meeting in executive session, both Commissioners stated that they were impartial and would participate in the decision. By unanimous vote of the four Commissioners, the Commission approved and adopted the ROO in Decision No. 77088 ("Decision").

¶6 Concordia appealed to the trial court. In addition to making substantive claims of error, Concordia asserted that the Decision was contrary to law, arbitrary and capricious, an abuse of discretion, and not supported by substantial evidence. Specifically, Concordia complained that the administrative action was stale and violated due process. Concordia did not directly press the Commission's substantive rulings, although it continued to assert due process violations, laches, and the Commission's failure to exercise its discretionary powers to reduce the ordered administrative penalties and restitution. The trial court affirmed the Decision concluding that (1) sufficient evidence supported the Commission's Decision and (2) the non-substantive issues had no merit. Concordia timely appealed.

DISCUSSION

¶7 Concordia does not challenge the substantive violations enumerated in the Decision, but urges the same non-substantive arguments that it made in the trial court. Each of Concordia's arguments present a question of law that we review de novo. See *Paczosa v. Cartwright Elementary Sch. Dist. No. 83*, 222 Ariz. 73, 77 ¶ 14 (App. 2009).

¶8 The Commission has broad regulatory authority under the Securities Act to protect the public from fraud and deception stemming from unscrupulous investment promoters. See *Shorey v. Ariz. Corp. Comm'n*, 238 Ariz. 253, 257 ¶ 12 (App. 2015). We will affirm a Commission's decision enforcing securities regulations unless it is "contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion." See A.R.S. § 12-910(E). An abuse of discretion occurs only when the administrative decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Torres v. N. Am. Van Lines, Inc.*, 135 Ariz. 35, 40 (App. 1982).

¶9 Concordia first complains that the Commission's 2014 Notice was unreasonably dilatory because it related to business activities from 1998 through 2008. That delay, Concordia argues, was prejudicial, and that

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principles of equity bar prosecution. Laches is an equitable defense “designed to discourage dilatory conduct.” *Sotomayor v. Burns*, 199 Ariz. 81, 82-83 ¶ 6 (2000) (barring unreasonably delayed claims that result in prejudice to the other party).

¶10 Laches does not apply to the Commission. “[T]he doctrine of laches does not apply against the State or its agencies in matters affecting the public interest absent a statute expressly allowing such a defense.” *State ex rel. Darwin v. Arnett*, 235 Ariz. 239, 245 ¶ 33 (App. 2014). Because no such statute exists, Concordia may not assert a laches defense.

¶11 Additionally, even if laches did apply, the Commission’s investigation was not unreasonably dilatory. The Commission’s mission is to protect the greater public good, and investigations of this sort may be inherently lengthy. The Commission learned of Concordia’s violations in 2012, promptly investigated those violations, and found over 200 violations of the Securities Act spanning a ten-year period. Its investigation also included a fraud investigation against the co-respondents. The Commission then issued the Notice 18 months later. Concordia does not explain how that delay prejudiced its ability to defend itself. Further, the delay was not necessarily attributable to the Commission because Concordia refused to comply with the Commission’s subpoenas and document requests, thereby prolonging its investigation.

¶12 Concordia’s next two issues assert violations of due process. Due process requires “a ‘fair trial in a fair tribunal.’” *See United States v. Superior Court*, 144 Ariz. 265, 280 (1985) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Litigants have a “right to be tried by an unbiased and impartial judge without a direct personal interest in the outcome of the hearing.” *Ungar v. Sarafite*, 376 U.S. 575, 584 (1964); *see also Horne v. Polk*, 242 Ariz. 226, 231 ¶ 17 (2017) (reviewing administrative process for campaign violations). A strong presumption of constitutionality guides our review. *Eastin v. Broomfield*, 116 Ariz. 576, 580 (1977).

¶13 Concordia received due process. Nothing in the Securities Act contemplates a jury trial. The Legislature authorized the Commission to assess administrative penalties and restitution against violators “after a hearing.” A.R.S. §§ 44-2036(A), -2032(1). “When the language of a statute is clear and unambiguous, a court should not look beyond the language.” *Cundiff v. State Farm Mut. Auto. Ins. Co.*, 217 Ariz. 358, 360 ¶ 8 (2008).

¶14 Concordia nevertheless argues that it had a constitutional right to a jury trial before a determination of restitution and administrative

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penalties. We are not persuaded by Concordia's attempt to bootstrap the use of the word "damages" in the Commission's administrative regulations to create a jury right. Securities enforcement actions are public actions, not private ones, *see Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 552 (App. 1986) (finding no right to individual hearings as to each investor under Securities Act enforcement action), and "[u]nless expressly provided for by statute, 'there is no right to a jury trial on statutory claims that did not exist at common law prior to statehood,'" *State ex rel. Darwin v. Arnett*, 235 Ariz. 239, 245 ¶ 36 (App. 2014) (the Arizona Constitution does not provide the right to jury in an environmental administrative action). Concordia bore the burden of proof to show a constitutional violation, and it did not do so. *See Paolik v. Chinle Unified Sch. Dist. No. 24*, 195 Ariz. 148, 154 ¶ 24 (App. 1999).

¶15 Concordia argues next that it did not receive due process because—despite their claims otherwise—Commissioners Tobin and Dunn had a personal conflict of interest depriving Concordia of an impartial judicial body. "All decision makers, judges and administrative tribunals alike, are entitled to a presumption of honesty and integrity." *Emmett McLoughlin Realty, Inc. v. Pima County*, 212 Ariz. 351, 357 ¶ 24 (App. 2006) (quotation omitted). A party may challenge impartiality by "demonstrat[ing] that the mind of the decision maker is irrevocably closed on the particular issues being decided." *Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Prods., Inc.*, 167 Ariz. 383, 387 (App. 1990) (quotation omitted). As the party challenging Commissioners Dunn's and Tobin's impartiality, Concordia had the burden of rebutting the "strong presumption that [they acted] 'free of bias and prejudice.'" *See State v. Cropper*, 205 Ariz. 181, 185 ¶ 22 (2003).

¶16 The trial court correctly found that Concordia's vague allegations of impartiality did not meet the legal standard to demonstrate a constitutional violation by the Commissioners. Moreover, Concordia had no conflict of interest with Commissioners Dunn and Tobin. Rather, any conflict of interest was attributable to Concordia's attorney and nothing prevented Concordia from hiring a different attorney.

¶17 The Commission ordered restitution and administrative penalties only after providing Concordia with notice of the alleged violations and an extensive hearing. *See A.R.S. § 44-1972(C), (E)*. Concordia therefore was provided due process. Substantial evidence supports the Commission's Decision, and it was not arbitrary and capricious nor an abuse of discretion.

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CONCLUSION

¶18 For the foregoing reasons, we affirm. As the prevailing party, we award the Commission its costs on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.



AMY M. WOOD • Clerk of the Court
FILED: AA