

BEFORE THE ARIZONA CORPORATION COMMISSION  
DOCKETED

AUG 29 2002

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DOCKET NO. S-03184A-97-0000

1 WILLIAM A. MUNDELL  
2 CHAIRMAN  
3 JIM IRVIN  
4 COMMISSIONER  
5 MARC SPITZER  
6 COMMISSIONER

7 IN THE MATTER OF  
8 ROBERT SHAKMAN  
9 HEALTHCARE PURCHASING ALLIANCE, INC.  
10 Respondents.

**ORDER** Decision No. 65160

11 Open Meeting  
12 August 29, 2002  
13 Phoenix, Arizona

**BY THE COMMISSION:**

14 On September 14, 2001, Richard Zimmerman ("Zimmerman") filed a Motion to Modify  
15 Order to Cease and Desist and Other Relief, Decision No. 60250 ("Motion") with the Arizona  
16 Corporation Commission ("Commission").

17 On September 28, 2001, the Commission's Securities Division Staff ("Division") filed a  
18 Response to the Motion in which it requested that the Commission deny the Motion.

19 On October 12, 2001, Zimmerman's counsel filed a Reply in Support of Motion and  
20 requested a hearing or oral argument.

21 On November 5, 2001, a Procedural Order set oral argument on the Motion for November 19,  
22 2001 at 10:00 a.m. Subsequently, the Division and Zimmerman's counsel jointly requested a  
23 continuance of the oral argument date, and by Procedural Order of November 29, 2001, oral  
24 argument on the Motion was continued to December 12, 2001.

25 On December 12, 2001, as scheduled, counsel for Zimmerman and counsel for the Division  
26 appeared before a duly authorized Administrative Law Judge of the Commission and presented legal  
27 arguments on the Motion.  
28 ...

**BACKGROUND****Decision No. 60250**

On June 12, 1997, in Decision No. 60250, the Commission found Robert Shakman ("Shakman") and the Healthcare Purchasing Alliance, Inc. ("HPA") in violation of the Arizona Securities Act by offering and selling unregistered securities in the form of HPA stock and notes without an applicable exemption from registration, by acting as dealers and or salesmen of securities without prior registration as dealers or salesmen without an applicable exemption from such registration, and by offering and selling securities in violation of the antifraud provisions of the Arizona Securities Act. Decision No. 60250 ordered Shakman and HPA to cease and desist from violations of the Arizona Securities Act, and to jointly and severally make monetary restitution in the amount of \$119,330, with interest, to those investors shown on the records of the Division as purchasers of HPA stock and notes. Decision No. 60250 requires Shakman and HPA to pay restitution funds to the Arizona Attorney General, who will deposit the funds in a trust account with a federally insured financial institution, and will disburse the available funds on a pro rata basis to those investors to whom Shakman and HPA sold HPA stock and the notes, as reflected in the records of the Division. Decision No. 60250 also orders Shakman and HPA, jointly and severally, to pay an administrative penalty of \$10,000 to the Treasurer of the State of Arizona for deposit into its general fund. Decision No. 60250 further orders that should collection become necessary, Shakman and HPA, jointly and severally, shall be liable to the Commission for its costs of collection and interest at the statutory rate of ten percent per annum on all amounts not timely paid.

Pursuant to A.R.S. § 44-2036(C), Decision No. 60250 was filed in Maricopa Superior Court on November 11, 1999. (See TJ99-03712).

**The Motion**

On September 14, 2001, Richard Zimmerman, who is an investor victim of Shakman and HPA, ("Zimmerman") filed the Motion with the Commission. The Motion requests that the Commission modify Decision No. 60250 to reflect certain "assignments of restitution." Attached to the Motion are copies of twelve documents titled "Assignment of Restitution," each signed by Richard Zimmerman and by one investor to whom Shakman and HPA have been ordered to pay

1 restitution ("Assignment Documents"). Under the terms of the Assignment Documents, the investor-  
2 signatory agrees to assign to Zimmerman all claims, rights and title to the restitution ordered by  
3 Decision No. 60250, agrees to cooperate with Zimmerman in collecting the restitution, agrees that the  
4 Commission may modify Decision No. 60250 to reflect the assignment, and agrees that the  
5 Commission or the Arizona Attorney General may pay the restitution and interest, or any portion  
6 thereof, to Zimmerman. Under the terms of the Assignment Documents, Zimmerman agrees to  
7 "assist and cooperate with the ACC or Arizona Attorney General in collecting on or enforcing the  
8 order" and Zimmerman agrees to pay the investors 50 percent of any restitution Zimmerman receives,  
9 within 30 days of the receipt thereof. The 50 percent payment from Zimmerman is capped at  
10 different amounts for different investors.

11 The Motion requests that the Commission modify Decision No. 60250 to reflect the  
12 agreements made in the Assignment Documents in order to allow the Commission or the Arizona  
13 Attorney General to disburse the ordered restitution and interest directly to Zimmerman, who will  
14 then disburse the agreed amount to each individual investor.

### 15 The Arguments

16 In its Response to the Motion filed on September 28, 2001, the Division states three grounds  
17 upon which the Motion should be denied. First, the Division argues that the Commission has no  
18 authority to modify or change its Order, because the Commission must initiate a review of its own  
19 Decision pursuant to A.A.C. R14-3-112(e) not later than ten days after service of the Decision.  
20 Second, the Division argues that the Commission is not a party to the agreements between  
21 Zimmerman and the other investors, and has no authority to enforce a private contract between  
22 investors. Lastly, the Division argues that a private party such as Zimmerman has no rights to  
23 enforce Decision No. 60250, which is a public action, and therefore, even if the Commission does  
24 modify Decision No. 60250, that Zimmerman, as an incidental beneficiary, will not receive any  
25 additional rights to collect restitution.

26 In Zimmerman's Reply in support of the Motion, filed on October 12, 2001, Zimmerman  
27 argues that the fact that the Division filed Decision No. 60250 with the Superior Court does not  
28 divest the Commission of jurisdiction to modify that Decision. Zimmerman also states that the

1 Division's argument that the Commission has no authority to enforce a private contract between  
2 investors is irrelevant because the Motion only asks that the Commission recognize the private  
3 contracts for assignments of restitution between Zimmerman and the other investors, and not that the  
4 Commission enforce the contracts. Zimmerman also disagrees with the Division's position that the  
5 investors are only incidental beneficiaries, and asserts that they are judgment creditors.

6 In oral argument, the Division disputed Zimmerman's assertion that the investors are  
7 judgment creditors, stating that in this case, the judgment that resulted from Decision No. 60250  
8 being filed with the Maricopa Superior Court is in the Commission's name, and pointed out that it  
9 includes not only the restitution to be paid to the Attorney General for distribution to the investors,  
10 but also the administrative penalties the Commission ordered. The Division emphasized that  
11 pursuant to the judgment, each of the 13 investors, including Zimmerman, is entitled to receive the  
12 amount of his or her investment plus 10 percent interest from the date they invested, and that  
13 Commission adoption of the contracts between Zimmerman and the investors would result in those  
14 investors paying more than 50 percent of their recoverable funds to Mr. Zimmerman, because the  
15 contracts allow Mr. Zimmerman to keep all the interest earned from the date of their investments, in  
16 addition to 50 percent of the investments' face values. The Division points out that in addition, under  
17 the terms of the contracts, Zimmerman is entitled to the interest and 50 percent of the investments  
18 even if he has no involvement in recovery of the funds. Lastly, the Division states that it makes no  
19 argument as to the validity of the contracts; but that if the contracts are valid, then Mr. Zimmerman  
20 has a right to enforce them, but not in this forum.

21 Zimmerman believes that if the Commission fails to either modify Decision No. 60250 in  
22 conformity with the contracts, or order the Division to change its records in such a way to allow the  
23 judgment to be paid according to the contracts, that the Commission is frustrating Zimmerman's  
24 attempts to protect the investors who entered into the contracts.

25 The Division believes that the Commission should not modify Decision No. 60250 by  
26 including the terms of the contracts because to do so would deprive the investors of their entitlement  
27 to receive the full restitution ordered by the Commission's Decision No. 60250.

28 ...

ANALYSIS

1  
2 We agree with Zimmerman that the fact that the Division filed Decision No. 60250 with the  
3 Superior Court does not divest the Commission of jurisdiction to modify that Decision. However, we  
4 believe that in order to modify a past Commission Decision, it is necessary to make a determination  
5 that such a modification would serve the public interest. The arguments Zimmerman presented in the  
6 Motion and in arguments on the Motion do not support a determination that the public interest would  
7 be served by granting the relief Zimmerman requests.

8 The Division did not take a position as to the validity of the Assignment Documents, but  
9 asserted that the Commission has no authority to enforce a private contract between investors.  
10 Zimmerman argued that the question of the Commission's authority to enforce a private contract  
11 between investors is irrelevant, because the Motion asks only that the Commission recognize the  
12 Assignment Documents, and not that the Commission enforce them. Zimmerman's argument on this  
13 point is not persuasive. The Commission's authority to enforce a private contract between investors  
14 would be highly relevant to a Commission determination to modify a prior Commission order to  
15 adopt private contractual terms governing the payment of restitution. If it would be improper to  
16 enforce such a private contract, it would not be proper to amend a Decision to "recognize" such a  
17 private contract.

18 Zimmerman argues that the Motion should be granted because, if the Commission fails to  
19 either modify Decision No. 60250 in conformity with the Assignment Documents, or order the  
20 Division to change its records in such a way to allow the judgment to be paid according to the  
21 Assignment Documents, that the Commission is frustrating Zimmerman's attempts to protect the  
22 investors who entered into the contracts. We disagree. Nothing in Decision No. 60250, the judgment  
23 on the Decision, or this Decision prevents Zimmerman from, in his words, "protecting the investors  
24 who entered into the contracts." If Zimmerman has a means of reaching the funds that Shakman and  
25 HPA have been ordered to pay in restitution for the investors, he may furnish that information to the  
26 investors, to the Division, or to the Attorney General at any time. In addition, the Commission's  
27 disposition of the Motion has no legal effect on the enforceability of the Assignment Documents,  
28 which are private contracts. The Assignment Documents are private contracts, and it is not necessary

1 for us to rule on their validity.

2 The Division argued that the investor-victims are only incidental beneficiaries of Decision  
3 No. 60250, because that Decision is a public action, and not a private action. Zimmerman disagreed,  
4 asserting that the investor-victims are judgment creditors. Because we find on other grounds today  
5 that it is not in the public interest at this time to modify Decision No. 60250, it is not necessary at this  
6 time to reach the question of whether the judgment resulting from Decision No. 60250 renders the  
7 investor victims judgment creditors.

8 Decision No. 60250 orders that each of the 13 investors, including Zimmerman, is entitled to  
9 receive the amount of his or her investment plus 10 percent interest from the date they invested.  
10 After considering the Motion, we continue to believe that Decision No. 60250 remains in the best  
11 interests of the public and in the best interests of the individual investors. We will therefore not  
12 modify Decision No. 60250 at this time.

### 13 FINDINGS OF FACT

14 1. On June 12, 1997, in Decision No. 60250, the Commission found Shakman and HPA  
15 in violation of the Arizona Securities Act by offering and selling unregistered securities in the form  
16 of HPA stock and notes without an applicable exemption from registration, by acting as dealers and  
17 or salesmen of securities without prior registration as dealers or salesmen and without an applicable  
18 exemption from such registration, and by offering and selling securities in violation of the antifraud  
19 provisions of the Arizona Securities Act.

20 2. Decision No. 60250 ordered Shakman and HPA to cease and desist from violations of  
21 the Arizona Securities Act, and to jointly and severally make monetary restitution in the amount of  
22 \$119,330, with interest, to those investors shown on the records of the Division as purchasers of HPA  
23 stock and notes.

24 3. Decision No. 60250 requires Shakman and HPA to pay restitution funds to the  
25 Arizona Attorney General, who will deposit the funds in a trust account with a federally insured  
26 financial institution, and will disburse the available funds on a pro rata basis to those investors to  
27 whom Shakman and HPA sold HPA stock and the notes, as reflected in the records of the Division.

28 4. Decision No. 60250 also orders Shakman and HPA, jointly and severally, to pay an

1 administrative penalty of \$10,000 to the Treasurer of the State of Arizona for deposit into its general  
 2 fund. Decision No. 60250 further orders that should collection become necessary, Shakman and  
 3 HPA, jointly and severally, shall be liable to the Commission for its costs of collection and interest at  
 4 the statutory rate of ten percent per annum on all amounts not timely paid.

5 5. Decision No. 60250 was filed in Maricopa Superior Court on November 11, 1999.

6 6. On September 14, 2001, Zimmerman filed the Motion with Commission.

7 7. On September 28, 2001, the Division filed a Response to the Motion in which it  
 8 requested that the Commission deny the Motion.

9 8. On October 12, 2001, Zimmerman's counsel filed a Reply in Support of Motion and  
 10 requested a hearing or oral argument.

11 9. A Procedural Order issued November 5, 2001, set oral argument on the Motion for  
 12 November 19, 2001 at 10:00 a.m. Subsequently, the Division and Zimmerman's counsel jointly  
 13 requested a continuance of the oral argument date, and by Procedural Order of November 29, 2001,  
 14 oral argument on the Motion was continued to December 12, 2001.

15 10. On December 12, 2001, counsel for Zimmerman and counsel for the Division  
 16 appeared before a duly authorized Administrative Law Judge of the Commission and presented legal  
 17 arguments on the Motion.

### 18 CONCLUSIONS OF LAW

19 1. The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona  
 20 Constitution, A.R.S. §§ 44-1901 et seq. and A.A.C. R14-3-112.

21 2. Zimmerman has not demonstrated adequate grounds to justify modification of Decision  
 22 No. 60250.

23 3. Decision No. 60250 remains in the best interests of the public and in the best interests of  
 24 the individual investors.

25 4. The Motion should be denied.

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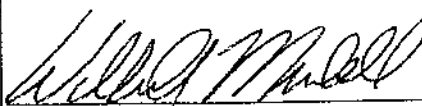
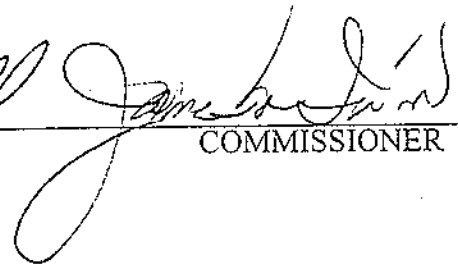
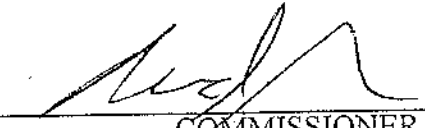
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ORDER

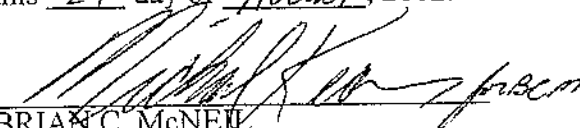
IT IS THEREFORE ORDERED that Richard Zimmerman's Motion to Modify Order to Cease and Desist and Other Relief, Decision No. 60250, is hereby denied.

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

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

  
 CHAIRMAN
   
 COMMISSIONER
   
 COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Secretary 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 29<sup>TH</sup> day of AUGUST, 2002.

  
 BRIAN C. McNEIL  
 EXECUTIVE SECRETARY

DISSENT \_\_\_\_\_

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1 SERVICE LIST FOR: THE MATTER OF ROBERT SHAKMAN  
2 HEALTHCARE PURCHASING ALLIANCE, INC.

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