IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

JUSTIN C. BILLINGSLEY, et al., *Plaintiffs/Appellants*,

v.

ARIZONA CORPORATION COMMISSION, *Defendant/Appellee*.

No. 1 CA-CV 18-0630
FILED: 11-19-2019

Appeal from the Superior Court in Maricopa County
No. LC2017-000498-001
The Honorable Patricia A. Starr, Judge

AFFIRMED

COUNSEL

Justin C. Billingsley, Brewster, NY
Plaintiff/Appellant

Arizona Corporation Commission, Legal Division, Phoenix
By Paul Kitchin
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Maria Elena Cruz and Judge Kenton D. Jones joined.

C A T T A N I, Judge:

¶1 Justin Billingsley and his wife appeal from the superior court's ruling affirming the decision by the Arizona Corporation Commission ("ACC") finding Billingsley violated the Arizona Securities Act and ordering him to pay restitution and administrative penalties. For reasons that follow, we affirm.

FACTS AND PRODECURAL BACKGROUND

¶2 This case involves the offering of securities in the form of a small number of promissory notes to fund LoanGo Corporation, a now-defunct start-up business. LoanGo, created by Jeffrey Scott Peterson, John Keith Ayers, and Billingsley in mid-2011, was conceived as an online payday lending company. Peterson, Ayers, and Billingsley were equal owners of the start-up, and the three were its only directors. In September 2011, the three directors approved a resolution that authorized raising $3,000,000 in capital for the company.

¶3 Initially, LoanGo retained a securities attorney and worked with a New York-based investment firm as placement agent for the anticipated offering. Although the New York firm participated in drafting a private placement memorandum, it did not ultimately sell any LoanGo securities.

¶4 Instead, Billingsley, an insurance provider who was not registered with the ACC as a securities salesman or dealer, sold LoanGo promissory notes to five individuals between September 2011 and April 2012. Billingsley had previously met the investors during insurance seminars he conducted at an RV park in Casa Grande, and he had sold them annuities. Billingsley persuaded these five investors to purchase a total of $250,000 in LoanGo notes. Each note had a one-year term and was to earn 18% interest, with monthly interest payments to begin 60 days after execution. But LoanGo never made any payments on the notes, either interest or principal.

¶5 In mid-2015, the ACC filed a notice with proposed order alleging that LoanGo, Billingsley, Peterson, and Ayers had violated Arizona securities law in connection with the sale of the notes.[1] The notice alleged registration violations (sale of unregistered securities by unregistered dealers or salesmen) as well as fraud in connection with the sale. The notice also joined Billingsley's wife, but only "for purposes of determining the liability of the marital communit[y]."

¶6 The administrative proceedings led to a three-day hearing before an administrative law judge ("ALJ"). Two of the investors—R. and J.—testified. The other three investors—E., S., and G.—did not testify, but an ACC investigator who had spoken with them during the LoanGo investigation related their experiences without objection from any party. *See* A.R.S. § 44-1973(B); Ariz. Admin. Code ("A.A.C.") R14-3-109(K); *see also Brown v. Ariz. Dep't of Real Estate*, 181 Ariz. 320, 328 (App. 1995).

¶7 E. purchased a $30,000 LoanGo note from Billingsley in September 2011. The next month, R. purchased a $45,000 note, G. a $25,000 note, and S. a $50,000 note. Billingsley sold J. two LoanGo notes, $70,000 in February 2012 and $30,000 in April 2012. All five affirmed that they had met Billingsley at the RV park and had purchased annuities or other insurance products from him in the past.

¶8 The investors described purchasing the LoanGo notes with little to no disclosure or explanation from Billingsley. Even though any investment in LoanGo was (as Billingsley admits) speculative and involved a high degree of risk, Billingsley told S. "repeatedly" that LoanGo notes were low risk and told E. that LoanGo was low risk and "a great investment, great opportunity." Billingsley did not discuss risk level with J. or R. at all, even though he knew R. was only interested in low-risk products.

¶9 R., E., S., and J. related that Billingsley did not give them any documentation of any kind before they purchased the notes, and they did not speak to anyone else about LoanGo before investing. R., E., and J. explained that they invested in LoanGo without more information because they trusted Billingsley in light of their prior business dealings with him. R., E., S., and J. further stated that Billingsley never told them that any portion of the invested funds would be used to pay him a commission (he

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1 The notice also included allegations against LoanGo, Peterson, and Ayers. Although the ACC ultimately found violations by each of these parties, none of them challenged the ACC's final order, and they are not parties to this appeal.

was a director of the company, not a registered securities salesman) or to cash out prior loans to the company from two of the founders (Peterson and Billingsley), rather than for operating the company and funding payday loans. And although the notes sold to E., R., G., and S. were in default before J.'s investment, Billingsley did not tell J. about the already existing defaults.

¶10 According to the investors, each had a net worth at the time of investment of less than $1,000,000. The four married investors had annual household incomes of under $300,000, and the other's annual income was less than $200,000. Although these financial thresholds are important in determining how securities regulations apply and what disclosure is required, J. noted that Billingsley never inquired as to his financial status, and R. testified Billingsley knew she did not meet those thresholds based on their prior dealings.

¶11 Billingsley testified on his own behalf, in large part contradicting the investors' accounts. He acknowledged that he had met all five investors at insurance and annuity sales events he conducted at an RV park, and he agreed that all five had previously purchased annuity products from him. Billingsley claimed, however, that before each investment, he provided each investor with a private placement memorandum prepared by the New York investment firm describing in detail the potential risk involved with investing in LoanGo and the use to which the funds would be put. And although he stated that he neither knew nor inquired as to the investors' income or net worth, Billingsley asserted that a representative from the New York firm had spoken with each investor telephonically before any investment to ensure they met the necessary wealth or income thresholds.

¶12 Ultimately, an ALJ issued a recommendation and, over Billingsley's written exceptions opposing the recommendation, the ACC adopted an opinion and order finding him to have violated the Arizona Securities Act in connection with the sale of the LoanGo notes. Specifically, the ACC found that the LoanGo notes were securities, that the notes were not exempt from the registration requirement generally applicable to securities, and that Billingsley had violated registration requirements by offering unregistered securities for sale and selling securities without being registered as a securities salesman or dealer. Additionally, the ACC found that Billingsley had committed securities fraud by misrepresenting the level of risk involved and by omitting material facts regarding both the use of the funds and, as to J., the prior defaults. The ACC ordered Billingsley to cease and desist the unlawful conduct and imposed $250,000 in restitution and

$15,000 in administrative penalties against Billingsley and his marital community.

¶13 Billingsley filed a request for rehearing, which was denied by operation of law. *See* A.R.S. § 44-1974 (rehearing request deemed denied if not granted within 20 days). Billingsley then sought judicial review in the superior court, and that court affirmed. *See* A.R.S. §§ 12-902(A), 44-1981. This appeal followed. We have jurisdiction under A.R.S. § 12-913. *See Svendsen v. Ariz. Dep't of Transp.*, 234 Ariz. 528, 533, ¶ 13 (App. 2014).

DISCUSSION

¶14 On judicial review of the ACC's decision enforcing securities laws, we independently review the administrative record to determine whether the action was unlawful, arbitrary, capricious, or an abuse of discretion. *See* A.R.S. § 12-910(E); *Shorey v. Ariz. Corp. Comm'n*, 238 Ariz. 253, 257, ¶ 11 (App. 2015); *Nutek Info. Sys., Inc. v. Ariz. Corp. Comm'n*, 194 Ariz. 104, 108, ¶ 15 (App. 1998); *see also Parsons v. Ariz. Dep't of Health Servs.*, 242 Ariz. 320, 322, ¶ 10 (App. 2017). We do not reweigh the evidence, but rather assess whether substantial evidence supports the decision. *E. Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n*, 206 Ariz. 399, 409, ¶ 35 (App. 2003). Substantial evidence exists as long as the evidentiary record supports the decision, even if the record would also support a different conclusion. *Id.*; *see also DeGroot v. Ariz. Racing Comm'n*, 141 Ariz. 331, 336 (App. 1984). We review legal determinations de novo. *McGovern v. Ariz. Health Care Cost Containment Sys. Admin.*, 241 Ariz. 115, 118, ¶ 8 (App. 2016).

¶15 Billingsley's appeal challenges the ACC's decision in four respects. First, he argues the LoanGo notes were exempt from registration, contrary to the ACC's finding of registration violations. Second, he claims the securities fraud findings lacked sufficient factual and legal support. Third, he asserts the ACC lacked authority to assess liability against his marital community. And fourth, he claims the ACC's decision failed to adequately address his exceptions. We address each contention in turn.

I. Registration Violations and Exemptions.

¶16 Unless subject to a statutory exemption, "any note" is a security for registration purposes under Arizona law. A.R.S. § 44-1801(27); *State v. Tober*, 173 Ariz. 211, 212–14 (1992). Generally, sale of an unregistered security or sale by an unregistered salesman is prohibited. A.R.S. §§ 44-1841 (unregistered securities), -1842 (unregistered salesperson). Thus, any security offered for sale in Arizona must be registered with the ACC, and any individual selling securities must be registered with the ACC as a salesman or dealer. Certain limited classes of securities are exempt from the registration requirement, as are certain transactions. A.R.S. §§ 44-1843 (exempt securities), -1844 (exempt transactions). Qualifying for exemption requires strict compliance with all facets of the relevant exemption provision. *See State v. Baumann*, 125 Ariz. 404, 411 (1980). And the party urging exemption as a defense has the burden to prove the existence of the exemption. A.R.S. § 44-2033.

¶17 The ACC concluded Billingsley failed to prove any exemption applied, and thus that he had violated § 44-1841 by selling unregistered securities and § 44-1842 by selling securities while not registered as a securities dealer or salesman. Billingsley does not dispute that the LoanGo notes were securities generally subject to registration, that the notes were not in fact registered, or that he was not registered as a securities salesman or dealer. He argues, however, that the sales were exempt transactions, relying on (1) exemptions under then-existing Rule 505 and Rule 506 of the U.S. Securities and Exchange Commission's Regulation D, along with their parallel Arizona provisions, and (2) a statutory exemption for private offerings.

A. Waiver.

¶18 Preliminarily, the ACC argues Billingsley waived reliance on exemptions by failing to timely raise the argument, asserting that he first raised the issue in his exceptions to the ALJ's proposed opinion. *See Jones v. Cochise County*, 218 Ariz. 372, 379, ¶¶ 22–23 (App. 2008) (describing waiver by failure to plead an affirmative defense as well as waiver by conduct). But Billingsley raised exemption as an affirmative defense in his answer to the original notice. And both his oral closing argument at the hearing and his post-hearing brief pressed arguments that were relevant only if exemptions were in play. Accordingly, we address Billingsley's exemption arguments on their merits.

B. Regulation D Exemptions.

¶19 Rule 505 and Rule 506 provide registration exemptions for limited offers or sales of securities by the issuer. 17 C.F.R. § 230.505 (amended 2015) (Rule 505); 17 C.F.R. § 230.506 (Rule 506). Both rules require compliance with certain general conditions, including disclosure of (among other things) the issuer's audited balance sheet to every purchaser who is not an "accredited investor." 17 C.F.R. §§ 230.502(b)(1), (2)(i)(B), 230.505(b)(1), 230.506(b)(1). As relevant here, "accredited investor" means an individual who exceeds either an income or a net worth threshold: an annual income exceeding $200,000 (or over $300,000 jointly with a spouse), or net worth exceeding $1,000,000. 17 C.F.R. § 230.501(a)(5), (6). Arizona's corresponding exemptions carry the same requirements. A.A.C. R14-4-126(E)(2)(a), (F)(1) (specific exemptions, incorporating general requirements), (C)(2)(a), (b)(ii) (general requirement of disclosure including audited balance sheet to any purchaser other than an accredited investor), (B)(1)(e)–(f) (defining accredited investor).

¶20 The ACC found that none of the investors were accredited investors and that Billingsley did not provide any documentary disclosure (much less an audited balance sheet) to at least four of the investors, meaning neither the Regulation D exemptions nor Arizona's analogues apply. The evidence supports these findings.

1. Accredited Investor Status.

¶21 Each of the investors reported a net worth of less than $1,000,000 and income of less than $300,000 (less than $200,000 for J., who was not married) at the time of investment. *See* 17 C.F.R. § 230.501(a)(5), (6); A.A.C. R14-4-126(B)(1)(e)–(f). Billingsley contends this evidence is not sufficient to support the ACC's finding. But his argument, at its core, simply requests that we reweigh conflicting evidence, which is outside the scope of our review. *See E. Vanguard Forex*, 206 Ariz. at 409, ¶ 35.

¶22 Specifically, Billingsley asserts that the ACC erred by crediting testimony at the hearing over written certification of net worth exceeding $1,000,000 attached to each investor's subscription agreement. But the check-the-box investor questionnaire indicating net worth was on a different page than the investors' signatures, and the investors' testimony left some doubt as to whether the investors saw these portions of the document before purchase. And here, unlike in the cases on which Billingsley relies, there was no collateral evidence corroborating such certifications. *See Wright v. Nat'l Warranty Co.*, 953 F.2d 256, 260–61 (6th Cir. 1992) (investor was a fiduciary to the issuers' shareholders and claimed to be an accredited investor as well as a sophisticated businessman); *In re Enron Corp. Sec., Deriv. & ERISA Litig.*, 761 F. Supp. 2d 504, 533 (S.D. Tex. 2011) ("sophisticated institutional investors"); *Supernova Sys., Inc. v. Great Am. Broadband, Inc.*, 1:10-CV-319, 2012 WL 425552, at *5–6 (N.D. Ind. Feb. 9, 2012) (corporate investor represented by counsel).

¶23 Billingsley faults the ACC's reliance on hearsay testimony—that is, the investigator's testimony as to E., S., and G.'s statements—in this regard. But, as he acknowledges, the ACC is not bound by the technical rules of evidence applicable in court and may consider, for example, hearsay evidence that "will aid in ascertaining the facts." A.A.C. R14-3-109(K); *see also* A.R.S. § 44-1973(B); *Brown*, 181 Ariz. at 328. Beyond that, no party offered any objection at the hearing when the investigator presented hearsay evidence as to what E., S., and G. had reported.

¶24 Moreover, Billingsley testified at the hearing that he neither knew nor investigated the investors' accredited status. Rather, he claimed to have relied on due diligence by a representative from the New York investment firm, who Billingsley said had contacted each investor directly. According to at least four of the investors, however, they did not speak to anyone other than Billingsley before purchasing the LoanGo notes. Although Billingsley now urges that the investors' luxury RVs and annuity purchases compel the conclusion that they were "wealthy and sophisticated," the existence of such assets does not establish that their respective net worths exceeded the threshold, especially in the face of contrary testimony or reports from the investors themselves.

¶25 In short, Billingsley urges us to discount the ACC's resolution of conflicting evidence and reach a different conclusion. But because the record supports the ACC's finding that none of the investors were accredited investors, we affirm in this regard. *See DeGroot*, 141 Ariz. at 336.

2. Requisite Disclosure.

¶26 Because the investors were not accredited, Billingsley was required to provide each investor with (among other things) an audited balance sheet before purchase. *See* 17 C.F.R. §§ 230.502(b)(1), (2)(i)(B), 230.505(b)(1), 230.506(b)(1); A.A.C. R14-4-126(C)(2)(a), (b)(ii), (E)(2)(a), (F)(1). And according to R., J., E., and S., Billingsley did not provide them with any documentation before selling them the LoanGo notes. Billingsley did not and does not offer any contrary evidence suggesting that any of the investors received an audited balance sheet.

3. Application.

¶27 Billingsley asserts that, because of the small number of investors, Rule 505 and its Arizona counterpart apply even though the investors were not accredited. While true that then-existing Rule 505 allowed up to 35 non-accredited investors to participate in an offering, 17 C.F.R. §§ 230.505(b)(2)(ii), 230.501(e)(1)(iv) (amended 2012), the general conditions requiring disclosure of an audited balance sheet to any non-accredited investor nevertheless apply. *See* 17 C.F.R. §§ 230.505(b)(1), 230.502(b)(1), (2)(i)(B).

¶28 Billingsley further asserts that the Rule 506 exemption and its Arizona equivalent apply regardless whether the investors were accredited because of the small number of investors and because all the investors were "sophisticated." Like Rule 505, Rule 506 allows participation by up to 35 non-accredited investors. 17 C.F.R. §§ 230.506(b)(2)(i), 230.501(e)(1)(iv). Billingsley correctly notes that Rule 506 specifies that any investor who is not accredited must "ha[ve] such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment," which Billingsley describes as being "sophisticated." 17 C.F.R. § 230.506(b)(2)(ii). But these are additional requirements that supplement, not displace, the general conditions requiring specific disclosures to each non-accredited investor—a requirement with which Billingsley did not comply. *See* 17 C.F.R. §§ 230.506(b)(1), 230.502(b)(1), (2)(i)(B).

¶29 In sum, substantial evidence supports the ACC's findings that (1) none of the investors were accredited and (2) Billingsley did not provide any documents (necessarily including the required audited balance sheet) to the investors before purchase. *See E. Vanguard Forex*, 206 Ariz. at 409–10, ¶ 35. These findings in turn support the ACC's conclusion that Billingsley failed to establish an exemption under Regulation D or Arizona's analogous provisions. *See* 17 C.F.R. §§ 230.501(a)(5)–(6), 230.502(b)(1), (2)(i)(B), 230.505(b)(1), 230.506(b)(1); A.A.C. R14-4-126(B)(1)(e)–(f), (C)(2)(a), (b)(ii), (E)(2)(a), (F)(1).

C. Private Offering Exemption.

¶30 Billingsley further posits that the LoanGo notes were part of a private offering and thus exempt from registration under 15 U.S.C. § 77d(a)(2) and A.R.S. § 44-1844(A)(1).

¶31 This exemption arises from identical provisions of federal and Arizona law, but it applies only if all offerees can "fend for themselves" in the sense that they have access to (and thus do not need separate disclosure of) the same kind of information that would otherwise be provided in a registration statement. *S.E.C. v. Ralston Purina Co.*, 346 U.S. 119, 124–27 (1953); *S.E.C. v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1090–91 (9th Cir. 2010) (characterizing a private offering as "a limited distribution to highly sophisticated investors, rather than a general distribution to the public"); *see also Sell v. Gama*, 231 Ariz. 323, 327, ¶ 18 (2013) (noting that federal securities law may be of persuasive value in interpreting similar provisions of Arizona securities law); 1996 Ariz. Sess. Laws, ch. 197, § 11(C) (42d Leg., 2d Reg. Sess.) (expressing legislative intent that interpretation of Arizona statutes governing sales of securities, A.R.S. tit. 44, ch. 12, be guided by federal construction of "substantially similar" provisions of federal law). The test includes consideration of "(1) the number of offerees; (2) the sophistication of the offerees; (3) the size and manner of the offering; and (4) the relationship of the offerees to the issuer." *S.E.C. v. Murphy*, 626 F.2d 633, 644–45 (9th Cir. 1980) (citations omitted). The "relationship" prong focuses on whether each offeree's relationship with the issuer ensures access to the "quite extensive" information that registration of the security would reveal. *Id.* at 647; *see also* 15 U.S.C. § 77aa (delineating the 32 categories of information required in a registration statement).

¶32 Here, although the offering was made only to a small number of people, Billingsley acknowledged when testifying that his prior interactions with the investors gave him no basis from which to assess their level of sophistication. Moreover, the record reveals no indication that any of the investors had any relationship with LoanGo, much less the type of relationship that would give them independent access to information like LoanGo's certified balance sheet, profit and loss statements for at least the latest fiscal year, or director and executive compensation schedules. *See* 15 U.S.C. § 77aa(14), (25), (26). To the contrary, three of the investors explained that they purchased the LoanGo notes despite inadequate information because they trusted Billingsley.

¶33 Accordingly, the record supports the ACC's conclusion that Billingsley failed to prove the application of any exemption, including the private offering exemption. Absent any applicable exemption, the ACC did not err by finding registration violations under §§ 44-1841 and -1842.

II. Securities Fraud.

¶34 Arizona law prohibits fraud in connection with the sale of securities. A.R.S. § 44-1991. Among other types of fraud, this statutory prohibition includes affirmative misrepresentations as well as misleading omissions of material facts:

> It is a fraudulent practice and unlawful for a person, in connection with . . . a sale or purchase of securities . . . directly or indirectly to . . .
>
> 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.

A.R.S. § 44-1991(A)(2). Materiality is assessed objectively by reference to whether the statement or omission would be significant to a reasonable buyer. *Aaron v. Fromkin*, 196 Ariz. 224, 227, ¶ 14 (App. 2000). And even if a diligent investor could discover the truth through investigation, the statute imposes an affirmative duty not to mislead investors in any way. *Trimble v. Am. Sav. Life Ins.*, 152 Ariz. 548, 553 (App. 1986). In light of this "heavy burden" not to mislead, *id.*, neither knowledge of falsity nor intent to defraud are elements of this kind of securities fraud. *State v. Gunnison*, 127 Ariz. 110, 113 (1980); *State v. Superior Court (Davis)*, 123 Ariz. 324, 331 (1979), *overruled on other grounds by Sell*, 231 Ariz. at 330, ¶ 32.

¶35 The ACC found that Billingsley committed securities fraud by affirmatively misrepresenting the degree of risk involved in the LoanGo notes and by misleadingly omitting material facts, including how the funds would be used (i.e., cashing out founders Peterson and Billingsley for prior loans to the company and paying Billingsley a commission) and, as to J., the fact that the prior notes were already in default. Billingsley challenges each finding.

A. Affirmative Misrepresentation: Degree of Risk.

¶36 The ACC found that Billingsley misrepresented to E. and S. that the LoanGo notes were a low-risk investment. This finding is supported by E. and S.'s descriptions of the transactions, presented at the hearing through the ACC investigator. According to S., Billingsley told him "repeatedly" that the notes were low risk. According to E., Billingsley told her the notes were low risk and thus "a great investment, great opportunity."

¶37 Billingsley does not dispute that risk level is material or that LoanGo was in fact a speculative, high-risk investment. Rather, he relies on conflicting evidence, largely based on his own testimony, that the investors knew or should have known the notes were risky. Primarily, he claims that he provided each investor with a private placement memorandum prepared by the New York firm describing the risk level in detail, and that each investor's subscription agreement included a disclaimer describing the notes as speculative and cross-referencing the private placement memorandum for further detail. But the investors—R., E., S., and J.—uniformly denied receiving any such documentation before purchasing the notes.

¶38 Billingsley suggests the ACC erred by crediting E. and S.'s positions because they were presented through the investigator's testimony. But, as noted previously, Billingsley did not object to this hearsay testimony at the hearing, and in any event, the ACC is authorized to consider reliable hearsay in ascertaining the facts. Further, these accounts of Billingsley's deception were consistent with R.'s direct testimony that Billingsley failed to discuss risk with her at all, despite knowing she was interested only in low-risk products. Moreover, to the extent Billingsley suggests the notes' high interest rate alone "clearly signaled a risky investment," such collateral indication of risk does not excuse Billingsley's misrepresentations. *See Trimble*, 152 Ariz. at 553.

¶39 The ACC was free to credit the investors' statements over Billingsley's contrary account. *See Nutek Info. Sys.*, 194 Ariz. at 113, ¶ 39 (reiterating that reviewing court does not reweigh evidence or reassess witness credibility). We thus affirm this aspect of the ACC's ruling.

B. Misleading Omissions.

¶40 Preliminarily, Billingsley argues that Arizona should abandon securities-fraud-by-omission, despite statutory language to the contrary. *See* A.R.S. § 44-1991(A)(2). Citing *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 174 (1994), Billingsley notes that "[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." *Id.* (quoting *United States v. Chiarella*, 445 U.S. 222, 235 (1980)). But even setting aside the fact that *Central Bank of Denver* was concerned with a different issue (whether the language of the federal securities fraud statute covered liability for aiding and abetting securities fraud), *see id.* at 175–78, Billingsley's argument conflates generic fraud by nondisclosure with the statute's designation of fraud by omission. The Arizona statute—like the existing federal rule, *see* 17 C.F.R. § 240.10b-5(b)—contemplates fraud by omission only when the speaker has made other statements that would otherwise be misleading. A.R.S. § 44-1991(A)(2). That is, the statute inherently provides the required "duty to speak" by applying it only to the duty to correct otherwise misleading statements. Billingsley's argument is thus unavailing.

1. Use of Funds.

¶41 The ACC found that Billingsley made material omissions by failing to inform E., R., S., and J. that funds from their purchase of the LoanGo notes would be used to (1) cash out Peterson and Billingsley's previous loans to the company, totaling $20,000, and (2) pay Billingsley a $15,000 commission. The evidence supports these findings.

¶42 R., E., S., and J. all recounted that Billingsley told them about investing in LoanGo as a new company he was starting, implying that funds invested would be used to operate the company. He did not mention that a substantial portion of the funds would be diverted away from operation of the company and funding of payday loans. As the ACC found, a reasonable investor would find diversion of funds away from operating capital—and particularly using investor funds to cash out the founders' own investments—material to the company's prospects of success.

¶43 Billingsley counters that using investor funds to repay founders' loans was disclosed in the private placement memorandum by reference to using funds for "working capital" or for "operating expenses and overhead." But this relies on the faulty premise that the investors in fact received the private placement memorandum. And although he suggests that describing the use to which LoanGo would put the funds was superfluous to generic warnings that the notes were high risk, this argument ignores both the ACC's findings about his affirmative misrepresentations as to risk level and the ACC's description of a specific risk that diverting funds from operating the company would diminish the likelihood of LoanGo ever achieving earnings to repay the investors.

¶44 As to the use of investor monies for the payment of a commission, Billingsley primarily disputes the ACC's finding that the $15,000 payment was in fact a commission. Although Billingsley testified that the payment was reimbursement for office and travel expenses, other evidence supports the ACC's characterization. The amount of the payment to Billingsley was exactly 10% of the funds he had raised at the time, and messages between Peterson and Ayers about the payment suggest they were hiding the nature of the commission payment as a sham loan: Peterson directed Ayers to prepare "to 'loan' $15k to [Billingsley]" because "he cant be 'paid' commission but he can be loaned money."

¶45 Billingsley further asserts that failing to mention that funds would be used to pay a commission can never support a fraud finding. But the cases on which Billingsley relies involve omissions by salesmen, who purchasers might well expect to receive a commission or other direct compensation for sales. *See United States v. Skelly*, 442 F.3d 94, 97 (2d Cir. 2006) (registered representative); *S.E.C. v. Mapp*, 240 F. Supp. 3d 569, 573, 580–81 (E.D. Tex. 2017) (outside salesman). And both cases acknowledge that, even assuming no duty to disclose a particular fact in the abstract, an omission of that fact may become actionable if it renders the statements actually made "misleading half-truths." *Skelly*, 442 F.3d at 97; *see also Mapp*, 240 F. Supp. 3d at 584. Here, Billingsley was not just a salesman, but an owner, director, and founder of LoanGo: the investors could reasonably expect that when he told them about getting in on the ground floor of his new company, he would use their invested funds to run the company, not simply divert funds from start-up operations of the business to income for himself.

¶46 Under these circumstances, the record supports the ACC's findings of fraud by omission as to use of funds raised.

2. Prior Defaults.

¶47 The ACC found that Billingsley made a material omission by failing to inform J. that, by the time of his investment, LoanGo had already defaulted on the four earlier notes. The evidence supports this finding.

¶48 The first interest payment on each of E., R., G., and S.'s notes was due 60 days after the date of the note: January 24, 2012. LoanGo did not make the payment when due, and the notes went into default 10 days later when LoanGo still had not paid. J. invested $100,000 within weeks after the defaults. Default as to these prior obligations, which tends to cast doubt on LoanGo's ability to cover new notes, would be material to a reasonable investor. *See Aaron*, 196 Ariz. at 227, ¶ 14.

¶49 Billingsley suggests he may not have known of the defaults at the time, but knowledge of falsity is not an element of statutory securities fraud. *See Gunnison*, 127 Ariz. at 113; *Aaron*, 196 Ariz. at 227, ¶ 15. He further urges that the evidence is not clear that the notes were in fact in default or that such missed payments were material. But ample evidence—including the terms of the notes themselves and uniform agreement that no payments were ever made—supports the ACC's contrary conclusion.

¶50 Because substantial evidence supports the ACC's findings of securities fraud, we affirm the decision in this regard. *See E. Vanguard Forex*, 206 Ariz. at 409–10, ¶ 35.

III. Liability of Marital Community.

¶51 Under A.R.S. § 44-2031(C), the ACC may join a spouse in an enforcement action "to determine the liability of the marital community." Generally, "a debt is incurred at the time of the actions that give rise to the debt." *Arab Monetary Fund v. Hashim*, 219 Ariz. 108, 111, ¶ 17 (App. 2008). Each spouse has authority to bind the community, and debts incurred during marriage are presumed to be community obligations. A.R.S. § 25-214(B); *Schlaefer v. Fin. Mgmt. Serv., Inc.*, 196 Ariz. 336, 339, ¶ 10 (App. 2000).

¶52 Billingsley argues that he and his wife permanently moved to Connecticut in September 2011—before he sold the LoanGo notes—so the ACC erred by holding his marital community liable for restitution and administrative penalties. Although Billingsley attached an affidavit to that effect to his exceptions, all prior evidence was to the contrary. In his answer to the ACC's original notice, Billingsley admitted he was an Arizona resident "from at least June 2011 through approximately February 2012" and testified that he moved away from Arizona around "fourth quarter 2012." Given this evidentiary basis, the ACC did not err. *See DeGroot*, 141 Ariz. at 336.

IV. Sufficiency of ACC Findings.

¶53 Finally, Billingsley urges that the ACC's decision was arbitrary and capricious because it failed to expressly address each of his exceptions to the ALJ's recommended opinion. The authorities on which he relies, however, simply reflect the accepted proposition that an agency's decision must have an evidentiary basis and describe the reasons for the result, not that the decision must expressly raise and address every possible counterargument. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983); *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014); *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999).

¶54 Here, the ACC's decision included comprehensive factual findings supported by citation to the record and explained the reasoning underlying each legal conclusion. While the ACC did not expressly address all of Billingsley's exceptions—which largely track his unavailing arguments on appeal—it provided "sufficiently comprehensive and explicit" findings and reasoning to support its decision and permit review. *See Douglas Auto & Equip. v. Indus. Comm'n*, 202 Ariz. 345, 347, ¶ 9 (2002).

CONCLUSION

¶55 The ACC's decision is affirmed.

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