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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2020-000093-001 DT 01/29/2021

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
P. McKinley
Deputy

VENTURES 7000 L L C
VERNON R TWYMAN JR.

ALAN S BASKIN

v.

ARIZONA CORPORATION COMMISSION (001)

JAMES DUANE BURGESS

JUDGE KILEY
OFFICE OF ADMINISTRATIVE HEARINGS
REMAND DESK-LCA-CCC

RECORD APPEAL RULING – ADMINISTRATIVE DECISION AFFIRMED

Appellants Ventures 7000, LLC ("V-7000") and Vernon R. Twyman, Jr., ("Twyman") (collectively, "Appellants") seek review of Decision No. 77547 (the "Final Decision") of the Arizona Corporation Commission (the "Commission"). This Court has jurisdiction pursuant to Ariz. Const. art. 6, § 14 and A.R.S. §§ 12-124(A), 12-905(A), and 44-1981. For the following reasons, this Court affirms the Final Decision.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

V-7000, an Oklahoma limited liability company, is owned by a trust known as the Wycliffe Trust, whose owner and managing trustee is Twyman. Appellants' Opening Brief ("Opening Brief" or "O.B.") at pp. 2-3; Final Decision at p. 16 ¶ 94.

Twyman is not, and never has been, registered with the Commission as a securities salesperson or dealer. Final Decision at p. 16 ¶ 92.

Twyman testified in the proceedings below that he has been engaged, since 1985, in efforts to locate and recover stashes of gold that have purportedly been lost and/or hidden in, and off the coast of, the Philippines. Final Decision at p. 72 ¶ 315, p. 74 ¶ 323. *See also* ROA B-7 at pp. 626-44.[1] He added that V-7000's name derives from the fact that "there are 7,000 islands in the Philippines,…and that's why we call it Ventures 7000." ROA B-8 at p. 889. He admitted, however, that, as yet, he has not actually recovered any gold in the Philippines. Final Decision at p. 72 ¶ 315, p. 74 ¶ 323; ROA B-13 at pp. 1031-32. *See also* ROA B-8 at pp. 759-60 ("Our activities have been focused on discovery and proving up the sites at this point, pending the resources necessary to fully excavate and recover, and that's kind of where - - that's where we are. We're trying to get to the final phase and we've been promised funds, but until they come in, we can't finish it.").

In 1998, Twyman entered into a consent judgment (the "S.E.C. Judgment") with the United States Securities and Exchange Commission ("S.E.C.") pursuant to which he was enjoined "from future violations of the antifraud and registration provisions of federal securities laws." Final Decision at p. 15 ¶ 90 (internal punctuation omitted). The S.E.C. Judgment expressly enjoins Twyman from, *inter alia*, "directly or indirectly…obtain[ing] money or property by means of any untrue statement of a material fact, or any omission to state a material fact," or otherwise "engag[ing] in any transaction…or course of business which operates…as a fraud or deceit upon any purchaser or prospective purchaser," in connection with "the offer or sale of securities." ROA C-62 at p. ACC008363.

The S.E.C. Judgment directed Twyman to disgorge $277,000, an amount that he admitted was "the reasonably approximated amount attributable to Twyman by reason of the activities alleged in the S.E.C.'s Complaint." Final Decision at p. 15 ¶ 90 (internal punctuation omitted). The S.E.C. waived the $277,000 disgorgement, however, "based on [Twyman's] demonstrated penury." *Id*. (internal punctuation omitted). In their Opening Brief, Appellants acknowledge that Twyman "stipulated to" the S.E.C. Judgment, but insist that he did so only because he "could not finance a defense in the [S.E.C.] action." O.B. at p. 4.

The Fortitude Foundation ("TFF") is a non-profit corporation whose president, at all relevant times, was Jeffrey D. McHatton ("McHatton"). Final Decision at p. 10 ¶ 67, p. 11 ¶ 72. Robert J. Moss ("Moss") and Robert B. Sproat ("Sproat") were directors of TFF. Final Decision at p. 12 ¶ 75, p. 13 ¶ 80. *See also* ROA B-14 at p. 1179; ROA C-89 at TFF000018. Moss, McHatton, and Sproat represented TFF as a non-profit run by "three (3) men of God who were

[1] The docket filings are listed in Exhibit A to the Notice of Filing Record on Appeal that was filed on April 27, 2020, and will be referred to herein as "ROA A-[No. __]." Transcripts are listed in Exhibit B to the Notice of Filing Record on Appeal and will be referred to herein as "ROA B-[No. __]." Exhibits are listed in Exhibit C to the Notice of Filing Record on Appeal and will be referred to herein as "ROA C-[No. __]."

called with a Divine purpose to help heal the needy, and in doing so bring salvation to their hearts for the Kingdom of God." Final Decision at p. 10 ¶ 69. *See also* ROA C-56 at p. ACC010430.

On May 10, 2012, TFF entered into a Joint Venture Funding Agreement ("JVFA") with the Wycliffe Trust, V-7000, Advanced Recovery Systems, Inc. ("ARSI"), Asian Precious Metals, Inc. ("APMI") and Environmental Reclamation Authority, Ltd. ("ERA"). Final Decision at p. 17 ¶ 98. *See also* ROA C-113. The JVFA collectively defines the Wycliffe Trust, V-7000, ARSI, APMI, and ERA as "Wycliffe." ROA C-113 at p. TFF000115.

The JVFA states that "Wycliffe is actively engaged in several business activities that offer extremely attractive investment returns for select individuals and or [*sic*] entities that are willing and able to enter mutually joint [*sic*] funding arrangements with Wycliffe." ROA C-113 at p. TFF000115. Under the JVFA, TFF agreed to borrow money from investors and to "utilize more than 93% of the net loan proceeds to fund" the activities of the entities collectively identified as "Wycliffe." *Id*. at pp. TFF000115 - TFF000116.

One of the projects that the "Wycliffe" entities were pursuing was the "Philippine Gold Recovery Project," or "PGR Project," an effort to recover the gold that is purportedly stashed away somewhere in, and/or off the coast of, the Philippines. Final Decision at p. 17 ¶ 99, p. 19 ¶ 102. *See also* ROA C-113 at p. TFF000116. Another such project, the "Low-Alpha Lead Buying and Selling" or "LAL Project," was a purported effort to procure low-alpha lead for resale to semi-conductor and electronic component manufacturers. Final Decision at p. 17 ¶ 99, p. 27 ¶ 138. *See also* ROA C-113 at p. TFF000116.

On behalf of V-7000, Twyman prepared, and gave to TFF, a document entitled "Financing Proposal Summary -- Ventures 7000 Philippine Gold Recovery Projects" ("Financing Proposal Summary"). The Financing Proposal Summary states:

> Ventures 7000 is an international joint venture entity that encompasses the business interests of Wycliffe Trust.... More than 70% of the net profits generated by Wycliffe from these business enterprises are allocable to a broad range of Judeo-Christian based charitable, educational, religious, humanitarian and philanthropic causes.

ROA C-50 at p. ACC03691. The Financing Proposal Summary represents that V-7000 was seeking to raise $250,000 to recover hidden gold bullion from two sites in the Philippines, an effort that was allegedly "poised for completion." *Id*. at p. ACC003691. It further states that "[V-7000] estimates the total amount of additional capital necessary to complete the funding of the Bay Project and pinpoint the gold bullion at Bahama Mama to be approximately $250,000." *Id*. at p.

ACC003694. It represents that "[t]he total amount of time necessary to complete this recovery and generate proceeds therefrom will be less than 120 days from the time that full funding is in place." *Id*. It projects that "a financier putting up the entire $250,000 would receive…an estimated return of 9.5 to 1 within 6 to 9 months of total funding and a combined estimated return from" the recovery at both sites "of 45 to 1 over an 18 to 24 month period." *Id*. at p. ACC003698.

The Financing Proposal Summary does not disclose the S.E.C. Judgment against Twyman, nor does it disclose that Twyman has been engaged for decades in efforts to recover gold purportedly hidden in the Philippines, without success. *See generally* ROA C-50.

In the spring of 2012, Moss, McHatton and Sproat solicited Timothy Brunt ("Brunt") to invest through TFF in the PGR Project. Moss gave Brunt the Financing Proposal Summary that Twyman had prepared on behalf of V-7000. Final Decision at p. 19 ¶ 105.

Brunt decided to invest the entire $250,000.00 that V-7000 was seeking. ROA B-8 at pp. 732-33, 739. At the Administrative Hearing, Brunt testified that he was motivated to make the investment not only by the financial return promised in V-7000's Financing Proposal Summary, but also by the fact that the Financing Proposal Summary promised that "more than 70 percent of the net profits generated by Wycliffe from its business enterprises" would be used to support "a broad range of Judeo-Christian based" charitable and humanitarian causes. *Id*. at p. 734. Brunt made clear that his decision to invest in the PGR Project was based at least in part on his acquaintance with, and confidence in, Twyman. Brunt testified that he first met Twyman in approximately April 2012, and had gotten to know him during the "weekly meeting[s]" that Brunt and Twyman both attended "at North Phoenix Baptist Church." ROA B-8 at pp. 720-21. Brunt testified that he made the $250,000 investment because he believed "Vern [Twyman] and Rob [Moss]" would be able to "do a lot of benefit to not only myself as an investor," but also "to help other people, and that hit my heart." *Id*. at p. 736.

On June 20, 2012, Brunt received a $250,000 Promissory Note and a Memorandum of Understanding ("MOU"), which were signed by Moss, McHatton, and Sproat. *See generally* ROA C-86; ROA C-89. The MOU recites that that TFF was "engaged in a Joint Venture Agreement with Wycliffe Trust…Ventures 7000 LLC…[ARSI] and [APMI] for the purpose of engaging in multiple business ventures," and that "TFF will use 85% or more of the net proceeds from" Brunt's $250,000.00 investment "to fund the various business ventures and investment opportunities being undertaken pursuant to the Joint Venture Agreement between TFF and Wycliffe." ROA C-89 at pp. TFF000014, TFF000015.

One day later, on June 21, 2012, Brunt wired $250,000 to an account controlled by McHatton. ROA B-8 at p. 732; ROA C-40. Later that day, McHatton wired $225,000 to an Oklahoma bank account controlled by Twyman. Final Decision at p. 22 ¶¶ 116-17; ROA C-40.

The statement from McHatton's account identifies the transferee account's beneficiary as "VERN TWYMAN REF: VENTURE 7000." ROA C-40.

Although, as noted above, V-7000's Financing Proposal Summary represented that the PGR Project was "poised for completion," that project produced no return on Brunt's investment other than a single payment to Brunt of $2,000, which Brunt described, in his testimony at the Administrative Hearing, as "a small payment to show good faith to investors." ROA B-8 at pp. 739, 749.

As noted above, the JVFA defines "Wycliffe" to include several entities, including ERA (which is described as "a US corporation in the process of being formed"). ROA C-113 at p. TFF000115. The JVFA further provides that, "[t]hrough the auspices of [ERA]," "Wycliffe will engage in the procurement of…Low-Alpha Lead" for subsequent resale. *Id*. at p. TFF000116. *See also* Final Decision at p. 17 ¶ 99. As the Commission found, TFF solicited funds using a document entitled "Executive Summary – Environmental Reclamation Authority, Ltd." ("ERA Executive Summary"). Final Decision at p. 27 ¶ 138. The ERA Executive Summary states in part that ERA "will acquire low alpha and ultra low alpha lead," which it describes as "a very valuable metal" for which "[t]here is more demand…than is currently being met by existing market supplies and production"; that "ERA has already had a verbal offer from one major defense contractor to buy 500 tons of low and ultra low alpha lead"; and that "TFF has an exclusive opportunity" to invest through "Wycliffe Trust & the ERA – JV." ROA C-45 at p. ACC002710. The ERA Executive Summary goes on to describe the investment opportunity as "very unique," representing that "[t]he element of risk for this venture" is "relatively small" and quoting "one of the leading experts on Low Alpha lead in the US" as saying that "[o]ur project lead" is "worth a fortune!" *Id*. at p. ACC002710, p. ACC002711.

Touting "this impressive LAL opportunity," Moss used the ERA Executive Summary to solicit investment funds. ROA C-45 at p. ACC002705. *See also* Final Decision at p. 27 ¶ 138. Additionally, as Moss testified at his August 23, 2016 Examination Under Oath, TFF obtained information about the LAL Project from "Vern [Twyman], Venture 7000 or ERA" which TFF then "made…available" to potential investors to "show[] them" where TFF was "positioned based on the joint venture partners and the opportunity at hand." ROA C-65 at pp. 295-98.

Between October 30, 2012 and December 19, 2012, TTF sold promissory notes and investment contracts to Brunt and several other individuals for investment in the LAL Project. Final Decision at p. 27 ¶ 138. The total amount TFF received from these six investors was $500,000. Final Decision at p. 34 ¶ 163.[2] Each investor's funds were deposited in an account

[2] Paragraph 163 of the Final Decision includes a chart reflecting that a total of $750,000 was deposited into McHatton's account, of which $650,000 was subsequently wired to Twyman's account. Final

controlled by McHatton; within days of each deposit, McHatton arranged for the majority of the funds to be wired to an Oklahoma bank account controlled by Twyman. *Id*. For example, Brunt wired $125,000 to McHatton's account on October 30, 2012, while another investor, Matthew Mannino, wired $75,000 to that account the following day. *Id*. *See also* ROA C-40. Shortly thereafter, on November 2nd, McHatton wired $170,000 from his account to the Oklahoma account. Final Decision at p. 34 ¶ 163; ROA C-40. The statement from McHatton's account identifies the transferee account's beneficiary as "WYCLIFFE TRUST REF: VERNON R. TWYMAN, JR., TRUSTEE." ROA C-40. Similarly, an investor named Lowell Olmstead wired $100,000 to McHatton's account on November 14, 2012; two days later, McHatton wired $85,000 from his account to the Oklahoma account. Final Decision at p. 34 ¶ 163; ROA C-40. Again, the account statement identifies the beneficiary as "WYCLIFFE TRUST REF: VERNON R. TWYMAN, JR., TRUSTEE." ROA C-40.

Beginning in April 2013, even though none of the LAL Project investors had received any return on their investments, TFF and Moss began soliciting them to convert those investments into investments into the PGR Project. *See*, *e.g*., ROA C-50 at pp. ACC003683, ACC003684 (April 26, 2013 email from Moss to Brunt stating in part, "We ALL know that the LAL Project is taking longer than expected…While we are still very excited about our LAL opportunity and its upside potential, in our estimation, the [PGR Project] could simply pay out sooner...[W]e are ready, willing and able to provide you…with this conversion option, so that you can roll-over from a debt position, into" the PGR Project "without coming out-of-pocket, with any more money."). Some of the investors agreed to do so. Final Decision at p. 37 ¶ 178. Twyman testified at the Administrative Hearing that, although "most of the investors rolled their money over" from the LAL Project to the PGR Project, the funds invested in the two accounts were "pooled" anyway, adding, "[W]e used it for both projects." ROA B-13 at 1035.

In August 2015, V-7000's Director of Investor Relations, Ken Covington ("Covington"), sent an email to TFF with an attachment entitled "Ventures 7000 Official News Brief." Final Decision at p. 46 ¶ 214; ROA C-30 at pp. ACC003160, ACC003162. The attachment, which featured a picture of Twyman on the first page, begins in part with, "[W]e present this update of the current activities of Ventures 7000" and represents, "[W]e are poised on the threshold of achieving all that we have so diligently pursued!" Final Decision at p. 46 ¶ 214; ROA C-30 at p. ACC003162. The Ventures 7000 Official News Brief goes on to state, "[W]e have a number of proven sites ready for immediate recovery," with "the only remaining hurdle" being "to garner sufficient funds to undertake and complete their final recovery." ROA C-30 at p. ACC003164. Asserting that "[w]e have now shifted from a 'treasure hunting mode' to a 'treasure recovery

Decision at p. 34 ¶ 163. The $750,000 total deposit figure includes the $250,000 that Brunt initially invested in the PGR Project. *Id*. The remaining $500,000 was invested by Brunt and others in the LAL Project. *Id*.

mode','' the Ventures 7000 Official News Brief offered further investments in the PGR Project by stating:

> As we finally move into the final recovery stage, there will be a small window of opportunity for existing partners to increase their investment position by purchasing additional revenue sharing units at a reduced rate and thereby increase their distribution payout.

ROA C-30 at p. ACC003166.

The Ventures 7000 Official News Brief omits any reference to the S.E.C. Judgment against Twyman or Twyman's decades-long history of failure in his efforts to recover hidden gold in the Philippines, nor does it disclose the fact that Brunt's $250,000 investment in the PGR Project had yielded no financial return. *See* Final Decision at p. 47 ¶ 216. *See also* ROA C-30.

Moss forwarded Covington's email and the attached "Ventures 7000 Official News Brief" to investors with the notation, "Here…is the most recent update from V-7000, our Joint Venture Partner." ROA C-30 at p. ACC003160. As the Commission found, none of the investors in the PGR Project invested any additional money "as a result of the solicitation" made in the Ventures 7000 Official News Brief. Final Decision at p. 47 ¶ 217.

It is undisputed that, other than the $2,000 payment to Brunt, none of the six investors received any return on their investments in the PGR Project and the LAL Project.[3]

On February 23, 2016, the Commission's Securities Division ("Division") filed a Temporary Order to Cease and Desist and Notice of Opportunity for Hearing ("Original Temporary Order") against Appellants as well as TFF, Moss and his wife; McHatton and his wife, Sproat, and Kevin Krause ("Krause") (collectively, "Respondents"). ROA A-1. The Division alleged multiple violations of the Arizona Securities Act (the "ASA") by V-7000, Twyman, TFF, Moss, McHatton, Sproat, and Krause. *See generally id*. V-7000 filed a Request for Hearing, as did McHatton, TFF, and Moss. ROA-A 12; ROA A-13; ROA A-34.

On July 19, 2016, the Division filed an Amended Temporary Order to Cease and Desist and Notice of Opportunity for Hearing ("Amended Temporary Order") against the same Respondents. ROA-A 50. Twyman and V-7000 filed a Request for Hearing on August 9, 2016.

[3] In his testimony at the Administrative Hearing, for example, Moss admitted that the LAL Project and the PGR Project have "not paid out." ROA B-14 at p. 1180. McHatton, too, admitted that "[t]he gold project failed to produce any return on anybody's investments," nor did "the lead project" produce "any income or profit." ROA B-15 at pp. 1377-78.

ROA A-66. Shortly thereafter, on August 19th, Twyman and V-7000 filed their Answer to the Amended Notice. ROA A-75.

A ten-day administrative hearing (the "Administrative Hearing") was held on February 21, 22, 23, 27, and 28, March 1 and 6, and May 1, 2, and 3.[4] Final Decision at p. 1. Twyman and V-7000 were represented by counsel at the Administrative Hearing, and Twyman was one of the witnesses who testified. Following the conclusion of the Administrative Hearing and the filing of post-hearing briefing, a Recommended Opinion and Order ("ROO") was filed on November 26, 2019. *See* ROA A-141.

On February 10, 2020, the Commission adopted the ROO, with minor modifications, as its Final Decision. *See* ROA A-162. In its Final Decision, the Commission found that

> Mr. Twyman and V-7000 participated in and induced TFF's unlawful sales to six investors in the PGR and LAL Projects between June 21, 2012, and December 19, 2012; and pursuant to A.R.S. § 44-2003(A), Mr. Twyman and V-7000 are liable for the violations of the Securities Act's registration and anti-fraud provisions, A.R.S. §§ 44-1841, 44-1842, and 44-1991(A), for those sales.

Final Decision at p. 74 ¶ 323. The Commission also found that,

> as the controlling person of V-7000, Mr. Twyman had the legal power to control the activities of the director of investor relations [*i.e.*, Covington] but Mr. Twyman presented no evidence that he took any steps to maintain and enforce a reasonable and proper system of supervision and internal control. Thus, Mr. Twyman is jointly and severally liable to the same extent as V-7000 for that entity's violations of A.R.S. 44-1991 pursuant to A.R.S. 44-1999(B).

Id. at p. 77 ¶ 334 (citation and internal quotations omitted). The Commission ordered Appellants, jointly and severally liable with Moss, McHatton, Sproat and TFF, to pay restitution of $744,474.17, a figure representing the amount that has "not been repaid to investors in the PGR and LAL Project[s]." *Id*. at p. 79 ¶ 343. Additionally, the Commission ordered Appellants to cease

[4] The Administrative Hearing had also been scheduled to proceed on March 2, 7 and 8, 2017, but those dates had to be rescheduled due to the illness of various participants. *See* ROA B-9, ROA B-11, ROA B-12.

and desist from further violations of the ASA and to pay an administrative penalty of $5,000. *Id*. at pp. 83, 85-86.

Ten days after the Commission entered its Final Decision, Appellants filed an Application for Rehearing, *see* ROA A-169, which was denied by operation of law after twenty days had passed. *See* A.R.S. § 44-1974 ("The commission may institute or grant rehearings on application made within twenty calendar days after entry of an order or decision…If the commission does not grant a rehearing within twenty calendar days, the application is considered to be denied."). Appellants filed a timely Notice of Appeal. *See* ROA A-173.

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, 352 P.3d 925, 930-31 (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, 431 P.3d 1200, 1205 (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, 569 P.2d 1363, 1365 (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, 107-08, 977 P.2d 826, 829-30 (App. 1998). *See also DeGroot v. Ariz. Racing Comm'n*, 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (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, 79 P.3d 86, 96 (App. 2003). *See also Wales v. Ariz. Corp. Comm'n*, 249 Ariz. 263, 269 ¶ 19, 468 P.3d 1224, 1230 (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 v. Ariz. Corp. Comm'n*, 238 Ariz. 253, 258 ¶ 14, 359 P.3d 997, 1002 (App. 2015).

The determination of the credibility of witnesses "is a matter within the province of the trier of fact," *Pugh v. Cook*, 153 Ariz. 246, 247, 735 P.2d 856, 857 (App. 1987), and the trier of fact may accept all, part, or none of a particular witness's testimony. *Callender v. Transpacific Hotel Corp*., 179 Ariz. 557, 562, 880 P.2d 1103, 1108 (App. 1993).

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, 379 P.3d 227, 231 (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, 268 P.3d 1138, 1142 (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).

While courts review questions of law *de novo*, they give "great deference" to the Commission's interpretation of the statutes that it enforces. *Eastern Vanguard*, 206 Ariz. at 410 ¶ 35, 79 P.3d at 97. *See also* A.R.S. § 12-910(E), (G) (providing that, in general, a reviewing court "shall decide all questions of law…without deference to any previous determination that may have been made on the question by the agency," but expressly exempting the Commission from this provision).

The elements of a joint venture are "an agreement, a common purpose, a community of interest, and an equal right of control." *Sparks v. Republic Nat. Life Ins. Co.*, 132 Ariz. 529, 540, 647 P.2d 1127, 1138 (1982). Each joint venture is an agent of the other joint venturers, and each is liable for the other's acts. *See Sparks*, 132 Ariz. at 540, 647 P.2d at 1138 ("Where a joint venture exists, each of the parties is the agent of the others and each is likewise a principal so that the act of one is the act of all. In such a relationship, it may be said that the partners or persons engaged in the common enterprise are subject to a common duty, the breach of which will subject those persons to liability for the entire harm resulting from the failure to perform the duty.") (citation omitted). *See also Tanner Cos. v. Superior Court*, 144 Ariz. 141, 143, 696 P.2d 693, 695 (1985) ("Joint venturers share full liability in agency and in tort.").

ISSUES ON APPEAL

Appellants assert three issues on appeal:

1. Did the Commission err in finding Appellants liable for participating in and inducing the sale of securities in violation of A.R.S. §§ 44-1841, -1842, -1991, and -2003(A)?

2. Did the Commission violate Appellants' due process rights by permitting an investor who had previously testified at the Administrative Hearing to subsequently address the Commission at an open meeting without being subject to cross-examination?

3. Did the administrative proceedings below violate Appellants' right to a jury trial?

DISCUSSION

In their Opening Brief, Appellants do not dispute that the promissory notes and related documents issued by TFF that evidence the investments in the PGR Project and the LAL Project constitute "securities" within the meaning of the ASA, nor do they dispute that those securities were unregistered in violation of the ASA. *See generally* O.B. Likewise, Appellants do not dispute that $744,474.17 is the amount of restitution that is owed to the six investors in the unregistered securities.[5] *See generally id*. Instead, Appellants assert that the Commission "painted with too broad of a brush" by including them within the scope of its Final Decision because, they allege, they "did not participate in or induce the sale of any contracts." O.B. at p. 2.

A. The Commission Did Not Abuse Its Discretion In Determining That Appellants Both "Induced" and "Participated in" the Unlawful Sale of Securities

The Commission determined that, "[p]ursuant to A.R.S. § 44-2003(A), [Twyman] and V-7000 participated in and induced the unlawful sale of securities in violation of A.R.S. §§ 44-1841, 44-1842 and 44-1991." Final Decision at p. 82 ¶ 6. Appellants challenge this determination, arguing that they assert that they "did not participate in" or "induce" the sale of securities and so are not liable under A.R.S. § 44-2003(A). O.B. at pp. 19-20, 22.

A.R.S. § 44-2003(A) provides in part that a securities enforcement action

> may be brought against any person, including any dealer, salesman or agent, who made, *participated in or induced* the unlawful sale or purchase, and such persons shall be jointly and severally liable to the person who is entitled to maintain such action. No person shall be deemed to have participated in any sale or purchase solely by

[5] In the Statement of the Case and Facts in their Opening Brief, Appellants state that "TFF raised $750,000 for seven investments…in the LAL Project or the PGR Project, but retained $100,000 of those funds; the remainder ($650,000) was disbursed to Wycliffe." O.B. at p. 10. Nowhere do they contend, however, that the Commission erred in determining the total amount of restitution owed, nor do they argue that their liability for restitution should be capped at the sum of $650,000, the amount they admit was "disbursed to Wycliffe."

> reason of having acted in the ordinary course of that person's professional capacity in connection with that sale or purchase.

A.R.S. § 44-2003(A) (emphasis added). Case law is clear that A.R.S. § 44-2003(A) is to be read broadly. *See, e.g., Grand v. Nacchio*, 225 Ariz. 171, 174 ¶¶ 16, 18, 236 P.3d 398, 401 (2010) (noting that "[t]he language of the [ASA] confirms a broad intent to sanction wrongdoing in connection with the purchase or sale of securities," and characterizing A.R.S. § 44-2003(A)'s provisions as "sweeping language of inclusion").

For purposes of A.R.S. § 44-2003(A), the term "induce" means to "overcom[e] indifference, hesitation, or opposition, [usually] by offering for consideration persuasive advantages or gains that bring about a desired decision." *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 21-22, 945 P.2d 317, 332-33 (App. 1996) (citations and internal quotations omitted). *See also In re Allstate Life Ins. Co. Litig.*, 971 F.Supp.2d 930, 942 (D.Ariz. 2013) ("[I]nducement is defined as moving or leading, prevailing upon, persuading, inspiring, or bringing about by influence or stimulation."). "Participate" means "to take part in something (an enterprise or activity) in common with others, or to have a share or part in something." *Grand*, 225 Ariz. at 175 ¶ 21, 236 P.3d at 402 (citations and internal punctuation omitted). "Participate" is synonymous with "partake." *Standard Chartered*, 190 Ariz. at 21, 945 P.2d at 332 (citation omitted). While A.R.S. § 44-2003(A) uses the terms in the disjunctive - - "participated in *or* induced the unlawful sale or purchase," A.R.S. § 44-2003(A) (emphasis added) - - the record establishes that substantial evidence supports the Commission's determination of liability using either term.

1. Substantial Evidence Supports the Commission's Determination that Appellants "Induced" the Unlawful Sale of Securities

V-7000 "induced" TFF's unlawful sales of securities in part because Twyman prepared V-7000's Financing Proposal Summary, thereby "offering" prospective investors, "for consideration[,] persuasive advantages or gains that bring about a desired decision." *Standard Chartered*, 190 Ariz. at 21-22, 945 P.2d at 332-33 (citations and internal quotations omitted). V-7000's Financing Proposal Summary includes such representations as the claim that gold recovery projects at two sites were "poised for completion" and "ready to move into the recovery stage," that "the projected returns" from the recovery of gold at those sites "are substantial, potentially exceeding 100 to 1," and that the recovery operation at one of the sites "is expected to take less than six weeks." ROA C-50 at pp. ACC003691, ACC003692. As the Commission found, the Financing Proposal Summary's "completion and investment return projections were misleading" in light of the fact that, "although Mr. Twyman had been working to recover the gold hidden in the Philippines since the 1980's, neither he nor any of his companies[,] including V-7000, had ever recovered any gold, or paid any returns to any investors." Final Decision at p. 72 ¶ 315, p. 74 ¶

323. Likewise, as the Commission found in its Final Decision, the Financing Proposal Summary's "failure to include information" about a prior S.E.C. Judgment against Twyman constituted a "material omission[]." *Id*. at p. 73 ¶ 319, p. 74 ¶ 323. The Commission's determination on these points is supported by substantial evidence, including the Financing Proposal Summary and Twyman's own testimony at the Administrative Hearing. *See generally* ROA C-50; ROA B-7 at pp. 626-44; ROA B-8 at pp. 759-60.[6]

At least one investor, Brunt, testified at the Administrative Hearing that he reviewed V-7000's Financing Proposal Summary before he invested, and that the contents of this document influenced his decision to proceed with the investment.[7] ROA B-8 at pp. 734, 736.

Appellants argue that the materials they prepared could not be said to have "induced" any investments because "the record establishes that Wycliffe took precautions to ensure that any material provided to TFF would remain confidential and not be provided to third parties." O.B. at p. 24. In support of this assertion, they cite Twyman's testimony at the Administrative Hearing and the "confidentiality" provision of the JVFA. *Id*., *citing* ROA B-8 at p. 799 *and* ROA C-113.

The Commission was not, however, required to accept Twyman's self-serving testimony on this point. Moreover, in his testimony at the Administrative Hearing, Moss did not corroborate

[6] In his testimony, Twyman claimed that in 2013 he located "big iron boxes" on "the ocean floor" off the Philippine coast that he believes contain gold. He admitted, however, that he had not recovered these boxes or the valuable cargo they purportedly contain. He asserted that, because "the boxes weigh a considerable weight," "[t]here's no way to bring them ashore," and so the boxes are "still on the ocean floor…to the best of our knowledge." ROA B-8 at pp. 882-84. The Commission was not, of course, required to accept Twyman's uncorroborated testimony on this point.

[7] Appellants dispute Brunt's testimony on this point, arguing that, earlier in the proceedings, Brunt made a contradictory statement to the effect that he did not receive the Financing Proposal Summary until "sometime in August 2012." Appellants' Reply Brief ("Reply Brief" or "R.B.") at p. 14. Appellants' contention, in this appeal, that Brunt did not receive V-7000's Financing Proposal Summary until after he made the $250,000 investment is contrary to their acknowledgement, in the proceedings below, that this document was, in fact, provided to Brunt before he made the investment. *See* ROA A-131, [Appellants'] Post Hearing Brief filed September 1, 2017, at p. 53 (asserting that "Mr. Moss, on behalf of TFF, and without [Appellants'] knowledge or authorization gave [the Financing Proposal Summary] to Mr. Brunt, who invested the requested $250,000 in the PGR Project."). In any event, it is for the Commission, and not this Court, to resolve conflicts in the evidence; the Court merely determines whether the record contains substantial evidence that supports the findings made by the Commission. *See Wales*, 249 Ariz. at 269 ¶ 19, 468 P.3d at 1230 ("Substantial evidence exists if the evidentiary record supports the decision, even if the record would also support a different conclusion.").

Twyman's claim that V-7000's Financing Proposal Summary fell within the scope of the JVFA's confidentiality provision. Moss testified that TFF "forwarded on" to the investors the "information regarding the projects" that it received from Appellants. ROA B-14 at pp. 1158-1159. At no point did Moss indicate that he, or anyone else acting on behalf of TFF, interpreted the JVFA to prohibit TFF from forwarding documentation received from Appellants to prospective investors. *See id*.

Further, as the Commission correctly noted, the Financing Proposal Summary is not marked "confidential" or "for TFF's eyes only," nor does it otherwise provide that its contents were not to be shared with third parties. *See* Final Decision at p. 72 ¶ 314, p. 74 ¶ 323. *See generally* ROA C-50.

Appellants' claim that the Financing Proposal Summary was not intended to be shared with third parties is contradicted by the language of that document, which plainly reads as a solicitation to potential investors. *See* ROA C-50 at p. ACC003691 ("This is a multi-faceted investment proposal offering both near- and long-terms returns to those financiers willing to undertake the challenge."); *id*. ("[W]e are in need of additional capital to bring these two sites to completion."); *id*. at p. ACC003692 ("[W]e are now offering a one-time bonus arrangement to aid in raising needed capital."); *id*. ("[T]he projected returns on these two projects are substantial, potentially exceeding 100 to 1 for those willing to partner with us in this endeavor."); *id*. at pp. ACC003695-ACC003696 ("Ventures 7000 has authorized the issuance of a maximum of One Thousand (1,000) Class 'A' Revenue Sharing Units…Current pricing on the Class 'A' Units is $50,000 per Unit. Additional Units beyond the first five (5) will still be available for sale at $50,000 per Unit to qualified buyers until the Company has reached the point of initial recovery, after which time no more units will be sold."). The contents of V-7000's Financing Proposal Summary itself thus do not support Appellants' contention that the Financing Proposal Summary was not intended to be shared with third parties. That fact alone constitutes substantial evidence that supports the Commission's rejection of Appellants' assertion that they could not be said to have "induced" any investments because the investment materials they provided to TFF were supposed to be kept confidential.

The Court finds that the Commission did not abuse its discretion in determining that, by providing TFF with investment documentation that TFF used to solicit investors, Appellants "induced" the unlawful sale of securities. On the contrary, substantial evidence supports the Commission's determination on this point.

2. Substantial Evidence Supports the Commission's Determination that Appellants "Participated In" the Unlawful Sale of Securities

V-7000 "participated in" TFF's securities sales in part because V-7000 took part in a joint venture with TFF that was ostensibly intended to earn profits through the PGR Project and the

LAL Project. *Grand*, 225 Ariz. at 175 ¶ 21, 236 P.3d at 402 (defining "participate" to include "to take part in something (an enterprise or activity) in common with others") (citations and internal punctuation omitted). As noted above, the JVFA identifies the parties thereto as TFF, on one hand, and, on the other hand, multiple entities, including V-7000, that are collectively referred to as "Wycliffe." ROA C-113 at p. TFF000115.

Appellants deny that V-7000 was a party to the JVFA, insisting that V-7000 was "not operational at the time of the JVFA, and is only listed in the JVFA as a title or dba for the projects." O.B. at p. 8. A review of the JVFA refutes this assertion. The JVFA identifies "Ventures 7000 LLC (a US limited liability company)" as one of the entities comprising "Wycliffe." ROA C-113 at p. TFF000115. The JVFA does not, in other words, use the name "Ventures 7000" as nothing more than a "title or dba," but identifies V-7000 as a limited liability company that is a party to the JVFA. *See id*.

Although Appellants describe the relationship between TFF and the entities collectively referred to as "Wycliffe" as a mere "business arrangement," O.B. at p. 7, it cannot reasonably be disputed that the JVFA created a joint venture. The elements of a joint venture - - "an agreement, a common purpose, a community of interest, and an equal right of control," *Sparks*, 132 Ariz. at 540, 647 P.2d at 1138 - - are all present here. The "common purpose" and "community of interest" exist in the "business ventures and/or projects" that are identified in the JVFA, *i.e*., the PGR Project and the LAL Project. ROA C-113 at p. TFF000116.[8] The JVFA provides that the entities referred to collectively as "Wycliffe" would pursue those "business activities" while TFF would borrow monies from "Qualified Investor(s)," with "more than 93% of the net loan proceeds" being used to fund those ventures. *Id*. at pp. TFF000115-TFF-000116. The "right of control" element of a joint venture is established by the provision of the JVFA entitling TFF to conduct an audit of Wycliffe's "books and records related to this transaction," with the entities collectively referred to as "Wycliffe" being obligated "to cooperate fully…and to provide full and unhindered access to all books and records in their possession or under their control…relat[ing] either directly or indirectly to this transaction." *Id*. at p. TFF000118. *See James Weller, Inc. v. Hansen*, 21 Ariz.App. 217, 221, 517 P.2d 1110, 1114 (1973) (holding that joint venture was created by agreement pursuant to which real property owner was required "to provide the financing" for construction while construction company was obligated "to construct as per plans and specifications," and construction company's "records…were subject to [owner's] inspection").

[8] Specifically, the JVFA identifies "three distinct business ventures and/or projects: (1) the project known as "Ventures 7000 Treasure Recovery" for "the recovery of hidden treasures" on land and "under the seas" in the Philippines; (2) the project known as "Ventures 7000 Gold Buying and Selling" for "the buying and selling of gold" in the Philippines and in international markets; and (3) the project known as the "Low-Alpha Lead Buying and Selling" for the "procurement" of low-alpha lead for resale "to major semi-conductor and electronic component manufacturers." ROA C-113 at p. TFF000116.

Because TFF and the Wycliffe entities, including V-7000, were joint venturers, TFF and V-7000 were each other's agents, with each being liable for the other's acts. *See Sparks,* 132 Ariz. at 540, 647 P.2d at 1138 ("Where a joint venture exists, each of the parties is the agent of the others and each is likewise a principal so that the act of one is the act of all. In such a relationship, it may be said that the partners or persons engaged in the common enterprise are subject to a common duty, the breach of which will subject those persons to liability for the entire harm resulting from the failure to perform the duty.") (citation omitted).

Appellants also "participated in" TFF's securities sales because they created investment information that they provided to TFF which TFF used to solicit investors, and then V-7000 received a share of the funds raised by TFF. *Grand,* 225 Ariz. at 175 ¶ 21, 236 P.3d at 402 (defining "participate" to include "or "to have a share or part in something") (citations and internal punctuation omitted). Although Appellants assert that the written materials they prepared were not intended to be shared with third parties, the Court finds, for the reasons set forth above, that the Commission did not err in rejecting that assertion. *See* Final Decision at p. 72 ¶ 314, p. 74 ¶ 322 ("Mr. Twyman and V-7000 prepared and provided the informational materials to TFF that TFF then used to solicit investors in" the PGR Project and the LAL Project, and "the V-7000 Financing Proposal Summary is not marked 'confidential' or 'for TFF eyes only'.")

Moreover, Twyman himself admitted, in his testimony at the Administrative Hearing, that V-7000 had a "stake" in the funds raised by TFF. When the Division's counsel asked Twyman about the $15 million that TFF was originally required to raise under the JVFA, the following exchange occurred:

> Division's Counsel: So with respect to this $15 million, Ventures 7000 and Wycliffe had a stake in the money that was to be raised. Right? 93 percent? That's what you were to get?
>
> Twyman: Yes.
>
> Division's Counsel: And then that 93 percent of the 15 million raised would go to fund these three ventures? Right?
>
> Twyman: That's correct.
>
> * * *
>
> Division's Counsel: Of the 15 million raised, and so then your financial interest in this money that they were going to raise would be $14 million. Correct?

> Twyman: Again, I'm not trying - - I'm not sure where you're headed with the financial interest. We had a commitment from them to put $14 million into our projects. They indicated they were going to bring somebody else to help them do that.
>
> Division's Counsel: And you were interested in getting that $14 million. Correct?
>
> Twyman: Of course we were.
>
> Division's Counsel: Okay.
>
> Twyman: That's why we went into the agreement.

ROA B-8 at pp. 873-75.

The fact that, by Twyman's admission, V-7000 had a stake in the funds raised by TFF using materials prepared by V-7000 establishes that V-7000 "participated in" TFF's sale of securities within the meaning of A.R.S. § 44-2003(A). *See Boland v. Hammond*, 759 N.E.2d 789, 790, 793 (Ohio App. 2001) (affirming judgment against defendant in "securities investment case," and holding that defendant "participated in…the sales of the securities" to third parties in part because he "stood to gain financially if [the] investments were ultimately made"). *Cf. Standard Chartered*, 190 Ariz. at 21, 945 P.2d at 332 (holding that accounting firm "did not participate in" sale of securities in part because it "had no stake in the sale").

Appellants cite *Grand* for the proposition that, "in addition to a stake in the outcome," "participation requires active…involvement in the sale." O.B. at p. 21. In the Court's view, *Grand* is of no assistance to Appellants. In *Grand*, the plaintiffs purchased stock in a new corporation "in the initial public offering," and subsequently purchased additional shares "from other sellers in the so-called aftermarket." *Grand*, 225 Ariz. at 173, 236 P.3d at 400. When the corporation failed, the plaintiffs sued those involved with the corporation, including its CEO and its chairman of the board, alleging securities violations. The plaintiffs alleged, *inter alia*, that the chairman of the board urged one of the plaintiffs "to purchase aftermarket shares without disclosing" that the defendants had fraudulently overstated corporate earnings. *Id*. at 174, 236 P.3d at 401. The Court observed that the plaintiffs' allegations that "the defendants encouraged [them] to buy stock from others in the aftermarket" is "classic inducement." *Id*. at 176, 236 P.3d at 403. Noting, however, that "inducing" the aftermarket sales is not necessarily the same as "participating in" such sales, the Court held that the plaintiffs' allegations did not state a claim for "participation in" the sales. *Id*. The Court expressly found the allegation that "the defendants had a financial interest in the aftermarket sales" because such sales "purportedly buoyed the price" of the corporate stock to be insufficient to state a claim for "participation" in the sales. *Id*. In so holding, the Court emphasized

that the plaintiffs "allege[d] no relationship whatsoever between" the defendants and the "sellers of the…aftermarket shares." *Id.*

Here, V-7000 and TFF were in a joint venture together. That fact alone distinguishes *Grand*, in which the defendants had "no relationship whatsoever" with the sellers of the securities. Moreover, there is no indication in *Grand* that the defendants stood to profit from the aftermarket sales. By contrast, Appellants here received $650,000 of the $750,000 that the six investors invested through TFF in the PGR Project and the LAL Project. *See* Final Decision at p. 34 ¶ 163. If nothing else, the record establishes that Twyman participated in TFF's unlawful sales to those six investors by using the proceeds TFF wired to pay himself compensation and to pay some of his personal expenses. *See* ROA B-8 at 764 ("A portion of those funds I did receive as part of my compensation over that period of time…"); ROA A-131, [Appellants'] Post Hearing Brief filed September 1, 2017, at p. 53) at p. 11 ("All of the investment monies wired to Wycliffe, *other than a small portion of compensation or reimbursement owed to Mr. Twyman*, went into the LAL Project or PGR Project…") (emphasis added).

Although it stated that the two terms are not necessarily synonymous, the *Grand* court observed that, under appropriate circumstances, "one may simultaneously *induce* and *participate in* an illegal sale." *Grand*, 225 Ariz. at 175, 236 P.3d at 402 (emphasis added). The Court explained that

> a seller [who] persuades a purchaser to buy securities through misrepresentations…has undoubtedly not only induced the illegal sale, but also participated in it, and, indeed, made it.

Id.. That is precisely the situation presented in this case: as the Commission found, Appellants prepared documentation containing misrepresentations, which was provided to investors and which induced them to purchase the securities. Final Decision at p. 74 ¶ 322. Pursuant to *Grand*, this conduct constitutes both inducement and participation, as the Commission has found. *Id.* at p. 74 ¶ 323 ("[W]e find that Mr. Twyman and V-7000 participated in and induced TFF's unlawful sales to six investors in the PGR and LAL Projects…").

In support of their position that they did not "participate in" the sale of securities, Appellants cite *Facciola v. Greenberg Traurig LLP*, 2011 WL 2268950 (D.Ariz., June 9, 2011) for the proposition that "[p]articipation under A.R.S. § 44-2003(A) requires something more than activities that are merely tangentially related to and concurrent with an ongoing sale." *See* O.B. at p. 20, *citing Facciola*, 2011 WL 2268950 at *2 (citation and internal quotations omitted). While Appellants have accurately quoted from *Facciola*, that case does not, in the Court's view, support Appellants' position. In *Facciola*, individuals who lost their investments in certain real estate transactions alleged securities violations, as well as other claims, against various defendants, including a mortgage lender and its law firm. The plaintiffs alleged that the law firm "prepar[ed]

false and misleading" documents that were "used to solicit investors" without "disclosing that" the mortgage lender and its managers "were illegally acting as unlicensed securities dealers" or that the mortgage lender had been unable to meet its "loan commitments." *Facciola*, 2011 WL 2268950 at *3, 4. In denying the law firm's motion to dismiss, the *Facciola* court held that the plaintiffs' allegations were sufficient to state a claim against the law firm for "participat[ing] in or induc[ing] securities transactions in violation of A.R.S. § 44-1991(A) and § 44-2003(A)." *Id*. at *4.

Here, substantial evidence in the record supports the Commission's determination that Appellants did exactly what the law firm in *Facciola* was alleged to have done, *i.e*., prepared false and misleading documents that were used to solicit investments in unregistered securities. As the *Facciola* court recognized, such conduct constitutes participating in or inducing securities transactions in violation of A.R.S. § 44-1991(A) and § 44-2003(A).

As noted above, A.R.S. § 44-2003(A) provides in part,

> No person shall be deemed to have participated in any sale or purchase solely by reason of having acted in the ordinary course of that person's professional capacity in connection with that sale or purchase.

A.R.S. § 44-2003(A). Citing this statutory language, Appellants assert that they "cannot be held to have participated in the alleged securities violations" because "they were simply acting within their ordinary course of professional capacity in managing" the gold recovery and lead purchasing "projects for Wycliffe." O.B. at p. 22. *See also* Final Decision at p. 66 ¶ 296 ("[Twyman] and V-7000 argue that they cannot be found to have participated because they were merely acting within the course of their professional capacity in managing the PGR and LAL Projects for Wycliffe.").

The Court agrees with the Commission, however, that one does not act "in the ordinary course of that person's professional capacity" by "knowingly creating false statements for use in sales materials." Answering Brief of Appellee Arizona Corporation Commission ("Answering Brief" or "A.B.") at p. 37 (citation and internal quotations omitted). *See also Livid Holdings Ltd. v. Salomon Smith Barney, Inc*., 416 F.3d 940, 952 (9th Cir. 2005) (reversing dismissal of securities and other claims against defendants, where plaintiff alleged that defendants "did not simply provide routine professional advice," but "wrote and inserted a prominent, misleading statement in the [m]emorandum being used to solicit investors"). Appellants prepared investment documents that contain false statements (such as the representation that "[t]he total amount of time necessary" to recover gold "will be less than 120 days from the time that full funding is in place," ROA C-50 at p. ACC003694) and material omissions (such as any reference to the S.E.C. Judgment against Twyman), documents that were subsequently used to solicit investors. The Court therefore finds

that the Commission did not err in holding Appellants liable notwithstanding their assertion of a "professional capacity" defense.

In their Reply Brief, Appellants argue, for the first time, that the Commission erred in finding that they "participated in or induced the offer or sale of securities in violation of A.R.S. § 44-2003" because, they contend, A.R.S. § 44-2003 "is a civil remedies statute and [is] inapplicable to proceedings before the Commission." R.B. at p. 2. Appellants never raised this argument in their Opening Brief. *See generally* O.B. Because Appellants raised this argument for the first time in their Reply Brief, the Court will not consider it. *See, e.g., Calif. Cas. Ins. Co. v. State Farm Mut. Auto. Ins. Co*., 185 Ariz. 165, 170 n. 1, 913 P.2d 505, 510 n.1 (App. 1996) ("An argument raised for the first time in a reply brief will not be considered, even if it is legally sound."); *Amfac Distrib. Corp. v. J.B. Contractors, Inc*., 146 Ariz. 19, 27, 703 P.2d 566, 574 (App. 1985) ("[Appellant] did not make this argument in its opening brief and is therefore precluded from raising it for the first time in its reply brief. It is improper to raise new issues in the reply brief.").

The Commission found Appellants liable for violating A.R.S. § 44-1991(A) by failing to disclose material information in the Financing Proposal Summary or the Ventures 7000 Official News Brief. Final Decision at p. 73 ¶ 319, p. 74 ¶ 323. It expressly found that the S.E.C. Judgment constituted "information that reasonable investors would want to know in reaching a decision to invest," and therefore that "[t]he failure to include this information is a further violation of the anti-fraud provisions" of A.R.S. § 44-1991(A). *Id*. at p. 73 ¶ 319.

Appellants assert that they cannot have "primary liability" under A.R.S. § 44-1991(A) because they did not provide information to investors. O.B. at p. 30. The only documents they created, they contend, were the Financing Proposal Summary and a document referred to as "the 2015 News Brief" and these documents "were confidential and meant solely for TFF." *Id*. (internal quotations omitted). While Appellants do not dispute that TFF "sent those documents out," they insist, "without" their "authorization or knowledge." *Id*.

As noted above, nothing in V-7000's Financing Proposal Summary indicates that it was intended to be confidential; on the contrary, its contents are clearly directed at soliciting investors. Likewise, nothing in the 2015 Official News Brief indicates that it was intended to be treated as confidential. ROA C-30 at pp. ACC003162–ACC003166. Moreover, Appellants' insistence that "TFF sent those documents out without [their] authorization or knowledge," O.B. at p. 30, is unavailing because, as joint venturers, each "is the agent of the others and each is likewise a principal so that the act of one is the act of all." *Sparks*, 132 Ariz. at 540, 647 P.2d at 1138. *See also Tanner Companies*, 144 Ariz. at 143, 696 P.2d at 695 ("Joint venturers share full liability in agency and in tort.").

The Court finds that the Commission did not abuse its discretion in determining that Appellants "participated in" the unlawful sale of securities, and that the Commission's determination is supported by substantial evidence.

3. Substantial Evidence Supports the Commission's Determination of "Controlling Person" Liability

The Commission found that Twyman, "the controlling person of V-7000," "is jointly and severally liable to the same extent as V-7000 for that entity's violations of A.R.S. § 44-1991." Final Decision at p. 77 ¶ 334.

Appellants argue that "there is no controlling person liability under A.R.S. § 44-1999(B)." O.B. at p. 33. They do not dispute that "[Twyman]…is a controlling person of V-7000." *Id*. They assert however, that Twyman can have no controlling liability because "V-7000 is not liable under A.R.S. § 44-1991(A) for any of TFF's documents." *Id*.

The Court rejects Appellants' argument that Twyman cannot be liable as V-7000's "controlling person" because V-7000 itself has no liability. On the contrary, the Court finds, for the reasons set forth above, the Commission did not abuse its discretion in finding V-7000 liable under A.R.S. § 44-1991(A).

In the alternative, Appellants argue that, "even if, arguendo, V-7000 is liable under A.R.S. § 44-1991(A)," Twyman can have no "controlling person" liability because he "acted in good faith and did not directly or indirectly induce V-7000's alleged anti-fraud violation." O.B. at pp. 33-34.

With respect to control person liability, the ASA provides

> Every person who, directly or indirectly, controls any person liable for a violation of section 44-1991 or 44-1992 is liable jointly and severally with and to the same extent as the controlled person to any person to whom the controlled person is liable unless the controlling person acted in good faith and did not directly or indirectly induce the act underlying the action.

A.R.S. § 44-1999(B).

The Arizona Court of Appeals has held that A.R.S. § 44-1999(B) imposes "presumptive control liability on those persons who have the *power* to directly or indirectly control the activities of those persons or entities liable as primary violators." *Eastern Vanguard*, 206 Ariz. at 412 ¶ 42, 79 P.3d at 99 (emphasis in original). Although A.R.S. § 44-1999(B) provides a defense to a

controlling person who "acted in good faith and did not directly or indirectly induce the act underlying the action," A.R.S. § 44-1999(B), a controlling person cannot successfully assert this defense unless he or she "demonstrate[s] *both* good faith *and* lack of inducement." *Eastern Vanguard*, 206 Ariz. at 413 ¶ 48, 79 P.3d at 100 (emphasis added).

To satisfy the "good faith" element of the defense afforded by A.R.S. § 44-1999(B), a controlling person must,

> [a]t the minimum,…establish that [he or she] exercised due care by taking reasonable steps to maintain and enforce a reasonable and proper system of supervision and internal control[s].

Eastern Vanguard, 206 Ariz. at 414 ¶ 50, 79 P.3d at 101 (citations and internal quotations omitted). Here, the Commission found that Twyman failed to satisfy this element because he "presented no evidence that he took any steps to maintain and enforce a reasonable and proper system of supervision and internal control." Final Decision at p. 77 ¶ 334. In their Opening Brief, Appellants do not controvert this finding by citing to any evidence in the record. Instead, they simply assert, with no citation to the record, that "[Twyman] acted in good faith," adding that he "did not directly or indirectly induce V-7000's alleged anti-fraud violation…" O.B. at p. 34.

The Court finds the record supports the Commission's determination that Twyman failed to establish that he satisfied the requirements of A.R.S. § 44-1999(B) by exercising due care in taking reasonable steps to maintain and enforce a reasonable and proper system of supervision and internal controls. *See Eastern Vanguard*, 206 Ariz. at 414 ¶ 50, 79 P.3d at 101. The Court therefore affirms the Commission's determination that the defense afforded by A.R.S. § 44-1999(B) does not apply here and that, as V-7000's controlling person, Twyman is jointly and severally liable pursuant to A.R.S. § 44-1999(B) for V-7000's violations of A.R.S. § 44-1991.[9]

[9] Although the Final Decision contains no express determination that Twyman also failed to establish the second element of the defense afforded by A.R.S. § 44-1999(B), *i.e.*, non-inducement, the Court finds, as discussed above, that evidence in the record would support a finding that Twyman did, in fact, induce the violations of A.R.S. § 44-1991(A). That fact establishes a second, independent basis for affirming the Commission's determination that the defense afforded by A.R.S. § 44-1999(B) is not available to Twyman here. *See BNSF Railway*, 228 Ariz. at 485 ¶ 12, 268 P.3d at 1142 ("The court of appeals will affirm the trial court's decision if it is correct for any reason[].") (citation and internal quotations omitted).

II. The Commission Did Not Violate Appellants' Right to Due Process By Permitting an Investor to Address the Commission at an Opening Meeting Without Being Placed Under Oath or Subject to Cross-Examination

During his testimony at the Administrative Hearing on March 1, 2017, Brunt was asked if he sought restitution; he answered in the negative. ROA B-8 at p. 750-51. He explained, "I'm keeping my money in the [PGR Project]. I believe in Vern [Twyman] and I believe in [TFF] 100 percent." *Id*. at p. 725.

Subsequently, however, Brunt changed his mind. On August 20, 2018, Brunt and his wife filed an Application for Leave to Intervene to Correct Testimony ("Motion to Intervene"). *See* ROA A-136. In their Motion to Intervene, Brunt and his wife acknowledged that Brunt had testified at the Administrative Hearing "that he did not want restitution," but stated that they now wished to "be included in any award of restitution." *Id*. at pp. 1-2. They explained that, after the Administrative Hearing, Brunt "learned that Moss and McHatton mislead [*sic*] him and made misrepresentations about the nature of certain investments," and that, "[a]fter reviewing these misrepresentations, [Brunt] has changed his position regarding restitution." *Id*. at p. 2.

Appellants did not oppose Brunt's Motion to Intervene. On June 17, 2019, the Commission granted the Motion to Intervene "for the limited purpose of allowing [Brunt and his wife] to be included in any award of restitution." ROA A-140 at p. 9.

At the Commission's open meeting on February 4, 2020 (the "February 4th Open Meeting") at which it considered the ROO, Brunt was allowed to address the Commission by telephone. He was not placed under oath before addressing the Commission, and Appellants' counsel was not permitted to cross-examine him.

Appellants argue that the Commission violated their right to cross-examine witnesses by permitting Brunt to speak at the February 4th Open Meeting without being "subject to cross-examination." O.B. at pp. 35, 36. In support of their position, they argue, first, that the Commission "wrongly granted" Brunt leave to intervene, asserting that his request to intervene was untimely. *Id*. at pp. 36, 37. Next, they assert that the Commission "compounded [its] error" by allowing Brunt "to address the Commission" at the February 4th Open Meeting "without cross-examination." *Id*. at p. 37.

In response, the Commission argues that, because Appellants never objected to Brunt's Motion to Intervene during the proceedings below, they waived the argument that the Commission erred in granting the Motion to Intervene. Case law supports the Commission's position on this point. *Neal v. City of Kingman*, 169 Ariz. 133, 136, 817 P.2d 937, 940 (1991) ("Failure to raise an issue at an administrative hearing that the administrative tribunal is competent to hear waives that

issue."); *Rouse v. Scottsdale Unified Sch. Dist. No. 48*, 156 Ariz. 369, 371, 752 P.2d 22, 24 (App. 1987) ("[T]he general rule is that failure to raise an issue before an administrative tribunal precludes judicial review of that issue on appeal unless the issue is jurisdictional in nature."). The Court therefore finds that Appellants waived any objection to Brunt's intervention by failing to object during the proceedings below.

The Commission points out that, because Brunt was permitted to intervene for purposes of requesting restitution, the Commission's Rules of Practice and Procedure entitled him to "be allowed to participate" in proceedings before the Commission concerning the issue of restitution. A.B. at pp. 50-51 (citation and internal quotations omitted). The Commission further notes that A.R.S. § 38-431.01(H) authorized public comment during the Commission's public meetings, and that nothing in statute requires that such comment be made under oath or bars comment from a person who had previously testified as a witness at an administrative hearing. A.B. at p. 51.

The Court agrees with the Commission that applicable rule and statute entitled Blunt, as an intervenor, to be heard on the issue of restitution at the February 4th Opening Meeting. *See* A.R.S. § 38-431.01(H) ("A public body may make an open call to the public during a public meeting, subject to reasonable time, place and manner restrictions, to allow individuals to address the public body on any issue within the jurisdiction of the public body."); A.A.C. R14-3-105(A) ("Persons, other than the original parties to the proceedings, who are directly and substantially affected by the proceedings, shall secure an order from the Commission or presiding officer granting leave to intervene before being allowed to participate."). The Court therefore agrees with the Commission that it did not violate Appellants' right to due process by allowing Brunt to address the Commission at the February 4th Open Meeting without being under oath or subject to cross-examination. This is particularly true because, as the Commission points out, Appellants had previously had the opportunity to examine Brunt when he testified at the Administrative Hearing. A.B. at p. 50.[10]

[10] The fact that Appellants had the opportunity to, and did, examine Brunt at the Administrative Hearing is one factor that distinguishes this case from the out-of-state cases on which Appellants rely. O.B. at p. 34, *citing People ex rel. Klaeren v. Village of Lisle*, 817 N.E.2d 147 (Ill.App. 2004) and *McCarthy v. Mobile Cranes, Inc*., 199 Cal.App.2d 500 (1962). *Klaeren* involved a joint hearing, before multiple municipal bodies, of a developer's proposal for the annexation, rezoning, and subdivision of certain property; at the joint hearing, the presiding officer "forbade any cross-examination" by opponents of the project. *Klaeren*, 817 N.E.2d at 154. Similarly, *McCarthy* involved the joint trial of three consolidated cases at which the trial judge prohibited the plaintiff in one of the cases from cross-examining a witness called by the defendant in one of the other cases. *McCarthy*, 199 Cal.App.2d at 505-06. This case, by contrast, does not involve the "total denial of cross-examination" addressed in *Klaeren*, 817 N.E.2d at 156, or the denial of "any cross-examination" addressed in *McCarthy*. 199 Cal.App.2d at 507.

III. Appellants Are Entitled to No Relief on Their Untimely Argument that the Administrative Proceedings Violated Their Purported Right to a Jury Trial

In their Opening Brief, Appellants assert that the Commission "violated" their purported "right to a jury trial." O.B. at p. 37. In support of their position, they note that "[t]he jury trial right attaches to claims for money damages" and assert that the remedies ordered here - - *i.e.*, "administrative penalties" and "restitution" - - constitute "damages." O.B. at p. 38. Whenever "a party seeks monetary relief," they contend, "it raises to the level of a legal remedy, entitling a party to trial by jury." *Id*. at p. 42.

In response, the Commission argues, first, that Appellants waived this claim by failing to raise it during the proceedings below. A.B. at p. 41. It contends that, "[n]ever once before or during" the Administrative Hearing "did [Appellants] request a jury trial." *Id*. Indeed, the Commission points out, on multiple occasions before the Administrative Hearing, Appellants expressly requested "a hearing" rather than a "jury trial." *Id*. *See also* ROA-A 34 ("[V-7000] hereby request[s] a hearing pursuant to A.R.S. § 44-1972 and A.A.C. Rule 14-4-307."); ROA-A 66 ("Pursuant to A.R.S. § 44-1972, A.A.C. R14-4-306 and A.A.C. R14-4-307, [Appellants] hereby respectfully request a hearing regarding the [Amended Temporary Order]…"); ROA-A 75 at p. 40 ("[Appellants] have previously requested a hearing in this matter and reaffirm that request."). "It was only after the ROO was issued," the Commission contends, that Appellants "first asserted that their violations should have been adjudicated in a jury trial instead of in the administrative hearing they had requested." A.B. at pp. 41-42. "[B]y requesting and participating in an administrative hearing without ever requesting a jury trial," the Commission concludes, "Twyman and V-7000 waived their purported right to a jury trial." *Id*. at p. 42.

A review of the record confirms the Commission's assertion that it was not until after the ROO had been issued (and after Twyman and V-7000 changed counsel) that Appellants first asserted the right to a jury trial on the Division's allegations. *See* ROA A-150, Motion for Substitution of Counsel With Client Consent filed January 6, 2020; ROA A-157, Appellants' Exceptions to [ROO] filed January 8, 2020, at p. 3 ("The ROO is in error because the hearing was in violation of [Appellants'] state and federal rights to a jury trial."). Indeed, even after the Commission entered its Final Decision, Appellants acknowledged that the Commission was the appropriate tribunal to resolve the allegations against them. In their request for a rehearing after entry of the Final Decision, Appellants claimed to have discovered "new material evidence" and asserted, "The Commission should vacate the order and grant [Appellants] a rehearing to present" the new evidence. ROA A-169 at pp. 2, 3.[11]

[11] In their Reply Brief, Appellants do not dispute that they did not request a jury trial until after the Administrative Hearing had concluded and the ROO had been issued. *See generally* R.B. They attempt to excuse their failure to make a timely request for a jury trial in the proceedings below by insisting

Moreover, case law supports the Commission's position that Appellants waived their claim that they were entitled to a jury trial by failing to raise it prior to the conclusion of the Administrative Hearing. *See, e.g., Neal*, 169 Ariz. at 136, 817 P.2d at 940 ("Failure to raise an issue at an administrative hearing that the administrative tribunal is competent to hear waives that issue."); *Rouse*, 156 Ariz. at 371, 752 P.2d at 24 ("[T]he general rule is that failure to raise an issue before an administrative tribunal precludes judicial review of that issue on appeal unless the issue is jurisdictional in nature."). *Cf. Jessicah C. v. Dep't of Child Safety*, 248 Ariz. 203, 207 ¶ 19, 459 P.3d 115, 119 (App. 2020) (rejecting mother's argument on appeal that trial court in dependency case denied her due process by granting change of physical custody without evidentiary hearing; noting that mother's counsel told trial court she was "ready to proceed with oral argument," Court held that "[t]his statement…in inconsistent with," and therefore effected a waiver of, mother's claim on appeal "that she was denied a right to an evidentiary hearing").

The Court holds, therefore, that Appellants waived this argument by failing to raise it until after the Administrative Hearing. In the Court's view, any other holding would be inconsistent with the "well settled" principle that "a party cannot gamble on the court's ruling by submitting a matter without objection and then, following an adverse ruling[,] complain." *Hale v. Brown*, 84 Ariz. 61, 65, 323 P.2d 955, 957 (1958).

Even if Appellants had not waived this argument, they would be entitled to no relief. Arizona courts have long recognized that the Arizona Constitution "preserves a right to a jury trial in only those actions that existed at common law when the Arizona Constitution was adopted in 1910." *Life Investors Ins. Co. of Am. v. Horizon Resources Bethany, Ltd*., 182 Ariz. 529, 532, 898 P.2d 478, 481 (App. 1995). "Unless 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, 330 P.3d 996, 1002 (App. 2014).

In *Life Investors*, the Court held that the defendants in a deficiency action had no right to a jury trial. *Life Investors*, 182 Ariz. at 531, 898 P.2d at 480. In so holding, the Court reasoned that,

> [s]ince the deed of trust statute was enacted in 1971, there was no provision for this type of statutory action in 1910, and, hence, no issue exists regarding preservation of a nonexistent right.

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that they "cannot be called to task for waiving a right that the Commission does not recognize." R.B. at p. 21. They cite no authority to support their suggestion that an appellant's failure to object in the proceedings below should be excused if the appellant expected its objection to be overruled anyway. Case law is to the contrary. *Stephens v. Industrial Comm'n*, 114 Ariz. 92, 94, 559 P.2d 212, 214 (App. 1977) ("This court will not consider on review an issue not raised before [administrative agency] where the petitioner has had an opportunity to do so.").

Id. at 532, 898 P.2d at 481. Similarly, in *Arnett*, the Court held that the defendants in an action by a state agency seeking civil penalties and remediation costs for environmental contamination had no right to a jury trial. *Arnett*, 235 Ariz. at 245 ¶ 37, 330 P.3d at 1002. In so holding, the Court noted that the agency's "statutory claims did not exist prior to statehood" because the relevant statutes were not enacted until 1986. *Id*.

Here, as the Commission asserts, "[t]he Division brought this enforcement action this enforcement action under A.R.S. § 44-2032 of the Securities Act, which was enacted in 1951," and "[t]here was no provision for this type of statutory action when the Arizona Constitution was adopted." A.B. at p. 44. Pursuant to *Life Investors* and *Arnett*, because the statutory claims asserted here did not exist at the time of statehood, Appellants have no right to a jury trial on those claims.

Appellants do not dispute that this administrative proceeding was brought pursuant to statutes that were not enacted until long after statehood. *See generally* R.B. They insist, however, that "[t]he test" for determining the existence of a right to a jury trial "is not whether the specific statute existed at the time of statehood, but whether a contemporaneous action that permitted a jury trial existed at statehood." *Id*. at p. 23. In support of their position, however, they cite post-statehood Arizona cases in which securities claims were tried to a jury. *Id*., *citing Durham v. Firestone Tire & Rubber Co.*, 47 Ariz. 280, 55 P.2d 648 (1936) and *Kempner v. Welker*, 36 Ariz. 128, 283 P. 284 (1929). Because nothing in these cases discusses the purported existence of a right to a jury trial in securities enforcement cases at the time of statehood, these cases do not support Appellants' position.

Appellants also argue that "the Seventh Amendment" to the United States Constitution creates only a "narrow exception" to the right to a jury trial, and insist that the Arizona Securities Act does not "qualify" for this "narrow exception." R.B. at p. 26. They go on to discuss, at some length, their position that the Seventh Amendment creates a "jury trial right" that cannot be defeated "by assigning a matter to an administrative agency." O.B. at p. 40. *See also id*. (citing case law for the proposition that "Congress" cannot "conjure away the Seventh Amendment by mandating that traditional legal claims be…taken to an administrative tribunal.") (citation and internal quotations omitted). Because, as the Arizona Court of Appeals has recognized, "the Seventh Amendment right to a jury trial does not apply to the states," *Fisher v. Edgerton*, 236 Ariz. 71, 81, 336 P.3d 167, 177 (2014), the Seventh Amendment entitles Appellants to no relief here.

In their Reply Brief, Appellants argue, for the first time, that "the Commission's restitution order exceeded [Appellants'] 'net profits', which transformed a purportedly equitable remedy into a punitive sanction." R.B. at p. 28. The imposition of a "punitive sanction," they argue, "entitles [them] to a jury trial." *Id*. In support of their position, they cite *Liu v. S.E.C.*, __ U.S. __, 140 S.Ct.

1936 (2020) for the proposition that "disgorgement becomes a penalty…when it exceeds net profits and fails to deduct legitimate business expenses." R.B. at p. 27, *citing Liu*, 140 S.Ct. at 1949-50.

Because this argument was raised for the first time in Appellant's Reply Brief, the Court will not consider it. *See, e.g., Sholes v. Fernando*, 228 Ariz. 455, 457 n. 2, 268 P.3d 1112, 1114 n.2 (App. 2011) ("[W]e disregard those portions of the [appellants'] reply brief to the extent not confined strictly to rebuttal of points urged in the appellee's brief.") (citation and internal quotations omitted); *Grant v. Ariz. Pub. Service Co.*, 133 Ariz. 434, 444, 652 P.2d 507, 517 (1982) ("The argument simply comes too late when made for the first time in appellant's reply brief.").

The Court holds that Appellants waived their "jury trial" claim by failing to timely raise it in the proceedings below and that, in any event, the Arizona Constitution does not require a jury trial for the statutory claims asserted against Appellants in these proceedings.

DISPOSITION AND ORDERS

Appellants have not shown cause to reverse or modify the Final Decision. That Decision was supported by sufficient evidence and was not arbitrary, capricious, or an abuse of discretion. The Commission did not misapprehend or misapply the applicable law. Accordingly,

IT IS THEREFORE ORDERED affirming Decision No. 77547 of the Arizona Corporation Commission and 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. JRAD 13; Ariz.R.Civ.P. 54(c).

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

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