Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2019-000109-001 DT 01/21/2020

HONORABLE DOUGLAS GERLACH

CLERK OF THE COURT
D. Tapia
Deputy

CONCORDIA FINANCING COMPANY L T D — ALAN S BASKIN

v.

ARIZONA CORPORATION COMMISSION (001) — JAMES DUANE BURGESS

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

MINUTE ENTRY

Concordia Financing Co., Ltd. appeals the Opinion and Order of the Arizona Corporation Commission that, among other things, requires Concordia to (i) cease and desist its business operations, (ii) pay the Commission more than $2.6 million, plus interest, as restitution for violations of Arizona's securities laws, and (iii) pay the Commission $700,000.00 as administrative penalties for those violations. For the reasons explained below, the court has decided to affirm the Order in all respects.[1]

Neither Concordia's opening nor reply brief dispute the Commission's findings that Concordia violated sections 44-1841 (sale of unregistered securities) and 44-1842 (securities transactions by unregistered dealers and salesmen) of the Arizona Securities Act. Instead,

[1] Concordia has requested oral argument, but the Commission has not. Because oral argument is not an opportunity to raise issues or urge arguments that have not been briefed, and because Concordia has had the benefit of two briefs, there is no reason to think that the issues presented have not been fully and fairly presented in the parties' written submissions. Therefore, the court has concluded that oral argument will not assist a decision, and the request is denied.

Concordia's briefs assert that reversal of the Order is warranted, wholly or in part, for the following reasons:

(i) Concordia was denied its right to a jury trial;

(ii) A conflict of interest required two Commissioners to recuse themselves from participating in the case;

(iii) Concordia should have been allowed to assert laches as a defense;

(iv) The orders requiring Concordia to pay restitution and administrative penalties ignore what applicable law allows; and

(v) Substantial evidence fails to support both the restitution order and the administrative penalties order.

1. The denial of a jury trial.

Concordia maintains (Open. Br. at 17-26) that the Commission's decision to order the payment of both restitution and administrative (or civil) penalties violated Concordia's right to have those issues decided by a jury.

In these circumstances, a reviewing court must first determine whether the Arizona Securities Act provides for a jury trial. *E.g., Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974) (stating that a court must "first ascertain whether a construction of the [state] statute is fairly possible by which the [Seventh Amendment constitutional] question may be avoided"). Nothing express or implied in the Arizona Securities Act suggests that it contemplates the convening of jury trials in proceedings aimed at enforcement of the state's securities' laws.

With that, the issue is whether, as a matter of constitutional law, a jury trial was required in this case. Even though the right to a jury trial guaranteed by the Seventh Amendment to the United States Constitution does not apply to the states, Arizona courts "interpret Arizona's constitutional provisions protecting the right to a jury trial consistent with the Seventh Amendment." *Fisher v. Edgerton*, 236 Ariz. 71, 81, ¶¶32-33, 336 P.3d 167, 177 (App. 2014).[2]

[2] Relying on language in a criminal case, *Derendal v. Griffith*, 209 Ariz. 416, 419, ¶6, 104 P.3d 147, 150 (2005), Concordia maintains (Open. Br. at 24) that "the Arizona Constitution requires greater protection of the right to trial by jury than does the federal constitution." Leaving aside that *Derendal* is a case in which the defendant's asserted right to a jury trial was denied, not to mention a case that relied on two other cases in which jury trial claims were denied, what is more important is that Concordia's opening brief makes no attempt, supported by applicable authority, to define the nature or extent of the purported "greater protection." And this court's independent research has located

a. Restitution.

The Seventh Amendment recognizes the right to a jury trial "[i]n Suits at common law" where the amount in dispute exceeds $20.00. "Suits at common law" means not only common law causes of action but also "actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989).

That said, "not all money claims are triable to a jury. A historic equitable remedy was the grant of restitution by which defendant is made to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives." *SEC v. Commonwealth Chem. Secs., Inc.*, 574 F.2d 90, 95 (2d Cir. 1978) (affirming denial of request for jury trial (citation and internal quotation marks omitted)); *see also Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 214-15 (2002) (stating that restitution is an equitable remedy when it is intended "to restore the plaintiff particular funds or property in the defendant's possession").

Under authority granted by A.R.S. §44-2032(1), the Commission ordered Concordia to disgorge itself of money to which it was not entitled and restore the status quo by returning the principal amounts that 58 investors had paid. [Opinion and Order, *In the Matter of Concordia Financing Co., et al.* (Ariz. Corp. Comm'n Order 77088 (2/20/19) at 279, para. 51; 280, para. 10] That order was consistent with the "ordinary meaning of restitution, which focuses on restoring the victim to a prior position." *Hirsch v. Arizona Corp. Comm'n*, 237 Ariz. 456, 466, ¶40, 352 P.3d 925, 935 (App. 2015); *see also Commonwealth Chem.*, 574 F.2d at 95 (requiring defendant to disgorge gains to which it is not entitled is "[a]n historic equitable remedy"). Thus, in the circumstances here, the restitution award is an equitable remedy.[3]

Apart from that, the Arizona Constitution (art. II, sec. 23) preserves the right to a jury trial only in those cases when the right existed before statehood. *E.g., State ex rel. Darwin v. Arnett*, 235 Ariz. 239, 245, ¶36, 330 P.3d 996, 1002 (App. 2014); *Life Invs. Ins. Co. of Am. v. Horizon*

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no authority recognizing that, in civil cases involving appeals from decisions of administrative agencies, the jury trial jurisprudence of Arizona's appellate courts is different from federal courts' Seventh Amendment jurisprudence.

[3] See also Patrick L. Butler, *Saving Disgorgement from Itself: SEC Enforcement After Kokesh v. SEC*, 68 Duke L.J. 333, 363 (2018) (explaining that, in federal Securities and Exchange Commission enforcement actions, restitution is an equitable remedy that "is intended to make investors whole" (citations and internal quotation marks omitted)); Donald C. Langevoort, *On Leaving Corporate Executives "Naked, Homeless, and Without Wheels": Corporate Fraud, Equitable Remedies, and the Debate Over Entity Versus Individual Liability*, 42 Wake Forest L. Rev. 627, 630, 641-42 (2007) (referring to restitution in securities litigation as an equitable remedy).

Resources Bethany, Ltd., 182 Ariz. 529, 532, 898 P.2d 478, 481 (App. 1995).[4] Otherwise, the right to a jury trial is a creature of statute. *See Manic v. Dawes*, 213 Ariz. 252, 254, 256. ¶¶12, 22, 141 P.3d 732, 734, 736 (App. 2006) (recognizing legislature's intent to create a statutory right to a jury trial in DUI case); *see also In re Estate of Newman*, 219 Ariz. 260, 272, ¶47, 196 P.3d 863, 875 (App. 2008) (acknowledging legislature's ability to create statutory right to jury trial in vulnerable adult cases). The Commission's cease and desist order, and the orders imposing financial obligations on Concordia, all stem from the Commission's responsibility to enforce Arizona's securities laws. And, an enforcement action under those laws did not exist until well after statehood.

Finally, as explained in the following section, because this case involves a "public right," the legislature was not precluded from authorizing the Commission to treat with this matter without the need for a jury.

Unsupported by applicable authority, Concordia suggests (Open. Br. at 20) that, when the Commission adopted section R14-4-308 of the Arizona Administrative Code, whether wittingly or not, the decision to use the word "damages" in that section accomplished a substantive transformation of what otherwise was an equitable claim into a common law claim for monetary relief. It is not the label, however, but the nature of the remedy that determines whether it is equitable or not. *See e.g.*, *Curtis*, 415 U.S. at 196 (recognizing that remedy in a monetary form does not transform that remedy into a legal remedy for damages). And, as explained above, requiring one who violates the securities laws to restore to the victims their money and property, and to which the violator has no lawful entitlement, amounts to restoring the status quo and, thus, is consistent with the equitable remedy of restitution. [See n.3 and accompanying text]

In short, therefore, the Commission was permitted to order return of the principal that investors had paid rather than allowing Concordia to keep it [Order (2/20/19) at 279, para. 51; 280, para. 10] without the need for a jury trial.

b. Administrative Penalties.

A fundamental rule of our system of government is that judicial power belongs in the judiciary. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982) (superseded on other grounds by statute, *Wellness Int'l Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015)); *see also Stern v. Marshall*, 564 U.S. 462, 483 (2011). That rule, however, is not absolute. The Supreme Court has recognized three exceptions, including the adjudication of public rights. *See Northern Pipeline*, 458 U.S. at 71; *see also Stern*, 564 U.S. at 505 (Scalia, J., concurring).

[4] Article II, section 23 of the Arizona constitution states in relevant part: "The right of trial by jury shall remain inviolate."

In 1765, William Blackstone defined public rights as rights that belonged to "the whole community, considered as a community, in its social aggregate capacity." *Wellness Int'l Network, Ltd. v. Sharif*, 135 S.Ct. 1932, 1965 (2015) (Thomas, J., dissenting) (quoting 1 William Blackstone, *Commentaries* 119 (1765); 4 William Blackstone, *Commentaries* 5 (1769)). Early examples of public rights included general regulatory compliance. *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1551 (2016) (Thomas, J., concurring) (citation omitted).

The Supreme Court first invoked the public rights doctrine in *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272 (1855). There, the Court held that Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." 59 U.S. at 284. But the Court provided an exception for public rights: "At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Id.*

Later, the Supreme Court identified sovereign immunity as the constitutional justification for the public rights exception. "[Claims against the United States] may arise in many ways and may be for money, lands, or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them." *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929); *see also Northern Pipeline*, 458 U.S. at 67 (1982) (stating that a fundamental reason to exclude public rights from Article III is "the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued") (superseded on other grounds by statute, *Wellness*, 135 S.Ct. at 1932).

The Supreme Court has since conceded that its "discussion of the public rights exception . . . has not been entirely consistent, and the [public rights] exception has been the subject of some debate." *Stern*, 564 U.S. at 488; *see also Wellness*, 135 S. Ct. at 1964-65 (Thomas, J. dissenting) (stating that "the contours of the 'public rights' doctrine have been the source of much confusion and controversy"). That confusion and controversy stem from the Court's willingness to recognize the public rights exception in at least some actions where the government is not a party. *Stern*, 564 U.S. at 490. *But see id.* at 503 (Scalia, J., concurring) ("I adhere to my view, however, that – our contrary precedents notwithstanding – a matter of public rights must at minimum arise between the government and others" (internal quotation marks, alteration, and citation omitted)).

That confusion and controversy, however, do not affect the outcome here because the Supreme Court has never held that, in actions like this one, where the government is a party, the public rights exception does not apply. As such, whether a right to a jury trial exists in matters where the government seeks to have civil penalties assessed in an administrative proceeding is governed by *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977). There, the Court held that, in cases in which the government sues in its sovereign capacity to enforce public rights created by statutes within Congress' power to enact, Congress may assign the adjudication of those rights to an administrative agency without a jury trial, even though "the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law instead of an administrative agency." *Id.* at 455.

Concordia's attempt (Reply Br. at 4) to frame the issue here as a matter of nonpublic rights is both unsupported and unsupportable. It is well-settled that the Arizona Securities Act is "a remedial measure *for the protection of the public*." *Grand v. Nacchio*, 225 Ariz. 171, 174, ¶16, 236 P.3d 398, 401 (2010) (citation and internal quotation marks omitted, emphasis added); *see also Hirsch*, 237 Ariz. at 466, ¶40, 352 P.3d at 935 (same). And, it is beyond fair dispute that, when the Commission brings an enforcement action under the securities laws, as it did here, the Commission is acting on behalf of the state in its sovereign capacity. As such, the Seventh Amendment operates as no impediment to the legislature's ability to enact legislation assigning responsibility to the Commission for the adjudication of a violation and corresponding imposition of administrative penalties under the Arizona Securities Act. *Atlas Roofing*, 430 U.S. at 455.

Tull v. United States, 481 U.S. 412 (1987), does not warrant a contrary conclusion. *Tull* is inapplicable here because it did not involve a civil penalty assessed in an administrative proceeding. Indeed, the federal Clean Water Act**,** which was the statutory basis for the civil penalty claim asserted by the government in *Tull*, did not provide for administrative agency action. Thus, to reconcile *Atlas Roofing* and *Tull* is to recognize that, when the government pursues a civil penalty in a statutorily authorized administrative action, a jury trial is not required, but when the government seeks a civil penalty in a court proceeding, a jury trial is required (although *Tull* (at 427) held that a jury determination is required only on the issue of liability). *See Curtis*, 415 U.S. at 195 (recognizing "congressional power to entrust enforcement of statutory rights to an administrative process . . . free from the strictures of the Seventh Amendment. But when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law").[5]

[5] This explains the outcome in *SEC v. Jensen*, 835 F.3d 1100 (9th Cir. 2016) on which Concordia relies (Open. Br. at 22), where the SEC commenced the action as a trial court proceeding and not as an administrative proceeding. Likewise, Concordia's substantial reliance (Open. Br. at 20-21) on what amounts to a minute entry by a Virginia trial court (*Commonwealth v. Service Dogs by Warren Retrievers*, 101 Va. Cir. 275, 2019 WL 4040147 (Va. Madison Cty.

In sum, Concordia was not entitled to a trial by jury for adjudication of the public rights created by the Arizona Securities Act that are at issue in this case, including a jury determination regarding the administrative penalties that the Act authorizes.

2. The failure of two Commissioners to recuse themselves.

Concordia insists (Open. Br. at 26-30) that two Commissioners, Boyd Dunn and Andy Tobin, should have been disqualified from participating in this matter because of a conflict of interest. Yet, neither Concordia brief identifies, and the record fails to establish, the existence of a conflict of interest between Concordia (or any other party) and either of the two commissioners at any time relevant to this case. Instead, the asserted conflict identified in Concordia's briefing was between a nonparty (Concordia's attorney) and the two commissioners as a result of that attorney's representation in an unrelated case where he sued the two commissioners on behalf of a client who has never been a party to this proceeding.

Even if Concordia, and not its attorney, had sued the two commissioners, "[t]here is no rule that requires a judge to recuse himself from a case, civil or criminal, simply because he was or is involved in litigation with one of the parties." *In re Taylor*, 417 F.3d 649, 652 (7th Cir. 2005) (emphasis added). And, under no authority cited in either of Concordia's briefs, nor under any that this court's research has located, is there a rule that would, in effect, allow a party like Concordia to engineer the disqualification of a judge merely by retaining an attorney who either has sued or does sue that judge in a separate, unrelated lawsuit on behalf of a client who is neither a party to nor affected by the proceeding in which the recusal is sought.

Further, if one were to assume the existence of a conflict here, it is exclusively of Concordia's own making. Although Concordia was entitled to counsel of its choice, if Concordia was at all concerned that the attorney it selected would be viewed unfavorably by Commissioners Dunn and Tobin, thus possibly placing Concordia in an unfavorable light, Concordia could have retained other counsel. But to conclude that Concordia may use its voluntary choice of attorneys as the basis for forcing the commissioners' disqualification is to espouse the disorderly administration of justice. *See Smith v. Smith*, 115 Ariz. 299, 303, 564 P.2d 1266, 1270 (App. 1977) (recognizing that, if a party can obtain disqualification of a judge merely by having a lawsuit filed against that judge, "the orderly administration of judicial proceedings would be severely hampered").

Cir. Ct. Mar. 11, 2019)) also misapprehends that a right to a jury trial will be recognized only when the enforcing authority initiates an action in a trial court. Neither *Jensen* nor *Service Dogs* nor any other authority cited in either of Concordia's briefs recognizes a right to a jury trial in a statutorily authorized administrative proceeding where the government is acting in its sovereign capacity. Moreover, nothing stated in *Tull* suggests that the Court intended to retreat from or otherwise modify the holding in *Atlas Roofing*.

In any event, if the facts here require recognition of a true conflict, because Concordia was solely responsible for its creation, Concordia's decision to proceed without retaining another attorney amounted to a waiver of that conflict. *See e.g., United States v. Villarreal*, 554 F.2d 235, 236 (5th Cir. 1977) (recognizing that "a defendant may choose to be represented by counsel with possible or real conflicts" and concluding that defendant's decision to continue employing a law firm after being told about its conflict "conclusively demonstrates a knowing, intelligent waiver of conflict-free representation").[6]

Apart from that, there is a well-recognized presumption that a judge, or as here, a commissioner, is impartial. *E.g., Pavlik v. Chinle United Sch. Dist. No. 24*, 195 Ariz. 148, 154, ¶24, 985 P.2d 633, 639 (App. 1999) (recognizing "presumption that [school board members] are fair and impartial public servants"); *see also State v. Cropper*, 205 Ariz. 181, 185, ¶22, 68 P.3d 407, 411 (2003) (referring to a "strong presumption that trial judges are free of bias and prejudice" (citation and internal quotation marks omitted)). To overcome that presumption, the person asserting the presence of bias must "*prove by a preponderance of the evidence* that the judge is biased or prejudiced." *Cropper*, 205 Ariz. at 185, ¶22, 68 P.3d at 411 (citation and internal quotation marks omitted, emphasis added); *see also Simon v. Maricopa Med. Center*, 255 Ariz. 55, 63, ¶29, 234 P.3d 623, 631 (App. 2010) (same); *State v. Ramsey*, 211 Ariz. 529, 541, ¶38, 124 P.3d 756, 768 (App. 2010) (stating that "a defendant must show by a preponderance of the evidence that the trial judge was, in fact, biased").

The record here establishes only that, upon reflection, Commissioners Dunn and Tobin concluded separately that they could render impartial decisions in this case. Given the absence of any record evidence establishing that any bias actually existed (as opposed to the imagined fears on which Concordia's opening brief relies), the commissioners' unwillingness to disqualify themselves in this matter was not error. *See Cropper*, 205 Ariz. at 185, ¶22, 68 P.3d at 411 (recognizing that "speculation, suspicion, apprehension, or imagination" do not establish bias or partiality). *Cf.* N.Y. Adv. Comm. Jud. Eth., Op 98-114, 1998 WL 1674716 (Oct. 22, 1998) (concluding that "[t]he fact that an attorney had been sued by the judge when the judge was District Attorney, does not require the judge to disqualify him/herself in proceedings in which the attorney appears, provided the judge believes that he or she can be impartial").

3. The refusal to recognize laches as a defense.

Concordia insists (Open. Br. at 30-33) that it should have been permitted to assert laches as a defense in the proceeding below. Since at least the 19th century, however, courts have held repeatedly that the defense of laches may not be raised in an action brought by the government.

[6] The reliance of Concordia's opening brief (at 27) on *Rippo v. Baker*, 137 S. Ct. 905 (2017), is misplaced because, unlike this case, the defendant in *Rippo* was not responsible for creating the conflict of interest on which his partiality claim was predicated.

See e.g., *Costello v. United States*, 365 U.S. 265, 281 (1961) ("It has consistently been held in the lower courts that delay which might support a defense of laches in ordinary equitable proceedings between private litigants will not bar a denaturalization proceeding brought by the Government"); *United States v. Summerlin*, 310 U.S. 414, 416 (1940) ("It is well settled that the United States is not . . . subject to the defense of laches in enforcing its rights"); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) ("As a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest"); *United States v. Beebe*, 127 U.S. 338, 344 (1888) ("The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right, or to assert a public interest, is established past all controversy or doubt").

The principal reason for disallowing laches as a defense is the government's role in protecting all of its citizens. *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 294 (1983). Thus, the laches of some of the government's agents will not be allowed to injure the public rights and public property that the government is designed to protect. *Id.*

It is well-settled law in this state that "the doctrine of laches does not apply against the State or its agencies in matters affecting the public interest absent a statute expressly allowing such a defense." *Arnett*, 235 Ariz. at 245, ¶33, 330 P.3d at 1002 (App. 2014); *see also Kerby v. State ex. rel. Frohmiller*, 62 Ariz. 294, 307-08, 157 P.2d 698, 704 (1945) (same). No statute applicable to this case recognizes laches as a defense. And, it is beyond fair dispute that enforcement of the state's securities laws is hardly a private matter that does not affect the public interest. *E.g.*, *Nacchio*, 225 Ariz. at 174, ¶16, 236 P.3d at 401 (stating that "[t]he legislature intended the [Arizona Securities Act] as a remedial measure for the protection of the public (citation and internal quotation marks omitted)); *Hirsch*, 237 Ariz. at 466, ¶40, 352 P.3d at 935 (same); *Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 556, 733 P.3d 1131, 1139 (App. 1986) (referring to restitution in securities cases as matters of "public interest").

4. The imposition of obligations to pay restitution and administrative penalties.

a. Restitution.

Relying on section R14-4-308(C)) of the Arizona Administrative Code, Concordia maintains (Open. Br. at 35-41) that ordering the Commission to pay restitution amounted to an abuse of discretion because the Commission "ignor[ed] every mitigating factor placed before it." That contention misreads the authority on which it relies.[7]

[7] Section R14-4-308(C) pertains only to restitution orders. It does not mention administrative penalties and, thus, by its plain language cannot be the basis for concluding that the imposition of penalties here was an abuse of discretion.

Section R14-4-308(C)(5) states in part that "the Commission *may* prescribe by order alternative restitution terms, including . . . [t]he payment of a specified lesser amount" than what is otherwise required by section R14-4-308(C)(1). (Emphasis added)[8] The rules applicable to the construction of administrative regulations are the same as the rules for construing statutes. *Smith v. Arizona Citizens Clean Elec. Comm'n,* 212 Ariz. 407, 412, ¶18, 132 P.3d 1187, 1192 (2006). Unlike the word "shall," which is typical of a mandatory requirement, the word "may" is generally construed as permissive. *E.g., In re Maricopa County Superior Court No. MH2003-000240*, 206 Ariz. 367, 369, ¶7, 78 P.3d 1088, 1090 (App. 2003); *State v. Seyrafi*, 201 Ariz. 147, 150-51, ¶14, 32 P.3d 430, 433-34 (App. 2001). Moreover, when a statute uses both "may" and "shall", it is reasonable to infer that the two words were intended their different, ordinary meanings. *See Sempre Ltd. P'ship v. Maricopa County*, 225 Ariz. 106, 109, ¶11, 235 P.3d 259, 262 (App. 2010). Section R14-4-308 uses the word "shall" 13 times and "may" 10 times; subsection C uses the word "shall" four times and "may" three times. As such, there is no apparent reasonable basis for concluding that, when section R14-4-308(C)(5) was adopted, the use of the word "may" was intended to create a mandatory duty to reduce the amount of restitution that otherwise could be ordered.

Thus, given the permissive language of section R14-4-308(C)(5), the issue is whether the Order falls within the bounds set by the legislature. It is beyond fair dispute here that what the Commission ordered was permitted by section R14-4-308(C)(1). Thus, as a matter of law, the restitution order was not an abuse of discretion. *Cf. Hirsch*, 237 Ariz. at 465, ¶35, 352 P.3d at 934 (concluding that "[t]he Commission acts within its discretion in imposing administrative penalties within the applicable limits").

b. Administrative Penalties.

Concordia also maintains (Open. Br. at 35-41) that the imposition of administrative penalties amounted to an abuse of discretion. By law, the Commission was authorized to impose a penalty of up to $5,000.00 "for each violation." A.R.S. §44-2036. The Commission found that Concordia was responsible for 139 violations in connection with each of two statutes, or 278 violations total, which is a finding that is not contested in either of Concordia's briefs. Thus, in these circumstances, the Commission could have assessed a penalty of up to $1,390,000.00 (278

[8] Section R14-4-308(C)(1) provides that "[i]f restitution is ordered by the Commission, (1) [t]he amount payable as damages to each purchaser shall include: (a) Cash equal to the fair market value of the consideration paid, determined as of the date such payment was originally paid by the buyer; together with (b) [i]nterest at a rate pursuant to A.R.S. § 44-1201 for the period from the date of the purchase payment to the date of repayment; less (c) [t]he amount of any principal, interest, or other distributions received on the security for the period from the date of purchase payment to the date of repayment." (Formatting altered).

times $5,000.00). In its discretion, the Commission elected instead to impose a penalty of $700,000.00.

Section 44-2036 states that the Commission "may" impose a penalty. For the reasons explained above, including the statute's use of both "shall" and "may," the imposition of a penalty is permissive.

As with the issue of restitution, Concordia maintains (Open. Br. at 40) that the abuse of discretion here is attributable to the Commission's failure to consider Concordia's mitigating evidence. But so long as the imposed penalty fell within what the legislature allowed, that argument fails. *Hirsch*, 237 Ariz. at 465, ¶35, 352 P.3d at 934.

Concordia further maintains (Open. Br. at 41) that reversal of the order imposing administrative penalties is compelled because the Commission failed to justify or otherwise explain why the amount was reasonable. In that regard, Concordia misapprehends the Commission's order and what section 44-2036 requires.

Section 44-2036 states that a penalty cannot be imposed unless the Commission first finds that a violation occurred. The Commission's order explains in detail how and why Concordia was responsible for violating Arizona's securities laws. The plain language of section 44-2036 does not require any further explanation. As such, Concordia's attempt to discredit the Commission's decision regarding penalties is, correctly understood, nothing other than attempt to have this court read into the statute a requirement that is not there, which is not permitted. *State v. Hernandez-Perez*, No. 1 CA-CR 18-0507, 2019 WL 2149522, at *2, ¶7 (Ariz. Ct. App. May 16, 2019) (recognizing that courts typically do not read words into a statute); *see also Iselin v. United States*, 270 U.S. 245, 251 (1926) (Brandeis, J.) ("To supply omissions [in a statute] transcends the judicial function"); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012) (recognizing that "a matter not covered is not covered" is a principle "so obvious that it seems absurd to recite it").

5. The absence of substantial evidence supporting the restitution and administrative penalties orders.

a. Restitution.

Concordia's opening brief seems to say (at 46) that, if it can be shown that the Commission's analysis of a few investors' accounts was faulty, the entire restitution order fails. Or, in other words, Concordia would have this court throw out all of the babies with the bath water, including those numerous investors whose restitution awards the opening brief does not dispute with any evidence specific to them.

Concordia's contention appears to be that the restitution award was inflated because the Commission failed to take into consideration payments that investors received, and as such, the restitution order makes them more than whole. To be sure, the record citations appearing in the opening brief regarding several investors *may* support an inference that the analysis of most, if not all other, investors' accounts was faulty and, thus, the restitution order is flawed, but that is it: the record evidence permits an inference only. And, it is well-settled that what inferences to draw and what inferences to reject were the exclusive province of the Commission. *See e.g., Bullard v. Stonebreaker*, 101 Ariz. 584, 422 P.2d 700 (1967) (stating that appellate court "must accept the inferences drawn by the jury"); *Harrington v. Industrial Comm'n*, 84 Ariz. 356, 359 328 P.2d 311, 313 (1958) (stating that "inference to be drawn was . . . exclusively the province of the triers of fact"); *State v. Dixon*, 7 Ariz. App. 457, 458, 440 P.2d 918, 919 (1968) (recognizing that inferences to be drawn from the evidence are "always left to the jury").

Moreover, the investor accounts on which Concordia's opening brief relies hardly assist the argument that the entire restitution analysis was flawed.

> (i) Concordia maintains (Open. Br. at 42) that the Hodel investors had numerous documents in their possession showing payments that they received from Concordia that the Commission never considered. The Hodels, however, were not awarded any restitution. [Order (2/20/19) at 265] Thus, Concordia has not been adversely affected by the purported failure to consider the Hodels' records, however voluminous they may be.
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> (ii) Concordia contends (Open. Br. at 45-46) that the Commission's analysis was faulty because it failed to credit payments received by both the Schuringa Trust and Bachman Trust investors. The exhibit on which the Commission based the restitution order (Exh. S-194) does not show any restitution being made payable to either trust. [*Id.* at 266][9]
>
> (iii) Concordia maintains (Open. Br. at 45) that payments received by investor Jack Guest were not properly credited. Here, the Commission concluded that the credits should be recognized, but applied them to the Guest Charitable Trust and not Guest personally. [*Id.* at 266] Neither Concordia brief identifies evidence in the record establishing that decision was in error nor any applicable authority that required the Commission to apply the gains of one party (the Trust) against the losses of another party (Guest in his individual capacity).

[9] Exhibit S-194 on which the restitution order relied was based on Concordia's own records and copies of checks. [Hearing Tr. (12/7/16) at 1082-84]

> (iv) Concordia insists (Open. Br. at 46) that the Commission awarded investors Fuhrman and Farmers restitution to which they were not entitled. For those contentions, Concordia's briefs cite nothing in the record, and therefore, if there is an argument to be made with respect to either of those investors, it has been waived. Rule 7(a)(5), Rs. P. Jud. Rev. Admin. Dec.; *see also e.g., Atkins v. Snell & Wilmer LLP*, No. 1 CA-CV 17-0519, 2018 WL 5019615, at *6, ¶31 (Ariz. Ct. App. Oct. 16, 2018) ("Because the [plaintiffs] do not support their argument by citations to the record, they have waived it for [appellate] review"); *State v. Espinosa*, No. 1 CA-CR 17-0001, 2018 WL 1281595, at *5, ¶19 (Ariz. Ct. App. Mar. 13, 2018) ("[Defendant] has waived this argument because she provides no citation to the record to support her factual assertion"); *Backus v. Ellison*, No. 1 CA-CV 14-0703, 2015 WL 5310259, 2015 WL 5310259, at *1, ¶3 (Ariz. Ct. App. Sept. 10, 2015) ("[Appellant's] brief fails to . . . provide[] minimal record citations, meaning [appellant] is deemed to have waived arguments that otherwise could have been properly presented").

Although Concordia asserts (Open. Br. at 42) that the amount of restitution requested during the evidentiary hearing "did not account for years of repayments that Contract holders testified to," other than the investors identified above, Concordia's opening brief fails to cite testimony in the record pertaining to any other investor/Contract holder. As such, Concordia has failed to show that the restitution ordered for any other investor was inflated or otherwise miscalculated.[10]

Concordia also asserts (Open. Br. at 42) that "[t]he evidence showed that most Contract holders received all or more of their money back." Neither of Concordia's briefs, however, show that any of the 58 investors whose investments led to the restitution order were among those who

[10] Testimony was presented (i) establishing that the requested restitution was based on Concordia's records and cancelled checks [Hearing Tr. (12/7/16) at 1082-84], (ii) denying that anything was missing from the restitution analysis [*id.* at 1112-13], and (iii) concluding that the requested outcome was based on everything that reasonable efforts had been able to obtain [*id.* at 1112-13]. There was no legal impediment to the Commission accepting that evidence as reliable while disregarding Concordia's efforts to discredit it. *Callender v. Transpacific Hotel Corp.*, 179 Ariz. 557, 562, 880 P.2d 1103, 1108 (App. 1993) (recognizing that a trier of fact may accept all, some, or none of what a witness says); *see also United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 287, 681 P.2d 390, 439 (App. 1983) (stating that "[t]he weight to be given conflicting evidence is for the trier of fact"). Concordia's seeming contention (Open. Br. at 42) that, either by way of testimony or documentary evidence, it was conceded that the restitution calculation was, in fact, a mere "judgment call" (quotation marks in text of opening brief) is unsupported by any of the record citations that accompany the contention.

purportedly received all or more of their money back. Concordia's reply brief also goes on to assert (at 17) that "Contract holders . . . that lost money received a greater return than they would have during the Great Recession" without explanation or the benefit of any legal authority supporting a conclusion that such losses, even if minimal, somehow absolve Concordia of its 278 securities laws violations.

This court is required to view the record in the light most favorable to upholding the Commission's Order. *Lewis v. Arizona St. Pers. Bd.*, 240 Ariz. 330, 334, ¶15, 379 P.3d 227, 231 (App. 2016) (stating that, on appeal, the evidence must be viewed "in the light most favorable to upholding" the agency's decision, which will be "affirm[ed] if any reasonable interpretation of the record supports the decision"); *Warehouse Indem. Corp. v. Arizona Dep't of Econ. Sec.* 128 Ariz. 504, 505, 627 P.2d 235, 236 (App. 1981) (same). Appellate courts do not decide what testimony or other evidence is credible and what is not; evaluating the credibility of witnesses and the weight to give conflicting evidence is the agency's prerogative. *Lathrop v. Arizona Bd. of Chiropractic Examiners*, 182 Ariz. 172, 181, 894 P.2d 715, 724 (App. 1995); *see also Gutierrez v. Gutierrez*, 193 Ariz. 343, 347-48 ¶ 13, 972 P.2d 676, 680-81 (App. 1999) (stating that it is a trier of fact's function to determine "witnesses' credibility and the weight to give to conflicting evidence"); *United Cal. Bank*, 140 Ariz. at 287, 681 P.2d at 439 (stating that "[t]he weight to be given conflicting evidence is for the trier of fact, not a reviewing court"). That means that this court is not permitted to second-guess the Commission's fact finding. *E.g., Doria J. v. Department of Child Safety*, No. 1 CA-JV 19-0030, 2019 WL 4440385, at *3, ¶14 (Ariz. Ct. App. Sept. 17, 2019) ("We do not reweigh evidence on appeal and will not second-guess the fact-finder's evaluation of the evidence").

Nevertheless, even giving Concordia the benefit of every reasonable doubt does not alter the outcome here because the most that can be said on Concordia's behalf is that the evidence supports either of two conclusions: the restitution order is inflated and the restitution order is appropriate. As such, the restitution order is supported by substantial evidence. *DeGroot v. Arizona Racing Comm'n*, 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (App. 1984) ("If two inconsistent factual conclusions could be supported by the record, then there is substantial evidence to support an administrative decision that elects either conclusion"); *Eastern Vanguard Forex, Ltd. v. Arizona Corp. Comm'n*, 206 Ariz. 399, 409, ¶35, 79 P.3d 86, 96 (App. 2003) (stating that "[s]ubstantial evidence exists if either of two inconsistent factual conclusions are supported by the record"); *see also Smith v. Arizona Dep't of Transportation*, 146 Ariz. 430, 432, 706 P.2d 756, 758 (App. 1985) ("To reverse an agency's decision, the reviewing court must find that there was no substantial evidence to support the agency's decision").

b. Administrative Penalties.[11]

Concordia's contention (Reply Br. at 15-17) that substantial evidence fails to support the order imposing administrative penalties is far less a legal argument and far more a plea for mercy that is misdirected to this court. That contention is merely a reassertion that no penalty should have been imposed because of the facts that purportedly mitigate in Concordia's favor. [See section 4(b), above] Concordia's reply cites no authority – case law, treatise, law review article, or anything else – in support of its contention. But leaving that aside, nothing said in section 44-2306(A) makes the imposition of a civil penalty contingent on the absence of any mitigating factors.

It is hornbook law that statutes must be interpreted and applied as they are written. *E.g., Arizona State Bd. of Accounting v. Keebler*, 115 Ariz. 239, 240, 564 P.2d 928, 929 (App. 1977) ("[I]f the language of the statute is plain and unambiguous it must be given effect and no other rules of construction will be employed to contradict their clear import"); *see also City of Phoenix v. Donofrio*, 99 Ariz. 130, 133, 407 P.2d 91, 93 (1965) ("[C]ourts will not read into a statute something which is not within the manifest intention of the legislature as gathered from the statute itself"); *Home Builders Ass'n v. City of Scottsdale*, 187 Ariz. 479, 483, 930 P.2d 993, 997 (1997) ("where the language of a statute is clear and unambiguous, courts are not warranted in reading into the law words the legislature did not choose to include"). A.R.S. §44-2306(A) authorizes the Commission to impose a monetary penalty. Under the plain language of that statute, the only fact that must be proven to justify a penalty is a violation of "any provision of this [i.e., Sale of Securities] chapter." Neither of Concordia's briefs dispute the Commission's finding that Concordia committed 278 such violations. That ends this part of the inquiry.

IT IS ORDERED:

1. As to Concordia Financing Co., Ltd., the Opinion and Order of the Arizona Corporation Commission in *In the Matter of Concordia Financing Company* (Docket No. S-20906A-14-0063) is affirmed.

[11] Concordia's contention that the order imposing administrative penalties is not supported by substantial evidence was raised for the first time in Concordia's reply brief (at 15-17). Typically, such arguments are not considered. *E.g., Summers v. Gloor*, 239 Ariz. 222, 227, ¶20 n.6 (App. 2016) (stating that "new arguments" raised in a reply brief "have been waived, and we will not consider them"); *California 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) (stating that "[a]n argument raised for the first time in a reply brief will not be considered, even if it is legally sound"). The Commission's response brief, however, elected to introduce the issue, and therefore, Concordia was entitled to address the issue in its reply. JRAD 7(c) (recognizing at least implicitly that an argument presented for the first time in a reply brief is permitted when it rebuts an issue raised in the appellee's answering brief).

2. This case is remanded to the Commission for any further proceedings that may be required.

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

/ s / HONORABLE DOUGLAS GERLACH

HONORABLE DOUGLAS GERLACH
JUDGE OF THE SUPERIOR COURT

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