

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2018-000077-001 DT

11/19/2018

HONORABLE SIGMUND POPKO

CLERK OF THE COURT

C. Avena  
Deputy

GEORGE T SIMMONS  
JANET B SIMMONS  
BRUCE L ORR  
SUSAN S ORR

CHARLES R BERRY  
BRUCE L ORR  
3757 FALCON AVE  
LONG BEACH CA 90807  
SUSAN S ORR  
3757 FALCON AVE  
LONG BEACH CA 90807

v.

THE ARIZONA CORPORATION  
COMMISSION (001)  
MATTHEW J NEUBERT (001)

PAUL SEHMAN KITCHIN

COMM. POPKO  
OFFICE OF ADMINISTRATIVE  
HEARINGS  
REMAND DESK-LCA-CCC

**RECORD APPEAL RULING – ADMINISTRATIVE DECISION AFFIRMED**

Appellants, GEORGE T. SIMMONS & JANET B. SIMMONS and BRUCE L. ORR & SUSAN S. ORR, seek review of Decision Number 76529 (“Decision”) of the Arizona Corporation Commission. This Court has jurisdiction pursuant to Ariz. Const. art. 6, § 14, A.R.S. §§ 12-124(A), -905(A), and 44-1981. For the following reasons, this Court affirms that Decision.

**FACTS AND PROCEDURAL BACKGROUND**

The Commission’s Securities Division instituted this action on or about August 26, 2015. The matter was assigned to an administrative law judge for hearing. After various pre-hearing

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procedures, the hearing was held over a seven-day period during May 2016. The administrative law judge issued his recommended opinion and order on October 10, 2017. After the parties filed exceptions, the Commission issued its unanimous 171-page Decision on January 3, 2018. After Appellants' rehearing applications were denied by operation of law,<sup>1</sup> they timely sought judicial review.

The Commission found and concluded that Appellants were two of several member-managers of an Arizona limited liability company called USA Barcelona Realty Advisors, LLC ("Barcelona").<sup>2</sup> Other individuals involved with Barcelona were Richard C. Harkins (Barcelona's president) and Robert J. Kerrigan (another manager). In this enforcement action, the Commission concluded that Barcelona violated several sections of the Arizona Securities Act, A.R.S. §§ 44-1801– 44-2126 (the "Act"), including fraud in violation of A.R.S. § 44-1991. The Commission further concluded that, due to their positions as "control persons" within Barcelona, Appellants were secondarily liable for Barcelona's primary fraud violation.<sup>3</sup> Based on these findings and conclusions, Appellants were found jointly and severally liable for restitution to the defrauded investors in the amount of \$1,215,353. In addition, Simmons was administratively fined \$40,000 while Orr was administratively fined \$30,000.<sup>4</sup>

Appellants do not challenge the Commission's determination with respect to the underlying violations or Barcelona's liability as the primary violator. Instead their challenge focuses on the determination that they are secondarily liable under A.R.S. § 44-1999(B) as "control" persons. Thus, it is unnecessary to recite the minute details with respect to the underlying fraud. The basic facts, however, are these. Using private placement offering memoranda, Barcelona offered for sale, and sold, certain promissory notes and investment

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<sup>1</sup> See A.R.S. § 44-1974.

<sup>2</sup> Appellants Janet Simmons and Susan Orr are the respective spouses of George and Bruce. The Commission named Janet and Susan in the enforcement action solely to determine the marital communities' liability. See A.R.S. § 44-2031(C); Decision, Conclusion of Law # 15. Thus, all references to actions taken by "Appellants," "Simmons," or "Orr" refer to George, Bruce, or both of them as the context requires during the discussion of the underlying facts.

<sup>3</sup> Decision, Conclusion of Law # 9. See also A.R.S. § 44-1999(B).

<sup>4</sup> The Commission also concluded that Appellants did not rebut the legal presumption that their respective "debts" arising from the restitution and fine orders were also attributable to their respective marital communities. Decision, Conclusions of Law, ## 15, 17; see also Decision at p. 154.

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contracts. The Commission determined that these instruments were non-exempt securities under the Act. The LLC was not registered with the Commission as a securities salesman or dealer. The LLC defrauded investors by, among other things, failing to inform certain investors that Harkins was involved in a prior failed real estate venture; an assistant of Harkins had a felony conviction in connection with an earlier investment fraud scheme; Kerrigan owed back taxes and was a defendant in a civil suit regarding a bank loan; Barcelona moved away from its primary business plan when that plan failed to raise the necessary capital; Barcelona failed to repay certain promissory notes owned by Kerrigan; certain of the funds raised from the investors would be used to pay those Kerrigan notes; Barcelona had failed to make timely payments to certain earlier investors; and certain proceeds raised from investors in a later offering would be used to pay investors from an earlier offering.<sup>5</sup>

The relevant facts concerning the Barcelona's organization and Appellants' respective roles in Barcelona are discussed below along with the relevant legal authorities.

**STANDARDS OF REVIEW**

This Court will “defer to an agency’s factual findings unless they are “arbitrary, capricious, or ... an abuse of discretion.” *Silver v. Pueblo Del Sol Water Co.*, 244 Ariz. 553, ¶ 9 (2018) (internal quotations omitted) (citing *J. W. Hancock Enterprises, Inc. v. Registrar of Contractors*, 126 Ariz. 511, 513 (1980)). *See also Schade v. Arizona State Retirement System*, 109 Ariz. 396, 398 (1973); *Arizona Bd. of Osteopathic Examiners in Med. & Surgery v. Ferris*, 20 Ariz. App. 535, 536, 514 P.2d 288, 289 (1973) (where applicable statutes do not mandate *de novo* judicial review, the “Superior Court can only decide whether the administrative action was erroneous in that it was arbitrary, capricious or involved an abuse of discretion”). *Cf.* A.R.S. § 12-910(E).<sup>6</sup>

Accordingly, this Court’s review determines whether the evidence supports the Commission’s findings. If the evidence is conflicting but still supports the Commission’s findings, this Court will not re-weigh the evidence. Instead, this Court must affirm the Commission’s findings. *See DeGroot v. Arizona Racing Comm’n*, 141 Ariz. 331, 336 (App.

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<sup>5</sup> Decision, Findings of Fact ## 13–20; Conclusions of Law ## 3–5, 8. *See also* Decision at pp. 95–109, 125–144.

<sup>6</sup> A.R.S. § 12-910 was recently amended to exclude Arizona Corporation Commission cases from its operation. *See* A.R.S. § 12-910(G) (eff. 8/3/18). Arizona case law, however, provides substantially the same standard of review as subsection (E).

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1984) (“A trial court may not function as a “super agency” and substitute its own judgment for that of the agency where factual questions and agency expertise are involved.”). *See also Arizona Board of Regents v. Superior Court*, 106 Ariz. 430 (1970) (citing *Jaffe v. State Dep’t of Health*, 64 A.2d 330 (Conn. 1949)); *Eastern Vanguard Forex, Ltd. v. Arizona Corp. Comm’n*, 206 Ariz. 399, 409–10 ¶ 35 (App. 2003) (“*Vanguard*”).

This Court, however, reviews issues of statutory interpretation *de novo*. *Silver*, 244 Ariz. 553, ¶ 9. After review, this Court may “modify, affirm or reverse the [D]ecision in whole or in part.” A.R.S. § 12-911(A)(5).

**ISSUES ON APPEAL**

Simmons’ Opening Brief initially lists nine separate issues for this Court’s review. Simmons Opening Brief at pp. 7–8. However, he later distills those nine issues into three assignments of error: (1) that the Decision is not supported by “any testimony or documentary evidence,” (2) the Decision incorrectly analogizes Simmons’ role in Barcelona to a director of an Arizona corporation, and (3) the Decision misapplies A.R.S. § 44-1999(B) as a matter of law. *Id.* at p. 8.<sup>7</sup> Orr makes substantively similar arguments, but expressly adds that if error is found with respect to imposing secondary liability on him, then the restitution and fine levied against his marital community must also fall.<sup>8</sup>

**DISCUSSION**

**CONTROL PERSON LIABILITY UNDER THE ACT**

With respect to control person liability, the Act provides

Every person who, directly or indirectly, controls any person liable for a violation of § 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

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<sup>7</sup> Simmons phrases his statement of the issues in terms of errors in the Decision and those made by the administrative law judge in his recommended opinion and order. This Court’s review is limited to the Decision. *See Smith v. Arizona Long Term Care Sys.*, 207 Ariz. 217, 220 ¶ 15 (App. 2004).

<sup>8</sup> Simmons does not expressly argue this point, but, obviously, if he is not secondarily liable then his marital community will not be either.

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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). For purposes of this statute, a “person” includes a limited liability company. *Id.* § 44-1801(17). Thus, Barcelona was a “person,” and anyone who directly or indirectly controlled Barcelona is secondarily liable for Barcelona’s fraud in violation of A.R.S. § 44-1991. The last sentence of the statute, however, does provide a defense if the controlling person acted in “good faith” and did not induce the fraud.

The Arizona Court of Appeals has authoritatively construed section 44-1999(B). In *Vanguard*, the court held that the statute 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.” 206 Ariz. at 412 ¶ 42 (emphasis in original).

Thus, to satisfy the first prong of § 44-1999(B), the evidence need only show that the person targeted as a controlling person had the legal power, either individually or as part of a control group, to control the activities of the primary violator.

*Id.* Therefore, it is not necessary that the controlling person participate in the underlying fraud or even exercise the power to control the primary violator. All that must be proved is that the controlling person had “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.” *Id.* at 412 ¶ 41 (quoting 17 C.F.R. § 230.405 (1995)) (emphasis altered); *id.* (“In this section ... when reference is made to ‘control,’ the term is intended to include actual control as well as what has been called legally enforceable control.” (quoting H.R.Rep. No. 73–1383, at 26 (1934)) (emphasis added).<sup>9</sup> This construction of the statute is consistent with the Act’s remedial purpose of protecting the investing public. *Id.* at 410, 412 ¶¶ 36, 42.

To avoid this presumptive liability, the controlling person has an affirmative defense. Successful use of this defense requires the controlling person to prove that he “acted in good faith and did not directly or indirectly induce the act underlying the action.” *Id.* at 413 ¶ 46 (quoting A.R.S. § 44-1999(B)). Merely not participating in the underlying fraud is insufficient to

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<sup>9</sup> *Vanguard* looked to federal law for guidance in construing section 44-1999(B) because that section was modelled after a federal statute and the legislature expressly directed Arizona courts to look to federal law as guidance in interpreting the Act. 206 Ariz. at 410-412 ¶¶ 36–42.

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establish good faith. *Id.* at 413–14 ¶ 48. Instead, “[a]t the minimum, in order to establish an affirmative defense in a case involving nonfeasance, controlling persons must establish that they exercised due care by taking reasonable steps to maintain and enforce a reasonable and proper system of supervision and internal control[s].” *Id.* at 414 ¶ 50 (internal quotation omitted).<sup>10</sup>

**DID THE COMMISSION MISAPPLY A.R.S. § 44-1999(B) BY INAPPROPRIATELY ANALOGIZING APPELLANTS’ ROLES IN BARCELONA, A LIMITED LIABILITY COMPANY, TO THAT OF DIRECTORS OF A CORPORATION?**

The Commission extensively discussed its understanding of section 44-1999(B), *Vanguard*, and the evidence supporting its conclusions made under those authorities. Decision at pp. 145-151. Appellants argue that because the Decision recites certain analogies of Appellants’ roles in Barcelona to a corporate director’s role, the Commission misunderstood or ignored the allegedly more limited nature of their actual roles in Barcelona. Simmons Opening Brief at pp. 12–15; Orr Appeal Brief at 9–13. The Commission did not improperly rely on corporate analogies to impose secondary liability on Appellants.

The Decision reflects the Commission’s clear understanding that it was dealing with a limited liability company. The Decision cites to A.R.S. § 29-681, a section of the Arizona Limited Liability Company Act. It refers to “operating agreements” and “articles of organization,” both terms of art used in that act. The Decision extensively discusses the terms of the two relevant operating agreements and Appellants’ roles in Barcelona pursuant to those agreements. It relies on its findings with respect to those instruments and Appellants’ activities on Barcelona’s behalf to make its determination with respect to Appellants’ secondary liability.

The relevant discussion in the Decision does not adopt a controlling analogy between limited liability company member-managers and corporate directors as a basis for imposing secondary liability. The Decision recites the Securities Division’s argument that Appellants, as Executive Members of Barcelona, were the “rough equivalent” of corporate directors. Decision at p. 146. It also recites the Division’s argument that Simmons’ own testimony lent itself to an analogy between Barcelona’s Executive Members and its non-voting members on the one hand

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<sup>10</sup> The Commission determined that Simmons waived any affirmative defense by not raising it “in his Post Hearing Briefs.” Decision, at p. 151. The Commission also determined that neither Appellant met his burden of proving that he “took reasonable steps to maintain and enforce a reasonable and proper system of supervision and internal controls” regarding Barcelona’s sale of securities. *Id.* In any event, neither Appellant has raised this issue in their appellate briefs, so it is waived. *See, e.g., Belen Loan Investors, L.L.C. v. Bradley*, 231 Ariz. 448, 457 ¶ 22 (App. 2012).

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and corporate directors and shareholders on the other. *Id.* The only other reference to corporations and boards of directors in the Decision's discussion of control person liability is within the discussion of *Vanguard* where the business structure at issue was a corporation. *Id.* at 150. That the Decision refers to the Securities Division's corporate analogies and *Vanguard's* discussion of a corporate structure does not mean that the Commission ignored or misunderstood the limited liability structure at issue in this case and then misapplied section 44-1999(B).

This Court's understanding of section 44-1999(B) and *Vanguard* is set forth above. This Court sees no material differences between its own understanding and the Commission's. This Court concludes that the Commission utilized the appropriate standard when it gauged Appellants' secondary liability. Any argument Appellants make that the Commission misapplied the law, at least to the extent they argue that the Commission misunderstood that law, is not well-taken, and the Decision was not "arbitrary, capricious or involved an abuse of discretion" on that basis. *Ferris*, 20 Ariz. App. at 536.

The remainder of Appellant's arguments are essentially challenges to the sufficiency of the evidence supporting the Commission's conclusion that Appellants were control persons within the meaning of A.R.S. § 44-1999(B) and, therefore, secondarily liable for Barcelona's primary violation of the securities fraud provision. To that issue this minute entry now turns.

**WAS THERE SUFFICIENT EVIDENCE TO SUPPORT THE COMMISSION'S FACTUAL FINDINGS THAT APPELLANTS WERE CONTROL PERSONS WITHIN THE MEANING OF A.R.S. § 44-1999(B)?**

**SIMMONS**

The Commission found that Simmons was a member-manager of Barcelona and, by virtue of Barcelona's operating agreements, he was an Executive Member, that is, a member of Barcelona's Executive Committee. The Commission also found that Simmons held the offices of Barcelona's Executive Vice-President and Chief Operating Officer. Digging further into the facts, the Commission further found that Simmons undertook several activities on behalf of Barcelona consistent with these roles. These findings then led the Commission to conclude that, at least since February 1, 2013, Simmons was a "control person" within the meaning of A.R.S. § 44-1999(B).

The Decision extensively reviews and cites the various testimonies and documentary evidence on which the Commission rested its conclusion that Simmons was a control person. Decision at pp. 145–151 (and footnotes therein). The record supports the Commission's

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findings. The LLC's operating agreements, although giving a large degree of day-to-day control to Harkins, reserved certain "Major Decisions" to Simmons and others as members of the so-called "Executive Committee."<sup>11</sup> These decisions included admitting new members to Barcelona as well as issuing Barcelona's notes.<sup>12</sup> A private placement offering memorandum confirmed that the Executive Members had control of Barcelona via this Major Decision-making authority.<sup>13</sup>

Simmons was also named as Barcelona's Executive Vice-President and Chief Operating Officer. As such, the "Second Operating Agreement" gave Simmons the power to manage Barcelona's "interests and execute agreements."<sup>14</sup> This is consistent with articles of amendment that Simmons was among the Barcelona's member-managers.<sup>15</sup>

The record also supports the Commission's conclusion that Simmons conducted himself consistent with these roles. Simmons signed at least one subscription agreement for a new investor, signed more than one independent contractor agreement, offered jobs to two individuals, and approved an expense account.<sup>16</sup> Simmons signed two letters to investors which identified him as one of the four Executive Members.<sup>17</sup> Simmons was a recipient of an e-mail from Harkins that was addressed to him (among others) as an Executive Member of Barcelona.<sup>18</sup> Simmons also authored an e-mail wherein he described himself as an Executive Member who,

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<sup>11</sup> Hearing Exhibit S-5 at ACC007214–ACC007215, ACC007268–ACC007269; Hearing Exhibit S-57 at ACC000737–ACC000738, ACC000790–ACC000792.

<sup>12</sup> Hearing Exhibit S-5 at ACC007268–ACC007269; Hearing Exhibit S-57 at ACC000791–ACC000792.

<sup>13</sup> Hearing Exhibit S-57 at ACC000738 ("The Executive Committee shall determine overall policies, objectives, and procedures for the operation of [Barcelona].").

<sup>14</sup> Hearing Exhibit S-57 at ACC000790–ACC000791.

<sup>15</sup> Hearing Exhibit S-3(b).

<sup>16</sup> Hearing Transcript at pp. 125, 372, 374, 721, 1193–1196, 1198.

<sup>17</sup> Hearing Exhibits S-26 and S-65.

<sup>18</sup> Hearing Exhibit S-24.

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along with the others, was working to capitalize Barcelona. This same e-mail also reads as a job description for a potential new “team” member for Barcelona.<sup>19</sup>

Simmons’ own testimony also supports the Commission’s conclusions. Simmons admitted during cross-examination that he never disavowed his Executive Member title.<sup>20</sup> He also confirmed various activities in which he was involved.<sup>21</sup> This also included at least raising the issue whether Barcelona’s private offering memoranda had been approved by legal counsel.<sup>22</sup>

Simmons, naturally, points to conflicting evidence in the record to demonstrate that he was not a control person or, at least, that there was insufficient evidence to prove that he was. He argues that because Barcelona was still in a “start-up” phase and its governance structure was in flux, that the only true control person was Harkins. He points out that Harkins and the other individual respondents in the enforcement action so testified. He contends that the Commission was arbitrary when it discounted this self-serving testimony. He contends that the Executive Committee was a nullity because Harkins never referred any “Major Decision” to that committee.<sup>23</sup> He also contends that his officer titles were in name only and that he only did what Harkins told him to do. He further notes that the operating agreements relied on by the Commission were unsigned and that the articles of amendment naming him a member-manager were signed only by Harkins.<sup>24</sup>

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<sup>19</sup> Hearing Exhibit S-176. See also Hearing Exhibit S-177 (letter from Simmons to new employee and signed by Simmons as “Chief Operating Officer” of Barcelona).

<sup>20</sup> Hearing Transcript at p. 1198.

<sup>21</sup> Hearing Transcript at pp. 1183–1223.

<sup>22</sup> Hearing Transcript at pp. 1200–1201. Raising this type of issue is some evidence that Simmons understood his role as a manager.

<sup>23</sup> The operating agreements gave each Executive Member the right to call “special meetings” of the Executive Committee. Hearing Exhibit S-5 at ACC007273 (Article 6.18(c)); Hearing Exhibit S-57 at ACC000794 (Article 6.12). Thus, if Simmons or any Executive Member believed that Harkins was taking Major Decisions without proper referral to the Executive Committee, each Executive Member had the authority to call a special meeting to address the issue. This is further evidence that Simmons had an avenue by which to exercise even indirect control over Barcelona but chose not to do so.

<sup>24</sup> A.R.S. § 29-633 does not require each person named as a member-manager to sign the articles of amendment.

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Simmons is correct that there was conflicting evidence before the Commission. However, as noted, this Court does not reweigh the evidence and substitute its judgment for the Commission's. Instead, this Court will "defer to [the Commission's] factual findings unless they are "arbitrary, capricious, or ... an abuse of discretion." *Silver*, 244 Ariz. 553, ¶ 9 (internal quotations omitted).

The Commission heard testimony which supported its reasonable reliance on the documentary evidence produced to it. Harkins testified that he filed the articles of amendment which named all of the member-managers and that the information in that document was correct.<sup>25</sup> He further testified that Barcelona's two operating agreements were in effect during their respective time frames.<sup>26</sup> He confirmed that Simmons did not need his permission to sign a new investor's subscription agreement.<sup>27</sup>

With this testimony supporting the documentary evidence, along with Simmons' own testimony and the documents authored by him, this Court cannot say that the Commission was arbitrary, capricious, or abused its discretion when it found Simmons was a control person of Barcelona within the meaning of A.R.S. § 44-1999(B).<sup>28</sup>

In addition to his factual arguments, Simmons cites several cases as support for his argument that the Commission erred when it found him a control person. None of these cases

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<sup>25</sup> Hearing Transcript at pp. 912–913.

<sup>26</sup> Hearing Transcript at pp. 931–932. Simmons protests that the Commission relied on Harkins "belief" that Barcelona's operating agreements were in effect. Simmons Reply Brief at p. 6. Ironically, Harkins also testified that he only "believed" that Simmons and the other Executive Members did not have the "legal power" to "control" Barcelona. Hearing Transcript at p. 909. It was for the Commission, as finder of fact, to determine which of Harkins' statements were entitled to credit. Moreover, even if the operating agreements were not in effect, the Commission still had a basis upon which to rest its conclusion that Simmons was a member-manager and was part of Barcelona's control group—Arizona law gives default powers to member-managers in the absence of an operating agreement. *See* Hearing Exhibit S-3(b) (articles of amendment); A.R.S. § 29-681(A) (setting forth management regime in absence of operating agreements).

<sup>27</sup> Hearing Transcript at p. 913.

<sup>28</sup> The evidence before the Commission showed that Simmons was very aware of his role and was actively involved in Barcelona's management structure. Thus, this is not a situation where an individual is being held secondarily liable for a business entity's debt solely because the individual's name appeared within the entity's organizing documents. *Cf. CSFM Corp. v. Elbert & McKee Co.*, 870 F. Supp. 819, 832 (N.D. Ill. 1994) (discussing *W. Leechburg Steel Co. v. Smitton*, 273 N.W. 439, 440 (Mich. 1937)).

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compel a reversal of the Decision. First, the issue in nearly all of these cases was whether the transactions at issue were transactions in a “security” under the applicable securities law or regulation.<sup>29</sup> The issue whether a particular transaction is one in a “security” is materially different from whether someone is a “control person.”<sup>30</sup> Second, the courts in those cases presumably had in mind the broad remedial purpose of securities regulation in general – protecting the investing public<sup>31</sup> – and “liberally construed” the applicable statute when determining whether the transaction at issue was one in a security. It would be inconsistent with the Arizona Act’s remedial purpose to import the reasoning of those cases to narrowly construe the Act to determine whether someone was a control person.

Another case Simmons relies on is an unreported federal district court case, *Kingsley Capital Mgmt., LLC v. Sly*, 2013 WL 3967615 (D. Ariz. 2013). That case did concern whether a person was secondarily liable for another person’s primary violation. On summary judgment, the district court ruled that the plaintiffs did not produce any evidence that the purported control person actually “had the legal power to control” the primary violator. *Id.* at \*10. Simmons’ reliance on *Kingsley* is unavailing. As described above, the Commission had sufficient evidence before it to conclude that Simmons was a member of a control group and, therefore, was a “control person” within the meaning of A.R.S. § 44-1999(B).

The Commission’s factual findings with respect to Simmons’ secondary liability were supported by the evidence and were not arbitrary, capricious, or an abuse of discretion. The Commission utilized the correct legal standard to determine that liability. Simmons, at most, shows only a conflict in the evidence. That conflict is not sufficient grounds to reverse the Decision. The cases Simmons relies on do not compel a contrary result.

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<sup>29</sup> See *Koch v. Hankins*, 928 F.2d 1471 (9th Cir. 1991) (membership interests in general partnership); *Hocking v. Dubois*, 885 F.2d 1449 (9th Cir. 1989) (condominium purchase agreement); *Matek v. Murat*, 862 F.2d 720 (9th Cir. 1988) (general partnership interests), *abrogated on other grounds*, *Hankins*, 928 F.2d 1471; *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981) (investments in joint venture); *Nutek Info. Sys., Inc. v. Ariz. Corp. Comm’n*, 194 Ariz. 104 (App. 1998) (membership interests in limited liability company).

<sup>30</sup> Cf. *Hankins*, 928 F.2d at 1475–76 (discussing test for determining whether a transaction involves an “investment contract,” and, hence, a “security”) with *Vanguard*, 206 Ariz. 399 (discussing control person liability under A.R.S. § 44-1999(B)).

<sup>31</sup> See, e.g., *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 298 (1946) (noting the purpose of securities regulation is to give the “investing public a full measure of protection”).

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**ORR**

Much of what was said about Simmons also applies to Orr. Orr was named as being one of Barcelona's Executive Members. He also was named as being a "Class A" member, albeit with a smaller ownership interest. His name, too, appears on the same two letters to the new investors which acknowledged his role as "Executive Member."<sup>32</sup> Although Orr professed not to have a precise understanding of the Executive Committee's role, he did understand it to be the group that would be "kind of driving the company."<sup>33</sup> He further understood that Barcelona's operating agreement gave the Executive Committee authority over the president and to make major decisions.<sup>34</sup> Orr further admitted that, as an Executive Member, he had input on Barcelona's private offering memoranda,<sup>35</sup> as well as how some of Barcelona's borrowings were structured.<sup>36</sup> Orr proposed an additional member to the Executive Committee, and that proposal was accepted.<sup>37</sup> Although Orr denied being involved in efforts to recruit investors for Barcelona, he admitted on cross-examination that several of his expense account items were from meetings or events that involved prospective or potential investors.<sup>38</sup> He also admitted that several payments to him were made pursuant to Barcelona's operating agreement.<sup>39</sup>

Just like Simmons, and based on the record before it, the Commission concluded that Orr was also a member of Barcelona's control group and, therefore, a control person. Orr, too, argues the evidence was in conflict. This Court, however, cannot conclude that the Commission's conclusion with respect to Orr was arbitrary, capricious, or an abuse of discretion.

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<sup>32</sup> Orr signed one letter personally and authorized Simmons to sign for him on a second letter. Hearing Transcript at pp. 740-742.

<sup>33</sup> Hearing Transcript at pp. 731-733.

<sup>34</sup> Hearing Transcript at pp. 733-734.

<sup>35</sup> Hearing Transcript at p. 736.

<sup>36</sup> Hearing Transcript at pp. 736-739.

<sup>37</sup> Hearing Transcript at p. 739.

<sup>38</sup> Hearing Transcript at pp. 747-750.

<sup>39</sup> Hearing Transcript at p. 755. This is additional evidence supporting the Commission's conclusion that the operating agreements were in effect.

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Orr relies on some of the same cases as Simmons. That reliance is unavailing for the same reasons it was unavailing to Simmons. Orr also cites a case which notes that control persons are generally higher up in the governance structure than the primary violator. *See Allstate Life Ins. Co. v. Robert W. Haird & Co.*, 756 F. Supp. 2d 1113 (D. Ariz. 2010). Perhaps so, but the words of our statute and the court of appeals' construction of it control the outcome of this case. The statute's text and binding case law leave no doubt that A.R.S. § 44-1999(B) also attaches secondary liability on those in the governing structure who could have taken action, but, for whatever reason, did not do so.

**The Liability of the Marital Communities**

Because the Decision with respect to Appellants' individual liability is being affirmed, and because Appellants have not raised any independent argument as to why their respective marital communities should not be liable pursuant to A.R.S. § 44-2301(C), there is no occasion to discuss that liability.

**DISPOSITION AND ORDERS**

Neither Appellant has shown cause to reverse or modify the 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 governing law. Accordingly,

IT IS THEREFORE ORDERED affirming Decision Number 76529 of the Arizona Corporation Commission.

IT IS ALSO ORDERED signing this minute entry as a formal order of the Court.

          /s/ Sigmund Popko            
The Hon. Sigmund G. Popko  
Judicial Officer of the Superior Court

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