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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission
DOCKETED
MAR 23 2004
DOCKETED BY NR

COMMISSIONERS

MARC SPITZER, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON
KRISTIN K. MAYES

Decision No. 66858

In the matter of: KATHLEEN WHORLEY SOMMER [CRD No. 2750036], d/b/a Sommer & Associates 249 W. Waltann Lane Phoenix, Arizona 85023 Respondent.	DOCKET NO. S-03489A-03-0000 **ORDER TO CEASE AND DESIST, ORDER OF RESTITUTION, ORDER OF REVOCATION, ORDER FOR ADMINISTRATIVE PENALTIES AND CONSENT TO SAME BY: RESPONDENT KATHLEEN WHORLEY SOMMER**

RESPONDENT KATHLEEN WHORLEY SOMMER ("SOMMER") elects to permanently waive any right to a hearing and appeal under Articles 11 and 12 of the Securities Act of Arizona, A.R.S. § 44-1801 *et seq.* ("Securities Act") with respect to this Order To Cease And Desist, Order of Restitution, Order of Revocation, Order for Administrative Penalties and Consent to Same By: Respondent Kathleen Whorley Sommer ("Order"). RESPONDENT admits the jurisdiction of the Arizona Corporation Commission ("Commission"); neither admits nor denies the Findings of Fact and Conclusions of Law contained in this Order; and consents to the entry of this Order by the Commission.

Arizona Corporation Commission
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I.

FINDINGS OF FACT

1. SOMMER became an Arizona-registered securities sales~~man, associated~~ with WMA Securities, Inc., on May 30, 1996. Her association with WMA terminated on December 31, 1997, and she then became registered in association with Jefferson Pilot Securities Corporation ("Jefferson Pilot"), effective March 3, 1998. SOMMER voluntarily terminated association with Jefferson Pilot,

effective October 31, 2000. She became registered in association with SunAmerica Securities, Inc. ("Sunamerica") on November 7, 2000.

2. Sunamerica discharged SOMMER on June 26, 2002, for engaging in private securities transactions without the approval of the dealer. SOMMER had requested approval to sell what she described as "business opportunities," but the approval document was never fully executed by the dealer. On June 28, 2002, SOMMER delivered to the Division a voluntary surrender of her registration. Accordingly, pursuant to A.R.S. § 44-1963(D), SOMMER continues to be subject to actions by the Commission under Article 10 of the Securities Act (in particular, A.R.S. § 44-1962) for conduct that began prior to the termination of her registration. The effective date of SOMMER's registration termination is July 1, 2002, and SOMMER has not been registered in Arizona since that date.

3. At times relevant to this Notice, SOMMER did business as "Sommer & Associates."

4. SOMMER holds a license to transact insurance business in the State of Arizona.

5. During the period relevant to this Notice, SOMMER has been a resident of Arizona. Her last known address is 249 West Waltann Lane, Phoenix, Arizona 85023.

6. During the period between August 1999 and August 2001, SOMMER sold unregistered investment contract securities, in the form of pay telephones and related service contracts. The investment contracts were issued and/or marketed by Alpha Telcom, Inc. ("Alpha"), American Telecommunications Company, Inc. ("ATC"), Strategic Partnership Alliance, LLC, and/or SPA Marketing, LLC (collectively, "SPA"). Alpha and ATC may be collectively referred to in this Notice as "Alpha/ATC." SOMMER states she relied on attorneys' opinions which opined that pay telephone sales did not constitute the sale of securities and nothing in these Findings of Fact suggests that SOMMER sold pay telephones knowing that they constituted securites.

7. At all times material to this Notice, Alpha was an Oregon corporation located at 2751 Highland Avenue, Grants Pass, Oregon 97526.

8. At all times material to this Notice, ATC was a Nevada corporation, formed as a wholly owned subsidiary of Alpha on or about September 17, 1998. Originally named ATC, Inc., the name was changed to American Telecommunications Company, Inc., in or about the first half of 2000. Its address was originally the same as Alpha's, but was later changed to 620 S.W. 4th Street, Grants Pass, Oregon 97526, then to 2900 Vine Street, Suite J, Grants Pass, Oregon 97526, and then to 942 S.W. 6th Street, Suite G, Grants Pass, Oregon 97526.

9. At all times material to this Notice, Paul S. Rubera ("Rubera") was the president and control person of Alpha, and the control person of ATC.

10. At all times material to this Notice, Alpha, ATC, SPA, and their affiliates, sold pay telephones with telephone service agreements, pursuant to which the investors would share in the profits of the pay telephones. Through the pay telephone investment program, Alpha/ATC and/or SPA raised approximately $135 million nationwide, from numerous investors, between 1997 and 2001.

11. ATC's primary role was marketing the contracts to investors. Alpha's main focus was obtaining telephone sites and installing, servicing, and managing the telephones.

12. In or about early 1999, ATC engaged SPA as its independent marketing and sales firm(s). SPA thereafter was responsible for contracting with, training, and supervising sales agents for the purpose of selling the pay telephone contracts. After SPA came on board, ATC remained as the processing center for the contracts, while Alpha continued to perform the service and maintenance of the pay telephones.

13. In 1999 SOMMER, directly or indirectly, entered into agreements with Alpha, ATC, and/or SPA, pursuant to which SOMMER sold Alpha/ATC pay telephones (the "Alpha investment contracts") within or from the state of Arizona.

14. SOMMER, based on literature she received and assurances from Alpha/ATC, and believing that same to be true, claimed the pay telephones were specially designed to accommodate the needs of persons with disabilities. In this way, SOMMER, convinced investors that the

investment contracts provided an opportunity to help persons with disabilities, and to qualify for a tax credit, as well as an opportunity to realize a high return on invested funds.

15. An investor who purchased an Alpha/ATC pay telephone would execute two agreements: a purchase agreement, and a service agreement with Alpha to manage the pay telephone. Sales agents of Alpha/ATC, including SOMMER, presented and promoted the two agreements simultaneously. The agreements offered four options for servicing the pay telephones, for the investor to consider. The four options ranged from "Level 1," in which Alpha would provide minimal services and the investor would have to perform substantial work to manage the pay telephone, to "Level 4," in which Alpha would provide all necessary services, including choosing a site and installing the pay telephone, collecting all revenue from the pay telephone's operation, and cleaning and repairing the pay telephone when necessary. Under Level 4, Alpha would split the net proceeds with the investor on a 70/30 basis, with Alpha retaining 70% and the investor receiving 30%.

16. The agreements provided that, only if the investor selected the "Level 4" service option, the investor would have the option to recover his/her principal, by requiring ATC to buy the investor's telephone at the original purchase price. This provision was referred to as the "buyback option." (If the option were exercised within 36 months of the investment, a penalty would reduce the buyback price.) If the investor selected any of the first three levels of service, s/he would have no right to recover the principal invested by selling the pay telephone to ATC.

17. The price of the pay telephones was the same regardless of the service option chosen, $5,000.00 per telephone. No known investor who purchased a pay telephone through SOMMER chose a company other than Alpha to manage his/her pay telephone, or chose a service level other than Level 4. The investors to whom SOMMER sold Alpha investment contracts, lacked expertise in the business of owning and managing pay telephones.

18. SOMMER told investors a "typical return" on a pay telephone would amount to 14% per year, a statement SOMMER believed was true. In practice, all investors received $58.34

per month per pay telephone purchased, which amounted to exactly 14% per annum, rather than receiving an amount related to the revenue generated by any particular pay telephone.

19. SOMMER told prospective investors that the Alpha/ATC investment was virtually risk-free and completely liquid, because of ATC's buyback obligation, which statement SOMMER believed was true based on literature and written opinions she had received from Alpha/ATC. Beginning not later than May 1, 2000, SOMMER added the representation, based on information received from Alpha/ATC, that the Alpha/ATC investment was safe because the buyback obligation was insured by solid insurance companies. To some investors, SOMMER named, or provided documents which named, the Northern and Western Insurance Company of Grand Turk, Turks and Caicos Islands, British West Indies ("N&W"). SOMMER also named, or provided documents provided to her by Alpha/ATC, which named, Lloyd's of London and/or other insurance companies, listed as re-insurers of ATC's promise. In fact, if any such insurance existed at all, it was "excess" coverage – ATC was supposed to cover the first $2,000,000 of buyback claims. N&W was a captive insurance company wholly owned by Paul S. Rubera, the president and control person of Alpha/ATC, and Robert S. Harrison of Richmond, Texas. N&W was not authorized to write insurance in Arizona during the relevant time period. SOMMER did not disclose those facts to investors. Neither ATC nor any insurance company has ever honored any SOMMER investor's exercise of the "buyback option," despite timely demand. ATC did not pay $5,000 per telephone, and no insurance company paid $5,000 per telephone, to any SOMMER investor. Nothing in this Findings of Fact suggests that SOMMER knew that such insurance was non-existent.

20. Alpha/ATC and/or SPA paid commissions to the sales agents, including SOMMER, for each pay telephone sold.

21. Between August 1999 and August 2001, within or from the state of Arizona, SOMMER sold Alpha investment contracts involving at least 123 pay telephones to at least 34 investors. The investors were residents of Arizona, New Jersey, and Pennsylvania. SOMMER

sold Alpha investment contracts to these investors without having made any suitability analysis, or any inquiry of the investors designed to assess the suitability of Alpha investment contracts for the investors. SOMMER raised a total of $615,000.00 for Alpha/ATC, for which she received commissions totaling $140,750.00.

22. During the period when she was offering and selling Alpha investment contracts to investors, SOMMER was a registered representative, first of Jefferson Pilot, and later of Sunamerica. SOMMER did not obtain the approval of either dealer to act as a sales agent for Alpha investment contracts. The sales of Alpha investment contracts that SOMMER made, were not recorded on the books and records of either dealer. SOMMER sold Alpha investment contracts to at least one customer of each dealer, as well as to investors who were not customers of either dealer.

23. Alpha/ATC has a long regulatory history in which state and federal securities regulators have found that these pay telephones and accompanying service contracts are unregistered securities in the form of investment contracts, and consequently have ordered Alpha/ATC and those working with it to cease and desist from offering or selling pay telephones in the relevant jurisdictions. SOMMER did not have any knowledge regarding these regulatory actions or orders, and did not disclose these regulatory actions or orders to investors to whom she offered Alpha investment contracts. The regulatory actions that occurred while SOMMER was offering and selling Alpha investment contracts included:

- February 2, 1999, Summary Order to Cease and Desist issued by Pennsylvania Securities Commission, in *Matter of Alpha Telcom, Inc., et al.*, No. 9812-06.
- June 30, 1999, Temporary Order of Prohibition issued by Illinois Secretary of State, in *Matter of Alpha Telcom, Inc.*, No. 9900201, followed by Consent Order of prohibition, Alpha agreeing to offer rescission to all Illinois investors, on January 14, 2000.
- July 21, 1999, Administrative Complaint filed and Order to Cease and Desist issued

by South Carolina Attorney General, Securities Division, *In re Paul Rubera and Alpha Telcom, Inc.*, File No. 99042, followed by consent Order to Cease and Desisst on October 7, 1999.

- November 17, 1999, Summary Order to Cease and Desist issued by North Carolina Secretary of State, in *Matter of the North Carolina Securities Division v. ATC, Inc., Paul Rubera, et al.*, File No. 99-038-CC.
- November 24, 1999, Cease and Desist Order issued by Wisconsin Department of Financial Institutions, in *Matter of Alpha Telcom, Inc. and Paul S. Rubera, et al.*, No. S-99225(EX).
- March 7, 2000, Temporary Cease and Desist Order issued by Rhode Island Department of Business Regulation, in *Matter of Alpha Telcom, Inc. and ATC, Inc.*
- July 18, 2000, Florida Department of Banking and Finance filed an administrative action against Alpha, ATC, and Rubera, seeking a Cease and Desist Order, Matters No. 0504-I-6/00, 0504a-I-6/00, 0504b-I-6/00.
- October 23, 2000, Desist and Refrain Order issued by California Department of Corporations to Rubera, Alpha, and ATC.
- November 28, 2000, Notice of Opportunity for Hearing issued by Ohio Department of Commerce, in *Matter of Alpha Telcom, Inc.*
- May 7, 2001, Administrative Complaint filed by Indiana Securities Division, and Cease and Desist Order issued by Indiana Secretary of State, in *Matter of Alpha Tel-Com, Inc., et al.*

24. On August 24, 2001, Alpha/ATC sought bankruptcy protection in Florida, pursuant to Chapter 11 of the United States Bankruptcy Code. A court-appointed receiver subsequently took over the remaining operations of Alpha/ATC, and examined its accounting records.

25. Additional regulatory actions proceeded against Alpha/ATC after SOMMER ceased to offer or sell Alpha investment contracts, including the SEC enforcement action in the United

States District Court for the District of Oregon, *SEC v. Alpha Telcom, Inc., et al.*, No. CV 01-1283 PA. The District Court issued a Temporary Restraining Order on August 27, 2001, and a Preliminary Injunction on September 6, 2001. The defendants, other than Rubera, consented to entry of judgments against them. The Court entered a consent judgment against ATC and SPA on November 5, 2001, and entered a consent judgment against Alpha on February 8, 2002, imposing permanent injunctions and other relief.

26. The SEC's case against Rubera was tried to the court, sitting without a jury. In an opinion issued February 7, 2002, which included Findings of Fact and Conclusions of Law, the United States District Court, District of Oregon, found that "[f]rom July 1, 1998 through June 30, 2001, Alpha's payphone program failed to generate revenue sufficient to cover the cost of phone charges and site commissions." The court further found that during only the one-year period from July 1, 2000, to June 30, 2001, the Alpha investment contract program lost approximately $1 million. Alpha paid each investor a return of 14% on invested funds, despite the unprofitability of the pay telephones. The court found that Alpha had borrowed from ATC to meet its cash flow needs, and the court further found that ATC's sole source of revenue was money from new investors. Accordingly, the Alpha investment contract program was, in fact, a Ponzi scheme.

II.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona Constitution and the Securities Act.

2. SOMMER offered or sold securities within or from Arizona, within the meaning of A.R.S. §§ 44-1801(15), 44-1801(21), and 44-1801(26).

3. SOMMER violated A.R.S. § 44-1841 by offering or selling securities that were neither registered nor exempt from registration.

4. SOMMER's conduct subjects SOMMER to an order of revocation pursuant to A.R.S. § 44-1962(A)(2), (9), and (10).

5. SOMMER's conduct is grounds for an order to cease and desist pursuant to A.R..S. §§ 44-1962 and 44-2032.

6. SOMMER's conduct is grounds for an order of restitution pursuant to A.R.S. §§ 44-1962 and 44-2032.

7. SOMMER's conduct is grounds for administrative penalties pursuant to A.R.S. §§ 44-1962 and 44-2032.

III.

ORDER

THEREFORE, on the basis of the Findings of Fact, Conclusions of Law, and SOMMER's consent to the entry of this Order, the Commission finds that the following relief is appropriate, in the public interest, and necessary for the protection of investors:

IT IS ORDERED, pursuant to A.R.S. §§ 44-1962 and 44-2032, that SOMMER, and any of SOMMER's agents, employees, successors and assigns, if any permanently cease and desist from violating the Securities Act.

IT IS FURTHER ORDERED, pursuant to A.R.S. §§ 44-1962 and 44-2032, that SOMMER shall pay restitution to investors shown on the records of the Commission in the amount of $140,750.00, plus interest at the rate of 3.25% per annum from the date of each investment until paid in full. Payment shall be made in installments as follows: $1,000 on the date of this Order, and $150.00 per month on or before the 1st day of each month beginning on the first day of the second month following entry of this Order. Any amount outstanding shall accrue interest at the rate of 3.25% per annum from the date of this Order until paid in full. Payment shall be made by cashier's check or money order payable to the "State of Arizona" to be placed in an interest-bearing account maintained and controlled by the Arizona Attorney General. The Arizona Attorney General shall disburse the funds on a pro rata basis to investors. Any funds that the Attorney General is unable to disburse shall revert to the state of Arizona. If SOMMER does not comply with this order of restitution, any outstanding balance shall be in default and shall be

immediately due and payable.

IT IS FURTHER ORDERED, pursuant to A.R.S. §§ 44-1962 and 44-2036, that SOMMER shall pay an administrative penalty in the amount of $5,000.00 Payment shall be made by cashier's checks or money orders payable to the "State of Arizona." The penalty shall be subordinate to the restitution obligations in the preceding paragraph and shall be paid following payment in full of that restitution obligation, in installments of $150.00 per month on or before the 1st day of each month beginning on the first day of the first month following payment in full of the restitution ordered herein. Any amount outstanding shall accrue interest at the rate of 3.25% per annum from the date of this Order until paid in full. The payment obligations for these administrative penalties shall be subordinate to any restitution obligations ordered herein and shall become immediately due and payable only after restitution payments have been paid in full, or if SOMMER has defaulted prior to fulfilling SOMMER's restitution obligations. For the purposes of this Order, a bankruptcy filing by SOMMER shall be an act of default on SOMMER's restitution obligations.

If SOMMER does not comply with this order for administrative penalties, any outstanding balance may be deemed in default and shall be immediately due and payable.

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IT IS FURTHER ORDERED, pursuant to A.R.S. § 44-1962, that SOMMER's securities salesman registration is revoked.

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

BY ORDER OF THE ARIZONA CORPORATION COMMISSION

CHAIRMAN COMMISSIONER COMMISSIONER

COMMISSIONER COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 23rd day of March, 2004

BRIAN C. McNEIL
Executive Secretary

DISSENT

This document is available in alternative formats by contacting Yvonne L. McFarlin, Executive Assistant to the Executive Secretary, voice phone number 602-542-3931, E-mail ymcfarlin@cc.state.az.us.

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CONSENT TO ENTRY OF ORDER

1. KATHLEEN WHORLEY SOMMER ("SOMMER"), an individual, admits the jurisdiction of the Commission over the subject matter of this proceeding. SOMMER acknowledges that he has been fully advised of her right to a hearing to present evidence and call witnesses and SOMMER knowingly and voluntarily waives any and all rights to a hearing before the Commission and all other rights otherwise available under Article 11 of the Securities Act and Title 14 of the Arizona Administrative Code. SOMMER acknowledges that this Order To Cease And Desist, Order of Restitution, Order of Revocation, Order for Administrative Penalties and Consent to Same By: Respondent Kathleen Whorley Sommer ("Order") constitutes a valid final order of the Commission.

2. SOMMER knowingly and voluntarily waives any right under Article 12 of the Securities Act to judicial review by any court by way of suit, appeal, or extraordinary relief resulting from the entry of this Order.

3. SOMMER acknowledges and agrees that this Order is entered into freely and voluntarily and that no promise was made or coercion used to induce such entry.

4. SOMMER acknowledges that she has been represented by counsel in this matter, she has reviewed this Order with her attorney and understands all terms it contains.

~~5.~~ SOMMER neither admits nor denies the Findings of Fact and Conclusions of Law contained in this Order.

6. By consenting to the entry of this Order, SOMMER agrees not to take any action or to make, or permit to be made, any public statement denying, directly or indirectly, any Finding of Fact or Conclusion of Law in this Order or creating the impression that this Order is without factual basis. SOMMER will undertake steps necessary to assure that all of her agents and employees, if any, understand and comply with this agreement.

7. While this Order settles this administrative matter between SOMMER and the Commission, SOMMER understands that this Order does not preclude the Commission from

instituting other administrative proceedings based on violations that are not addressed by this Order.

8. SOMMER understands that this Order does not preclude the Commission from referring this matter to any governmental agency for administrative, civil, or criminal proceedings that may be related to the matters addressed by this Order.

9. SOMMER understands that this Order does not preclude any other agency or officer of the state of Arizona or its subdivisions from instituting administrative, civil, or criminal proceedings that may be related to matters addressed by this Order.

10. SOMMER agrees that she will not apply to the state of Arizona for registration as a securities dealer or salesman or for licensure as an investment adviser or investment adviser representative at any time in the future.

11. SOMMER agrees that she will not exercise any control over any entity that offers or sells securities or provides investment advisory services, within or from Arizona.

12. SOMMER agrees that until restitution and penalties are paid in full, SOMMER will notify the Director of the Securities Division within 30 days of any change in home address or any change in SOMMER's ability to pay amounts due under this Order.

13. SOMMER understands that default shall render her liable to the Commission for its costs of collection and interest at the maximum legal rate.

14. SOMMER agrees that she will continue to cooperate with the Securities Division including, but not limited to, providing complete and accurate testimony at any hearing in this matter and cooperating with the state of Arizona in any related investigation or any other matters arising from the activities described in this Order. Nothing in this paragraph, however, shall require SOMMER to waive any of her constitutional rights, including her rights under the 5th Amendment of the United States Constitution.

15. SOMMER consents to the entry of this Order and agrees to be fully bound by its terms and conditions. If SOMMER breaches any provision of this Order, the Commission may vacate this Order and restore this case to its active docket.

Kathleen Whorley Sommer

KATHLEEN WHORLEY SOMMER

SUBSCRIBED AND SWORN TO BEFORE me this 1st day of March, 2004.

Frances Harmon

NOTARY PUBLIC

My Commission Expires:

Feb. 4, 2008

OFFICIAL SEAL
FRANCES HARMON
Notary Public State of Arizona
MARICOPA COUNTY
My Comm. Expires Feb. 4, 2008