

EXCEPTION

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In the matter of:)
)
PHILLIP WILLIAM MERRILL)
3788 N. 156th Drive)
Goodyear, Arizona 85338)
CRD #2436444,)
)
Respondent.)

DOCKET NO. S-03450A-02-0000

**DIVISION'S EXCEPTIONS TO
RECOMMENDED
OPINION AND ORDER**

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") hereby submits its exceptions and attached proposed amendments to the Recommended Opinion and Order of Administrative Law Judge Philip J. Dion III, in the above-referenced matter.

The Division agrees with the recommendations and urges the Commissioners to adopt the Recommended Opinion and Order with the amendments discussed in Section I below and listed on Exhibit "A" attached hereto. Sections II, III, and IV, at pages 7-15 hereto, address substantive issues related to the Division's proposed amendments.

I. The Division's Proposed Amendments to the Recommended Opinion and Order.

The Division requests the following amendments to the Recommended Opinion and Order:

In paragraph 9, at page 2, line 20: **Delete "e" in "Hays"**

In paragraph 16, at page 3:

- At line 23: **Delete "Respondent and"** (Ms. Mayfield's settlement was with Morgan Stanley Dean Witter ("MSDW"), not Respondent, although she released Respondent in connection with her settlement with MSDW.)

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- At line 23: **Delete “Lori Mayfield” and insert “The Division”**

(Ms. Mayfield is not before the commission in a capacity to request damages. Restitution obligations are owed to the state of Arizona. The Division is not including in its restitution calculation an amount representing Ms. Mayfield's losses. A more detailed discussion relating to the distinctive nature of this public enforcement action, and other related proposed revisions, follows in sections “II” and “III” below.)

- At lines 23-24: **Delete “in this matter” and insert “in connection with Lori Mayfield’s investments.”**

In paragraph 23, at page 4:

- At line 20: **Delete “CRD” and insert “CRP”**
- At line 21: **Insert “s” after “Science”**

In paragraph 24, at page 4:

- At line 25: **Delete “Respondent and”**
- At lines 25-26: After “and” **insert “the Division”** and after “restitution” **insert “in connection with Janet Mayfield.”**

In paragraph 26, at page 5, line 8, before “sale”: **Delete “short” and insert “short-term”**

In paragraph 30, at page 5, line 26: **Delete “CRD” and insert “CRP”**

In paragraph 31, at page 6, line 3: **Delete “CRD” and insert “CRP”**

At page 6, at lines 5, 6, 8, 10, 12, 16, 19, 21, 23, and 26: **Delete “e” in “Hays”**

At page 7, at lines 2, 3, 6, 7, 10, 11, 12, 15, 16, 17, 19, 20, and 22: **Delete “e” in “Hays”**

In footnote 22, at page 10, lines 24-25: **Delete the entire sentence:**

Respondent argued that Mr. Donovan’s qualifications to render an expert opinion in this matter are suspect because he never served in a position where he was charged with the duty of reviewing transactions for suitability, such as a supervisor, a branch manager or a compliance officer for a registered broker/dealer.

1 (This statement is inappropriate given the fact that it merely restates Respondent's
2 attorney's objection to the Division's request to have Mr. Donovan certified as an expert
3 witness, which objection was overruled at the hearing. (See Exhibit "B" attached hereto,
4 Transcript of Hearing at pages 704-709.) The administrative law judge has discretion to
5 disregard Mr. Donovan's expert opinions, or to accord them any amount of weight, or no
6 weight, as to any given issue. However, the order should not adopt Respondent's argument
7 after overruling it at hearing. Repeating that overruled argument in the order is
8 inappropriate and misleading because it implies that the argument has merit or forms the
9 basis for a ruling or finding in this case, which it does not. In fact, the objection was
10 without merit, as discussed in more detail in section IV below. Since the objection was
11 overruled, it was not incumbent upon the Division to make a more detailed record of all of
12 the reasons why the objection was without merit at the hearing.)

13 In paragraph 78, at page 12:

- 14 • At line 15: **Delete "2002" and insert "2000"**
- 15 • At line 15: **Delete "MDSW" and insert "MSDW"**
- 16 • At line 16: **Insert "s" after "Science"**

17 In paragraph 79, at page 12, line 17: **Delete "MDSW" and insert "MSDW"**

18 In paragraph 82, at page 13, line 2: **Insert "s" after "Science"**

19 In paragraph 83, at page 13, lines 11 and 13: **Insert "s" after "Science"**

20 In paragraph 86, at page 14, line 3: **Insert "s" after "Science"**

21 At page 17, lines 6 and 11: **Delete "e" in "Hays"**

22 In paragraph 115, at page 18, line 9: **Insert "s" after "Science"**

23 In paragraph 117, at page 18, line 20: **Insert "s" after "Science"**

24 At page 20, lines 5, 10, 11, and 12: **Delete "e" in "Hays"**

25 In paragraph 126, at page 20, line 8, after the comma after "transactions": **Insert "as to"**

26

1 In paragraph 126, at page 20, line 9:

- 2 • After "Janet Mayfield", insert **"the Division"**
- 3 • After "restitution", insert a period (".")
- 4 • Delete "as"
- 5 • Delete "they" and insert in its place **"Lori Mayfield and Janet Mayfield"**
- 6 • Delete **"and the Respondent"**

7 In paragraph 126, at page 20, lines 10-12, relating to Sylvia Hays:

- 8 • Delete the following (3) sentences:

9 **Ms. Hays testified that she decided not to reverse the unauthorized**
10 **trade made in her account and preferred to "let it ride". Ms. Hays**
11 **made the decision to remain in the fund even after Respondent**
12 **offered to reverse the trade at no cost. Therefore, we are not ordering**
13 **any restitution for Ms. Hays.**

14 (*See the discussions that follow in sections II and III below.*)

- 15 • Insert the following:

16 **As to Sylvia Hays, the evidence supports an order of restitution for**
17 **\$10, 078.97. The record shows that Ms. Hays invested \$10,115.13 on**
18 **September 6, 2000. Interest on that amount at 10% from the date of**
19 **purchase until December 2, 2003 is \$3,275.64. That total, less**
20 **\$3,311.80, the amount received upon liquidation of the investment, is**
21 **\$10,078.97.**

22 (The calculation of restitution relating to Sylvia Hays pursuant to A.A.C. Rule R14-4-308
23 is outlined in Exhibit "C" attached hereto.)

24 In paragraph 126, at page 20, relating to Beatrice DuChene:

- 25 • At line 13: Delete **\$1,925.26**, and insert **\$3,074.09**
- 26 • At line 18, after the end of the paragraph, insert: **"That amount plus**
27 **interest at 10% from the date of the unauthorized sale until December 2,**
28 **2003 is \$3,074.09.**

29 In paragraph 127, at page 20, relating to Viola Brotherson:

- 30 • Delete the paragraph in its entirety and insert the following in its place:

31 **As to Viola Brotherson, the evidence supports an order of restitution**
32 **for \$62,435.25. The record shows that on May 21, 1996, \$12,000 was**

1 invested into the Dean Witter High Income Fund ("DWHIF"); on May
2 22, 1996, \$1,600 was invested into the DWHIF; and on November 20,
3 1996, \$5,700 was invested into the DWHIF. On November 7, 1997, all
4 of the DWHIF was sold and exchanged into Dean Witter High Yield
5 Fund ("DWHY") (the result of a name change); on January 2, 1998,
6 \$30,000 was invested into the DWHY; and on January 12, 1998,
7 \$14,500 was invested into DWHY. Total monies invested were \$63,800.

8 On August 23, 2000, the DWHY was completely liquidated and
9 exchanged into Morgan Stanley Dean Witter Information Fund
10 ("MSDWIF"); on December 18, 2000, the MSDWIF was completely
11 liquidated and invested into Morgan Stanley Dean Witter Health
12 Sciences Fund ("MSDWHSF"); and on May 22, 2002, the MSDWHSF
13 was completely liquidated for \$22,050.47.

14 During 1996, \$1,077 was paid out in dividends and capital gains.
15 During 1997, \$2,147.24 was paid out in dividends and capital gains.
16 During 1998, \$6,575.37 was paid out in dividends. During 1999,
17 \$6,483.88 was paid out in dividends. During 2000, \$3,585.47 was paid
18 out in dividends. During 2001, no dividends or capital gains were paid
19 out. During 2002, no dividends or capital gains were paid out.

20 The total investments of \$63,800, less the total proceeds of the
21 liquidation sale in the amount of \$22,050.47 and the total dividends
22 and capital gains paid out in the amount of \$19,868.96, is \$21,880.57.
23 That amount, plus interest at 10% from the date of each investment
24 until December 2, 2003 totaling \$40,554.68, is \$62,435.25.

25 In paragraph 2(a), at page 21, line 8: Delete "Sara" and insert "Sylvia"; delete "e" in "Hays"

26 In paragraph 2(c), at page 21, line 12: Delete "Sara" and insert "Sylvia"; delete "e" in "Hays"

In paragraph 7, at page 21, at line 25, after "Restitution in the amount of":

- Delete: "\$1,925.26 payable to Beatrice DuChene" and
- Insert: "\$3,074.09 related to Beatrice DuChene, \$10,078.97 related to Sylvia Hays,
and \$62,435.25 related to Viola Brotherson."

In paragraph 7, at page 21, at line 26, delete the following sentence: "Pursuant to A.A.C. R14-4-308, the Division should conduct an accounting to establish the appropriate restitution figure owed to Viola Brotherson, and file its results in this Docket."

In paragraph 10, at page 22, line 2, before "not applicable in this matter:"

- Delete: "The doctrine of laches is" and
- Insert: "The doctrines of laches and ratification are"

(See discussions following in sections II and III below.)

1 In the Conclusions of Law, at page 21, line 12: **Insert** a comma (,) after “transactions”

2 In the Order, at page 22:

- 3 • At line 7: After “restitution”, **insert “to the State of Arizona, related”** before “to
4 Beatrice DuChene”
- 5 • At line 7, **delete “\$1,925.26”** and **insert “\$3,074.09”** (This amount includes pre-
6 judgment simple interest at 10% per annum from December 15, 1997, the date of sale,
7 until the date of the Open Meeting, December 2, 2003. *See* “Calculation of Restitution
8 Amount for Beatrice Duchene, attached hereto as Exhibit “D”.)
- 9 • At line 7-8: **Delete “plus accrued interest from December 15, 1997, within sixty**
10 **days of the date of this Order”** as duplicative. (*See* proposed amended lines 22-23
11 below.)
- 12 • **Delete** lines 9-10: **“IT IS FURTHER ORDERED that the restitution ordered to**
13 **Beatrice DuChene shall bear interest from December 15, 1997, at the rate of ten**
14 **percent per year.”** as duplicative of the proposed amendment to lines 7-8.
- 15 • Beginning at line 9, after paragraph addressing restitution relating to Beatrice DuChene,
16 **insert** the following paragraph addressing restitution related to Sylvia Hays: **IT IS**
17 **FURTHER ORDERED that pursuant to A.R.S. § 44-2032, Respondent shall pay**
18 **restitution to the State of Arizona relating to Sylvia Hays in the amount of**
19 **\$10,078.97.”** (*See* detailed discussion at Section III below and “Calculation of
20 Restitution Amount for Sylvia Hays, which includes simple interest at 10% per annum
21 from the date of purchase to the date of the Open Meeting, attached hereto as Exhibit
22 “C”.)
- 23 • At lines 11-16, **delete** the following paragraph addressing restitution relating to Viola
24 Brotherson in its entirety:

25 **IT IS FURTHER ORDERED that the Securities Division shall**
26 **conduct an accounting to establish the restitution due to Viola**
Brotherson. That figure should include the losses and charges

1 incurred by Viola Brotherson due to her investments in the MSDW
2 High Income/Yield Fund, MSDW Health Science Fund B and MSDW
3 Information Fund B, subject to any set offs, including withdrawals or
income payments made by Viola Brotherson from those funds, for the
period of time that Respondent was Viola Brotherson's financial
advisor.

4 And Insert the following new paragraph: "IT IS FURTHER ORDERED that
5 pursuant to A.R.S. § 44-2032, Respondent shall pay restitution to the State of Arizona
6 relating to Viola Brotherson in the amount of \$62,435.25." (See "Calculation of
7 Restitution Amount for Viola Brotherson, which includes simple interest at 10% per annum
8 from the dates of purchase to the date of the Open Meeting, attached to the Division's
9 Accounting to Establish Restitution Figure Regarding Viola Brotherson in Response to
10 Recommended Opinion and Order, filed on October 31, 2003, as Exhibit "A".)

- 11 • Delete lines 17-19, as duplicative.
- 12 • Delete lines 20-21, addressing accounting.
- 13 • At lines 22-23: Delete "figure filed by the Securities Division within sixty days after
14 the Securities Division makes the filing" and insert "within sixty days of the
15 effective date of this Order."

16 **II. The Division Is Not Pursuing a Private Right of Action, but Is Bringing a**
17 **Regulatory Enforcement Action in the Public Interest for Statutory Violations.**

18 Enforcement actions are brought by the Securities Division against persons "who violate the
19 Arizona Securities Act or the Investment Management Act to protect the public's right to rely on
20 compliance with those acts by promoters and sellers of securities and investment advisory services.
21 See Laws 1951, Ch. 18, § 20 ("The intent and purpose of this Act is for the protection of the public,
22 the preservation of fair and equitable business practices, the suppression of fraudulent or deceptive
23 practices in the sale or purchase of securities, and the prosecution of persons engaged in fraudulent
24 or deceptive practices in the sale or purchase of securities.")

25 Actions brought by the Division before the Commission are not private actions for damages
26 by the victims of the wrongdoers brought through the Division. While victims may receive an

1 ancillary benefit because the Commission is authorized to enter an order “to correct the conditions
2 resulting from the act” (A.R.S. § 44-2032(1)), the primary beneficiary of the Commission’s
3 enforcement of the law is the public. *Cf. Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548,
4 555, 733 P.2d 1131, 1138 (Ariz. App. Div. 1, 1986) (holding that statutes of limitations did not
5 apply when government is seeking to assert a right belonging to general public despite the ancillary
6 benefit from the action by investors). *See also Securities and Exchange Commission v. Rind*, 991
7 F.2d 1486, 1491 (9th Cir. 1993) (“When the commission sues to enforce the securities laws, it
8 vindicates public rights and furthers the public interest.”)

9 Any order of restitution is sought by the Division, not a victim; is calculated based on the
10 harm caused by the wrongdoer; and is intended to allocate fault to the wrongdoer, deter
11 contemplation of future wrongdoing, and if possible ameliorate the harm caused by the wrongdoer.
12 *Cf. Trimble*, 152 Ariz. At 556, 733 P.2d at 1139 (holding that the public interest is served by the
13 cessation of illegal and fraudulent acts; requiring restitution to victims has a deterrent effect that
14 also serves the public interest).

15 Findings of fact, analysis, and conclusions of law contained within a Commission decision
16 regarding an enforcement action brought by the Division in the public interest should reflect the
17 fact that the action is a state regulatory enforcement action and not a private action.

18 **III. Ratification is Not a Valid Defense in an Enforcement Action.**

19 The Findings of Fact, at page 7, paragraph 44, address losses suffered by investor Sylvia
20 Hays, during the period that Respondent handled her account. Under “Analysis”, on page 17,
21 paragraph 110, at lines 5-6, the recommended Opinion and Order finds that Respondent made
22 unauthorized transactions in the account of Sylvia Hays. In the same paragraph, at lines 11-13, the
23 recommended Opinion and Order finds: “Further, the testimony of Sylvia Hays and Janet
24 Mayfield prove beyond a preponderance of the evidence that Respondent engaged in a pattern and
25 practice of unauthorized transactions in the fall and winter of 2000.” The “Conclusions of Law”, at
26 page 21, paragraphs (a) and (c) conclude that Respondent failed to disclose to Ms. Hays that he had

1 conducted unauthorized transactions in her accounts and engaged in transactions, practices or
2 courses of business which operated as a fraud or deceit on Mr. Hays by conducting unauthorized
3 and unsuitable transactions in their accounts. However, on page 20, paragraph 126, lines 11
4 through 13, the recommended Opinion and Order states as follows: "Ms. Hayes made the decision
5 to remain in the fund even after Respondent offered to reverse the trade at no cost. Therefore, we
6 are not ordering any restitution for Ms. Hayes."¹

7 This combination of findings and conclusions suggests that the administrative law judge
8 adopted Respondent's argument, which was opposed on the record by the Division, that ratification
9 of Respondent's wrongful acts by the victim should be considered in assessing the remedies
10 awardable to the Division for violations of the Securities Act. The Division disagrees with the
11 applicability of the defense of ratification in an enforcement action. The adoption of any defense
12 based on the action or inaction of a victim is inappropriate. Once the Division proves that the
13 transactions were unauthorized, the remedy of restitution should apply. The Division requests an
14 order of restitution in the amount of \$10,078.97, relating to Ms. Hays' unauthorized transactions.
15 The calculation of restitution related to Ms. Hays' unauthorized transactions, pursuant to A.A.C.
16 Rule R14-4-308(C), is attached hereto as Exhibit "C".

17 The policy of the Commission is to distribute recovered restitution to the victims in order to
18 correct the harm caused by the wrongdoer. This policy does not transform an enforcement action
19 in the public interest into a private cause of action brought through a state agency. *E.g. Trimble*,
20 152 Ariz. at 555, 733 P.2d at 1138) (holding that the fact the State sought relief recompensing an
21 individual member of the public does not diminish the interest or authority of the State to
22 prosecute). A restitution order entered by the Commission is enforceable by the Commission, not
23 the victim. *See In the matter of Robert Shakman Healthcare Purchasing Alliance, Inc.*, ACC
24 Decision No. 65160 docketed on August 29, 2002, (Commission denied a Motion to Modify Order

25 _____
26 ¹ Even if the Commission determined that the restitution calculation should not include an amount representing a
condition resulting from respondent's wrongful act with respect to Ms. Hayes, the wording of the finding of fact should
reflect the nature of the regulatory enforcement action.

1 to Cease and Desist filed by an investor victim seeking assignment of restitution order and finding
2 that such modification was not in the public interest). Any ordered restitution may be placed in an
3 interest-bearing account maintained and controlled by the Arizona Attorney General, and any
4 ordered restitution funds that the Attorney General is unable to disburse revert to the state of
5 Arizona. *See e.g. In the matter of Carl Delano Woodard aka: Carl Woodward*, (ACC Decision
6 No. 66353, docketed on October 2, 2003); *In the matter of Douglas Sanchez and Karen Sanchez, et*
7 *al.*, (ACC Decision No. 66354, docketed on October 2, 2003); *In the matter of Ralph Shaul and*
8 *Leslie Shaul*, (ACC Decision No. 66355, docketed on October 2, 2003). *See also* A.R.S. § 44-
9 302(11).

10 In bringing an enforcement action, the burden on the Division is to show a violation of
11 Arizona securities law by establishing the statutory elements. A.R.S. § 44-1991(A) states that it is
12 a fraudulent practice and unlawful for a person to engage in specified activity. Defenses for the
13 violation of the law are limited to those provided in the statutes.² Nowhere in § 44-1991(A), nor
14 anywhere in the Securities Act, does it say “unless a victim ratifies the wrongdoer’s actions.” *Cf.*
15 *State v. Dejarlais*, 969 P.2d 90, 92 (Wash. 1998) (holding that allowing a consent defense to the
16 violation of a protection order would not only be inconsistent with, but would undermine,
17 legislative intent clearly expressed in the statute). The Division’s enforcement of the obligation to
18 comply with statutory requirements that were enacted in the public interest is mandated by statute,
19 does not depend upon a complaint from the victim, and the victim cannot modify the respondent’s
20 statutory obligation to the public through ratification, consent, waiver, or any other action.
21 Defenses a wrongdoer may have against a plaintiff in a private civil action when a plaintiff is
22 seeking damages are not applicable in an enforcement action brought by the Division for the
23 violation of the law. *Cf. State v. Burton*, 8 Ariz. App. 186, 189, 444 P.2d 743, 746 (1968) (holding
24

25 ² An example of a defense available in an enforcement action is found in § 44-1999(A), which provides that a
26 controlling person is not liable jointly and severally if “the controlling person had no knowledge of or reasonable
grounds to believe in the existence of the facts by reason of which the liability of the controller person is alleged to
exist.”

1 that the victim's willingness to allow a defendant to make checks good after the defendant drew
2 checks on a closed account did not waive the defendant's criminal liability).

3 Even if authorized to do so, the Commission should not adopt a defense to a public action,
4 such as ratification, that would enable the actions of a single victim to modify a legislative mandate
5 regarding the business practices of individuals licensed under Arizona law. In fact, by the adoption
6 of A.A.C. R14-4-308, the Commission has made perfectly clear that it has adopted no such
7 defense. A.R.S. § 44-2032(1) authorizes the Commission to order restitution "as prescribed by
8 rules of the commission." A.A.C. R14-4-308(C) governs the calculation of restitution. *See e.g.*
9 *Cochise County v. Arizona Health Care Cost Containment System*, 170 Ariz. 443, 445, 825 P.2d
10 968, 970 (Ariz. App. Div. 2, 1991), citing *Clay v. Arizona Interscholastic Ass'n*, 161 Ariz. 474,
11 476, 779 P.2d 349, 351 (1989) (administrative agency must follow its own rules). Under A.A.C.
12 R14-4-308(C), if restitution is ordered by the Commission:

13 1. The amount payable as damages to each purchaser shall include:

14 a. Cash equal to the fair market value of the consideration paid,
15 determined as of the date such payment was originally paid by the buyer; together
16 with

16 b. Interest at a rate pursuant to A.R.S. § 44-1201 for the period from the
17 date of the purchase payment to the date of repayment; less

17 c. The amount of any principal, interest, or other distributions received
18 on the security for the period from the date of purchase payment to the date of
19 repayment.

18 ...
19 5. Based on the circumstances of the respondent and the purchasers, if
20 necessary or appropriate to the public interest and consistent with the protection of
21 the investors, the Commission may prescribe by order alternative restitution terms . .
22 ..

21 Reduction in the calculated amount of damages because Ms. Hayes did not reverse the
22 unsuitable trade is not necessary or appropriate to the public interest nor is it consistent with the
23 protection of the investors. The public interest and investors are not well served by any suggestion
24 in an enforcement action that the conduct of the victim obviates the liability for the damage caused
25 by the conduct of the wrongdoer. *Cf. State v. Burton*, 8 Ariz. App. at 189, 444 P.2d at 745
26

1 (Criminal liability of a defendant was not waived by the victim allowing time for the defendant to
2 make restitution before filing a complaint.)

3 **IV. The Opinions Offered by the Division's Staff Should Not Be Discounted Merely**
4 **Because Staff's Regulatory Expertise Does Not Arise Solely from Practical**
5 **Experience In the Private Sector.**

6 At hearing, the Division offered its examiner, Michael Donovan, as an expert witness, to
7 give his opinions on suitability regarding the investments of two of Respondent's clients. After
8 overruling Respondent's objections to Mr. Donovan's qualification to offer expert testimony, the
9 hearing officer decided to disregard Mr. Donovan's testimony and exhibits in finding for the
10 Division on the suitability issues relating to one of the investors and for the Respondent on the
11 other.

12 In footnote 22, at page 10, lines 24-25, the following sentence should be deleted:

13 Respondent argued that Mr. Donovan's qualifications to render an expert opinion in this
14 matter are suspect because he never served in a position where he was charged with the
15 duty of reviewing transactions for suitability, such as a supervisor, a branch manager or a
16 compliance officer for a registered broker/dealer.

17 This statement is inappropriate given the fact that it merely restates Respondent's attorney's
18 objection to the Division's request to allow Mr. Donovan to testify as an expert witness, which
19 objection was overruled at the hearing. (See Exhibit "B" attached hereto, Transcript of Hearing at
20 pages 704-709.) The administrative law judge has discretion to disregard Mr. Donovan's expert
21 opinions, or to accord them any amount of weight, or no weight, as to any given issue. See e.g.
22 *Lathrop v. Arizona Bd. of Chiropractic Examiners*, 182 Ariz. 172, 181, 894 P.2d 715, 724 (Ariz.
23 App. Div. 1, 1995). However, the order should not adopt Respondent's argument regarding Mr.
24 Donovan's qualifications as an expert, after overruling the objection at hearing. Repeating the
25 overruled objection in the order is inappropriate and misleading because it implies, incorrectly, that
26 the argument forms the basis for a ruling or finding in this case.

Even more damaging, however, is the implication that the argument has merit. In fact, the
objection was without merit. Mr. Donovan's qualifications to render an expert opinion are not

1 “suspect” merely because he has not been employed as “a supervisor, a branch manager or a
2 compliance officer for a registered broker/dealer.” Mr. Donovan’s testimony as an expert was
3 admitted at the hearing. Respondent could have, but chose not to offer an expert witness to
4 disagree with Mr. Donovan’s opinions. The opinions offered by the Division’s professional staff
5 should not be discounted merely because the witness’s expertise arises from the regulatory arena,
6 and not solely from experience in the private sector.

7 The Commission has exceptional discretion to determine the competency of a witness to
8 testify as an expert. *Cf. e.g. Lathrop*, 182 Ariz. at 181, 894 P.2d at 724, citing *Lay v. City of Mesa*,
9 168 Ariz. 552, 554, 815 P.2d 921, 923 (Ariz. App. Div. 1, 1991). A witness is competent to testify
10 as an expert if the witness possesses training and experience that qualifies the witness to render
11 opinions that will be useful to the trier of fact. *Id.* The expert is not required to “have the highest
12 possible qualifications or highest degree of skill or knowledge” to testify. *Lay*, 168 Ariz. at 554,
13 815 P.2d at 923, citing *Good v. City of Glendale*, 150 Ariz. 218, 220, 722 P.2d 386, 388 (Ariz.
14 App. Div. 2, 1986). The purpose of the expert’s testimony is to allow the trier of fact to receive
15 information beyond the competence of the trier of fact that will be useful to the resolution of the
16 dispute. *Id.* For the purpose of that testimony, the witness is sufficient as an expert if the witness
17 has skill and knowledge superior to that of persons in general. *E.g. Good*, 150 Ariz. at 220, 722
18 P.2d at 388 (witness not required to have taught disarmament techniques nor to have received
19 recent training regarding those skills to testify as an expert regarding the adequacy of firearms and
20 disarmament training given to the Glendale City Police).

21 Since Respondent’s objection to Mr. Donovan’s competence to testify as an expert was
22 overruled, it was not incumbent upon the Division to make a more detailed record at the hearing of
23 all of the reasons why the objection was without merit.

24 The Arizona Court of Appeals stated as follows:

25 Under A.R.S. section 44-1822, the Commission may make such public or private
26 investigations within or outside of this state as the commission deems necessary to
determine whether any person has violated or is about to violate any provisions of

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[Chapter 12: Sales of Securities]. This statute allows the Commission to "investigate and examine ... the affairs of any person when the commission believes that such person is or may be issuing or dealing in or selling or buying securities.

Carrington v. Arizona Corp. Com'n, 199 Ariz. 303, 305, 18 P.3d 97, 99 (Ariz. App. Div. 1, 2001), *rev. denied*. As part of its investigations, the Commission employs examiners and other investigators, who investigate and examine into the affairs of any dealers or salesmen. See A.R.S. § 44-1813 and A.R.S. § 44-1822.

The training and experience of the Division's investigative staff is both sophisticated and substantial. Mr. Donovan testified that he alone has conducted over 25 examinations of brokerage firms each year and has five years of experience as an examiner in the securities industry. He has personally investigated 30 to 50 customer complaints each year, dealing with the conduct of registered securities salesmen and dealers, most of them including suitability issues. See transcript attached hereto as Exhibit "B". It is not logical to assume that employees of brokerage firms have greater expertise than the Division professionals, who are trained and experienced in the matters relating to regulatory oversight of the securities industry.

Courts and legislatures recognize that agency personnel have specialized knowledge and expertise in the matters for which they are charged with the responsibility for regulatory enforcement. See e.g. *Croft v. Ariz. State Board of Dental Examiners*, 157 Ariz. 203, 208, 755 P.2d 1191, 1196 (Ariz. App. Div. 1, 1988), citing *Matter of Wickman*, 138 Ariz. 337, 674 P.2d 891 (Ariz. App. Div. 1, 1983). ("Additionally, it is well settled that in ruling on the sufficiency of evidence in administrative proceedings, courts should show a certain degree of deference to the judgment of the agency based upon the accumulated experience and expertise of its members.")

See also A.R.S. Section 41-1062(A)(3).³

...
...

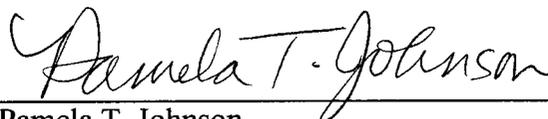
³ "Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge... The agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence."

1 **CONCLUSION**

2 Enforcement actions brought by the Division before the Commission are brought for the
3 purpose of protecting the investing public, not to benefit private individuals; and certain defenses
4 to private claims, such as ratification and laches, are not appropriate in this forum. Restitution
5 orders are awarded to the Division for the benefit of the State, and any benefit to individual victims
6 is ancillary to enforcing the regulatory purpose behind the Arizona Securities Act.

7 Expert testimony offered by experienced Division staff, trained by the State and skilled in
8 the regulatory requirements under the Arizona Securities Act, is not undermined by lack of specific
9 experience in the private sector. The Commission is charged by the legislature with investigating
10 and enforcing the Arizona Securities Act. Arizona courts have deferred to the Commission in
11 determinations related to securities matters because of its unique expertise to properly conduct
12 investigations and evaluate the evidence relating to compliance with the securities laws.

13 **RESPECTFULLY SUBMITTED** this 14th day of November, 2003.

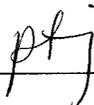
14 

15 Pamela T. Johnson
16 Senior Counsel
17 Securities Division

18
19 ORIGINAL AND 13 COPIES filed
20 With Docket Control on November 14, 2003.

21 Copies of the foregoing mailed *ifaxed*
22 November 14, 2003, to:

23 Frank Lewis
24 BEGAM, LEWIS, MARX AND WOLFE
25 111 W. Monroe, Ste. 1400
26 Phoenix, AZ 85003



THIS AMENDMENT:			
_____ Passed _____	_____ Passed as amended by _____		
_____ Failed _____	_____ Not Offered _____	_____ Withdrawn _____	

SECURITIES DIVISION PROPOSED AMENDMENT # 1

TIME/DATE PREPARED: November 14, 2003

MATTER: PHILIP WILLIAM MERRILL.

AGENDA ITEM NO. S-

DOCKET NO: S-03450A-02-0000

OPEN MEETING DATE December 2, 2003

In paragraph 9, at page 2, line 20, **delete: "e" in "Hays".**

In paragraph 16, at page 3:

- At line 23, **delete: "Respondent and"**
- At line 23, **delete: "Lori Mayfield" and insert in its place: "The Division"**
- At line 23-24, **delete: "in this matter" and insert in its place: "in connection with Lori Mayfield's investments."**

In paragraph 23, at page 4:

- At line 20, **delete: "CRD" and insert in its place: "CRP"**
- At line 21, **insert: "s" after "Science"**

In paragraph 24, at page 4:

- At line 25, **delete "Respondent and"**
- At line 25, after "MSDW and" **insert: "the Division"**
- At line 26, after "restitution" **insert: "in connection with Janet Mayfield."**

In paragraph 26, at page 5, line 8, before "sale", **delete: "short" and insert in its place: "short-term"**

In paragraph 30, at page 5, line 26, **delete: "CRD" and insert in its place: "CRP"**

In paragraph 31, at page 6, line 3, **delete: "CRD" and insert in its place: "CRP"**

At page 6, at lines 5, 6, 8, 10, 12, 16, 19, 21, 23, and 26, **delete: "e" in "Hays"**

At page 7, at lines 2, 3, 6, 7, 10, 11, 12, 15, 16, 17, 19, 20, and 22, **delete: "e" in "Hays"**

In footnote 22, at page 10, lines 24-25, **delete** the entire sentence:

Respondent argued that Mr. Donovan's qualifications to render an expert opinion in this matter are suspect because he never served in a position where he was charged with the duty of reviewing transactions for suitability, such as a supervisor, a branch manager or a compliance officer for a registered broker/dealer.

In paragraph 78, at page 12:

- At line 15, **delete: "2002"** and **insert** in its place: **"2000"**
- At line 15, **delete: "MDSW"** and **insert** in its place: **"MSDW"**
- At line 16, **insert: "s"** after "Science"

In paragraph 79, at page 12, line 17, **delete: "MDSW"** and **insert** in its place: **"MSDW"**

In paragraph 82, at page 13, line 2, **insert: "s"** after "Science"

In paragraph 83, at page 13, lines 11 and 13, **insert: "s"** after "Science"

In paragraph 86, at page 14, line 3, **insert: "s"** after "Science"

At page 17, lines 6 and 11, **delete: "e"** in "Hays"

In paragraph 115, at page 18, line 9, **insert: "s"** after "Science"

In paragraph 117, at page 18, line 20, **insert: "s"** after "Science"

At page 20, lines 5, 10, 11, and 12, **delete: "e"** in "Hays"

In paragraph 126, at page 20, line 8, after the comma after "transactions", **insert: "as to"**

In paragraph 126, at page 20, line 9:

- **Insert** after "Janet Mayfield": **"the Division"**
- **Insert** a period after "restitution": **."**
- **Delete: "as"**
- **Delete: "they"** and **insert** in its place: **"Lori Mayfield and Janet Mayfield"**
- **Delete: "and the Respondent"**

In paragraph 126, at page 20, lines 10-12, relating to Sylvia Hays:

- **Delete** the following (3) sentences:

Ms. Hays testified that she decided not to reverse the unauthorized trade made in her account and preferred to "let it ride". Ms. Hays made the decision to remain in the fund even after Respondent offered to reverse the trade at no cost. Therefore, we are not ordering any restitution for Ms. Hays.

- **Insert** in its place the following:

As to Sylvia Hays, the evidence supports an order of restitution for \$10,078.97. The record shows that Ms. Hays invested \$10,115.13 on September 6, 2000. Interest on that amount at 10% from the date of purchase until December 2, 2003 is \$3,275.64. That total, less \$3,311.80, the amount received upon liquidation of the investment, is \$10,078.97.

In paragraph 126, at page 20, relating to Beatrice DuChene:

- At line 13, **delete**: \$1,925.26, and **insert** in its place: \$3,074.09.
- At line 18, after the end of the paragraph, **insert** the following sentence: "That amount plus interest at 10% from the date of the unauthorized sale until December 2, 2003 is \$3,074.09."

In paragraph 127, at page 20, lines 19-24, relating to Viola Brotherson:

- **Delete** the following paragraph in its entirety, including footnote 34:

Regarding the unsuitable transactions in Viola Brotherson's account, we order that an accounting be done to establish the appropriate restitution figure(fn. 34) That figure should include the losses and charges incurred by Viola Brotherson due to her investments in the MSDW High Income/Yield Fund, MSDW Health Sciences Fund B and MSDW Information Fund B, subject to any set offs, including withdrawals or income payments made by Viola Brotherson from those funds, for the period of time that Respondent was Viola Brotherson's financial advisor.

(Footnote 34): Based on the record, the amount of restitution to be ordered is unclear and an accounting is needed to ensure that the proper amount of restitution is ordered.

- **And Insert** the following in its place:

As to Viola Brotherson, the evidence supports an order of restitution for \$62,435.25. The record shows that on May 21, 1996, \$12,000 was invested into the Dean Witter High Income Fund ("DWHIF"); on May 22, 1996, \$1,600 was invested into the DWHIF; and on November 20, 1996, \$5,700 was invested into the DWHIF. On November 7, 1997, all of the DWHIF was sold and exchanged into Dean Witter High Yield Fund ("DWHY") (the result of a name change); on January 2, 1998, \$30,000 was invested into the DWHY; and on January 12, 1998, \$14,500 was invested into DWHY. Total monies invested were \$63,800.

On August 23, 2000, the DWHY was completely liquidated and exchanged into Morgan Stanley Dean Witter Information Fund ("MSDWIF"); on December 18, 2000, the MSDWIF was completely liquidated and invested into Morgan Stanley Dean Witter Health Sciences Fund ("MSDWHSF"); and on May 22, 2002, the MSDWHSF was completely liquidated for \$22,050.47.

During 1996, \$1,077 was paid out in dividends and capital gains. During 1997, \$2,147.24 was paid out in dividends and capital gains. During 1998, \$6,575.37 was paid out in dividends. During 1999, \$6,483.88 was paid out in dividends. During 2000, \$3,585.47 was paid out in dividends. During 2001, no dividends or capital gains were paid out. During 2002, no dividends or capital gains were paid out.

The total investments of \$63,800, less the total proceeds of the liquidation sale in the amount of \$22,050.47 and the total dividends and capital gains paid out in the amount of \$19,868.96, is \$21,880.57. That amount, plus interest at 10% from the date of each investment until December 2, 2003 totaling \$40,554.68, is \$62,435.25.

In paragraph 2(a), at page 21, line 8:

- **Delete: "Sara" and insert in its place: "Sylvia"**
- **Delete: "e" in "Hays"**

In paragraph 2(c), at page 21, line 12:

- **Delete "Sara" and insert in its place: "Sylvia"**
- **Delete "e" in "Hays"**

In paragraph 7, at page 21, at line 25, after "Restitution in the amount of":

- **Delete: "\$1,925.26 payable to Beatrice DuChene" and**
- **Insert in its place: "\$3,074.09 related to Beatrice DuChene, \$10,078.97 related to Sylvia Hays, and \$62,435.25 related to Viola Brotherson."**

In paragraph 7, at page 21, at line 26, delete the following sentence: **"Pursuant to A.A.C. R14-4-308, the Division should conduct an accounting to establish the appropriate restitution figure owed to Viola Brotherson, and file its results in this Docket."**

In paragraph 10, at page 22, line 2, before "not applicable in this matter:"

- **Delete: "The doctrine of laches is" and**
- **Insert in its place: "The doctrines of laches and ratification are"**

In the Conclusions of Law, at page 21, line 12: **Insert a comma (,) after “transactions”**

In the Order, at page 22:

- At line 7, after “restitution” and before “to Beatrice DuChene” **insert** in its place: **“to the State of Arizona, related”**
- At line 7, **delete**: **“\$1,925.26”** and **insert** in its place: **“\$3,074.09”**
- At line 7-8, **delete**: **“plus accrued interest from December 15, 1997, within sixty days of the date of this Order”**
- **Delete** lines 9-10: **“IT IS FURTHER ORDERED that the restitution ordered to Beatrice DuChene shall bear interest from December 15, 1997, at the rate of ten percent per year.”**
- Beginning at line 9, after paragraph addressing restitution relating to Beatrice DuChene, **insert** the following new paragraph: **“IT IS FURTHER ORDERED that pursuant to A.R.S. § 44-2032, Respondent shall pay restitution to the State of Arizona relating to Sylvia Hays in the amount of \$10,078.97.”**
- At lines 11-16, **delete** the paragraph addressing restitution relating to Viola Brotherson in its entirety:

IT IS FURTHER ORDERED that the Securities Division shall conduct an accounting to establish the restitution due to Viola Brotherson. That figure should include the losses and charges incurred by Viola Brotherson due to her investments in the MSDW High Income/Yield Fund, MSDW Health Science Fund B and MSDW Information Fund B, subject to any set offs, including withdrawals or income payments made by Viola Brotherson from those funds, for the period of time that Respondent was Viola Brotherson’s financial advisor.

- And at line 11, **insert** in its place the following: **“IT IS FURTHER ORDERED that pursuant to A.R.S. § 44-2032, Respondent shall pay restitution to the State of Arizona relating to Viola Brotherson in the amount of \$62,435.25.”**
- **Delete** lines 17-19: **“IT IS FURTHER ORDERED that the restitution figure shall bear an interest of ten percent from the date of each purchase or charge associated with aforementioned funds in Viola Brotherson’s account.”**

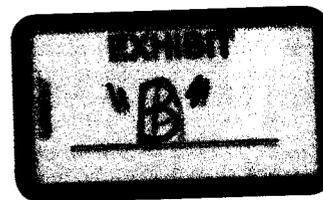
- **Delete lines 20-21: “IT IS FURTHER ORDERED that Securities Division shall file its accounting with Docket Control thirty days after the date of this Decision.”**
- **At lines 22-23, delete: “figure filed by the Securities Division within sixty days after the Securities Division makes the filing” and insert: “within sixty days of the effective date of this Order.”**

1 Q. And how many years did you say you had been
2 with the Securities Division?
3 A. Over five years.
4 Q. Personally, how many -- you mentioned that you
5 conduct examinations; is that correct?
6 A. Right.
7 Q. Examinations of what entities?
8 A. I do field exams on branch offices of
9 broker/dealers, investment advisors, and look at the
10 activity of the firms as well as the activity of the
11 individual representatives to see that they're in
12 compliance with the Arizona securities laws.
13 Q. And approximately how many exams of a
14 broker/dealer or broker/dealer branch do you conduct a
15 year?
16 A. I conduct somewhere in the area of 25 a year.
17 Q. Have you testified previously before the
18 Commission as an expert testimony -- or I'm sorry --
19 as an expert witness?
20 A. Yes, I have.
21 Q. Was that in the Chamber Group case, I believe,
22 in 2001?
23 A. Yes.
24 MR. BINGHAM: Your Honor, at this time I ask
25 that Mr. Donovan be recognized as an expert witness in

1 responsible for supervising any other registered
2 representatives at Prudential or at Merrill Lynch?
3 A. No.
4 Q. Okay.
5 A. Just my registered sales assistant, but not
6 other registered reps.
7 Q. You testified that you received training in
8 suitability at Merrill Lynch; is that correct?
9 A. Uh-huh. And it was my responsibility to
10 determine suitability of all of my accounts.
11 Q. And have you received any -- as an examiner
12 with the Securities Division during your examinations,
13 do you from time to time review suitability of
14 transactions?
15 A. That is one of the areas that we look at when
16 we're conducting an examination.
17 Another area of responsibility with the
18 Division is the reviewing of consumer complaints. And
19 when I review consumer complaints, suitability is
20 always -- almost always an issue in those complaints.
21 And so I have to make decisions based on the
22 suitability there, and I've been doing that for five
23 years, too.
24 So there's a lot more complaints that I have
25 had to review than actual examinations that I've had to

1 general securities, and particularly in suitability of
2 securities.
3 ALJ DION: Mr. Lewis?
4 MR. LEWIS: I don't believe that his training,
5 which is trade training that everybody has to go
6 through to become a securities representative at a
7 major firm, qualifies him as an expert. It qualifies
8 him as someone who knows what he's supposed to do, but
9 it doesn't qualify him as an expert in the field.
10 He hasn't had any training in compliance. He
11 hasn't been a compliance officer. He hasn't been
12 anyone who is charged in a firm with the duty to
13 determine whether transactions were suitable or not,
14 except for his own customers.
15 And if he's qualified, then every registered
16 representative in the country would be qualified as an
17 expert, and that just isn't true, sir.
18 ALJ DION: Mr. Bingham, any response?
19 MR. BINGHAM: Your Honor, I can -- with the
20 objection, I can certainly ask a few more questions of
21 Mr. Donovan that may resolve some of these issues that
22 Mr. Lewis brought up.
23 ALJ DION: Go ahead and ask him a couple of
24 more questions, and then I'll address your response.
25 Q. (BY MR. BINGHAM) Mr. Donovan, were you ever

1 review.
2 Q. Can you give us a minimum number, in your best
3 estimation, of complaints that you review each year for
4 suitability purposes?
5 A. That will vary from year to year. It's
6 probably around somewhere about 30 to 50. That's just
7 a guesstimate. And suitability is an issue in almost
8 every one of those cases.
9 Q. During your examinations of securities dealers
10 and securities dealer's branches, do you deal with the
11 compliance officers?
12 A. Yes.
13 Q. Do you ever discuss suitability issues with
14 them?
15 A. All of the time.
16 MR. BINGHAM: Your Honor, once again I ask that
17 Mr. Donovan be recognized as an expert witness in
18 general securities, and particularly in suitability of
19 securities. Mr. Donovan has --
20 MR. LEWIS: I have the same objection.
21 ALJ DION: Same objection. I'm going to
22 overrule the objection, but I am going to note
23 Mr. Lewis' position in that Mr. Donovan has not really
24 had the experience -- supervisory experience regarding
25 the regulation of others accounts, specifically



1 subordinates, as to what is or is not suitable.
2 I am also going to note that it does not appear
3 that he has -- other than his contact with compliance
4 officers, did not necessarily have a position in that
5 at Merrill Lynch or at Prudential regarding those
6 particular activities.
7 However, I am taking into consideration
8 Mr. Donovan's years as a securities examiner with the
9 Corporation Commission, which is five years, which is
10 certainly not insignificant. But I will weigh and
11 balance his testimony based on those factors.
12 So you may continue, Mr. Bingham.
13 MR. BINGHAM: Thank you.
14 THE WITNESS: May I say something?
15 One thing I apparently failed to mention when
16 you asked me about the different background, I did have
17 a training course in the Series 24, which is the series
18 for supervisors of a broker/dealer's firm.
19 And as part of my training as an examiner with
20 the State, I went through the training of the Series
21 24. Did not test for it, but we went through the
22 training for it.
23 Q. (BY MR. BINGHAM) And just to make sure that
24 everyone understands, from what you've testified about,
25 with a Series 24 license you can supervise other

1 Q. And are those new account forms there in
2 Exhibit S-2 that you're looking at now?
3 A. Yes, they are.
4 Q. Mr. Donovan, do you see the client or the
5 client profile section? And you may need to go to the
6 third page of Exhibit 2 where there's a better copy of
7 the new account form.
8 A. Talking about the branch form?
9 Q. Yes.
10 A. Okay.
11 Q. And just for the record, it's marked as page 25
12 of the manager's manual. Also marked as ACC 03806
13 Bates number.
14 Mr. Donovan, you see that in the client
15 objectives section the first objective is income.
16 Do you see that? It may be a little difficult
17 to read.
18 A. What section is it in?
19 Q. Client objective, which is in the client
20 profile section at the very top of that section.
21 A. Oh, client profile. Okay.
22 Q. Do you see where it says 1, then to the right
23 of that income?
24 A. Yes.
25 Q. And then below that is a number 2 with the

1 registered representatives; is that correct?
2 A. That is the registration required for branch
3 managers to supervise. Right.
4 Q. Mr. Donovan, I am handing you what is marked as
5 Exhibits S-2 and S-2A.
6 MR. LEWIS:? Do I have those?
7 MR. BINGHAM: I'm sorry?
8 MR. LEWIS: I said, do I have those?
9 MR. BINGHAM: You should, yes.
10 S-2A is the, I believe, the last page of 2 that
11 we -- yeah. This is 2-A.
12 MR. LEWIS: What is 2?
13 MR. BINGHAM: 2 is --
14 MR. LEWIS: Okay. All right. I got it.
15 Q. (BY MR. BINGHAM) If you go ahead and look at
16 Exhibit S-2, Mr. Donovan.
17 A. Yes.
18 Q. Mr. Donovan, did you do a suitability review of
19 Ms. DuChene's accounts?
20 A. Yes, I did.
21 Q. And Mr. Donovan, what information did you use
22 for the suitability review of Ms. DuChene's accounts?
23 A. All of the questions and answers that appeared
24 on the new account form that she filled out with Dean
25 Witter.

1 words aggressive income to the right of that?
2 If I can point this out to him, Your Honor,
3 just to save time.
4 ALJ DION: Please do
5 Q. (BY MR. BINGHAM) And I'm pointing to the
6 client profile section.
7 A. Yeah. I find it now.
8 Q. Do you see there where it says 2, and then to
9 the right of that aggressive income?
10 A. Right.
11 Q. What is your -- tell us what the difference in
12 your opinion is between income and aggressive income?
13 A. Well, income is basically that. Looking for an
14 investment that would provide them a regular source of
15 income, whether it's monthly or quarterly or
16 semi-annually, depending on the type of product. And
17 growth in that investment is not a consideration.
18 More aggressive income would be an investment
19 that would provide income, but growth is also a
20 consideration. That they would like to have some kind
21 of a growth along with their income. And that
22 sometimes means that they will take a little less
23 income than they might have in a straight income
24 investment in order to get a little growth along with
25 it.

PHILIP MERRILL

CALCULATION OF RESTITUTION AMOUNT FOR SYLVIA HAYS

ANALYSIS OF INVESTMENTS AND INTEREST CALCULATION

<u>DATE OF INVESTMENT</u>	<u>ENDING DATE</u>	<u># OF DAYS OUTSTANDING</u>	<u>AMOUNT INVESTED</u>	<u>INTEREST RATE</u>	<u>INTEREST CALCULATED</u>
9/6/2000	12/2/2003	1,182	<u>10,115.13</u> (1)	10%	<u>3,275.64</u> (4)

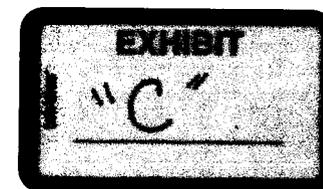
OFFSETS - AMOUNTS RECEIVED

<u>YEAR</u>	<u>DIVIDENDS</u>	<u>CAP. GAINS</u>	<u>TOTAL</u>
2000	0.00	0.00	0.00
2001	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>
	<u>0.00</u>	<u>0.00</u>	<u>0.00</u> (3)

10/26/2001	Liquidation of investment - amount received		<u>3,311.80</u> (2)
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SUMMARY

Total Investment			10,115.13 (1)
Less: Amount received upon liquidation of investment			<u>-3,311.80</u> (2)
			6,803.33
Less: Amounts received - Dividends and Capital Gains			<u>0.00</u> (3)
Net loss before interest			6,803.33
Add: Interest from date of investment to December 2, 2003			<u>3,275.64</u> (4)
Restitution amount as of December 2, 2003			<u>10,078.97</u>



PHILIP MERRILL

CALCULATION OF RESTITUTION AMOUNT FOR BEATRICE DUCHENE

<u>BEGINNING DATE</u>	<u>ENDING DATE</u>	<u># OF DAYS OUTSTANDING</u>	<u>PRINCIPAL AMOUNT</u>		<u>INTEREST RATE</u>	<u>INTEREST CALCULATED</u>	
12/15/1997	12/2/2003	2,178	1,925.26	(1)	10%	1,148.83	(2)
	PRINCIPAL					1,925.26	(1)
	INTEREST (THROUGH 12/2/2003)					1,148.83	(2)
	TOTAL					<u>3,074.09</u>	

