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Arizona Corporation Commission

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1 Harry N. Stone (# 5281)
2 3030 N. 3rd Street
3 Phoenix, AZ 85012
4 (602) 241-8575
5 Attorney For Respondent Wes Wyatt

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AZ CORP COMMISSION
DOCUMENT CONTROL

ARIZONA CORPORATION COMMISSION
SECURITIES DIVISION

7 In the matter of:

8 Wes Wyatt,
9 Financial Greenhouse LLC
10 Alpha Telecom and OMAC

11 Respondents.

Case No. S-03529A-03-0000

MOTION TO QUASH SUBPOENA
DUCES TECUM

13 Respondent, Wes Wyatt, by and through his undersigned attorney, hereby
14 respectfully moves the Commission to vacate that certain Supoena dated January 23, 2003
15 issued to Wes Wyatt compelling him to appear to provide testimony under oath and further
16 requiring him to produce those documents set forth in Exhibit "A" to the Subpoena. A copy
17 of the Subpoena is attached hereto and made a part hereof.

18 Notice is hereby given that this motion is not a waiver of Wes Wyatt's rights under
19 A.R.S. §41-1066. Wes Wyatt hereby asserts his privilege against self-incrimination with
20 respect to compulsory testimony and production of records all in accordance with A.R.S.
21 §41-1066.

22 This motion is based on the following grounds:

- 23 1. The subpoena's request for documents is indefinite and the information sought
24 is not relevant;
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2 In addition to the foregoing, the subpoena further requires the production of
3 38 separate categories of items. The requested items, most of which are
4 overbroad, unspecific, vague and beyond the scope of any relevant investigation,
5 include the following:

6 a. **Item 3** requires the name, address and telephone numbers of "all past
7 and present officers, directors or managing members" but no entity is identified;

8 b. **Item 4** requires all records of salaries and other compensation paid to
9 those persons who are unidentified in Item 3.

10 c. **Item 5** requires records on compensation received by Mr. Wyatt from
11 any source involving pay telephones, whether or not it involves any activities in
12 Arizona.

13 d. **Item 7** requires telephone logs, calendars emails, etc., of all those
14 unidentified persons from Item 3.

15 e. **Item 8** requires personal financial information, with no time limitation,
16 "with respect to any entity or with respect to Wes Wyatt individually."

17 f. **Item 9** requires records of all assets and liabilities of any "of the above
18 listed entities or individuals" (it is unclear if them means that Respondents or those
19 referenced in Item 3).

20 g. **Item 10** requires records of all documents filed with any governmental
21 agency without regard as to its location or if it has anything to do with any activities
22 in the State of Arizona.
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1 Although Mr. Wyatt, subject to his legal rights, is willing to cooperate with the
2 Commission in any investigation, this subpoena is so overbroad, vague, and burdensome,
3 that it fails to meet basic constitutional standards.

4 Scope of Commission's Investigation:

5 State administrative agencies, such as the Arizona Corporation Commission, have no
6 inherent powers. Their powers are limited to those granted by statute. Phoenix v. Phoenix
7 Civil Serv. Bd., 169 Ariz. 256, 259, 818 P. 2d 241, 244 (App. 1991); Boyce v. City of
8 Scottsdale, 157 Ariz. 265, 267, 756 P. 2d 934, 936 (App. 1988).

9 The grant of authority to the Arizona Corporation Commission is set forth in A.R.S.
10 §44-1822 which authorizes the commission to:

11 "make such public or private investigations within or without the state as
12 the commission deems necessary to determine whether any person has
13 violated or is about to violate any provision of this chapter" [referring to
14 Chapter 12, Sale of Securities].

15 The commission's power to compel testimony and production of records is set forth in
16 A.R.S. §44-1823 which says in pertinent part as follows:

17 "For the purpose of investigations or hearing which, in the opinion of the
18 commission, are necessary and proper for the enforcement of this
19 chapter, any member of the commission, subpoena witnesses, take
20 evidence and require by subpoena duces tecum . . .the production of
books, papers. . .or other documents." Emphasis added.

21 Of importance, is that the commission's powers are not boundless but are limited to matters
22 that are necessary and proper for the enforcement of Chapter 12, Sale of Securities. The
23 commission may not act unreasonably and may not use its investigatory powers to "harass,
24 intimidate or defame". Polaris Int'l Metals Corp. v. Arizona Corp. Commission, 133 Ariz.
25 500, 506, 652 P. 2d 1023, 1029 (1982).

1 The United States Supreme Court has said that the investigatory powers of
2 administrative agencies are analogous in their breadth to those of the grand jury. *United*
3 *States v. Morton Salt Co.*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950). The courts
4 have authority under some circumstances to limit or stop an agency's investigation. In
5 discussing the federal agency that investigates securities cases, the Second Circuit Court of
6 Appeals opined in dictum, "It is true that while the S.E.C. is entitled to great freedom in
7 conducting its investigations, it is not at liberty to act unreasonably, and in appropriate
8 circumstances the court may inquire into the reasons for an investigation and into its
9 effects." *S.E.C. v. Brigadoon Scotch Distributing Co.*, 480 F. 2d 1047, 1056 (2d Cir, 1973).

10
11 When an Arizona administrative agency unreasonably infringes on the liberties of a
12 corporation, its officers, and its shareholders, it is the Arizona courts who must be able to
13 curb the abuse of power. The corporation commission has been treated
14 as a fourth branch of government in Arizona. *Arizona Corporation Commission v. Superior*
15 *Court*, 105 Ariz. 56, 459 P. 2d 489 (1969); *Selective Life Insurance Co. v. Equitable Life*
16 *Assurance Society*, 101 Ariz. 594, 422 P. 2d 710 (1967). However, the system of checks
17 and balances does not rely solely on one branch to restrain its own agents within the proper
18 constitutional limits. It is the courts that have the function of protecting our constitutional
19 liberties by upholding them in individual cases or controversies. Being receptive to an
20 individual's claim of unfair treatment by the state or federal government is part of the
21 American judiciary's heritage.

22
23 Thus, if an administrative agency's investigation becomes a tool of harassment and
24 intimidation rather than a means to gather appropriate information, the appropriate court
25 may intrude and stop the incursion into the constitutional liberties of the

1 parties under investigation.

2 Shasta Minerals & Chemical Co. v. S.E.C., 328 F.2d 285 (10th Cir. 1964) is
3 instructive. At issue in *Shasta Minerals* was a subpoena issued by the S.E.C. to a company.
4 When the company refused to comply, the S.E.C. brought a court action
5 to enforce the subpoena. Both parties moved for summary judgment. The S.E.C. relied only
6 on its investigative power to demand enforcement of the subpoena and declined to give any
7 explanation for its actions. The company filed affidavits "showing a systematic persecution
8 and harassment of [the company] and of its president." 328 F.2d at 287.

9 The affidavits also stated that the S.E.C. had told the company that it would never
10 be allowed to register under the federal securities laws. Because the S.E.C. had not
11 controverted these allegations nor offered an explanation for its actions, the allegations
12 were presumed true for purposes of the summary judgment motion. The appellate court
13 held that in such circumstances, granting summary judgment in favor of the S.E.C. was
14 improper because the allegations supported a claim that the S.E.C. had acted arbitrarily and
15 beyond its authority.

16 The central issue in *Shasta Minerals*, *supra*, is identical to the instant case — can
17 an agency use its investigative powers to go into a "fishing expedition" for reasons unrelated
18 to the agency's legitimate purposes.

19 The commission is empowered to investigate for purposes of enforcing the
20 securities laws of the State of Arizona. The Commission may not constitutionally use its
21 investigatory powers to investigate transactions beyond the scope of securities transactions
22 relating to Arizona.
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1 A review of the items requested for production shows an overbroad, vague and
2 unreasonable. In United States v. Morton Salt Co. 338 U.S. 632 (1950), the United States
3 Supreme Court set forth the standard for judicial enforcement of administrative subpoenas.
4 It held that an agency's investigation is lawful if (Page 652):

- 5 a. The inquiry is within the authority of the agency,
- 6 b. The demand is not too indefinite, and
- 7 c. The information sought is reasonably relevant.

8 The Second Circuit in In Re McVane, 44 F. 3d 1127 (2d Cir 1995), set
9 higher standards where records dealing with financial assets were involved. It
10 stated as follows:
11

12 “..before it may subpoena the personal financial information of a potential
13 target for the purpose of determining that individual's net worth, the FDIC
14 must articulate specific grounds for its suspicion of liability.” At 1170.

15 Summary:

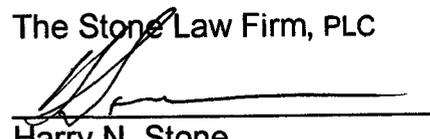
16 An examination of the requested documents shows a clear pattern of overbroad
17 and vague demand for production, not only of Mr. Wyatt's records but also financial
18 information regarding persons who are unidentified. The authority of the Commission is
19 limited to investigation dealing with the Sale of Securities within the meaning of Chapter 12.
20 The Commission's demand is unreasonable and not relevant in that it engages in a “fishing
21 expedition” as to the identity of persons and documents.

22 It is respectfully requested that the subpoena be quashed in its present form.
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1 DATED: March 3, 2003

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The Stone Law Firm, PLC



Harry N. Stone
3030 N. 3rd Street, #200
Phoenix, AZ 85012
(602) 241-8575
Attorney For Respondent
Wes Wyatt

Original of the foregoing filed
On March 3, 2003 with:

Arizona Corporation Commission
Phoenix, Arizona

23-2530

SUBPOENA
SECURITIES DIVISION
ARIZONA CORPORATION COMMISSION

TO: Wes Wyatt
7800 E. Lincoln Dr #2001
Scottsdale, AZ 85250

In the Matter of

Wes Wyatt, Financial Greenhouse LLC, Alpha Telcom, and OMAC

**involving possible violations of the Securities Act
and/or Investment Management Act of Arizona.**

YOU ARE HEREBY REQUIRED to appear before Kathleen C. DeLaRosa of the SECURITIES DIVISION of the ARIZONA CORPORATION COMMISSION at 1300 WEST WASHINGTON, THIRD FLOOR, PHOENIX, ARIZONA 85007, on the 3rd day of February, 2003, at 1:00 o'clock P.M., to PROVIDE TESTIMONY AND PRODUCE THE DOCUMENTS LISTED IN EXHIBIT "A" WHICH IS ATTACHED HERETO AND INCORPORATED HEREIN BY REFERENCE.



The seal of the Arizona Corporation Commission is affixed hereto, and the undersigned, a member of said Arizona Corporation Commission, or an officer designated by it, has set his hand at Phoenix, Arizona this 23rd day of January, 2003.

LeRoy Johnson, Director of Enforcement
Securities Division

Persons with a disability may request a reasonable accommodation such as a sign language interpreter, as well as request this document in an alternative format, by contacting Shelly M. Hood, Executive Assistant to the Executive Secretary, voice phone number 602/542-3931, e-mail shood@cc.state.az.us. Requests should be made as early as possible to allow time to arrange the accommodation.

Pursuant to A.A.C. R14-4-305, any person required to appear at a formal interview may be represented by legal counsel.

Exhibit "A"

For the period beginning January 1, 1999, to the present, all documents, records, books, and any other papers, whether stored on electronic media or otherwise, incident or relating to WES WYATT, FINANCIAL GREENHOUSE, L.L.C., ALPHA TELCOM, INC., OMAC, or any other business engaged in any way in the sale or leasing of pay telephones with which any of the preceding persons or entities have been associated or affiliated or in which any of the foregoing persons or entities have any financial interest of any kind (including receipt of commissions or compensation therefrom), including but not limited to:

1. Articles of incorporation or organization, bylaws, and annual reports, including any amendments;
2. Records of all pre-organization or corporate meetings, committee meetings, shareholder or member meetings, board of director meetings, or other business meetings, including minutes, resolutions adopted or proposed, agendas, and all information used or presented at these meetings;
3. Names, addresses, and telephone numbers of all past and present officers and directors or managing members;
4. Records of all salaries, bonuses, reimbursement, distributions, draws, loans, or any other compensation, whether monetary or otherwise, paid to the individuals listed in response to paragraph 3, particularly with respect to sales, leasing arrangements, or management agreements of pay telephones;
5. All records of the terms and amounts of commissions, salaries, bonuses, draws, fees, loans, reimbursement, distributions, or any other compensation paid to Wes Wyatt and/or Financial Greenhouse, L.L.C., from any source whatsoever involving sales, leasing arrangements, or management agreements of pay telephone;
6. Telephone logs, appointment calendars, message records, email, correspondence, and travel records of all individuals listed in response to paragraph 3;
7. Telephone logs, appointment calendars, message records, email, correspondence, and travel records of Wes Wyatt;
8. All financial statements, annual and quarterly financial reports, whether audited or unaudited, with accompanying footnotes and any auditor's reports (whether reports with respect to an entity or with respect to Wes Wyatt individually);
9. All assets and liabilities currently held by any of the above-listed entities or individuals;

10. All documents filed with any governmental agency related to the conduct of business, the formation of affiliated businesses, the renewal or maintenance of status as a legal entity, or the dissolution of the business of any of the listed entities or individuals;

11. All documents submitted for the purpose of compliance, reporting, or seeking exemptions from registration with any state or federal securities agency by any of the listed individuals or entities;

12. All documents concerning inquiries, investigations, or actions by any state or federal governmental agency with respect to any of the above individuals or entities;

13. Names, addresses, and telephone numbers and position of all past and present employees, independent contractors, or other agents of any of the listed individuals or entities;

14. Names of individuals listed in response to paragraph 13 who hold supervisory or managerial positions with any of the above listed individuals or entities;

15. Employment contracts, agreements, correspondence, and any other documents between any of the above-listed individuals or entities and any name listed in response to paragraph 13;

16. All records of the terms and amount of commissions, salaries, bonuses, draws, fees, loans, reimbursement, distributions, or any other compensation paid to any name listed in response to paragraph 13;

17. Agreements or contracts of any kind by and/or between Wes Wyatt and/or Financial Greenhouse, L.L.C., and any other entity listed;

18. All state and federal tax returns, including any applications, forms, or correspondence prepared or filed by or on behalf of any of the above-listed individuals or entities;

19. All accounting records and books of original entry including but not limited to, cash receipts journal, cash disbursements journal, sales journals, general journal, subsidiary journals, general ledger, subsidiary ledgers, and chart of accounts with respect to any of the above-listed individuals or entities;

20. All bank or other depository institution accounts in the name of, or for the benefit of any of the above-listed individuals or entities, whether open or closed, including:

- a. the name of the bank or depository institution and address of the branch at which the account is located;
- b. the name and number of each account;
- c. the names of all signatories on each account.

21. All account statements, deposit receipts, canceled checks (both front and back), and wire transfers for all accounts requested in paragraph 20 above;

22. All account opening documents and account statements for any credit, debit or other charge card account in the name of or for the benefit of any of the above-listed persons or entities;

23. All telephone billing statements, mailing records, invoices, email, inter-office communications, correspondence, and any other records of communications by any of the above listed persons or entities, their agents, employees, officers and directors with any other individual or entity;

24. All advertisements, correspondence, circulars, offering memoranda, newsletters, prospectuses, tax opinions, legal opinions, reports, brochures, flyers, handouts, or any other records made available to potential or actual investors by any of the above-listed persons or entities;

25. Copies of all advertisements, announcements, infomercials, or press releases, that appeared in any media, including newspapers, trade journals, magazines, radio, television, or on the Internet with respect to products or services offered or sold by any of the above-referenced individuals or entities;

26. All information provided through the Internet by or with respect to any of the above-listed individuals or entities, including copies of all web pages, and all addresses of web sites, news groups, and email addresses;

27. The names, addresses, telephone numbers, and contact persons for all Internet service providers, web hosting services, web page designers, or other providers of services related to the Internet presence of any of the above-listed individuals or entities;

28. All contracts or agreements between any of the above-listed persons or entities and any person or entity identified in response to paragraph 27 above, records of all payments made to such persons or entities, and any communications between any of the above-listed persons or entities and such person or entity;

29. All lists of prospective investors in pay telephone systems of any kind, including sales lead lists, demographic lists, and any other source of investor names, whether drafted by, purchased by, or obtained for the benefit of any of the above-listed persons or entities;

30. All lists of persons who attended seminars, classes or meetings held or sponsored by any of the above-listed persons or entities, and/or their affiliates or agents, with respect to pay telephone sales, leasing, or management;

31. Names, addresses, and telephone numbers of all individuals or entities that have been offered or sold any type of interest in pay telephones or in any related product or service in connection with or by any of the above-listed persons or entities;

32. Documents relating to each individual or entity listed in paragraph 31 including any contracts, forms, subscriptions, agreements, notes, questionnaires, records of investment status, checks, wire transfers, receipts, account statements, tax information, and any correspondence, updates, or other communications;

33. The amounts and dates of each investment for each individual or entity listed in paragraph 31;

34. The amounts and dates of any interest, earnings, distributions, dividends, stock splits, spin-offs, rescission, refund, or any other form of returns to each individual or entity listed in paragraph 31;

35. Names and addresses of all shareholders or members of any of the above-listed entities including the amount of shares or units held and a sample share certificate or other evidence of ownership;

36. Records of all securities held, issued, purchased, or traded, including any brokers, underwriters, market makers, clearing firm, or other entities used in each transaction;

37. Records of any mergers, acquisitions, spin-offs, or predecessor entities;

38. All internal reports and any reports provided to shareholders or members.

R14-4-305. Rights of witnesses; formal interview; procedures

A. Any person required or requested to appear as a witness at a formal interview may be accompanied, represented, and advised by a lawyer. The lawyer's roll during the formal interview shall be limited to the following activities:

1. Giving legal advice to the witness before, during, and after the formal interview;
2. Questioning the witness briefly at the conclusion of the formal interview for the purpose of clarifying any testimony the witness has given; and
3. Making summary notes during the formal interview solely for the use of the witness and the lawyer.

B. Notwithstanding Subsection (A), the following lawyers may not represent witnesses:

1. Any lawyer who has represented another witness who has testified at a formal interview in the examination or investigation,
2. Any lawyer who has represented another person who is a subject of the examination or investigation,
3. Any lawyer who may be a material witness in the examination or investigation,
4. Any lawyer who is subject of the examination or investigation.

C. The Director may permit a lawyer to represent a witness in those situations described in subsections (B)(1) through (B)(4) upon a showing that such representation should be permitted in the interest of justice and will not obstruct the examination or investigation. If a lawyer is not permitted to represent a witness under Subsection (B), that lawyer's partners or associates of the lawyer's law firm are also precluded from representing the witness.

D. All formal interviews may be recorded by the Division either mechanically or by a shorthand reporter employed by the Division. No other recording of the formal interview will be permitted, except summary note taking.

E. Unless permitted in the discretion of the Division, no witness or lawyer accompanying such witness shall be permitted to be present during the formal interview of any other witness testifying in a nonpublic examination or investigation. No person not employed by the Commission or the Attorney General shall be present during a formal interview except that the Division may authorize members of law enforcement or other state, federal or self-regulatory agencies to be present during such formal interview.

F. The Division may exclude from a formal interview any person previously permitted to attend the formal interview, including a lawyer, whose conduct is dilatory, obstructionist, or contumacious. In addition, the members of the staff of the Division conducting the formal

interview may report the conduct to the Director for appropriate action. The Director may thereupon take such further action as circumstances may warrant, including, but not limited to, exclusion from further participation in the examination or investigation.

G. A person who has submitted documentary evidence or testimony in connection with a formal interview shall be entitled, upon written request, and upon proper identification, to inspect the witness' own testimony on a date to be set by the Director. The Director may delay the inspection of the record until the conclusion of the examination or investigation if, in the Director's discretion, the Director determines that earlier inspection may obstruct or delay the examination or investigation.

H. In connection with an examination or investigation, the Director may delegate authority to members of the staff to administer oaths and affirmations, sign subpoenas, take evidence, and receive books, papers, contracts, agreements or other documents, records, or information, whether filed or kept in original or copied form or electronically stored or recorded.

I. During a formal interview, a witness shall not knowingly make any untrue statements of material fact or omit to state any material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.