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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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JAN 21 2004

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KRISTIN K. MAYES

DOCKETED BY *CM*

In the matter of:
WESLEY KARBAN WYATT, et ux., et al.
c/o Harry N. Stone, Esq.
3030 North Third Street
Phoenix, Arizona 85012,
Respondents.

DOCKET NO. S-03529A-03-0000

SECURITIES DIVISION'S MOTION
FOR ADVERSE INFERENCE BASED
ON RESPONDENT'S FAILURE TO
PROVIDE DOCUMENTS IN
RESPONSE TO SUBPOENA

The Securities Division ("Division") of the Arizona Corporation Commission (the "Commission") requests that the Hearing Officer make an adverse inference against Respondent Wesley Karban Wyatt ("Wyatt"), based on Wyatt's failure to produce documents in connection with the Division's subpoena requesting documents relevant to Wyatt's activities involving the sale of investment contracts in this case. This motion is supported by the record in this matter, by the hearing exhibits referred to herein, and by the following Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 21st day of January, 2004.

ARIZONA CORPORATION COMMISSION
SECURITIES DIVISION

Kathleen Coughenour DeLaRosa
By _____

Kathleen Coughenour DeLaRosa (#012670)
1300 West Washington, Third Floor
Phoenix, Arizona 85007
Attorneys for Arizona Corporation Commission

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. BACKGROUND.**

3 This case parallels a number of other pending cases against individuals and entities who
4 were involved in selling unregistered investment contracts involving pay telephone sale and
5 leaseback arrangements with Alpha Telecom, Inc. (the "Alpha investment contracts"). See Docket
6 Nos. S-03506A-02-0000, S-03507A-02-0000, S-03508A-02-0000, S-03509A-02-0000, and
7 S-03510A-02-0000. In March, 2003, the Division filed and served a Notice of Opportunity for
8 Hearing Regarding Proposed Order to Cease and Desist, for Restitution, for Administrative
9 Penalties, and for Other Affirmative Action ("Notice") in this matter, detailing the facts on which
10 its case against Wyatt is based.

11 The requests contained in the subpoena at issue were tailored to elicit responsive
12 documents that would be relevant to the Division's investigation and to the Alpha investment
13 contracts, requesting only information on pay telephone investment contracts "with which any of
14 the [subpoenaed] persons or entities have been associated or affiliated or in which any of the
15 [subpoenaed] persons or entities have any financial interest" (Subpoena, Exhibit "A",
16 attached to Motion to Quash).

17 Wyatt did not produce any documents responsive to the Division's subpoena. The Division
18 staff assigned to the matter met with Wyatt's attorney, and ultimately narrowed the requests at the
19 request of Wyatt's counsel. (Exhibit "1", letter dated May 2, 2003.) Despite the Division's
20 agreement to narrow those requests, Wyatt has never produced a single document responsive to the
21 Division's subpoena.

22 **II. ARIZONA LAW PERMITS A NEGATIVE INFERENCE IN RESPONSE TO**
23 **WYATT'S FAILURE TO PROVIDE DOCUMENTS RESPONSIVE TO THE**
24 **DIVISION'S SUBPOENA.**

25 A trier of fact may properly draw an adverse inference from a party's failure to produce
26 evidence. *State Tax Comm'n v. Graybar Elec. Co.*, 86 Ariz. 253, 257, 344 P.2d 1008, 1011 (1959)
("Where . . . information is readily available to a party, it can only be presumed from the failure to

1 produce it that the inference is adverse”); *S.E.C. v. Poirier*, 140 F. Supp. 2d 1033, 1045 (D. Ariz.
2 2001) (adverse inference based on failure to disclose relevant documents during discovery).

3 It is well established that “[w]hen the contents of a document are
4 relevant to an issue in a case, the trier of fact generally may receive
5 the fact of the document’s nonproduction or destruction as evidence
6 that the party which has prevented production did so out of the well-
7 founded fear that the contents would harm him” Under these
8 circumstances, it would be permissible . . . to draw an adverse
9 inference against [defendant] that he has failed to produce any of
10 these [documents] out of a fear that they support the contention that
11 he knew or should have known of the . . . fraud.

12 *Dietrich v. Bauer*, 126 F. Supp. 2d 759, 766 (S.D.N.Y. 2001) (citations omitted).

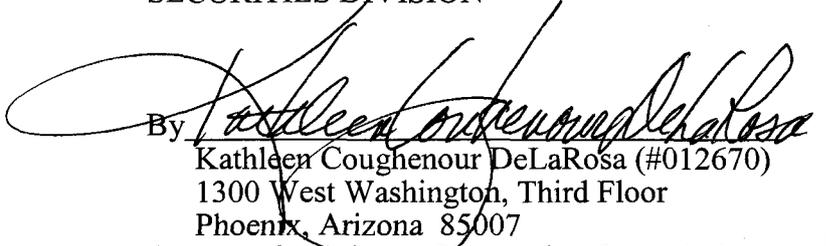
13 In this case, the Division will offer evidence that Wyatt violated Arizona law in at least
14 three respects: The Division will present evidence that Wyatt committed violations of the
15 registration provisions of the Securities Act by selling securities when he was not registered as a
16 dealer or salesman, and that he sold securities that were not registered for sale in Arizona. *See*
17 A.R.S. §§ 44-1841, 44-1842. The Division also will present evidence that Wyatt violated the anti-
18 fraud provisions of the Securities Act by making material misrepresentations or omissions in the
19 course of his sales of securities. *See* A.R.S. § 44-1991. The Division will present substantial
20 evidence at the hearing establishing violations of A.R.S. §§ 44-1842, 44-1842, and 44-1991. The
21 Division will not, however, be able to present certain financial evidence, because of Wyatt’s
22 failure or refusal to provide that information in response to the Division’s subpoena—even after
23 the Division narrowed that subpoena at the specific request of Wyatt’s counsel.

24 As a result, this tribunal may properly make any appropriate negative inferences based on
25 Wyatt’s failure to provide documents responsive to the Division’s subpoena. *See Graybar*, 86
26 Ariz. at 257, 344 P.2d at 1011. The Division therefore requests that the Hearing Officer include in
his proposed Order a Finding of Fact that, in response to the Division inquiries and subpoena,
Wyatt failed to provide any documentary response, despite the Division’s agreement to narrow its
requests so that they were more narrowly tailored to the specific inquiry against Wyatt. The
Division further requests that the Hearing Officer include in his proposed Order a Conclusions of

1 Law that, as a result, the Commission should infer that the Division reached conclusions that were
2 reasonable and more likely than not correct with respect to the amounts Wyatt received as a result
3 of his illegal activities.

4 RESPECTFULLY SUBMITTED this 21st day of January, 2004.

5 ARIZONA CORPORATION COMMISSION
6 SECURITIES DIVISION

7
8 By 
9 Kathleen Coughenour DeLaRosa (#012670)
10 1300 West Washington, Third Floor
11 Phoenix, Arizona 85007
12 Attorney for Arizona Corporation Commission

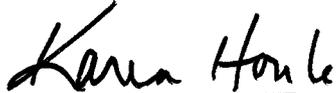
11 ORIGINAL and 13 copies of the
12 foregoing filed this 21st day
13 of January, 2004, with:

13 Docket Control
14 Arizona Corporation Commission
15 1200 West Washington Street
16 Phoenix, Arizona 85007

16 COPY of the foregoing
17 mailed/delivered this 21st
18 day of January, 2004, to:

18 Hon. Philip Dion III
19 Hearing Division
20 Arizona Corporation Commission
21 1200 West Washington Street
22 Phoenix, Arizona 85007

21 Harry N. Stone, Esq.
22 3030 North Third Street
23 Phoenix, Arizona 85012
24 Attorney for Respondents

23 

24 Wyatt M Adverse Inference Failure to Produce.doc

COMMISSIONERS
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WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON



BRIAN C. McNEIL
EXECUTIVE SECRETARY

MARK SENDROW
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SECURITIES DIVISION
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Phoenix, AZ 85007-2996
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**ARIZONA CORPORATION
COMMISSION**

May 2, 2003

Harry N. Stone, Esq.
The Stone Law Firm, PLC
3030 North Third Street, Suite 200
Phoenix, Arizona 85012

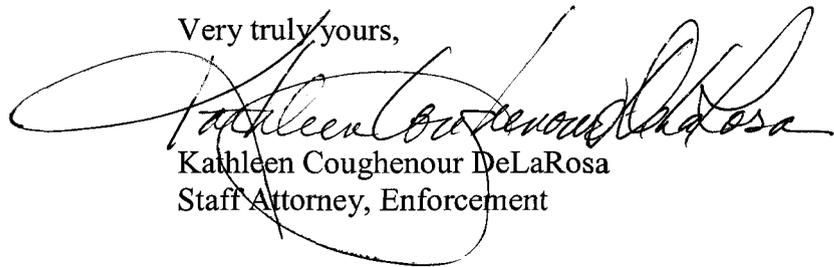
Re: *In the matter of Wesley Karban Wyatt, et al.*, Arizona Corporation Commission Docket
No. S-03529A-03-0000

Dear Mr. Stone:

Thank you for your letter of April 27, 2003. Rather than issue a new subpoena requesting the information with the limitations on which we agreed, I have simply revised Exhibit "A" to the subpoena. A copy is enclosed. When can you provide documents responsive to the subpoena?

If you have any questions regarding this matter, please let me know.

Very truly yours,



Kathleen Coughenour DeLaRosa
Staff Attorney, Enforcement

/kcd

Enclosure

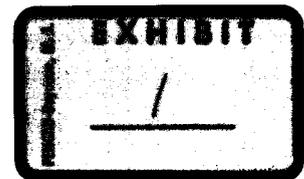


Exhibit "A"

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 ("Wyatt") and/or FINANCIAL GREENHOUSE, L.L.C. ("FG") (collectively "Respondents"),
- in connection with the sale or leasing of pay telephones within or from Arizona, or to residents of Arizona, on behalf of Alpha Telcom, Inc. and/or OMAC (including receipt of commissions or compensation therefrom),
- including but not limited to:

1. Articles of incorporation or organization, bylaws, and annual reports of FG, including any amendments;

2. Records of all FG 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 of FG;

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, with respect to sales, leasing arrangements, or management agreements of Alpha Telcom or OMAC pay telephones within or from Arizona, or to Arizona residents;

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 telephones within or from Arizona, or to Arizona residents;

6. Telephone logs, appointment calendars, message records, email, correspondence, and travel records of all individuals listed in response to paragraph 3 in connection with activities within or from Arizona, or in connection with offers or sales of Alpha Telcom pay telephones to Arizona residents;

7. Telephone logs, appointment calendars, message records, email, correspondence, and travel records of Wes Wyatt with respect to his activities within or from Arizona, or in connection with offers or sales of Alpha Telcom pay telephones to Arizona residents;

~~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); We have agreed that the Division will defer its request for these items at the present time.~~

~~9. All assets and liabilities currently held by any of the above listed entities or individuals; We have agreed that the Division will defer its request for these items at the present time.~~

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 FG;

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, in connection with activities within or from Arizona;

12. All documents concerning inquiries, investigations, or actions by any state or federal governmental agency with respect to matters pertaining to Alpha Telcom, Wes Wyatt, or FG;

13. Names, addresses, and telephone numbers and position of all past and present employees, independent contractors, or other agents of FG;

14. Names of individuals listed in response to paragraph 13 who hold supervisory or managerial positions with FG;

15. Employment contracts, agreements, correspondence, and any other documents between FG 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 Respondents and any other entity listed in response to paragraph 13;

18. All state and federal tax returns, including any applications, forms, or correspondence prepared or filed by or on behalf of any of the Respondents;

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 Respondents and their activities within or from Arizona, or involving sales of Alpha Telcom contracts to Arizona residents;

20. All bank or other depository institution accounts in the name of, or for the benefit of Respondents into which any funds were deposited or from which any funds were withdrawn in connection with Respondents' activities within or from Arizona, or their activities involving sales of Alpha Telcom contracts to Arizona residents, 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 Respondent, which account(s) were utilized in connection with Respondents' activities within or from Arizona or their activities involving sales of Alpha Telcom contracts to Arizona residents;

23. All telephone billing statements, mailing records, invoices, email, inter-office communications, correspondence, and any other records of communications by Respondents, their agents, employees, officers and directors with any other individual or entity in connection with Respondents' activities within or from Arizona or their activities involving sales of Alpha Telcom contracts to Arizona residents;

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 Respondents in connection with Respondents' activities within or from Arizona or their activities involving sales of Alpha Telcom contracts to Arizona residents;

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 Respondents in connection with Respondents' activities within or from Arizona or their activities involving sales of Alpha Telcom contracts to Arizona residents;

26. All information provided through the Internet by or with respect to Respondents in connection with Respondents' activities within or from Arizona or their activities involving sales of Alpha Telcom contracts to Arizona residents, 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 Respondents in connection with

Respondents' activities within or from Arizona or their activities involving sales of Alpha Telcom contracts to Arizona residents;

28. All contracts or agreements between any Respondent 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 Respondent 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 Respondents in connection with Respondents' activities within or from Arizona or their activities involving sales of Alpha Telcom contracts to Arizona residents;

30. All lists of persons who attended seminars, classes or meetings held or sponsored by Respondents, and/or their affiliates or agents, in connection with Respondents' activities within or from Arizona or their activities involving sales of Alpha Telcom contracts to Arizona residents;

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 Respondent in connection with Respondents' activities within or from Arizona or their activities involving sales of Alpha Telcom contracts to Arizona residents;

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 FG 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 by FG, including any brokers, underwriters, market makers, clearing firm, or other entities used in each transaction;

- FG;
37. Records of any mergers, acquisitions, spin-offs, or predecessor entities of FG;
 38. All internal reports and any reports provided to shareholders or members of FG.