

ORIGINAL



0000117525

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVING
COMMISSIONER
MARC SPITZER
COMMISSIONER



BRIAN C. McNEIL
EXECUTIVE SECRETARY

RECEIVED

ARIZONA CORPORATION COMMISSION

2002 FEB -8 A 9 31

AZ CORP COMMISSION
DOCUMENT CONTROL

DATE: FEBRUARY 8, 2002

DOCKET NO: S-03439A-00-0000

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Marc Stern. The recommendation has been filed in the form of an Order on:

TOWER EQUITIES, INC. and
PHILIP A. LEHMAN
(NOTICE OF OPPORTUNITY)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by 4:00 p.m. on or before:

FEBRUARY 19, 2002

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

FEBRUARY 21, 2002

For more information, you may contact Docket Control at (602)542-3477 or the Hearing Division at (602)542-4250.

BRIAN C. McNEIL
EXECUTIVE SECRETARY

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 WILLIAM A. MUNDELL
CHAIRMAN
3 JIM IRVIN
COMMISSIONER
4 MARC SPITZER
COMMISSIONER

5 IN THE MATTER OF:

6 TOWER EQUITIES, INC.
7 8141 N. Main Street
Dayton, PJ 45415-1747
8 CRD#16195

9 PHILIP A. LEHMAN
Tower Equities, Inc.
10 8141 N. Main Street
Dayton, OH 45451-1747
11 CDR#1345038

12 Respondents.

DOCKET NO. S-03439A-00-0000

13 DECISION NO. _____

OPINION AND ORDER

14 DATE OF HEARING:

June 13, 2001

15 PLACE OF HEARING:

Phoenix, Arizona

16 ADMINISTRATIVE LAW JUDGE:

Marc E. Stern

17 APPEARANCES:

Snell & Wilmer, L.L.P., by Mr. Donald C.
Zavala, Jr., and Mallon & Johnson, P.C., by Ms.
Barbara A. Mallon, on behalf of Tower Equities,
18 Inc.; and

19 Ms. Moira A. McCarthy, Assistant Attorney
General and Ms. Amy J. Leeson, Special
20 Assistant Attorney General, on behalf of the
Securities Division of the Arizona Corporation
21 Commission.

22 **BY THE COMMISSION:**

23 On December 27, 2000, the Securities Division ("Division") of the Arizona
24 Corporation Commission ("Commission") filed a Notice of Opportunity for Hearing ("Notice")
25 against Tower Equities, Inc. ("Tower") and Mr. Philip A. Lehman, (collectively the "Respondents")
26 in which the Division alleged that the Securities and Exchange Commission ("SEC") had found that
27 the Respondents had committed multiple violations of the Securities Act of 1933, the Securities
28 Exchange Act of 1934 and the Investment Advisers Act of 1940 in connection with the offer and sale

1 of securities resulting in a Cease and Desist Order ("C&D Order"). As a consequence of the SEC's
2 C&D Order, the Division alleged that the Securities Act of Arizona ("Act") had been violated and
3 that Tower's and Lehman's registration as a securities dealer and salesman, respectively, should be
4 revoked.

5 The Respondents were duly served with copies of the Notice.

6 On January 18, 2001, Respondents Tower and Lehman filed a request for hearing.

7 On January 23, 2001, by Procedural Order, a pre-hearing conference was scheduled and held
8 on February 8, 2001, and during that proceeding the parties stipulated to a hearing on April 10, 2001.

9 On April 3, 2001, the parties requested a continuance of the proceeding for at least 45 days to
10 further narrow the issues and to complete the production of documents.

11 On April 4, 2001, the hearing on the above-captioned proceeding was continued from April
12 10, 2001 to May 30, 2001.

13 On May 18, 2001, the Respondents filed a Motion for Extension of Time ("Motion") stating
14 that counsel for the Respondents did not receive the Commission's April 4, 2001, Procedural Order
15 continuing the proceeding to May 30, 2001. Counsel remained unaware until May 15, 2001, that the
16 hearing had been rescheduled and stated that she needed additional time to prepare for the hearing.

17 On May 21, 2001, the Division filed a response to the Motion of the Respondents arguing that
18 they had failed to show good cause for any further delays. Subsequently, a teleconference was
19 arranged to take place between the presiding Administrative Law Judge and counsel for the Division
20 and the Respondents.

21 On May 25, 2001, a teleconference was held with counsel for the Respondents and the
22 Division wherein the parties agreed to the following: that the hearing scheduled for May 30, 2001, be
23 continued until June 13, 2001 as a telephonic hearing; that counsel for the Respondents would file her
24 Application to Appear Pro Hac Vice ("Application") for purposes of representing the Respondents in
25 the proceeding; that on or before May 30, 2001, the parties would file a Joint Pre-Hearing Statement
26 ("Statement") which would contain stipulations of fact and the parties' request for findings of fact,
27 the identification of issues of law and policy and a summary of their respective positions on those
28 issues; that on or before June 6, 2001, all exhibits and witness lists (if any) would be exchanged by

1 the parties with copies provided to the Administrative Law Judge; and that the hearing scheduled for
2 June 13, 2001 would be conducted telephonically with counsel for the parties arguing their respective
3 positions on the primary issues involved in the proceeding.

4 On May 29, 2001, by Procedural Order, the hearing was continued to June 13, 2001.

5 On May 30, 2001, the Division and the Respondents filed the Statement containing
6 stipulations of fact and a summary of their respective positions on the issues of law and policy.

7 On June 5, 2001, counsel for the Respondents, Ms. Barbara A. Mallon, filed an Application
8 and designated as local counsel Mr. Donald C. Zavala, Jr. who consented to his designation for
9 purposes of communication and service of documents.

10 On June 6, 2001, by Procedural Order, the Application of Ms. Mallon was granted.

11 On June 13, 2001, a full public hearing was commenced before a duly authorized
12 Administrative Law Judge of the Commission at its offices in Phoenix, Arizona. Respondents
13 entered their appearance through counsel and the Division appeared with counsel. A number of
14 exhibits were admitted into evidence as agreed between the parties and arguments on the issue were
15 heard from counsel for the Respondents and for the Division. Following the conclusion of the
16 hearing, the parties agreed that closing memoranda would be filed simultaneously on June 29, 2001.
17 Following the filing of closing memoranda, the matter was taken under advisement pending the
18 submission of the Recommended Opinion and Order to the Commission.

19 * * * * *

20 Having considered the entire record herein and being fully advised in the premises, the
21 Commission finds, concludes, and orders that:

22 **FINDINGS OF FACT**

23 1. On December 27, 2000, the Division filed a Notice that alleged violations of the Act
24 which were grounds to revoke Tower's Arizona registration as a securities dealer pursuant to A.R.S.
25 § 44-1961 and to revoke Mr. Lehman's Arizona registration as a securities salesman pursuant to
26 A.R.S. § 44-1962. The Division's Notice was issued as a result of a SEC C&D Order and alleged
27 that the Respondents had been permanently enjoined from engaging in or continuing their fraudulent
28 conduct in connection with the sale or purchase of securities. The Division further alleged that Mr.

1 Lehman had been suspended from association with any broker, dealer, investment adviser or
2 investment company for a period of at least six months and that, at all relevant times, he was the sole
3 shareholder, chairman, vice president and chief compliance officer of Tower.

4 2. Tower is an Ohio corporation, the address of which is 8141 N. Main Street, Dayton,
5 Ohio 45415-1747¹.

6 3. Tower is a registered securities dealer in Arizona, and has been a registered securities
7 dealer in Arizona since January 6, 1998. Tower is an investment adviser registered with the United
8 States SEC since in or about 1988.

9 4. Lehman, whose business address is that of Tower Equities, Inc., is registered securities
10 salesman in Arizona, and has been a registered securities salesman in Arizona since November 20,
11 1998.

12 5. From at least January 1, 1997 until October 1, 2000, Lehman was the sole shareholder,
13 chairman, vice president and chief compliance officer of Respondent Tower.

14 6. From at least January 1, 1997 until October 1, 2000, Lehman was a person controlling
15 Respondent Tower.

16 7. On or about September 7, 2000, the SEC entered its order in Administrative
17 Proceeding No. 3-10024 before the SEC. Among other things in the order, the SEC:

- 18 (a) Suspended Lehman from association with any broker, dealer, investment adviser
19 or investment company for a period of nine months, effective on the second
20 Monday following entry of the order;
- 21 (b) Ordered Lehman to cease and desist from committing or causing any violation of
22 the anti-fraud provisions of the federal securities laws or investment adviser law;
23 and
- 24 (c) Ordered Tower to cease and desist from committing or causing any violation of the
25 anti-fraud provisions of the federal securities laws or investment adviser law.
- 26
27

28 ¹ Findings of Fact 2 through 39 are findings stipulated to by the parties in the Statement.

1 8. Attached to the Joint Pre-Hearing Statement marked as Exhibit A is a true and correct
2 copy of the SEC's order dated September 7, 2000.

3 9. The SEC order resulted from Offers of Settlement submitted by Tower and Lehman
4 after public administrative proceedings and cease and desist proceedings had been commenced
5 against them by the SEC on September 22, 1999.

6 10. The SEC found that Tower and Lehman had willfully violated the Securities Act of
7 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940, in that they
8 made misrepresentations of material facts and omitted to state material facts to investors regarding
9 several offerings. These offerings were:

10 (a) Tower Venture 97-A, Ltd., an Ohio limited liability company ("Tower Venture");

11 (b) Lifetime Assets, LLC; an Ohio limited liability company of which Lehman was
12 the president and managing partner ("Lifetime Assets");

13 (c) Baylor/Gavic, LLC, an Ohio limited liability company of which Lehman was the
14 president and managing partner ("Baylor/Gavic"); and

15 (d) Wellington, LLC, an Ohio limited liability company of which Lehman was the
16 president and managing partner ("Wellington").

17 11. From in or about February 1997 to in or about December 1998, Tower and Lehman
18 raised a total of approximately \$10,125,000 from their investment advisor clients for the four issues
19 just listed.

20 12. Lehman invested no money of his own in any of the four issues.

21 13. In the Tower Venture offering, Tower and Lehman represented to investors that \$10
22 million in investor funds would be used to make a "loan premium payment" to Credit Austerlitz
23 Finances, Ltd. ("Credit Austerlitz"), a European entity.

24 14. Tower and Lehman represented that in return for this \$10 million payment, Credit
25 Austerlitz would provide a \$30 million, "self-liquidating loan" to a joint venture in which Tower
26 Venture would be a partner. Respondents Tower and Lehman represented that receipt of the \$30
27 million "loan proceeds" by the joint venture would be secured by a standby letter of credit ("SLC")
28 issued by a major European bank and confirmed by a major U.S. bank.

1 15. No interest rate was stated for this \$30 million "loan." Respondents Tower and
2 Lehman represented to investors that over a ten-year period, the \$10 million "loan premium
3 payment" would be used to "liquidate" the obligation to repay \$30 million, and that the \$20 million
4 difference would never have to be repaid.

5 16. The SEC found that "this 'loan' transaction did not, and could not, exist."

6 17. The SEC found that "none of the European banks identified by Tower and Lehman
7 would have issued a standby letter of credit for the Tower Venture 'loan' transaction."

8 18. In the Tower Venture offering, Tower and Lehman represented to investors that a
9 portion of the "loan" proceeds would be used to purchase viatical insurance policies, for which
10 investors could expect to earn a return of approximately 33 percent on their invested funds after one
11 year.

12 19. The SEC found that Tower and Lehman had no reasonable basis for this representation
13 since they had no agreement with any viatical company to purchase viatical insurance policies and
14 had not conducted adequate due diligence.

15 20. With regard to each of the other three offerings listed above (Lifetime Assets,
16 Baylor/Gavic and Wellington), the SEC found that the purported use of investment proceeds in each
17 of the offerings was "a 'transaction' with a 'trading company' sponsored by a 'transaction bank' in
18 Europe."

19 21. The SEC found that Tower and Lehman had "no basis for these representations" and
20 that "Lehman and Tower Equities never had any agreement with any European bank to 'sponsor' the
21 transaction, never had any agreement with any 'trading company' and never identified any
22 'transaction.'"

23 22. In at least one of the three offerings, Respondents Tower and Lehman told investors
24 they could expect to earn returns of up to 100 percent on their investment within 25 days, or an
25 annualized rate of 1,440 percent, with minimal risk.

26 23. In its order, the SEC imposed sanctions of censure and entry of a cease and desist
27 order against Tower. The SEC did not suspend Tower's broker-dealer or investment adviser license.
28 The SEC did not require Tower to pay a financial penalty, stating its reason as follows: "The

1 Commission has reviewed the sworn financial statement and other evidence provided by Tower
2 Equities and has determined that Tower Equities does not have the financial ability to pay a civil
3 penalty.”

4 24. No Arizona residents invested in any of the four offerings that were the subject of the
5 SEC order. The investors were residents of at least fifteen different states, including New York,
6 Illinois, Rhode Island, Georgia, Ohio, Nevada, Michigan, Missouri, Tennessee, California, South
7 Carolina, Utah, Kentucky, Florida and Wisconsin.

8 25. All investors' monies were refunded to them, with interest.

9 26. Tower did not receive compensation for its participation in any of the four offerings
10 that were the subject of the SEC order.

11 27. Since October 1, 2000, Respondent Tower had been wholly-owned by a holding
12 company, Tower Investment Services, Inc.

13 28. From October 1, 2000 to May 1, 2001, the ownership of the holding company, Tower
14 Investment Services, Inc., was as follows: 50 percent S&P Business Trust, 16.66 percent Heath
15 Lehman, 16.66 percent Greg Merrick, and 16.66 percent Kenneth Wiseman.

16 29. S&P Business Trust is an Ohio business trust. For purposes of the present proceeding
17 only, the Division and Respondents stipulate that this business trust is 100 percent owned by Sara
18 Ann Merrick, wife of Respondent, Philip Lehman. Accordingly, Lehman's wife has indirectly held
19 ownership of at least 50 percent of Respondent Tower since October 1, 2000.

20 30. Sara Merrick is not registered or licensed as a securities dealer or salesman, or as an
21 investment banker or investment adviser representative, in any jurisdiction of the United States.

22 31. Heath Lehman is the son of Philip Lehman.

23 32. Greg Merrick is the son of Sara Merrick and stepson of Philip Lehman.

24 33. Since October 1, 2000, Respondent Lehman has not been a director or officer of
25 Tower.

26 34. On or about May 1, 2001, Heath Lehman ceased to own his 16.66 percent share of the
27 holding company, Tower Investment Services, Inc., and that share became treasury stock of the
28 corporation. This action had the effect of concentrating the voting control of the remaining

1 shareholders of the holding company, including Sara Merrick who indirectly holds 50 percent
2 ownership of Respondent Tower. Accordingly, Sara Merrick presently holds, in substantive effect,
3 more than 50 percent voting control of Respondent Tower.

4 35. Kenneth Wiseman is a certified public accountant and has been secretary/treasurer and
5 a director of Respondent Tower since 1984. Wiseman is the chief financial officer of Respondent
6 Tower.

7 36. Kenneth Wiseman was a sponsor of Tower Venture 97-A, Ltd., (one of the four issues
8 that were the subject of the SEC order described above), and was a director of the "forming and
9 managing member" of Tower Venture 97-A, Ltd.

10 37. Respondent Tower presently has six securities salesmen associated with it, who are
11 registered securities salesmen in Arizona. All six of these salesmen reside in and conduct their
12 business from states other than Arizona. Among them they have nine Arizona accounts, which
13 belong to not more than six Arizona families. These salesmen include Kenneth Wiseman and Philip
14 Lehman, who is presently suspended by the SEC pursuant to the order described above.

15 38. Tower employs over 140 registered representatives nationwide.

16 39. Tower introduces its Arizona accounts, on a fully-disclosed basis, to other broker-
17 dealer firms which act as clearing brokers with respect to the accounts.

18 40. At all times herein, Respondent Lehman was a control person of Tower within the
19 meaning of A.R.S. § 44-1961(B).

20 41. Respondent Lehman did not argue against the imposition of a sanction of revocation
21 as a consequence of the SEC C&D Order. However, Respondent Tower argued that the SEC's C&D
22 Order was not the equivalent of a permanent injunction "by order, judgment or decree of an
23 administrative tribunal or a court of competent jurisdiction" pursuant to A.R.S. § 44-1961(A)(9) and
24 that Respondent Lehman was no longer a controlling person of Tower pursuant to A.R.S. § 44-
25 1961(B) so that Tower should not be subject to possible sanctions by the Commission up to, and
26 including the revocation of Tower's registration as a dealer in Arizona.

27 42. Respondent Tower further argued that the Commission should not sanction Tower due
28 to three mitigating factors as follows:

- 1 • that the revocation Tower's registration, as a policy, would be unfair because there
- 2 was no misappropriation or loss of funds;
- 3 • that only two other jurisdictions, Ohio and Indiana, brought disciplinary actions
- 4 and only against Respondent Lehman, not Tower; and
- 5 • Arizona had no involvement in the underlying action and no Arizonans were
- 6 injured by Tower's actions.

7 43. Based upon our review of the Statement, the stipulated facts, the exhibits and the
8 closing arguments, we conclude that Respondent Lehman's registration as a securities salesman in
9 Arizona should be revoked.

10 44. Based upon our review of the Statement, the stipulated facts, the exhibits and the
11 closing arguments in this proceeding, we believe that the SEC's C&D Order merits revocation of the
12 registration of Tower. Arizona law is clear in favoring investor protection. We believe that the SEC
13 C&D Order is the equivalent of a dealer being permanently enjoined by an administrative tribunal as
14 required under A.R.S. § 44-1961(A)(9). This is true even though no Arizona investors were involved
15 in the above-described action of which Respondents Lehman and Tower were a part, and is further
16 supported in the case cited by the Division, National Labor Relations Board v. Colten, 105 F.2d 179
17 (6th Cir. 1939) which found that a cease and desist order issued by the National Labor Relations
18 Board, an administrative agency, was of the nature of an injunction.

19 CONCLUSIONS OF LAW

20 1. The Commission has jurisdiction over this matter pursuant to Article VX of the
21 Arizona Constitution and A.R.S. §§ 40-1801 et seq.

22 2. The actions and conduct of the Respondents Tower and Mr. Lehman which resulted in
23 the SEC finding fraudulent conduct and issuing a C&D Order constitute actions violative of A.R.S.
24 §§ 44-1961(A)(9) and (B) and A.R.S. § 44-1962(A)(8) and should be revoked.

25 ORDER

26 IT IS THEREFORE ORDERED that pursuant to the authority granted to the Commission
27 under A.R.S. § 44-1961, that the registration of Tower Securities, Inc. as a securities dealer be, and is
28 hereby, revoked.

1 IT IS FURTHER ORDERED that, pursuant to the authority granted to the Commission under
2 A.R.S. § 44-1962, the registration of Mr. Philip A. Lehman as a securities salesman be, and is hereby,
3 revoked.

4 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

5 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

6
7
8 CHAIRMAN

COMMISSIONER

COMMISSIONER

9
10 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive
11 Secretary of the Arizona Corporation Commission, have
12 hereunto set my hand and caused the official seal of the
13 Commission to be affixed at the Capitol, in the City of Phoenix,
14 this ____ day of _____, 2002.

15 _____
BRIAN C. McNEIL
EXECUTIVE SECRETARY

16 DISSENT _____
17 MES:mj

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SERVICE LIST FOR:

TOWER EQUITIES, INC.

DOCKET NO.

S-03439A-00-0000

Barbara A. Mallon
MALLON & JOHNSON, P.C.
19 S. LaSalle Street, Suite 1202
Chicago, Illinois 60603
Attorney for Respondents
Fax: 312-346-8896

Donald C. Zavala
SNELL & WILMER
One Arizona Center
Phoenix, AZ 85004

Robert A. Zumoff
Assistant Attorney General
ARIZONA ATTORNEY GENERAL'S OFFICE
1275 West Washington Street
Phoenix, Arizona 85007

W. Mark Sendrow, Director
Securities Division
ARIZONA CORPORATION COMMISSION
1300 West Washington Street
Phoenix, Arizona 85007