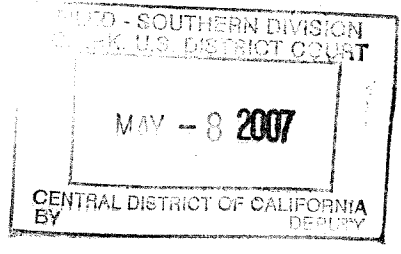


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6 Attorneys for THOMAS A. SEAMAN,
RECEIVER

7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

10
11 SECURITIES AND EXCHANGE
COMMISSION,
12
13 Plaintiff,

14 v.

15 LAMBERT VANDER TUIG (a/k/a/
LAMBERT VANDER TAG a/k/a/
16 DEAN I. VANDER TAG), THE
CAROLINA DEVELOPMENT
17 COMPANY, INC. (a/k/a THE
CAROLINA COMPANY AT
PINEHURST, INC.), AND
18 JONATHAN CARMAN,
19
20 Defendants.

Case No. SACV06-172-AHS (MLGx)
Complaint Filed: February 16, 2006

- RECEIVER'S:**
- (1) NOTICE OF MOTION FOR AN ORDER TO DISGORGE ILL-GOTTEN GAINS FROM CERTAIN SALES AGENTS;
 - (2) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF;
 - (3) DECLARATION OF NORMA V. GARCIA IN SUPPORT THEREOF; AND
 - (4) DECLARATION OF RECEIVER THOMAS A. SEAMAN IN SUPPORT THEREOF

Date: June 4, 2007
Time: 10:00 a.m.
Place: Courtroom. 10A
411 W. Fourth Street
Santa Ana, California

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26 COPY

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Cases

In re Alpha Telecom, Inc., et al.,
2004 U.S. LEXIS 20002 (D.Or. 2004)3, 4, 6, 7, 12, 14

EEOC v. Pan American World Airways, Inc.,
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8 F.3d 653 (9th Cir. 1993)14

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SEC v. First Pacific Bancorp,
142 F.3d 1186 (9th Cir. 1998)3, 10, 13

SEC v. JT Wallenbrock & Assoc., et al.,
440 F.3d 1109 (9th Cir. 2006)3, 10, 13, 14

SEC v. Wencke,
783 F.2d 829 (9th Cir. 1986)3

Statutes

15 U.S.C. Sections 77v(a), 78aa3

Central District Rule 7-34

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 4, 2007, at 10:00 a.m., or as soon thereafter as counsel may be heard in Department 10A of the above-named court, located at 411 West Fourth Street, Santa Ana, California, the Court appointed Receiver Thomas A. Seaman ("Receiver") will move the Court for a disgorgement order of the ill-gotten gains, plus interest, received by the following sales agents from defendant The Carolina Development Company, Inc. ("Carolina Company") totaling \$7,318,731.62:

- Scott Yard, \$1,341,216.42;
- Mark Sostak (d.b.a. Sostak, Inc.), \$463,783.50;
- Joel Davis, \$429,285.96;
- Bryan Isom (d.b.a. To The Moon, LLC), \$407,739.15;
- Craig Flournoy (d.b.a. RCB Consultants, Inc.), \$403,814.81;
- Jess Larsen (d.b.a. Empire Constructor Development, Inc.), \$401,156.92;
- Soren Svendsen, \$358,838.83;
- Fred Miller (d.b.a. New Heritage, LLC), \$330,905.46;
- Liz Quiroz (d.b.a. Lighthouse Investment Group, Inc.), \$324,237.64;
- Mark Thurman, \$319,360.36;
- Harold O'Laughlin, \$283,016.46;
- Charles Lyster (d.b.a. C Everett Enterprises), \$270,766.12;
- George Allendorf (d.b.a. West Coast Synergy), \$246,470.73;
- Mark Schmidt, \$234,693.47;
- Sean Brazney, \$203,672.15;
- Ken Iles, \$184,440.74;

- 1 • Nick Larsen (d.b.a. Empire Constructor Development, Inc.),
- 2 \$179,687.42;
- 3 • Kirk Porter (d.b.a. Lion Crest Consulting), \$157,416.17;
- 4 • Nadine Quackenbush, \$128,156.25;
- 5 • Don Anderson, \$124,658.21;
- 6 • C Dillow & Company, \$120,000;
- 7 • Egypt McGee, \$116,226.50;
- 8 • Juanita P. Resendez, \$115,346.60;
- 9 • Bob Ward, \$100,461.52; and
- 10 • Daniel C. Mack, \$73,380.23 (collectively, the "Sales Agents").
- 11 (Seaman Decl., ¶ 2.)

12 This motion is made pursuant to the Court Order Appointing Receiver
13 issued on February 16, 2006, attached to Norma V. Garcia's Declaration as
14 Exhibit "B," and the common law authority vested in this Court to issue
15 disgorgement orders. *SEC v. JT Wallenbrock & Assoc., et al.*, 440 F.3d 1109, 1113
16 (9th Cir. 2006); *In re Alpha Telecom, Inc., et al.*, 2004 U.S. Lexis 20002 (D.Or. 2004).
17 Specifically, this Court has "broad equity powers to order the disgorgement of 'ill-
18 gotten gains' obtain[ed] through the violation of federal securities laws." *SEC v. JT*
19 *Wallenbrock & Assoc., et al.*, 440 F.3d 1109, 1113 (9th Cir. 2006), *citing*, *SEC v.*
20 *First Pacific Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1998).

21 The Sales Agents were mailed notice of this motion, and some were
22 provided personal service of same, on Friday, May 4, 2007. Thus, the Sales Agents
23 were given proper notice under 15 U.S.C. sections 77v(a), 78aa, and equally
24 important, provided a meaningful opportunity to be heard. *SEC v. Wencke*, 783 F.2d
25 829, 838 (9th Cir. 1986); *see also EEOC v. Pan American World Airways, Inc.*, 897
26 F.2d 1499, 1508 (9th Cir. 1990) ("Actual knowledge of the pendency of an action
27 removes any due process concerns about notice of the litigation."); *In re Alpha*

1 *Telcom, Inc., supra*, at *12 (holding mail service is sufficient notice for nominal
2 defendants/disgorgement candidates).

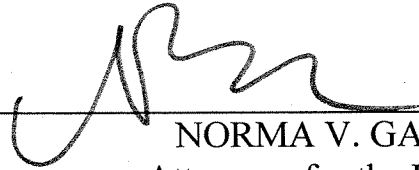
3 This motion is based upon this notice, the attached memorandum of
4 points and authorities, declaration of Norma V. Garcia, declaration of Thomas A.
5 Seaman, all pleadings, records, and documents filed herein, all matters of which the
6 Court may properly take judicial notice, and such other and further evidence or
7 argument as may be presented at the hearing on this motion.

8 This motion is made following demand letters and in some instances
9 telephonic meet and confers, pursuant to Central District Local Rule 7-3, which took
10 place between December, 2006 and January 2007.

11 DATED: May 7, 2007

12 SHEPPARD MULLIN RICHTER & HAMPTON LLP

13
14
15 By



16 NORMA V. GARCIA
17 Attorneys for the Receiver
18 THOMAS A. SEAMAN
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 The Court appointed Receiver, Thomas A. Seaman, hereby moves the
4 Court for a disgorgement order for the ill-gotten gains (or commissions), plus
5 interest, received by the following sales agents from defendant The Carolina
6 Development Company, Inc. ("Carolina Company" or "Carolina") totaling
7 \$7,318,731.62:

- 8 • Scott Yard, \$1,341,216.42;
- 9 • Mark Sostak (d.b.a. Sostak, Inc.), \$463,783.50;
- 10 • Joel Davis, \$429,285.96;
- 11 • Bryan Isom (d.b.a. To The Moon, LLC), \$407,739.15;
- 12 • Craig Flournoy (d.b.a. RCB Consultants, Inc.), \$403,814.81;
- 13 • Jess Larsen (d.b.a. Empire Constructor Development, Inc.),
14 \$401,156.92;
- 15 • Soren Svendsen, \$358,838.83;
- 16 • Fred Miller (d.b.a New Heritage, LLC), \$330,905.46;
- 17 • Liz Quiroz (d.b.a. Lighthouse Investment Group, Inc.),
18 \$324,237.64;
- 19 • Mark Thurman, \$319,360.36;
- 20 • Harold O'Laughlin, \$283,016.46;
- 21 • Charles Lyster (d.b.a. C Everett Enterprises), \$270,766.12;
- 22 • George Allendorf (d.b.a. West Coast Synergy), \$246,470.73;
- 23 • Mark Schmidt, \$234,693.47;
- 24 • Sean Brazney, \$203,672.15;
- 25 • Ken Iles, \$184,440.74;
- 26 • Nick Larsen (d.b.a. Empire Constructor Development, Inc.),
27 \$179,687.42;

- 1 • Kirk Porter (d.b.a. Lion Crest Consulting), \$157,416.17;
 - 2 • Nadine Quackenbush, \$128,156.25;
 - 3 • Don Anderson, \$124,658.21;
 - 4 • C Dillow & Company, \$120,000;
 - 5 • Egypt McGee, \$116,226.50;
 - 6 • Juanita P. Resendez, \$115,346.60;
 - 7 • Bob Ward, \$100,461.52; and
 - 8 • Daniel C. Mack, \$73,380.23 (collectively, the "Sales Agents").
- 9 (Seaman Decl., ¶ 2.)

10 The Sales Agents engaged in the sale of unregistered securities for the
11 Carolina Company. The sale of unregistered securities is a strict liability offense,
12 which requires the disgorgement of the amounts received by the agents. *In re Alpha*
13 *Telcom, Inc., et al.*, 2004 U.S. Lexis 20002 (D.Or. 2004) (disgorging commissions
14 from sales agents). Indeed, whether or not the sales agents know they are violating
15 federal securities laws by selling unregistered securities is not a defense, nor is it a
16 factor to be considered when issuing a disgorgement order. *Id.* at *22.

17 Accordingly, the Receiver respectfully requests this Court issue an
18 order to disgorge the respective ill-gotten gains, plus interest, from each Sales
19 Agent.

20 II. BACKGROUND FACTS

21 On or about February 16, 2006, the Securities and Exchange
22 Commission (the "Commission") filed a complaint against Lambert Vander Tuig
23 (a/k/a Lambert Vander Tag, a/k/a Dean L. Vander Tag, a/k/a Dean L. Vandertag),
24 the Carolina Development Company, Inc. (a/k/a The Carolina Company at
25 Pinehurst, Inc.), and Carman for violations of the Federal Securities Laws in the
26 United States Central District Court of California entitled *Securities and Exchange*

1 *Commission v. Vander Tuig et al.*, Case No. SACV06-172 AHS (ANx). (Garcia
2 Decl., Ex. "B.")

3 In its complaint, the Commission alleged that as of September 2004,
4 the Defendants fraudulently raised in excess of \$30 million from numerous investors
5 nationwide. *Id.* The Commission further alleged that the Carolina Company held
6 itself out to be a real estate development company specializing in developing resort
7 communities surrounding prestigious golf courses. *Id.* To induce individuals to
8 invest, Defendants prepared and distributed fraudulent private placement
9 memoranda, fraudulent sales materials, and published a website containing false
10 statements, among other things. *Id.*

11 On February 16, 2006, the Commission also filed for temporary
12 restraining orders and the appointment of a receiver for the Carolina Company. On
13 February 16, 2006, the Central District Court granted the restraining orders and
14 issued an order appointing the Receiver. The Order allows the Receiver to

15 "take control of the Companies' funds, assets and property
16 wherever situated, with the powers set forth herein,
17 including powers over all funds, assets, premises (whether
18 owned, leased, occupied, or otherwise controlled), choses
19 in action, books, records, and other property belonging to
20 or in the possession or control of the Companies...." (Ex.
21 "B," Order, p. 2, ¶¶ 21-25) (emphasis added).

22 The Order also requires the Carolina Company and the defendants,
23 including Carman, to,

24 ***"transfer to the Receiver, as and when directed by him,***
25 ***any and all funds, property, documents or records of the***
26 ***Companies, in whatever form,*** that may be in their
27 possession, custody or control; and that any signatories on
28 any and all the Companies' accounts at banks, brokerage
firms or financial institutions which have possession,

1 custody or control of any assets or funds in the name of or
2 for the benefit of the Companies, shall forthwith take all
3 steps necessary to relinquish their signatory authority as to
4 said accounts . . ." (Garcia Decl., Ex. "B," Order, p. 8: 9-
17)(emphasis added).

5 Also on February 16, 2006, the Central District Court issued a freeze
6 order, freezing all bank accounts and assets of the Carolina Company, including
7 Carman's assets (the "Freeze Order"). (Garcia Decl., Ex. "C.")

8 On April 7, 2006, the Central District Court issued an order expanding
9 the scope of the receivership (the "Expanded Order"), which also provides that
10 Carman shall transfer all assets in his custody and/or control to the Receiver. (Garcia
11 Decl., Ex. "D.")

12 On February 22, 2007, this court granted the Commissions Motion for
13 Summary Judgment against Vander Tuig, finding that Vander Tuig had in fact
14 violated the federal securities laws. (Garcia Decl., ¶ 7.) The Court further ordered
15 that \$29,252,000 be disgorged from Vander Tuig. *Id.*

16 Since his appointment, the Receiver has worked diligently to recover
17 all assets belonging to the Receivership Entities. (Seaman Decl., ¶ 2.) To that end,
18 the Receiver conducted a thorough accounting of the Carolina Company's assets,
19 books, check register, and cash flow. (Seaman Decl., ¶ 2.) Specifically, the Funds
20 In Transit Form, a company record, discovered by the Receiver identified each
21 Carolina Company sales representative by investor and the amount invested in the
22 Carolina. Indeed, through the Receiver's thorough review of the Carolina
23 Company's books he learned that the following 25 Sales Agents, together, received
24 \$7,318,731.62 in commissions for their sale of the unregistered Carolina Company
25 common stock:

- 26 • Scott Yard, \$1,341,216.42;
- 27 • Mark Sostak (d.b.a. Sostak, Inc.), \$463,783.50;

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- Joel Davis, \$429,285.96;
- Bryan Isom (d.b.a. To The Moon, LLC), \$407,739.15;
- Craig Flournoy (d.b.a. RCB Consultants, Inc.), \$403,814.81;
- Jess Larsen (d.b.a. Empire Constructor Development, Inc.), \$401,156.92;
- Soren Svendsen, \$358,838.83;
- Fred Miller (d.b.a New Heritage, LLC), \$330,905.46;
- Liz Quiroz (d.b.a. Lighthouse Investment Group, Inc.), \$324,237.64;
- Mark Thurman, \$319,360.36;
- Harold O'Laughlin, \$283,016.46;
- Charles Lyster (d.b.a. C Everett Enterprises), \$270,766.12;
- George Allendorf (d.b.a. West Coast Synergy), \$246,470.73;
- Mark Schmidt, \$234,693.47;
- Sean Brazney, \$203,672.15;
- Ken Iles, \$184,440.74;
- Nick Larsen (d.b.a. Empire Constructor Development, Inc.), \$179,687.42;
- Kirk Porter (d.b.a. Lion Crest Consulting), \$157,416.17;
- Nadine Quackenbush, \$128,156.25;
- Don Anderson, \$124,658.21;
- C Dillow & Company, \$120,000;
- Egypt McGee, \$116,226.50;
- Juanita P. Resendez, \$115,346.60;
- Bob Ward, \$100,461.52; and
- Daniel C. Mack, \$73,380.23.

(Seaman Decl., ¶¶ 2-3, Ex. "I.")

1 The Receiver's accounting further demonstrated the commission checks
2 received by the Sales Agents ranged from less than \$50 to \$200,000, that they were
3 issued generally between January 2004 and February 16, 2006, and that they were
4 issued to the Sales Agents as individuals and at times to their affiliate corporate
5 names.¹ *Id.* at ¶ 3. In every instance, the commission checks came directly from the
6 Carolina Company. *Id.* at ¶ 3.

7 Importantly, on April 5, 2006, this Court issued its Findings of Fact and
8 Conclusions of Law in Support of Preliminary Injunction, where it found that some,
9 if not all, investors did not take the proper steps to confirm the investors were
10 accredited. (Garcia Decl., Ex. "G.") Indeed, the Court found, in part, that "[a]t least
11 some of the sales representatives failed to qualify potential investors by asking them
12 their income and net worth." (Garcia Decl., Ex. "G."; Findings of Fact and
13 Conclusions of Law, ¶ 74.) The Court further found that "[a]t least one sales
14 representative claimed individuals could aggregate their income or net worth if they
15 could not qualify individually." *Id.*

16 Equally important, in or about February 2007, the Court also issued its
17 Findings of Fact and Conclusions of Law in Support of Motion for Summary
18 Judgment, where the Court found that ". . .the Commission has shown that
19 Defendants [Vander Tuig and Carman], directly or indirectly, offered and sold
20 unregistered Carolina Company common stock. Defendants have not met their
21 burden of establishing that an exemption from registration applies." (Garcia Decl.,
22 Ex. "F," Conclusions of Law No. 7.) It is undisputed that defendants Vander Tuig
23 and Carman sold the unregistered securities through the Sales Agents. It is also
24 undisputed that the Sales Agents sold unregistered securities and received
25 substantial sums of money in the form of commissions for the sale of same.

26
27 ¹ The corporate affiliations are identified above in parenthesis next to each
Sales Agent's name.

1 **III. LEGAL ANALYSIS**

2 **A. This Court Has Authority To Disgorge The Sales Agents' Ill-Gotten**
3 **Gains.**

4 This Court has "broad equity powers to order the disgorgement of 'ill-
5 gotten gains' obtain[ed] through the violation of federal securities laws." *SEC v. JT*
6 *Wallenbrock & Assoc., et al.*, 440 F.3d 1109, 1113 (9th Cir. 2006), *citing, SEC v.*
7 *First Pacific Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1998). This Court has broad
8 discretion in calculating the amount to be disgorged from the agents. *Id.* at 1113.
9 Indeed, the calculation requires only a "reasonable approximation of profits causally
10 connected to the violation." *Id.* at 1113-1114, *quoting, First Pac. Bancorp*, 142 F.3d
11 1186, 1192. But the "amount of disgorgement should include 'all gains flowing
12 from the illegal activities.'" *Id.* at 1114, *quoting, SEC v. Cross Fin. Servs.*, 908
13 F.Supp. 718, 734 (C.D.Cal. 1995) The purpose of disgorgement is to "deprive a
14 wrongdoer of unjust enrichment, and to deter others from violating securities laws
15 by making violations unprofitable."

16 **1. The Commissions Received By The Sales Agents From The**
17 **Carolina Company Constitute Their Ill-Gotten Gains, And As**
18 **Such, Must Be Disgorged.**

19 This Court issued its conclusions of law on [date], 2007, finding that
20 that Vander Tuig directly or indirectly, engaged in the sale of unregistered
21 securities. (Garcia Decl., Ex. "F," Conclusions of Law, No. 7.) ("...the Commission
22 has shown that Defendants, directly or indirectly, offered and sold unregistered
23 Carolina Company common stock. Defendants have not met their burden of
24 establishing that an exemption from registration applies."). *The sale of*
25 *unregistered securities is a "strict liability offense, regardless of whether [the*
26 *agent] knew it was wrong."* *In re Alpha Telcom, Inc., et al.*, 2004 U.S. Dist. Lexis
27 20002, *22 (disgorging commissions from sales agents)(emphasis added). Where
28

1 sales agents were compensated for "furnishing illegal services," the "law cannot
2 permit them to benefit from the sale of unregistered securities[,]" and as such, the
3 "agents must disgorge the amount by which they were unjustly enriched." *Id.* at 22.

4 In *In re Alpha Telcom, Inc.* the sales agents sold investment contracts
5 for public pay phones, an unregistered security. 2004 U.S. Dist. Lexis 20002 (D.Or.
6 2004). The investors were promised 30% of the pay phone net revenues, even if
7 their specific phone did not generate any income. *Id.* After the court held the
8 investment contract was an unregistered security, the Receiver brought a motion to
9 disgorge approximately \$21MM in ill-gotten gains from 165 sales agents. The
10 Court held the ill-gotten gains should be disgorged because the sale of unregistered
11 securities is a strict liability offense. *Id.* at *22. The court acknowledged that its
12 holding made the agents "guarantors of the products" they sold. *Id.* at *22. The
13 court reasoned that risk of such liability would encourage true due diligence. *Id.* at
14 *22 Specifically, the court stated that "[i]f an agent has doubts about the integrity of
15 the product, or whether it is an unregistered security, the agent should not sell the
16 product. Faced with the risk of disgorgement, due diligence might really be diligent,
17 instead of an exercise in papering the file." *Id.*

18 Here, it is undisputed that the Sales Agents sold unregistered common
19 stock for the Carolina Company. The Receiver's accounting of the Carolina
20 Company discovered that, together, the Sales Agents received a total of
21 \$7,084,038.15 in commissions for the sale of unregistered securities. (Seaman Decl.,
22 ¶ --.) Indeed, each Sales Agent received several checks from the Carolina Company
23 constituting their respective commissions, ranging from less than \$50 to \$200,000,
24 from January 2004, to February 2006.² (Seaman Decl., ¶ 3, Ex. "I.") More

25
26 ² A worksheet listing the check numbers, the date each check issued, and
27 amounts issued to each Sales Agent is attached to the Receiver's declaration
28 as Exhibit "F."

1 specifically, each Sales Agent received the following commissions from the
2 Carolina Company:

- 3 • Scott Yard, \$1,341,216.42;
- 4 • Mark Sostak (d.b.a. Sostak, Inc.), \$463,783.50;
- 5 • Joel Davis, \$429,285.96;
- 6 • Bryan Isom (d.b.a. To The Moon, LLC), \$407,739.15;
- 7 • Craig Flournoy (d.b.a. RCB Consultants, Inc.), \$403,814.81;
- 8 • Jess Larsen (d.b.a. Empire Constructor Development, Inc.),
9 \$401,156.92;
- 10 • Soren Svendsen, \$358,838.83;
- 11 • Fred Miller (d.b.a New Heritage, LLC), \$330,905.46;
- 12 • Liz Quiroz (d.b.a. Lighthouse Investment Group, Inc.),
13 \$324,237.64;
- 14 • Mark Thurman, \$319,360.36;
- 15 • Harold O'Laughlin, \$283,016.46;
- 16 • Charles Lyster (d.b.a. C Everett Enterprises), \$270,766.12;
- 17 • George Allendorf (d.b.a. West Coast Synergy), \$246,470.73;
- 18 • Mark Schmidt, \$234,693.47;
- 19 • Sean Brazney, \$203,672.15;
- 20 • Ken Iles, \$184,440.74;
- 21 • Nick Larsen (d.b.a. Empire Constructor Development, Inc.),
22 \$179,687.42;
- 23 • Kirk Porter (d.b.a. Lion Crest Consulting), \$157,416.17;
- 24 • Nadine Quackenbush, \$128,156.25;
- 25 • Don Anderson, \$124,658.21;
- 26 • C Dillow & Company, \$120,000;
- 27 • Egypt McGee, \$116,226.50;

28

- Juanita P. Resendez, \$115,346.60;
- Bob Ward, \$100,461.52; and
- Daniel C. Mack, \$73,380.23.

(Seaman Decl., ¶¶ 2-3, Ex. "I.")

This Court has broad discretion in calculating the amount to be disgorged from the agents. *Id.* at 1113. According to the Ninth Circuit, the calculation need only a "reasonable approximation of profits causally connected to the violation." *Id.* at 1113-1114, quoting, *First Pac. Bancorp*, 142 F.3d 1186, 1192. ***But the "amount of disgorgement should include 'all gains flowing from the illegal activities.'"*** *Id.* at 1114, quoting, *SEC v. Cross Fin. Servs.*, 908 F.Supp. 718, 734 (C.D.Cal. 1995)(emphasis added.). The Receiver's accounting sets forth unequivocally the total sum each Sales Agent received from the Carolina Company for their respective involvement in the sale of unregistered securities. Accordingly, the amounts sought by this motion constitute "all gains flowing from the illegal activities."

2. The Sales Agents Are Not Entitled To Any Set-Offs.

The Sales Agents will likely contend they are entitled to set-offs for expenses, or in some instances, where they invested their own money in the Carolina Company. The Ninth Circuit has held, however, that a disgorgement candidate is *not* entitled to a set-off for the amount of money he/she invested in the company. *SEC v. JT Wallenbrock & Associates, et al.*, 440 F.3d 1109, 1117, (As we noted in *First Pacific Bancorp*, 'the fact that [a defendant's] scheme ultimately failed and he lost \$1,000,000 of his own funds [does not] release him from his [disgorgement] obligations.'"), quoting, *First Pac. Bancorp*, at 1192. Indeed, the court in *JT Wallenbrock & Associates* held that "[t]he district court did not abuse its discretion in ordering disgorgement of \$409,798 against [defendant] despite his loss on the \$1.2 million he invested in the pyramid scheme. *Id.* at 1117.

1 Further, the court in *In re Alpha Telecom, Inc.* held that agents "are 'not'
2 entitled to a set-off." 2004 U.S. Dist. Lexis 20002, *25. The Court does, however,
3 have "**discretion** to allow a reasonable set-off, if appropriate under the
4 circumstances." *Id.* at *25, citing, *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450,
5 1474-75 (2d Cir. 1996)(emphasis added). The Ninth Circuit provides that the
6 amount disgorged cannot exceed "the amount by which the agent was unjustly
7 enriched, plus interest." *Id.*, citing, *Hateley v. SEC*, 8 F.3d 653 (9th Cir. 1993).

8 Here, the Receiver seeks only the amount each Sales Agent received
9 from the Carolina Company, plus interest, which constitutes the amount by which
10 each Sales Agent was unjustly enriched. The Receiver urges the Court to follow
11 Ninth Circuit precedent denying set-offs for expenses incurred by individuals
12 involved in the sale of unregistered securities. In *SEC v. JT Wallenbrock & Assoc.*,
13 for instance, the Ninth Circuit held that the district court's decision not to deduct
14 expenses from a disgorgement order was not abuse of discretion. 440 F.3d
15 1109,1114. The Ninth Circuit went on to state that "it would be unjust to permit the
16 defendants to offset against the investor dollars they received the expenses of
17 running the very business they created to defraud those investors into giving the
18 defendants the money in the first place." *Id.*

19 Accordingly, the Receiver respectfully requests the Court issue an
20 order to disgorge the respective ill-gotten gains, plus interest, from each Sales Agent
21 – without set-offs.

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IV. CONCLUSION

For the foregoing reasons, the Receiver respectfully requests the Court grant this motion and issue an order to disgorge the respective ill-gotten gains, plus interest, from each Sales Agent.

DATED: May 7, 2007

SHEPPARD MULLIN RICHTER & HAMPTON LLP

By



NORMA V. GARCIA
Attorneys for the Receiver
THOMAS A. SEAMAN

DECLARATION

1 *funds, property, documents or records of the Companies, in whatever form*, that
2 may be in their possession, custody or control; and that any signatories on any and
3 all the Companies' accounts at banks, brokerage firms or financial institutions which
4 have possession, custody or control of any assets or funds in the name of or for the
5 benefit of the Companies, shall forthwith take all steps necessary to relinquish their
6 signatory authority as to said accounts . . ." (Ex. "B," Order, p. 8: 9-17)(emphasis
7 added).

8 5. Also on February 16, 2006, the Central District Court issued a
9 freeze order, freezing all bank accounts and assets of the Carolina Company,
10 including Vander Tuig's and Carman's assets (the "Freeze Order"). A true and
11 correct copy of the Freeze Order is attached hereto as Exhibit "C."

12 6. On April 7, 2006, the Central District Court issued an order
13 expanding the scope of the receivership (the "Expanded Order"), also providing that
14 Vander Tuig and Carman shall transfer all assets in his custody and/or control to the
15 Receiver. A true and correct copy of the Expanded Order is attached hereto as
16 Exhibit "D."

17 7. On February 22, 2007, this Court granted the Commissions
18 Motion for Summary Judgment against Vander Tuig, finding that Vander Tuig had
19 in fact violated the federal securities laws. The Court further ordered that
20 \$29,252,000 be disgorged from Vander Tuig. A true and correct copy of the Court's
21 Order granting the Motion for Summary Judgment is attached hereto as Exhibit "E."
22 A true and correct copy of the Proposed Statement of Facts and Conclusions of Law
23 are also attached hereto as Exhibit "F."

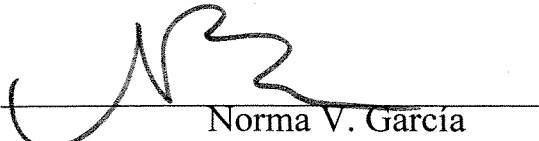
24 8. On or about April 5, 2006, this Court issued its Findings of Fact
25 and Conclusions of Law in Support of Preliminary Injunction. A true and correct
26 copy is attached hereto as Exhibit "G."

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9. On or about December 7, 2006, the Receiver mailed a demand letter to each Sales Agent, requesting that the ill-gotten gains be returned to the Receiver for benefit of the estate immediately. True and correct copies of the letters mailed to the 25 sales agents are attached hereto as Exhibit "H."

10. Some of the sales agents contacted me via telephone and in writing. To date, not one sales agent has returned the commissions they received from the Carolina Company.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct and that I executed this declaration on May 7, 2007 at Costa Mesa, California.


Norma V. Garcia

DECLARATION

- 1 • Soren Svendsen, \$358,838.83;
- 2 • Fred Miller (d.b.a New Heritage, LLC), \$330,905.46;
- 3 • Liz Quiroz (d.b.a. Lighthouse Investment Group, Inc.),
- 4 \$324,237.64;
- 5 • Mark Thurman, \$319,360.36;
- 6 • Harold O'Laughlin, \$283,016.46;
- 7 • Charles Lyster (d.b.a. C Everett Enterprises), \$270,766.12;
- 8 • George Allendorf (d.b.a. West Coast Synergy), \$246,470.73;
- 9 • Mark Schmidt, \$234,693.47;
- 10 • Sean Brazney, \$203,672.15;
- 11 • Ken Iles, \$184,440.74;
- 12 • Nick Larsen (d.b.a. Empire Constructor Development, Inc.),
- 13 \$179,687.42;
- 14 • Kirk Porter (d.b.a. Lion Crest Consulting), \$157,416.17;
- 15 • Nadine Quackenbush, \$128,156.25;
- 16 • Don Anderson, \$124,658.21;
- 17 • C Dillow & Company, \$120,000;
- 18 • Egypt McGee, \$116,226.50;
- 19 • Juanita P. Resendez, \$115,346.60;
- 20 • Bob Ward, \$100,461.52; and
- 21 • Daniel C. Mack, \$73,380.23.

22 3. My accounting further demonstrated the commission checks
23 received by the Sales Agents ranged from less than \$50 to \$200,000, that they were
24 issued generally between January 2004 and February 16, 2006, and that they were
25 issued to the Sales Agents either as individuals, or to their affiliate corporation. I
26 created a spreadsheet identifying the date, number, and dollar amount for every
27 check each sales agent received from the Carolina Company. A true and correct
28

1 copy of the spreadsheet is attached hereto as Exhibit "I." Importantly, every
2 commission check received by the Sales Agents came directly from the Carolina
3 Company.

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5 I declare under penalty of perjury under the laws of the State of
6 California and the United States of America that the foregoing is true and correct,
7 and that this Declaration was executed this 7th day of May 2007 at
8 Irvine, California.

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12 THOMAS A. SEAMAN
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