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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

MARC SPITZER, Chairman
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2004 APR -2 A 10: 24

AZ CORP COMMISSION
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In the matter of:

WORLDWIDE FOREX, INC.
Steven Labell, Registered Agent
700 North Hiatus Road, Suite 203
Pembroke Pines, Florida 33026

UNIVERSAL FX, INCORPORATED
Darren C. Blum, P.A., Registered Agent
8751 West Broward Boulevard
Plantation, Florida 33324

DAVID BRIDGES
c/o WORLDWIDE FOREX
700 North Hiatus Road, Suite 203
Pembroke Pines, Florida 33026

Respondents.

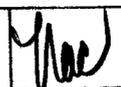
Docket No. S-03541A-03-0000

**SECURITIES DIVISION'S RESPONSE
TO RESPONDENTS' MOTION TO
VACATE SECOND PROCEDURAL
ORDER AND IN THE ALTERNATIVE,
MOTION TO SET ASIDE DEFAULT**

Arizona Corporation Commission

DOCKETED

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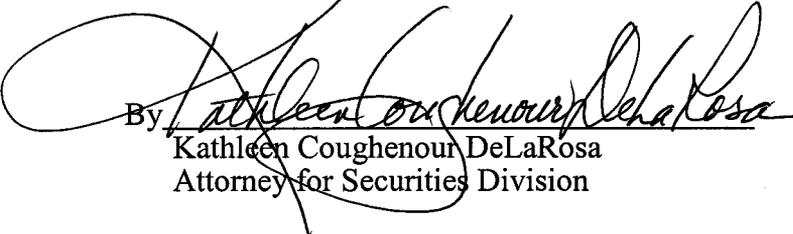
DOCKETED BY 

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") responds in opposition to Respondents' Motion to Vacate Second Procedural Order and in the Alternative, Motion to Set Aside Default ("Motion to Set Aside"). Respondents are not entitled to an order setting aside the default order. They were in default effective January 24, 2004, and took no reasonable action to cure that default within a reasonable time thereafter. Their conduct is not justified by mistake, inadvertence, or excusable neglect. This motion is supported by the record herein and by the following Memorandum of Points and Authorities.

...
...
...

1 RESPECTFULLY SUBMITTED this 2nd day of April, 2004.

2 ARIZONA CORPORATION COMMISSION
3 SECURITIES DIVISION

4
5 By 
6 Kathleen Coughenour DeLaRosa
7 Attorney for Securities Division

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. FACTS.**

10 On or about October 28, 2003, the Division served the Respondents according to law with a
11 Temporary Order to Cease and Desist and Notice of Opportunity for Hearing. A Florida attorney
12 acting on behalf of Respondents, who is not admitted to practice in Arizona, filed an answer and
13 request for hearing on or about November 26, 2003. On December 4, 2003, the Commission
14 entered its First Procedural Order ("FPO") requiring Respondents' Florida attorney either to
15 associate counsel admitted to practice in Arizona and/or to be admitted *pro hac vice* to practice in
16 Arizona. The FPO included the following provisions:

17 IT IS THEREFORE ORDERED that the Request filed on
18 behalf of Worldwide, UFX and Mr. Bridges shall be held in
19 abeyance for ***45 days from the date of receipt of this Procedural
20 Order by Respondents' counsel.***

21 IT IS FURTHER ORDERED that upon the ***timely*** filing by
22 Respondents' counsel of a Motion PHV, a pre-hearing conference
23 will be scheduled.

24 IT IS FURTHER ORDERED that if Respondents' counsel
25 fails to file a Motion PHV ***in a timely fashion outlined above,*** the
26 Respondents ***will be in default.***

FPO at page 2, lines 10-16 (emphasis added).

In the Commission's Second Procedural Order ("SPO"), dated March 11, 2004, the Hearing Officer indicated Respondent's counsel had received a copy of the FPO on December 8, 2003 (SPO at page 2, lines 13-14). As a result, Respondents' counsel was required to file a Motion and

1 Consent for Admission Pro Hac Vice with the Commission on or before January 24, 2004. (Id. at
2 page 2, lines 14-15.)

3 Neither Respondents' Florida attorney, nor the Arizona attorneys with whom he indicated
4 he would associate, filed any further documents with the Commission indicating compliance with
5 the FPO on or before January 24, 2004. Instead, on or about February 6, 2004, the law firm of
6 Roshka Heyman & DeWulf, PLC, Paul J. Roshka, Jr. and James M. McGuire, filed a document
7 entitled Notice of Appearance of Local Counsel. In that document, they stated they were entering
8 their appearance on behalf of the Respondents herein. The Division thereafter filed a Motion for
9 Entry of Default ("Default Motion"), requesting the Commission to issue an order confirming that
10 Respondents were in default for failure to comply with the FPO, and mailed copies of the Default
11 Motion to both attorneys for Respondents. The Commission thereafter issued its SPO, confirming
12 that the Respondents were in default, and ordering the Division to submit a default order to the
13 Commission.

14 Respondents have now come before the Commission seeking relief from default. They
15 claim they never received their copies of the Default Motion, and that, in any case, default should
16 not be entered because of excusable neglect and because of the policy favoring litigation of
17 meritorious claims. Respondents' positions are not well-founded, and their motion should be
18 denied.

19 **II. RESPONDENTS HAVE NOT DEMONSTRATED THAT THEY ARE ENTITLED**
20 **TO RELIEF FROM THE COMMISSION'S ORDERS.**

21 **A. Respondents Were in Default Before Respondents' Florida Attorney Even**
22 **Attempted to Comply with the FPO.**

23 The Commission's Hearing Officer properly concluded that Respondents' initial filing, by a
24 Florida attorney, could not be an effective filing on behalf of Respondents. The Arizona Supreme
25 Court's rules provide, in part:

26 *No person shall practice law in the State of Arizona without being
admitted to the bar by compliance with the following rules, provided
that an attorney practicing in another state . . . may be permitted . . .*

1 to appear in a matter pro hac vice, in accordance with the procedures
set forth in subpart (d) of this Rule.

2 Ariz. R. S. Ct. 33(c) (emphasis added). The practice of law in Arizona is defined to include
3 “representing another in a judicial, quasi-judicial, or administrative proceeding,” Ariz. R. S.
4 Ct. 31(A)(3). Rule 33 sets out specific procedures for admission pro hac vice.

5 The Commission’s FPO required Florida counsel to secure admission pro hac vice and file
6 evidence thereof with the Commission. The FPO further provided that, if he did not *timely*
7 comply, the Respondents *would be in default* as of 45 days from the time Florida counsel received
8 the FPO. As a result, the Division’s motion requesting that the Hearing Officer enter an order
9 specifically providing for the default was a request that he perform a ministerial act. The
10 Respondents were already in default as of January 24, 2004. The SPO was simply a confirmation
11 that Respondents had not complied with the FPO and, in fact, had been in default since January 24,
12 2004. The Division’s motion, unlike a motion in superior court, did not toll and could not have
13 tolled the time for compliance with the deadline set in the FPO.

14 As a result, Respondents’ arguments regarding whether or not they received the Division’s
15 Default Motion are entirely irrelevant to the issue of whether default was proper in this matter, and
16 whether the Commission should set aside the SPO. The parties were already in default. The
17 Division’s Default Motion merely requested an order confirming the terms of the FPO, that the
18 Respondents were in default because they had failed to comply with the terms of the FPO within
19 the time set by that order. Respondents’ arguments about whether or not they received the Default
20 Motion thus have no impact on the decision in this matter.

21 The facts are simple: Respondents’ counsel did not timely file the documents required by
22 the Commission. As a result, Respondents were in default as of January 24, 2004. The SPO
23 merely confirmed that fact. It should not be set aside.

24 . . .
25 . . .
26 . . .

1 **B. Respondents Have Failed to Establish That They Meet the Requirements for**
2 **Relief from Default.**

3 The Commission plainly advised Respondents of the time limit within which they must
4 engage counsel properly admitted in Arizona, or within which their counsel must be admitted *pro*
5 *hac vice* and file an appropriate appearance on their behalf. Neither of those actions occurred
6 within the appropriate time frame. Instead, a Phoenix law firm filed a Notice of Appearance
7 thirteen days *after* the deadline set in the FPO.

8 The Arizona Supreme Court has “consistently held that a motion to set aside a default
9 judgment may be granted *only* when the moving party has demonstrated *each of the following*:
10 that its failure to file a timely answer was excusable under one of the subdivisions of rule 60(c);
11 that it acted promptly in seeking relief from the default judgment; and that it had a substantial and
12 meritorious defense to the action.” *Daou v. Harris*, 139 Ariz. 353, 358-59, 678 P.2d 934, 939-40
13 (1984) (emphasis added).

14 Respondents have not excused their failure timely to comply with the Commission’s order
15 to appear through properly admitted counsel. Indeed, “mere carelessness is not sufficient reason to
16 set aside a default judgment.” *Daou*, 139 Ariz. at 359, 678 P.2d at 940. The test is “whether the
17 neglect or inadvertence is such as might be the act of a reasonably prudent person under similar
18 circumstances.” *Id.* A “party’s mere neglect, inadvertence or forgetfulness without any reasonable
19 excuse” will not provide grounds to undo a default judgment. *Sax v. Superior Ct., Pima Cty.*, 147
20 Ariz. 518, 520, 711 P.2d 657, 659 (1985).

21 The facts of this case, and the arguments of counsel, closely resemble those in *General*
22 *Electric Capital Corp. v. Osterkamp*, 172 Ariz. 191, 836 P.2d 404 (App. 1992), *rev. denied*. In that
23 case, the California defendant had retained Arizona counsel to represent her in an action filed by
24 General Electric Capital Corporation (“GECC”). *See id.* at 192, 836 P.2d at 405. GECC filed an
25 application for default pursuant to the Arizona Rules of Civil Procedure, Rule 55(A)(2). *Id.* In
26 accordance with that rule, default was to become effective on January 11, 1990. *Id.* The

1 defendant's Arizona attorney filed an answer on January 19, and followed up with a motion to set
2 aside default on January 29, "asserting that the failure to timely answer was due to excusable
3 neglect." *Id.*

4 The court recognized that

5 [T]he good cause which the defaulting party must show in order to
6 set aside entry of default under Ariz. R. Civ. P. 55(c), is the same as
7 that necessary to set aside a judgment by default. This requires that
8 the party moving to set aside the default must meet with
requirements of Ariz. R. Civ. P. 60(c)(1), 16 A.R.S., by showing
mistake inadvertence, surprise or excusable neglect.

9 *Osterkamp*, 172 Ariz. at 194, 836 P.2d at 407 (citations omitted in part). The court observed that
10 the motion to set aside the default was based on the attorney's erroneous conclusion that he would
11 be entitled to relief from the default under the circumstances of the case, despite clear indications
12 to the contrary. *See id.* The court specifically stated:

13 [A]n attorney's misunderstanding or ignorance of the rules of civil
14 procedure is not the type of excuse contemplated in Rule 60(c) as a
15 sufficient ground for vacating the entry of default or default
judgment. Moreover, the fault of the attorney is attributable to the
client.

16 *Id.* (citations omitted). The court also noted that if a party does not, as a matter of law, make a
17 showing of excusable neglect, the tribunal need not address whether the applicant met the
18 requirements of a meritorious defense and prompt application for relief. *Id.*

19 An attorney's misunderstanding or misinterpretation of the plain language of the
20 Commission's order likewise cannot be a basis for vacating the SPO and setting aside the default in
21 this matter. The order clearly set out what the Florida attorney was required to do within 45 days,
22 and plainly stated that, if he failed to timely comply, the Respondents would be in default as of the
23 45th day. The SPO simply responded to the Division's request that the Commission confirm that
24 the Respondents, indeed, had been in default since January 24, 2004.

25 Respondents have not demonstrated that they are entitled to any of the relief they seek.
26 They are not entitled to have the Commission set aside the FPO, the SPO, or the default.

1 **III. CONCLUSION.**

2 For all of the foregoing reasons, and based upon the record herein, the Division requests
3 that the Commission deny Respondents' Motion to Set Aside.

4 RESPECTFULLY SUBMITTED this 2nd day of April, 2004.

5 ARIZONA CORPORATION COMMISSION
6 SECURITIES DIVISION

7 By 
8 Kathleen Coughenour DeLaRosa
9 Senior Counsel
10 1300 West Washington, 3rd Floor
11 Phoenix, Arizona 85007
12 Attorney for Securities Division

13 ORIGINAL and 13 copies
14 of the foregoing filed this
15 2nd day of April, 2004, with:

16 Docket Control
17 Arizona Corporation Commission
18 1200 West Washington Street
19 Phoenix, Arizona 85007

20 And

21 COPY of the foregoing mailed/
22 delivered this 2nd day of
23 April, 2004, to:

24 Hon. Marc E. Stern
25 Hearing Division
26 Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

delivered

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