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EXCEPTION RECEIVED

BEFORE THE ARIZONA CORPORATION

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JIM IRVIN  
Commissioner-Chairman

RENZ D. JENNINGS  
Commissioner

WILLIAM A. MUNDELL  
Commissioner

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IN THE MATTER OF:

DOCKET NO. S-03177A-98-0000

FOREX INVESTMENT SERVICES  
CORPORATION  
2700 North Central Avenue, Suite 1110  
Phoenix, Arizona 85004

RESPONDENTS' EXCEPTIONS TO  
RECOMMENDED OPINION AND ORDER

et al.,

Respondents.

Pursuant to A.A.C. R14-3-110(B), Respondents<sup>1</sup> submit their Exceptions to the Recommended Opinion and Order. These Exceptions are supported by the following Memorandum of Points and Authorities.

DATED this 10th day of March, 2000.

ROSHKA HEYMAN & DEWULF, PLC

By  
Paul J. Roshka, Jr.  
Alan S. Baskin  
Two Arizona Center  
4 00 North 5th Street, Suite 1000  
Phoenix, Arizona 85004  
Attorneys for Respondents

<sup>1</sup> The term "Respondents" as used in this pleading refers to all Respondents with the exception of Respondent James Charles Simmons, Jr.

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## MEMORANDUM OF POINTS AND AUTHORITIES

In the Notice of Opportunity for Hearing filed in this matter, the Securities Division (“the Division”) named nine different individuals and four different corporate entities as Respondents. The hearing in this matter spanned three months, involved twenty hearing dates and resulted in thousands of pages of transcripts. This matter involves numerous issues, including issues of first impression before the Commission, along with issues regularly considered by the Commission. Respondents filed four separate briefs, which totaled over one hundred pages, related to the various issues presented. The Division’s pleadings also exceeded one hundred pages.

The Recommended Opinion and Order (“ROO”) ignores the meritorious arguments raised by Respondents and simply grants, word-by-word, the relief requested by the Division. Respondents respectfully submit that there is no evidentiary or legal basis for the Findings of Fact and Conclusions of Law in the ROO. In light of the voluminous pleadings already filed in this matter, however, Respondents will not repeat their arguments in their entirety herein. Rather, Respondents will simply note their exceptions and refer the Commission to the portions of the pleadings filed by Respondents<sup>2</sup> that support the relevant exception. Respondents’ exceptions are as follows:

1. The ROO is in error because Congress has preempted the Commission from regulating transactions in foreign currency, and the Commission does not have jurisdiction over this matter. (MTD, at 1-13; RMTD, at 1-10.)
2. The ROO is in error because Congress preempted, through the Federal Arbitration Act, the State’s action for restitution, and the Commission cannot order restitution against Respondents. (MTD, at 14-16; RMTD, at 10-14.)

26 <sup>2</sup> The pleadings filed by Respondents will be cited as follows: 1) Respondents’ Motion to Dismiss Re: Lack of Jurisdiction and Motion to Dismiss Securities Division’s Claim for Restitution will be cited as “MTD”; 2) Respondents’ Reply in Support of  
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1 Assuming arguendo that the Commission has jurisdiction over this matter, Respondents note the  
2 following additional exceptions:

- 3 1. The ROO is in error because Respondents FISC, EVFL, Tokyo, Mr. Cho, Mr. Tam, Ms. Yuen, Mr.  
4 Cheng and Mr. Sharma have no primary liability for any violations of the Arizona Securities Act.  
5 (“the Act.”) (PHM, at 10-22; RPHM, at 3-20.)
- 6 2. The ROO is in error because Respondents EVG, Tokyo, Mr. Tam, Ms. Yuen, Mr. Cheng, Mr.  
7 Sharma, Mr. Lee and Mr. Suen are not liable as controlling persons pursuant to A.R.S. § 44-1999  
8 for any violations of the Act. (PHM, at 23-37; RPHM, at 20-23.)
- 9 3. Assuming arguendo that any Respondents are controlling persons, the ROO is in error because  
10 Respondents acted in good faith and did not directly or indirectly induce the conduct at issue, and  
11 are therefore not liable for any alleged violations of the Act. (PHM, at 38; RPHM, at 23-26.)
- 12 4. The ROO is in error because none of the Respondents have violated the anti-fraud provisions of  
13 the Act. (PHM, at 39-41; RPHM, at 3-20.)
- 14 5. The ROO is in error because it proposes that the Commission make a negative inference against  
15 certain Respondents. (PHM, at 36-37.)
- 16 6. The ROO is in error because there is no factual or legal basis for its recommended order of the  
17 payment of restitution and administrative penalties by Respondents. (PHM, at 42-43; RPHM, at  
18 26-27.)

## 19 CONCLUSION

20 The Commission does not have jurisdiction over this matter because Congress has preempted the  
21 Commission from regulating transactions in foreign currency. Congress has also preempted, through the  
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23 Motion to Dismiss will be cited as “RMTD”; 3) Respondents’ Post-Hearing Memorandum will be cited as “PHM”; and 4)  
24 Respondents’ Response to Securities Division’s Post-Hearing Memorandum will be cited as “RPHM.”  
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1 Federal Arbitration Act, the State's action for restitution, and the Commission cannot order restitution  
2 against Respondents.

3 To the extent the Commission believes it has jurisdiction in this matter, the Division has failed to  
4 establish either primary or secondary liability under the Act as to the Respondents. The Division has  
5 also failed to establish any violations of the registration and anti-fraud provisions of the Act. Finally,  
6 the Division has failed to provide a basis for any restitution order or administrative penalties. The  
7 Commission must dismiss all allegations against Respondents.  
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9 ROSHKA HEYMAN & DEWULF, PLC

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12 By \_\_\_\_\_  
13 Paul J. Roshka, Jr.  
14 Alan S. Baskin  
15 Two Arizona Center  
16 4 00 North 5th Street, Suite 1000  
17 Phoenix, Arizona 85004  
18 Attorneys for Respondents  
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1 ORIGINAL and ten copies of the  
2 foregoing hand-delivered  
3 this 10th day of March, 2000 to:

4 Docket Control  
5 Arizona Corporation Commission  
6 1200 West Washington Street  
7 Phoenix, Arizona 85007

8 COPY of the foregoing hand-delivered  
9 this 10th day of March, 2000 to:

10 Mark C. Knops  
11 Senior Counsel  
12 Securities Division  
13 Arizona Corporation Commission  
14 1300 West Washington, 3rd Floor  
15 Phoenix, Arizona 85007

16 Hearing Officer  
17 Hearing Division  
18 Arizona Corporation Commission  
19 1200 West Washington  
20 Phoenix, Arizona 85007

21 Robert A. Zumoff  
22 Office of the Attorney General  
23 1275 West Washington  
24 Phoenix, Arizona 85007

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