



REHEARING

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BEFORE THE ARIZONA CORPORATION COMMISSION

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RENZ D. JENNINGS
Commissioner
WILLIAM A. MUNDELL
Commissioner

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Arizona Corporation Commission

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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

APPLICATION FOR REHEARING

et al.,

Respondents.

Pursuant to A.A.C. R14-3-112, Respondents¹ submit their Application for Rehearing. This Application is supported by the following Memorandum of Points and Authorities.

DATED this 7th day of April, 2000.

ROSHKA HEYMAN & DEWULF, PLC

By

Paul J. Roshka, Jr.
Alan S. Baskin
Two Arizona Center
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Phoenix, Arizona 85004
Attorneys for Respondents

¹ 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

Respondents respectfully submit that there is no evidentiary or legal basis for the Findings of Fact and Conclusions of Law in the Order issued by the Commission in this matter. In light of the voluminous pleadings already filed in this matter, Respondents will not repeat their arguments in their entirety herein. Rather, Respondents will simply note the basis of each argument in this Application and refer the Commission to the portions of the pleadings filed by Respondents² that support the relevant argument. The Commission should grant a rehearing for the following reasons:

1. Pursuant to A.A.C. R14-3-112(C)(6), (7), the Commission should grant a rehearing because Congress has preempted the Commission from regulating transactions in foreign currency, and the Commission does not have jurisdiction over this matter. The Commission's determination that it has jurisdiction erroneously applied the law and was contrary to law. A.A.C. R14-3-112(C)(6), (7); (MTD, at 1-13; RMTD, at 1-10.)
2. Pursuant to A.A.C. R14-3-112(C)(6), (7), the Commission should grant a rehearing because Congress preempted, through the Federal Arbitration Act, the State's action for restitution, and the Commission cannot order restitution against Respondents. The Commission's determination that it has the power to order restitution erroneously applied the law and was contrary to law. A.A.C. R14-3-112(C)(6), (7); (MTD, at 14-16; RMTD, at 10-14.)

Assuming arguendo that the Commission has jurisdiction over this matter, the Commission should grant a rehearing for the following additional reasons:

1. Pursuant to A.A.C. R14-3-112(C)(6), (7), the Commission should grant a rehearing because Respondents FISC, EVFL, Tokyo, Mr. Cho, Mr. Tam, Ms. Yuen, Mr. Cheng and Mr. Sharma have

² 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

1 no primary liability for any violations of the Arizona Securities Act. (“the Act.”) The
2 Commission’s determination that these individuals are primarily liable: a) erroneously applied the
3 law; b) was contrary to law; and c) was not justified by the evidence. A.A.C. R14-3-112(C)(6),
4 (7); (PHM, at 10-22; RPHM, at 3-20.)

5 2. Pursuant to A.A.C. R14-3-112(C)(6), (7), the Commission should grant a rehearing because
6 Respondents EVG, Tokyo, Mr. Tam, Ms. Yuen, Mr. Cheng, Mr. Sharma, Mr. Lee and Mr. Suen
7 are not liable as controlling persons pursuant to A.R.S. § 44-1999 for any violations of the Act.
8 The Commission’s determination that these individuals are controlling persons: a) erroneously
9 applied the law; b) was contrary to law; and c) was not justified by the evidence. A.A.C. R14-3-
10 112(C)(6), (7); (PHM, at 23-37; RPHM, at 20-23.)

11 3. Assuming arguendo that any Respondents are controlling persons, the Commission should grant a
12 rehearing because Respondents acted in good faith and did not directly or indirectly induce the
13 conduct at issue, and are therefore not liable for any alleged violations of the Act. The
14 Commission’s rejection of the good faith defense: a) erroneously applied the law; b) was contrary
15 to law; and c) was not justified by the evidence. A.A.C. R14-3-112(C)(6), (7); (PHM, at 38;
16 RPHM, at 23-26.)

17 4. Pursuant to A.A.C. R14-3-112(C)(6), (7), the Commission should grant a rehearing because none
18 of the Respondents violated the anti-fraud provisions of the Act. The Commission’s determination
19 that Respondents violated the anti-fraud provisions: a) erroneously applied the law; b) was
20 contrary to law; and c) was not justified by the evidence. A.A.C. R14-3-112(C)(6), (7); (PHM, at
21 39-41; RPHM, at 3-20.)
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27 Motion to Dismiss will be cited as “RMTD”; 3) Respondents’ Post-Hearing Memorandum will be cited as “PHM”; and 4)
Respondents’ Response to Securities Division’s Post-Hearing Memorandum will be cited as “RPHM.”

- 1 5. Pursuant to A.A.C. R14-3-112(C)(6), (7), the Commission should grant a rehearing because the
2 Order incorrectly makes a negative inference against certain Respondents. This determination: a)
3 erroneously applied the law; b) was contrary to law; and c) was not justified by the evidence.
4 A.A.C. R14-3-112(C)(6), (7); (PHM, at 36-37.)
- 5 6. Pursuant to A.A.C. R14-3-112(C)(5), (6), (7), the Commission should grant a rehearing because
6 the Order contains no factual or legal basis for ordering the payment of restitution and
7 administrative penalties by Respondents or for the amount of penalties imposed. The evidence
8 presented at hearing did not warrant any penalties against Respondents and the penalties imposed
9 were excessive. As such, the Order of restitution: a) erroneously applied the law; b) was contrary
10 to law; c) was not justified by the evidence; and d) imposed excessive penalties. A.A.C. R14-3-
11 112(C)(5), (6) and (7); (PHM, at 42-43; RPHM, at 26-27.)

12
13 **CONCLUSION**

14 For the foregoing reasons, the Commission should vacate the Order and grant a rehearing.

15
16 **ROSKA HEYMAN & DEWULF, PLC**

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1 ORIGINAL and ten copies of the
2 foregoing hand-delivered
3 this 7th day of April, 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 7th day of April, 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

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