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BEFORE THE ARIZONA CORPORATION COMMISSION

CARL J. KUNASEK

Chairman

JIM IRVIN

Commissioner

RENZ D. JENNINGS

Commissioner

JUN 21 9 42 AM '99

DOCUMENT CONTROL

In the matter of

DOCKET NO. S-03177A-98-0000

FOREX INVESTMENT SERVICES

CORPORATION

2700 N. Central Ave., Suite 1110

Phoenix, AZ 85004

SECURITIES DIVISION'S
OBJECTIONS TO FORM OF
PROCEDURAL ORDER

EASTERN VANGUARD FOREX LTD.

2700 N. Central Ave., Suite 1110

Phoenix, AZ 85004

c/o HWR Services Limited, Registered Agent

P. O. Box 71, Craigmuir Chambers

Road Town, Tortola

British Virgin Islands

Arizona Corporation Commission
DOCKETED

JUN 21 1999

EASTERN VANGUARD GROUP LIMITED

c/o AMS Trustees Limited, Registered Agent

Creque Building, Main Street, P. O. Box 116

Road Town, Tortola

British Virgin Islands

DOCKETED BY *rac*

K. (DAVID) SHARMA

Eastern Vanguard Forex Ltd.

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Road Town, Tortola

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PETER SUEN SUK TAK

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- INTERNATIONAL INVESTMENT LTD.)
- 10 1800 Van Ness Ave., 2nd Fl.)
- San Francisco, CA 94109)
- 11 WING MING TAM)
- c/o Tokyo International Investment Ltd.)
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- 13 San Francisco, CA 94109)
- 14 GUO QUAN ZHANG)
- c/o Tokyo International Investment Ltd.)
- 15 1800 Van Ness Ave., 2nd Fl.)
- San Francisco, CA 94109)
- 16 **Respondents.**)
- 17)
- 18)

19

20 The Securities Division ("Division") of the Arizona Corporation Commission ("Commission")

21 hereby objects to the form of the Procedural Order issued by the Hearing Division on June 18, 1999

22 ("June 18th Order") in the above-captioned matter. The Division's objections are grounded as follows.

23 **I.**

24 **THE DIVISION DID NOT AGREE TO PROVIDE RESPONDENTS WITH ANY**

25 **SUPPLEMENTAL NOTICE OF AUTHORITIES**

26 The Order states that the Division "agreed" to provide certain citations to legal authority

"requested" by Respondents during an "procedural conference" held on June 2, 1999. The Division

1 respectfully disagrees with this characterization. On that June 2nd, the Division and Respondents' counsel
2 telephonically contacted the Hearing Officer for the sole purpose of scheduling a date and time for the
3 pending oral argument. During this informal off-the record conversation, the Division advised that it
4 would support some of its briefed arguments with additional authority. Respondents' counsel
5 immediately demanded that the Hearing Officer require the Division to prepare and provide a Notice of
6 Supplemental Authorities to Respondents before the argument, citing for authority only that counsel's
7 procedural practice in federal court. The Division objected to any such procedural requirement for an oral
8 argument on questions of law in an administrative hearing, particularly since the Division was defending
9 against Respondents' own motions for dismissal of the Division's case on jurisdictional grounds. Purely
10 as a matter of courtesy and not because of any erstwhile claim of procedural "fairness" by Respondents,
11 the Division did volunteer to provide Respondents' counsel with a preview copy of an as-yet unpublished
12 three-page administrative decision from a sister state securities regulatory agency that the Division
13 anticipated citing for persuasive purposes in its oral argument. The Division also indicated it would also
14 try to provide Respondents' counsel with an informal list of some other authorities it might refer to in oral
15 argument, but no comprehensive list or deadline was ever specified or promised by the Division. As a
16 matter of common sense it would have been patently illogical and contradictory for the Division to
17 oppose a procedural requirement for a Notice of Supplemental Citation and yet "agree" to provide the
18 same to Respondents' counsel absent an express ruling to do so by the Hearing Officer.

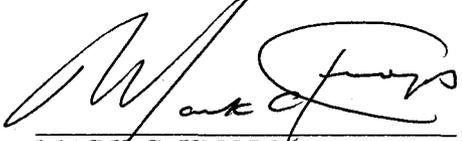
19 The Hearing Officer issued a Procedural Order on June 3rd ("June 3rd Order"), scheduling the oral
20 argument for the following June 18th. This June 3rd Order was silent as to any matter involving the
21 provision of legal citations to Respondents' counsel. Nor was any other writing docketed in this matter
22 memorializing any alleged "agreement" by the Division in this regard or otherwise entered into by the
23 Division. The Division did in fact provide Respondents' counsel one day before the scheduled oral
24 argument with a courtesy letter listing other authorities as well as a copy of the administrative decision.
25 These items, together with a follow-up fax sent the same day adding one additional citation inadvertently
26 left out, are attached hereto and incorporated herein as Exhibit A.

1 legal research to assist Respondents' own motions to dismiss the Division's case. Respondents' counsel in
2 this hearing are skilled and experienced practitioners in securities regulatory litigation. They come before
3 the Commission on an equal footing with the Division. The scheduled oral argument was originally
4 requested last January by the Division on pure questions of law to defend against Respondents' own
5 dismissal motions filed *last November*. Respondents have briefed these motions twice. By this time,
6 professional practitioners like Respondents' counsel must surely be presumed to be well grounded in all
7 questions of law raised or implicated by their own motions. Yet Respondents' counsel was heard to
8 complain during the June 18th telephonic conference that he had not seen any of the authorities provided
9 by the Division the preceding day and required a continuance to review them. Such a response speaks
10 more to the frivolous nature and purpose of Respondents' motions to dismiss than to any conceivable due
11 process abridgement .

12 Respondents may well celebrate the artful procurement by their counsel of yet another delay and
13 procedural novelty in this hearing. The Division regrets that such manipulations so effectively undercut
14 the expedited public relief this special form of proceeding was intended to serve.

15
16 RESPECTFULLY SUBMITTED AND DATED this 18th day of June, 1999.

17
18
19 JANET NAPOLITANO
Attorney General
Consumer Protection & Antitrust Section

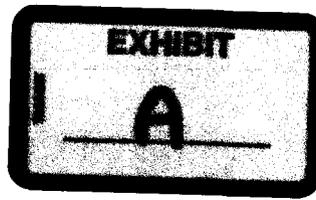
20
21
22 By: 

23 MARK C. KNOPS
Special Assistant Attorney General
Robert A. Zumoff
Assistant Attorney General
Attorneys for the Securities Division of the
24 Arizona Corporation Commission
25
26

CARL J. KUNASEK
CHAIRMAN

JIM IRVIN
COMMISSIONER

RENZ D. JENNINGS
COMMISSIONER



BRIAN C. McNEIL
EXECUTIVE SECRETARY

MARK SENDROW
DIRECTOR

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June 17, 1999

BY FAX AND FIRST CLASS MAIL

Alan S. Baskin
Roshka, Heyman & DeWulf, PLC
Two Arizona Center
400 N. 5th St., Ste. 1000
Phoenix, AZ 85004

RE: FISC

Dear Alan:

Attached as an "Exhibit" is a list of some cases and authorities other than those already cited in briefing that I may touch on during oral argument of the jurisdictional issues your clients have raised in this matter. I am also enclosing a copy of the Idaho administrative decision noted on the Exhibit.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mark C. Knops".

Mark C. Knops
Senior Counsel

:mck
Enclosures

EXHIBIT

Treasury Amendment

Johnson, the Perimeters of Regulatory Jurisdiction Under the Commodity Futures Trading Commission Act, 25 Drake L. Rev. 61 (1975) (CEA and state jurisdiction)

Securities and Exchange Commission--Commodity Futures Trading Commission Jurisdictional Correspondence, 1975 CCH Fed. Securities Law Reports ¶ 80,336 (jurisdictional grants under CEA)

Bromberg, *Commodities Law and Securities Law--Overlaps and Preemptions*, 1 J. Corp. L. (1976) (preview of later treatment in Bromberg, *Securities and Commodities Fraud*)

Davidson v. Dean Witter Reynolds, Inc., 478 F. Supp. 494 (D. Colo. 1979) (1934 Act applies to GNMA certificates)

LTV Federal Credit Union v. UMIC Government Securities, Inc., 523 F.Supp. 819 (N.D. Tex. 1981) (stock options are securities subject to fed. securities laws)

Fisher v. Dean Witter Reynolds, Inc., 526 F. Supp. 558 (E.D. Pa. 1981) (fed. securities laws apply to government securities and GNMA certificates)

First Nat. Bank of Las Vegas, N.M. v. Estate of Russell, 657 F.2d 668 (5th Cir. 1981) (1934 Act applies to government securities)

Board of Trade of City of Chicago v. S.E.C., 677 F.2d 1137 (7th Cir. 1982) (1934 Act applies to GNMA certificates)

ABM Industries, Inc. v. Oppenheimer Government Securities, Inc., 1983 CCH Fed. Securities Law Reports ¶ 99,434 (N.D. Ill. October 21, 1982) (Fed. Securities Act apply to GNMA certificates)

Berk v. Oppenheimer & Co., Inc., CCH 1983 Fed. Securities Law Reports ¶99,436 (N.D. Ill. February 18, 1983) (1934 Act applies to GNMA certificates)

ABM Industries, Inc. v. Oppenheimer Government Securities, Inc., 1983 CCH Fed. Securities Law Reports ¶ 99,435 (N.D. Ill. March 14, 1983) (fed. securities acts apply to GNMA certificates)

Abrams v. Oppenheimer Government Securities, Inc., 737 F.2d 582 (7th Cir. 1984) (fed. securities acts apply to GNMA certificates)

Abrams v. Oppenheimer Government Securities, Inc., 589 F.Supp. 4 (D. Ill. 1984) (fed. securities acts apply to GNMA certificates)

EXHIBIT

Allen, Kicking the Bucket Shop: The Model State Commodity Code as the Latest Weapon in the State Administrator's Anti-Fraud Arsenal, 42 Washington and Lee L. Rev. 889 (1985) (state jurisdiction under open season provision)

I & II P. Johnson & T. Hazen, *Commodities Regulation* (2d ed. 1989) §§ 3.98, 4.30, 4.36, 4.38, 4.40 (CEA and state jurisdiction)

One-O-One Enterprises, Inc. v. Caruso, 848 F.2d 1283 (D.C. Cir. 1988) (stock option a security subject to fed. securities laws)

Computer Concepts, Inc. v. Brandt, 310 Or. 706, 801 P.2d 800 (1990) (stock option a security subject to Oregon Securities Act)

1 Snider, *Regulation of the Commodities Futures and Options Markets* (2d ed. 1995) §§ 10.04, 10.05, 10.15, 10.19 (CEA and state jurisdiction)

State of Idaho v. International Currency Management, 1998-7-109, Disposition of Respondents Petition for Reconsideration (May 7, 1999) (CEA and state jurisdiction)

Arbitration

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 87 S. Ct. 1801 (1967) (separability)

Malcoff v. Coyier, 14 Ariz. App. 524, 484 P.2d 1053 (1971) (mutuality of obligation)

Domke Comm Arbitration §§ 4.02, 8.01, 8.02, 8.03 (Rev Ed) (separability)

U.S. Insulation, Inc. v. Hilro Const. Co., Inc., 146 Ariz. 250, 705 P.2d 490 (Ct. App. 1985) (separability)

Carroll v. Lee, 148 Ariz. 10, 712 P.2d 923 (1986) (mutuality of obligation)

Osterneck v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 841 F.2d 508 (3rd Cir. 1988) (FAA preemption)

Securities Industry Ass'n v. Connolly, 883 F.2d 1114 (1st Cir. 1989) (FAA preemption)

Broemmer v. Abortion Services of Phoenix, Ltd., 173 Ariz. 148, 840 P.2d 1013 (1992) (reasonable expectations precluded enforcement of arbitration agreement)

Cotton v. Slone, 4 F.3d 176 (2nd Cir. 1993) (waiver)

Allied-Bruce Terminix Companies, Inc. v. Dobson, 115 S. Ct. 834 (1995) (FAA)

Equal Employment Opportunity Commission v. Frank's Nursery & Crafts, Inc., ___ F.3d ___ (6th Cir. 1999), 1999 WL 235476 (no FAA preemption)

COPY

**BEFORE THE DIRECTOR OF THE DEPARTMENT OF FINANCE
OF THE STATE OF IDAHO**

STATE OF IDAHO, Department of
Finance, Securities Bureau,

Docket No. 1998-7-109

Complainant,

**DISPOSITION OF RESPONDENTS'
PETITION FOR RECONSIDERATION**

vs.

INTERNATIONAL CURRENCY
MANAGEMENT, L.L.C., and
HOWARD W. NEEDLE,

Respondents.

The Preliminary Order, together with Its Findings of Fact and Conclusions of Law, was issued April 23, 1999. On May 6, 1999, Respondents served their Petition for Reconsideration. The Petition for Reconsideration is timely. Although timely, the Petition for Reconsideration IS DENIED.

In Respondents' February 18, 1999, post-hearing memorandum, Respondents took the position that the Idaho Commodities Code, Idaho Code §30-1501, et. seq., has no application in this case under the doctrine of federal preemption. Respondents cited 7 U.S.C. § 2 and *Dunn v. CFTC*, 117 S. Ct. 913 (1997), in support of the proposition that the federal government may not regulate the type of activity at issue in this case. The hearing officer agrees.

Respondents next contended that, since the federal government cannot regulate this type of activity, then neither can a state such as Idaho. Respondents cited no authority for this proposition, and the hearing officer found none. It was

and still is concluded that, even though the federal government may not have regulatory authority in this area, that does not stop the state from passing and enforcing its own legislation under its sovereign powers to protect its own citizens.

In the Petition for Reconsideration, Respondents again want to address whether the Idaho Commodities Act is preempted. This time, instead of saying that states are preempted from exercising regulatory authority in this area because the federal government is precluded from doing so, Respondents seem to suggest that the federal government may have authority in this area and that the exercise of federal authority is exclusive, thereby prohibiting state involvement. This position is untenable.

First, assuming there is applicable federal legislation and consequent regulatory authority, that does not by itself preclude Idaho from also passing and enforcing its own legislation. Respondents have cited no authority, whether statutory or from case law, supporting the notion that a state may not regulate the type of activity we are concerned about in this case if the federal government also has authority to regulate that activity. Respondents cite *Rosner v. Gelderman, Ltd.*, [CCH] Comm. Fut. L. Rep. ¶27, 343 (SDNY 1998). It is interesting to observe that, in *Rosner*, it appears that the remedies sought against certain parties, similarly situated to Respondents here, were brought under both federal and New York state law.

Second, until this recent Petition for Reconsideration, Respondents have argued that the federal government does not have authority to regulate off-exchange foreign currency contract trading. Now, Respondents suggest that perhaps the federal government does have such authority and thereby the state is preempted. Respondents cannot flip-flop and have it both ways. Either the

federal government has authority in this area or it does not. Respondents point out that even they do not believe that *Rosner* is a correct statement of law. However, they note that *Rosner* does provide a basis upon which to assert that federal authority is present in a case such as this. Another case potentially standing for that proposition is *CFTC v. Standard Forex, Inc.*, 1993 WL 809966 (EDNY 1993). These New York Federal District Court cases are not persuasive in light of decisions from higher courts. The United States Supreme Court in *Dunn, supra*, and our own Ninth Circuit in *CFTC v. Frankwell Bullion, Ltd.*, 99 F.3d 299 (9th Cir. 1996), have unequivocally held that the federal government does not have jurisdiction to regulate off-exchange foreign currency contract trading. Although the federal government may not have that authority, that does not preclude the states from legislating in the area.

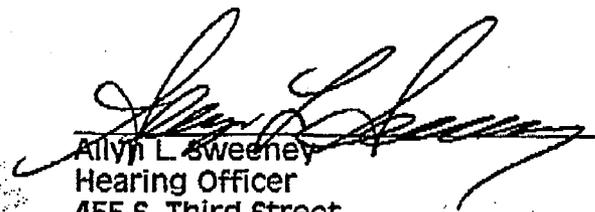
Third, the Federal District Courts in *Rosner* and *Standard Forex*, even if those cases were to be followed, still require, for federal law to apply, that the transactions at issue take place on a board of trade. The *Rosner* and *Standard Forex* courts define "board of trade" with considerable more liberality than the United States Supreme Court did in *Dunn* and our Ninth Circuit did in *Frankwell Bullion*. The point is that, even under *Rosner* and *Standard Forex*, there still must be a factual finding that a board of trade exists. That is impossible in this case. Respondent Needle testified that, with regard to the transactions at issue, there is no exchange and there is no board of trade. Transcript, P. 17, LI. 19-23; P. 109, LI. 9-13.

Respondents' Petition for Reconsideration is consequently DENIED, and the Findings of Fact, Conclusions of Law and Preliminary Order of April 23, 1999, remain in effect.

DISPOSITION OF RESPONDENTS' PETITION FOR RECONSIDERATION - 3

C:\DOCS\LSDEPT-FIN\NEEDLE\DISP-PET.REC

DATED this 7th day o May, 1999.



Aliyn L. Sweeney
 Hearing Officer
 455 S. Third Street
 P.O. Box 2773
 Boise, Idaho 83701

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May, 1999, caused to be served the following documents on the following in the method indicated below:

- U.S. Mail, postage prepaid
- Facsimile (FAX)
- Hand Delivered

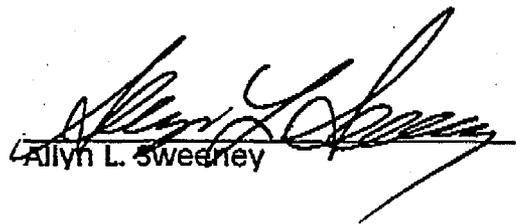
The Original hereof and one Copy to:

Scott B. Muir
 Department of Finance
 P.O. Box 83270
 Boise, ID 83270-0031

One Copy hereof to:

Howard J. Stein
 Attorney at Law
 Three First National Plaza, Ste 3750
 Chicago, IL 60602

Owen H. Orndorff
 Lori A. Dingel
 Orndorff Law Offices
 1087 West River St., Ste. 230
 Boise, ID 83702



Aliyn L. Sweeney

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Fax Cover Sheet

of pages (including Cover Sheet) 01

Date Sent Thursday, June 17, 1999 4:34:54 PM

TO: Alan S. Baskin
PHONE: 256-6100
FAX: 256-6800
FROM: Mark C. Knops
PHONE: (602) 542-0621
FAX: (602) 594-7438
NOTES: RE: my previously-faxed letter and "Exhibit," please add the following case under "Arbitration" on the Exhibit: Maxwell v. Fidelity Services, Inc., 184 Ariz. 82, 907 P.2d 51 (1995) (unconscionability).

*****WARNING*****

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2 filed this 21 day of June, 1999, with:

3 Docket Control
4 Arizona Corporation Commission
5 1200 West Washington
6 Phoenix, AZ 85007

7 COPY of the foregoing mailed and/or faxed this
8 21 day of June, 1999 to:

9 James Charles Simmons, Jr.
10 5045 N. 58th Ave. #23A
11 Glendale, AZ 85301
12 RESPONDENT PRO SE

13 Paul J. Roshka, Jr., Esq.
14 Alan S. Baskin, Esq.
15 Roshka Heyman & Dewulf, PLC
16 Two Arizona Center
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18 Phoenix, AZ 85004

19 ATTORNEYS FOR ALL RESPONDENTS EXCEPT JAMES CHARLES SIMMONS

20 By: Karen Houle
21
22
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24
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26

1 ORIGINAL AND TEN (10) COPIES of the foregoing
2 filed this 28th day of December, 1999, with:

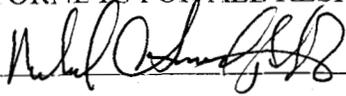
3 Docket Control
4 Arizona Corporation Commission
5 1200 West Washington
6 Phoenix, AZ 85007

7 COPY of the foregoing mailed and/or faxed this
8 28th day of December, 1999 to:

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19 ATTORNEYS FOR ALL RESPONDENTS EXCEPT JAMES CHARLES SIMMONS

20 By:  _____
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