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BEFORE THE ARIZONA CORPORATION COMMISSION

REVISED

JIM IRVIN
Commissioner-Chairman
RENZ D. JENNINGS
Commissioner
CARL J. KUNASEK
Commissioner

JAN 4 4 54 PM '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 RESPONSE
IN OPPOSITION TO RESPONDENTS'
MOTIONS TO DISMISS RE: LACK
OF JURISDICTION AND DIVISION'S
CLAIM FOR RESTITUTION**

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Arizona Corporation Commission

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17 **Respondents.**

18
19 **INTRODUCTION**

20 On November 25, 1998, counsel on behalf of all Respondents except James Charles
21 Simmons, Jr., filed in the above-captioned matter Respondents' Motion to Dismiss RE: Lack of
22 Jurisdiction and Motion to Dismiss Securities Division's Claim for Restitution ("Jurisdiction
23 Motions").¹ The Securities Division ("Division") of the Arizona Corporation Commission
24 ("ACC") hereby opposes each of these motions for the following reasons.

25
26 ¹ Neither motion was made by or on behalf of Respondent Simmons, nor has he joined or responded to them. Indeed, movants' service page attached to their motions does not even show service upon him. For purposes of this response, "Respondents" will hereafter refer to the movants only.

I
**ACC JURISDICTION OVER RESPONDENTS' VIOLATIONS OF THE
SECURITIES ACT OF ARIZONA IS NOT PREEMPTED BY THE COMMODITY
EXCHANGE ACT**

The Securities Act of Arizona ("SAA") confers on the ACC jurisdiction to administer and enforce its provisions. *See State ex rel. Corbin v. Goodrich*, 151 Ariz. 118, 121, 122, 726 P.2d 215, 218, 219 (Ariz. App. 1986); A.R.S. §§ 44-1821, -1822, -1821, -1961, -1971, -2032. This jurisdiction includes authority to regulate the offer and sale of securities in the form of commodity investment contracts. *See Goodrich*, 151 Ariz. at 121, 123, 726 P.2d at 218, 220; A.R.S. §§ 44-1801(23), -- 1841, -1842, -1991. The Division alleged in this matter that Respondents violated the SAA in connection with the offer or sale of commodity investment contracts in the form of leveraged foreign currency trading accounts. *Notice of Opportunity for Hearing Regarding Proposed Order for Relief* ("Notice of Opportunity"), pp. 6, 9-12. Respondents do not contest that the trading accounts are such commodity investment contract securities. *Hearing Transcript*, p. 3156 lines 20-25, p. 3158 lines 1-8.

A. The Commodity Exchange Act Expressly Preserves State Subject Matter Jurisdiction to Regulate Activities Including the Offer and Sale of Securities Involving Foreign Currency Transactions

1. The Original Jurisdictional Savings Clause at 7 U.S.C.A. § 2(i)

Although Respondents' Motion to Dismiss RE: Lack of Jurisdiction is predicated on their extrapolation of selected language from the "Treasury Amendment" incorporated into Section 2 of the Commodity Exchange Act² ("CEA"), nowhere in their motion do they recite either the whole Amendment or whole statutory section in which the Amendment is embedded. In interpreting any statute, the starting point is the language of the statute itself. *Commodity Futures Trading Commission v. Frankwell Bullion Ltd.*, 904 F. Supp. 1072, 1075 (N.D. Calif. 1995) ("*Frankwell I*"). Had Respondents done so, it would have been obvious on any plain reading of that section that their preemption argument is expressly foreclosed by the language and structure of the statute itself.

² 7 U.S.C.A. §1 *et seq.* Respondents misdescribe this law as the "Commodities Exchange Act". (Italics added for emphasis.) Jurisdiction Motions, p. 3 lines 13-14, p. 4 line 16.

1 Absent a clearly established intention to the contrary, the language of the statute must be regarded as
2 conclusive. 904 F. Supp. at 1075.

3 At all relevant times to this matter, the complete text of 7 U.S.C.A. § 2 has read as
4 follows:

5 § 2. Accounts, agreements, and transactions *subject to jurisdiction* of Commodity
6 Futures Trading Commission; relation to jurisdiction of Securities and Exchange
Commission and Federal and State courts; *excepted transactions*

7 (i) The Commission shall have *exclusive* jurisdiction, except to the extent otherwise
8 provided in section 2a of this title, with respect to accounts, agreements (including any
9 transaction which is of the character of, or is commonly known to the trade as, an "option",
10 "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline
11 guaranty"), and *transactions* involving contracts of sale of a commodity for *future* delivery,
12 traded or executed on a contract market designated pursuant to section 7 of this title or any
13 other board of trade, exchange, or market, and *transactions* subject to regulation by the
14 Commission pursuant to section 23 of this title. *Except as hereinabove provided*, nothing
15 contained in *this section* shall (I) *supersede or limit the jurisdiction at any time conferred on*
16 the Securities and Exchange Commission or *other regulatory authorities under the laws of*
the United States or *of any State*, or (II) *restrict* the Securities and Exchange Commission
and *such other authorities from carrying out their duties and responsibilities in accordance*
with *such laws*. Nothing in *this section* shall supersede or limit the jurisdiction conferred on
courts of the United States or any State. (ii) Nothing in *this chapter* shall be deemed to
govern or in any way be applicable to *transactions in foreign currency, security warrants,*
security rights, resales of installment loan contracts, repurchase options, government
securities, or mortgages and mortgage purchase commitments, unless such transactions
involve the sale thereof for future delivery conducted on a board of trade. (Italics added for
emphasis.)

17 The key to interpreting this statute is to recognize that it contains only two
18 subsections, (i) and (ii), and that savings clauses in the first subsection frame and limit the Treasury
19 Amendment "excepted transactions" listed in the second subsection.

20 The first subsection has three sentences. The first sentence is a congressional grant to the
21 Commodity Futures Trading Commission ("CFTC") of *exclusive* subject matter jurisdiction³ over
22 commodity futures and options on futures, and over "leverage" commodity transactions⁴ not
23 qualifying as a commodity future or futures option. See 1 A. Bromberg & L. Lowenfels, *Bromberg*

24
25 ³ The United States Supreme Court has characterized this sentence as "the exclusive-jurisdiction provision."
See *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 386, 387, 102 S.Ct. 1825, 1843, 1844, 72
L.Ed. 2d 182 (1982).

26 ⁴ See 7 U.S.C.A. § 23, as referenced in the first sentence. This category was added to subject certain precious
metals transactions to exclusive CFTC regulation and is not relevant here.

1 *and Lowenfels on Securities Fraud & Commodities Fraud* 2d ed § 4.6 (471) (1996). This grant
2 originated in the Commodity Futures Trading Commission Act of 1974 (“1974 Act”) that amended
3 the CEA to create the CFTC and its jurisdiction.⁵ See Sec. 201, Pub. L. No. 93-463, 88 Stat. 1389
4 (1974) in Laws of 93rd Congress—2nd Session, pp. 1596-97. This provision displaced the
5 jurisdiction of state securities and state commodities agencies over transactions within its ambit. 1
6 A. Bromberg & L. Lowenfels, *supra*. Except for later amendments renumbering cited sections
7 therein and referencing a jurisdictional refinement between the CFTC and the Securities and
8 Exchange Commission, the language of this first sentence has not substantially changed since its
9 enactment on October 23, 1974.

10 The second sentence is a statutory savings clause⁶ in which Congress expressly specified
11 that except for the preemptive CFTC jurisdiction “hereinabove provided,” *nothing* contained in “this
12 *section*” shall “supersede or limit the jurisdiction *at any time* conferred on ... *other regulatory*
13 *authorities* under the *laws* of ... *any State*” or “restrict ... such *other* authorities from carrying out
14 their duties and responsibilities in accordance with *such laws*.” (Italics added for emphasis.)⁷ The
15 plain meaning of the phrase “this section” is *all* of Section 2, including its subsections (i) and (ii). By
16 this savings clause, Congress expressly subordinated subsection (ii) and its “excepted transactions”
17 to this overriding preservation of subject matter jurisdiction “conferred at any time” *by state laws* on

18 ⁵ Respondents erroneously state that the “CEA created the CFTC, and gave it exclusive jurisdiction over the
19 regulation of commodities. ... All commodities trading was to be accomplished on exchanges, and regulated by the
20 CFTC.” Jurisdiction Motions, p. 4 lines 16-18. See also p. 11 lines 19-20. Respondents further err by claiming that
21 Congress gave the “Commodities Futures Trading Commission ... broad, extensive, and exclusive jurisdiction over
22 investments involving commodities.” Jurisdiction Motions, p. 3 lines 14-17. (Italics added for emphasis.) The CFTC
23 was actually created by the 1974 Act amending the CEA and only given exclusive jurisdiction over commodity *futures*
24 and options thereon, as well as the narrow category of “leverage” commodity transactions. Commodities trading is a
25 much larger industry than just commodity *futures* contracts. Commodity *forward* contracts and commodity *spot market*
26 contracts, for example, are not subject to the CEA. See 7 U.S.C.A. § 1a(11) (forward contracts excluded from CEA);
Commodity Futures Trading Commission v. Co Petro Marketing Group, Inc., 680 F.2d 573, 577-578 (9th Cir. 1982)
(cash forward contracts excluded from CEA regulation); 1 A. Bromberg & L. Lowenfels, *supra*, § 4.6 (423)
(commodity forward contracts); *Bank Brussels Lambert, S.A v. Intermetals Corp.* 779 F. Supp. 741, 748, 749
(S.D.N.Y. 1991) (CEA regulates the futures market and is inapplicable to “the huge spot market”).

⁶ *Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 675 (11th Cir. 1988). See also 1 A. Bromberg & L. Lowenfels,
supra, § 4.6 (700) (passed in 1974 “to preserve a measure of state authority”).

⁷ The current language of this second sentence is identical to that originally enacted in 1974. See Sec. 201,
Pub. L. No. 93-463, 88 Stat. 1389 (1974) in Laws of 93rd Congress—2nd Session, p. 1597. Respondents completely
ignore this savings clause.

1 “other regulatory authorities” to carry out “their duties and responsibilities in accordance with such
2 laws.” The phrase “at any time” plainly means in the past or the future.⁸ Except where they
3 contravene the exclusive jurisdiction of the CFTC, the duties and responsibilities conferred by the
4 SAA on the ACC to enforce that state law fall squarely within this Section 2(i) preservation of state
5 regulatory jurisdiction.⁹

6 Following the same direction in the third and last sentence of this first subsection, Congress
7 added a more expansive savings clause to preserve the jurisdiction of both the federal and state
8 judiciary.¹⁰ Overriding even the exclusive CFTC jurisdiction granted in the first sentence, Congress
9 mandated again that “[n]othing in *this section* shall supersede or limit the jurisdiction conferred on
10 courts of the United States or any State.” (Italics added for emphasis.)¹¹ By tracking the language of
11 “this section” found in the preceding sentence, Congress made plain its intent that federal and state
12 court jurisdiction not be limited by either the first two sentences of Section 2(i) or the Section 2(ii)
13 “excepted transactions.”

14 Having been expressly subordinated by the jurisdictional reservations in the preceding
15 second and third sentences, the language of subsection (ii) must yield and be limited by those two
16 savings clauses. The single sentence of this last subsection provides that “[n]othing in this chapter”
17 (the CEA) shall “be deemed to govern or in any way be applicable to *transactions in foreign*
18 *currency, security warrants, security rights, resales of installment loan contracts, repurchase*
19

20 ⁸ Effective May 9, 1974, the SAA was amended to add commodity investment contract to its definition of a
21 security. *Laws 1974*, Ch. 126, §§ 1, 6. Congress subsequently enacted the 1974 Act on October 23, 1974. 88 Stat.
22 1389. In 1986 the SAA definitions of commodity and commodity investment contract were amended to their present
23 language. *Laws 1986*, Ch. 220, § 1. Commodity is defined at A.R.S. § 44-1801(3) to include “any foreign currency.”
These current definitions track Sec. 1.01(d) and (e) in Part I of the Model State Commodity Code adopted on April 5,
1985 by the North American Securities Administrators Association. See NASAA Reports (CCH) ¶ 4402 at 3204. The
Code “does not purport either to prohibit or regulate those commodity transactions preempted by the federal
Commodity Exchange Act.” *Id.*, ¶ 4401 at 3201 (Preamble).

24 ⁹ This savings clause allows concurrent jurisdiction between the CFTC and the Securities and Exchange
Commission or state securities regulatory agencies over certain commodity-related securities not within the exclusive-
25 jurisdiction provision. 1 A. Bromberg & L. Lowenfels, *supra*, §4.6 (471), (472-479).

26 ¹⁰ For a discussion of the enactment of this jurisdictional savings clause, see *Curran*, 456 U.S. at 386-387, 102
S.Ct. at 1843.

¹¹ See 79A C.J.S. *Securities Regulation* §470 (1995). The current language of this third sentence is also
identical to that originally enacted in 1974. See the footnote cite above.

1 options, government securities, or mortgages and mortgage purchase commitments, unless such
2 transactions involve the sale thereof for future delivery conducted on a board of trade.” (Italics
3 added for emphasis.)¹² Taking its plain language together with that in the preceding two sentences,
4 this subsection is merely a third savings clause¹³ otherwise preserving transactions in the eight listed
5 items from *federal regulation under the CEA* unless they involve the sale of futures on a board of
6 trade.

7 Focussing exclusively on the foreign currency category in this subsection, Respondents’
8 Argument ignores the presence of the other seven financial instruments. To acknowledge these other
9 items would indeed serve to undercut their own preemption argument by forcing it into a logical
10 impasse: Congress could not intend to arbitrarily preempt just one of eight listed items from all state
11 regulatory jurisdiction, but an intent to preempt all items is patently untenable in view of widespread
12 and established state securities regulation of such items as security warrants and rights and
13 government securities.

14 Respondents mischaracterize two recent CFTC enforcement case holdings¹⁴ as providing a
15 “clear mandate” that the Amendment “does not permit regulation of the currency trading that is the
16 subject of the Division’s Notice in this matter.” Jurisdiction Motions, p. 3 lines 21-22, p. 4 lines 1-
17 3.¹⁵ These two holdings are much more limited in scope than Respondents’ portrayal and provide no
18 support for their claim of preempted state jurisdiction in this matter. The “question presented” to the
19 Supreme Court was “whether Congress has authorized the *Commodity Futures Trading Commission*
20

21 ¹² The current language of this subsection is nearly identical to that originally enacted in 1974. See the
preceding two footnotes.

22 ¹³ This characterization of current subsection (ii) is confirmed by the original drafting of its language in Sec.
201(b) of the 1974 Act, where it appears not as a separate subsection but merely as the last of three consecutive
23 sentences following the phrase “[a]nd provided further.” (Italics in original.) The preceding two sentences in this
original layout now comprise the last two savings clause sentences of current subsection (i).

24 ¹⁴ *Dunn v. Commodity Futures Trading Commission*, 519 U.S. 465, 117 S.Ct. 913, 137 L.Ed. 2d 93 (1997);
Commodity Futures Trading Commission v. Frankwell Bullion Ltd., 999 F.3d 299 (9th Cir. 1996) (hereafter referred to
as “*Frankwell II*”).

25 ¹⁵ Respondents again mischaracterize the two holdings by omitting that these holdings expressly apply to
26 CFTC jurisdiction only. Jurisdiction Motions, p. 5 lines 20-21, p. 6 lines 13-14. Only later do Respondents finally
disclose that the *Dunn* holding addressed CFTC regulatory authority. Jurisdiction Motions, p. 7 lines 4-5, 11, 12, 15-
16.

1 (CFTC or Commission) to regulate ‘off-exchange’ trading in *options* to buy or sell foreign
2 currency.” *Dunn*, 519 U.S. at ___, 117 S.Ct. at 915 (Italics added for emphasis.) Declaring the
3 “outcome of this case is dictated” by the Amendment, the Court identified the “narrow issue that we
4 must decide is whether the ... phrase (“transactions in foreign currency”) includes transactions in
5 *options* to buy or sell foreign currency.” *Id.* at ___, at 915. (Italics added for emphasis.) Their
6 holding was “plain that foreign currency *options* are ‘transactions in foreign currency’ within the
7 meaning of the statute.” *Id.* at ___, 915-916. (Italics added for emphasis.) Nothing beyond this
8 “narrow issue” of *CFTC* jurisdiction over foreign currency *options* was ever addressed by the *Dunn*
9 holding, despite Respondents’ scattershot assertion that it “does not permit regulation of the
10 currency trading that is the subject of the Division’s Notice in this matter.”

11 Similarly, the issue decided by the Ninth Circuit in this regard was “whether foreign
12 currency transactions” in the form of futures or spot trades “are exempted from *CFTC* jurisdiction
13 because they are not transactions involving sales on a board of trade” within the meaning of the
14 Amendment. *Frankwell II*, 99 F. 3d at 301. (Italics added for emphasis.) Their narrow holding was
15 that “Congress intended ‘transactions conducted on a board of trade’ to mean on-exchange trades”
16 and “to exempt all off-exchange transactions in foreign currency.” *Id.* at 304. As in *Dunn*, nothing
17 beyond this narrow issue of *CFTC* jurisdiction¹⁶ was addressed by this Ninth Circuit holding.¹⁷

18
19 ¹⁶ Indeed, the portion of the opinion containing this holding and its supporting reasoning is captioned “*CFTC*
Jurisdiction.” *Id.* (Italics added for emphasis.)

20 ¹⁷ Respondents note that *Frankwell* was a lawsuit by the CFTC and the “California Corporations
21 Commission,” Jurisdiction Motions, p. 5 lines 22-24, but failed to disclose the rest of the story. The CFTC and the
22 Commissioner of the California Department of Corporations (“DOC”) were co-plaintiffs in the original civil injunctive
23 complaint alleging violations of the CEA and of state law. See *Commodity Futures Trading Commission v. Frankwell*
24 *Bullion Ltd.*, 1994 WL 449071 (N.D. Cal.) 1 (officially unreported order denying preliminary injunction). The non-
25 CEA state law claims were pleaded under the supplemental jurisdiction of the federal court. *Id.* at 1 and n.1. In a
26 subsequent order, the district court grant summary judgment against the CEA claims because the foreign currency
transactions at issue were off-exchange and therefore “exempted from *CFTC* jurisdiction” by the Amendment. See
Frankwell I, 904 F.Supp. at 1073, 1077, 1078, 1079. (Italics added for emphasis.) With no federal claims left in the
case, the court declined to assert supplemental jurisdiction over the state law claims and dismissed them *without*
prejudice. *Id.* at 1073, 1078, 1079. The court also declined to permit defendants to amend their answer to add the
affirmative defense of preemption to the state law claims. *Id.* at 1079. Thereafter, the CFTC *alone* appealed the
summary judgment against the CEA claims to the Ninth Circuit (together with the imposition of receivership fees). See
Frankwell II, 99 F.3d at 299, 300. The DOC was not an appellant and the state law claims were never part of or
addressed in the appellate proceedings or *Frankwell II*.

1 Respondents also cite two other cases for support, both private lawsuits: *Bank Brussels*
2 *Lambert, S.A. v. Intermetals Corp.*, *supra*, n. 5 and *Kwiatkowski v. Bear Stearns Co., Inc.*, Comm.
3 Fut. L. Rep. (CCH) ¶27,224 (August 29, 1997) (S.D.N.Y.); 1997 WL 538819 (S.D.N.Y.).
4 Respondents mistakenly claim *Bank Brussels Lambert* “held that the Treasury Amendment clearly
5 exempted transactions in foreign currency from CEA coverage, and that imposition of regulatory
6 laws would wreak havoc on the free market-dependent world of foreign currency exchange.”
7 Jurisdiction Motions, p.7 line 25, p. 8 line 1. The actual *Bank Brussels Lambert* holding pertaining to
8 the CEA¹⁸ was that the foreign currency transactions at issue were in the spot instead of the futures
9 market and therefore not “within the coverage” of the CEA. 779 F. Supp. at 748. In *dicta* rejecting
10 one of “numerous contentions” made “in an effort to overcome the inapplicability of the
11 Commodities Exchange Act to the spot market for foreign currencies”, *id.*, the district court
12 responded to a theory that the Amendment did not exempt from the CEA “brokerage transactions or
13 transactions between bank and customer” in the spot market by commenting that “[t]he statute
14 unmistakably exempts foreign currency transactions ‘unless for future delivery.’” *Id.* at 751.
15 Moreover, the passage from this opinion mistakenly quoted by Respondents¹⁹ as part of the holding
16 is also merely *dicta* in the form of comment on another of the “numerous contentions.”²⁰ Nothing in
17 this opinion comforts Respondents by addressing or invading the state regulatory jurisdiction
18 expressly preserved by the §2(i) savings clause in the CEA, or supports the application of the
19 Amendment to the allegations against Respondents.

20 The unofficially reported *Kwiatkowski* district court decision dismissed four private claims
21 for relief under the CEA by citing *Dunn, supra*, for authority that the off-exchange (“over the
22

23 ¹⁸ There were three other causes of action decided in this opinion that were unrelated to the CEA.

24 ¹⁹ Jurisdiction Motions, p. 8 lines 3-8.

25 ²⁰ Respondents misquote the opening of the passage as “I know further ...”. The reported language reads “I
26 note further ...”. *Id.* at 750. Respondents also ignored the preceding paragraph in the opinion, which states: “I agree
with IM [Intermetals Corp.] that if this were a case of contracts for future delivery, the factors suggested by courts and
the CFTC would bring IM’s trading within, rather than outside, the coverage of the Act. As IM’s speculation was on
the spot market, however, and not for future delivery, those factors do not control.” *Id.* The two paragraphs taken
together follow from the holding that the CEA applies only to futures and not to spot market trading in foreign
currencies. The Amendment is peripheral to this holding.

1 counter” or “OTC”) foreign currency *futures* contracts at issue were not subject to the CEA under
2 the Amendment. 1997 WL 538819 at 1-3, 10. Contrary to Respondents assertion, nothing in
3 *Kwiatkowski* supports their claim of preemption against the ACC under the Amendment.²¹

4 In sum, Respondents did not and can not cite any reported opinion for authority that a state
5 securities regulatory agency is preempted by the Amendment from enforcing state securities law
6 against the offer and sale of securities that involve foreign currency transactions. There is no such
7 authority. Nor is there any opinion holding that the Amendment has any effect, preemptive or
8 otherwise, outside the confines of the CEA.

9 **2. The Concurrent Jurisdiction Restored to the States by the “Open**
10 **Season Provision” at 7 U.S.C.A. § 16 (e)**

11 Respondents struggle vainly to reconcile their Amendment preemption argument with the
12 statutory language at Section 16(e)²² of the CEA. Jurisdiction Motions , pp.11-13. They start from
13 the erroneous premise that the 1974 Act “gave the CFTC exclusive jurisdiction over the regulation
14 of commodities.” *Id.* at p. 11 lines 19-21. As demonstrated above, the exclusive-jurisdiction
15 provision applied only to commodity futures, leverage commodity transactions and options on
16 futures, and the savings clauses in the 1974 Act preserved state jurisdiction to regulate other
17 commodity-related transactions. Respondents then assert that in 1983 Congress amended the CEA
18 to permit states to “supplement the CFTC’s regulation of commodities in certain contexts,” *id.* at p.
19 11 lines 21-22, wrongly implying that Section 16(e) is the only authorization by the CEA of state
20 regulatory jurisdiction over commodities.

21 This subsection provides in relevant part that “[n]othing” in the CEA “shall supersede or

22 ²¹ Moreover, as Respondents acknowledge, Jurisdiction Motions, p. 6 n. 2, another court from the same district
23 subsequently undercut *Kwiatkowski* in a trio of related receivership cases resulting from a 1995 civil injunctive
24 enforcement action jointly initiated by the CFTC and the State of New York. *See Rosner v. Peregrine Finance Limited*,
25 1998 WL 249197 (S.D.N.Y.) (“*Rosner I*”); *Rosner v. Emperor International Exchange Co.*, 1998 WL 255437 (S.D.N.Y.);
26 *Rosner v. Gelderman, Ltd.*, 1998 WL 255439 (S.D.N.Y.). Following the same legal analysis in all three unofficially
reported decisions, the *Rosner* court found that the foreign currency futures contracts at issue were off-exchange
transactions conducted on a “board of trade” (in these cases, the corporation originally offering the contracts to the public),
and therefore not exempt from the CEA under the Amendment. *Rosner I* at 5-6. Furthermore, the *Rosner* court expressly
rejected *Kwiatkowski* as “unpersuasive” and “based on a misreading of *Dunn*.” *Id.* at 6.

²² 7 U.S.C.A. § 16 is codified under the heading “Commission operations.” Subsection (e) is subheaded
“Relation to other laws, departments, or agencies.”

1 *preempt* ... the application of any ... State statute, including any rule or regulation thereunder, to
2 any transaction in or involving any commodity, product, right, service, or interest ... that is not
3 conducted on or subject to the rules of a contract market, or ... (except as otherwise specified by the
4 Commission by rule or regulation) that is not conducted on or subject to the rules of any board of
5 trade, exchange, or market located outside the United States, its territories or possessions, or ... that
6 is not subject to regulation by the Commission under section 6c or 23 of this title ...". 7 U.S.C.A. §
7 16(e) (Italics added for emphasis.). The current subsection language is unchanged from that
8 originally enacted on January 11, 1983 in Section 229 of the Futures Trading Act of 1982 ("1982
9 Futures Act"). See 96 Stat. 2294 (Public Law 97-444).

10 The Congressional purpose behind this 1983 amending addition to the CEA was to *expand*
11 concurrent jurisdiction to include *off-exchange* futures and other transactions originally preempted
12 by the exclusive-jurisdiction provision under the 1974 Act.²³ The House Report accompanying its
13 bill²⁴ explained that exclusive CFTC jurisdiction over futures trading "has been largely successful in
14 regard to transactions conducted on duly constituted commodity exchanges." House Report No. 97-
15 565, Part I, 97th Cong., 2d Sess. 44, in U.S. Code Cong. & Admin. News 1982, p. 3893. But by
16 1978 "it became apparent that the CFTC's budget and resources were inadequate to control a variety
17 of off-exchange commodities activities, some of which are fraudulent in nature." *Id.* The new
18 subsection "would *explicitly* permit the application of any ... State law ... to activities of persons
19 who ... unlawfully engage in commodity transactions ... such as off-exchange futures or other
20 commodity investments," *id.*, in order to "*enhance* the authority of the States in protecting the public
21 against persons engaging in unlawful off-exchange transactions not authorized by the Act. *Id.* at
22 3952. (Italics added for emphasis.)

23 Under this provision, for example, State law enforcement agencies will be
24 able to proceed under their own laws and through local courts or administrative
25 proceedings against persons who engage in commodity *futures* transactions other
26 than on or subject to the rules of contract markets designated by the Commission.

²³ The heading for Sec. 229 of the 1982 Futures Act was "Off-Exchange Jurisdiction; Role of States." 96 Stat. 2318.

²⁴ The House bill was enacted in lieu of a Senate bill. U.S. Code Cong. & Admin. News 1982, p. 3871.

1 Similarly, persons engaged in commodity *option* or *leverage* transactions not
2 authorized by the Act or Commission regulations will not be able to successfully to
3 defend their activities based on the Commission's exclusive jurisdiction over these
4 transactions.

5 *Id.* at 3953. (Italics added for emphasis.) Through this subsection Congress would curtail
6 exclusive CFTC jurisdiction to *exchange-traded* futures, *authorized* commodity options and
7 *regulated* leverage contracts. *See id.* at 3978; *Commodity Futures Trading Commission v. American*
8 *Metals Exchange Corp.*, 775 F.Supp. 767, 779 (D.N.J. 1991). Characterized as an "open season" on
9 "off-exchange commodity frauds", *id.* at 3893, and christened "the open season provision," *id.* at
10 3971, *see American Metals, id.*, this addition restored to the states a portion of their subject matter
11 jurisdiction preempted by the 1974 Act in the first sentence and the opening exception clause of the
12 second sentence in Sec. 2(i), widening the concurrent jurisdiction already preserved by the savings
13 clause in the second sentence of Sec. 2(i). Whereas the generalized savings clause impliedly affirms
14 state law commodity regulation outside the CEA and its exclusive-jurisdiction provision, the "open
15 season" language to "explicitly permit" such state regulation expressly affirms and expands state
16 law jurisdiction over commodity transactions.

17 Despite Respondents' misguided statutory construction, the open season provision does
18 indeed trump the Amendment. Their struggle to elevate the Amendment over the provision stumbles
19 on their mistake that the Amendment's writ ever ran outside the CEA. As demonstrated above,
20 Congress acted through the Amendment in 1974 to except certain transactions from subjection to the
21 CEA while elsewhere preserving state regulatory jurisdiction over them. In 1983 Congress revisited
22 the CEA to "enhance" that state regulatory jurisdiction with its open season provision, declaring that
23 "[n]othing in this chapter [the CEA] shall supersede or preempt" the application of "any" state
24 statute to "any transaction in or involving any commodity" unless otherwise provided in Sec.
25 16(e)(2).²⁵ By the plain meaning of "[n]othing in this chapter," Congress manifestly swept therein

26 ²⁵ Indeed, the applicable and dispositive statutory construction of Sec. 16(e) with Sec. 2 is to consider the
former *in pari materia* with the Sec. 2(i) savings clause provision instead of in conflict with the Amendment. Under
this doctrine, statutes (or parts thereof) with a common purpose are *in pari materia* (upon the same matter of subject)
and should be construed together as constituting one harmonious law, even if enacted at different times without
references therein to one another, *See* 82 C. J. S. *Statutes* § 366(a) (5th Reprint—1983), or in apparent conflict or
containing apparent inconsistencies. 82 C.J.S., *supra*, at § 368. The Amendment was expressly inapplicable to the state

1 the Amendment already embedded within the CEA. Moreover, since the Amendment expressly
2 limits only CEA regulatory jurisdiction (“[n]othing in *this chapter* shall be deemed ...”), Congress’
3 subsequent open season mandate against preemption of state law clearly forecloses any implication
4 of such preemption from a CEA subsection predating the 1982 Futures Act.²⁶ The open season
5 provision neither swallowed nor rendered the Amendment inoperable, because the Amendment
6 never ran outside the CEA. The provision merely foreclosed Respondents’ implied preemption
7 argument.

8 Respondents have not raised any affirmative defense that the ACC is preempted in this
9 matter by the exclusive-jurisdiction provision of the CEA. Moreover, Respondents stipulated that no
10 investor buy or sell orders to EVFL were executed on any organized trading exchange. Hearing
11 Exhibit S-161, p. 6 lines 2-3. Therefore, the ACC has subject matter jurisdiction over Respondents
12 violations of the SAA pursuant to *both* Secs. 2(i) and 16(e) of the CEA;

13 **B. Federal “Negative” Preemption is Expressly Inapplicable By Sec. 16(e)**

14 The exercise of federal supremacy is not lightly to be presumed. *New York State Department*
15 *of Social Services v. Dublino*, 413 U.S. 405, 413, 93 S.Ct. 2507, 2513, 37 L.Ed. 2d 688 (1973). Any
16 preemption claim must overcome the assumption that the historic police powers of the states are not
17 superseded by a federal law unless that was the clear and manifest purpose of Congress. *Ray v.*
18 *Atlantic Richfield Company*, 435 U.S. 151, 157, 98 S.Ct. 988, 994, 55 L.Ed. 2d 179 (1978). Such
19 preemption is not favored in the absence of persuasive reasons. *Commonwealth Edison Company v.*
20 *Montana*, 454 U.S. 609, 634, 101 S.Ct. 2946, 2962, 69 L.Ed. 2d 884 (1981), *reh’g denied*, 453 U.S.
21 927, 102 S.Ct. 889. To avoid unintended encroachment on the authority of the states, a court

22
23 jurisdiction preserved by the generalized Sec. 2(i) savings clause that Congress subsequently enhanced with its
24 “explicit” open season bar against CEA preemption of state jurisdiction except as otherwise provided within Sec. 16(e)
25 itself. For application of the doctrine of *in pari materia* in Arizona, see *State ex rel. Larson v. Farley*, 106 Ariz. 119,
26 471 P.2d 731 (1970) (In banc); *Arizona Gunite Builders, Inc. v. Continental Casualty Company*, 105 Ariz. 99, 459 P.2d
724 (1969).

²⁶ Even assuming a facial conflict from the “[n]othing in the chapter” phrase initiating both the Amendment
and the open season provision, the former is still trumped by the latter because “if there is an unreconcilable conflict,
the latest enactment will control, or will be regarded as an exception to, or qualification of, the prior statute.” See 82 C.
J. S., *supra*, at § 368.

1 interpreting a federal statute pertaining to a subject traditionally governed by state law will be
2 reluctant to find preemption. *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 663-664, 113
3 S.Ct. 1732, 1737, 123 L.Ed. 2d 387 (1993). The subject at issue in this matter is state regulation of
4 the *offer and sale of securities* that involve foreign currency transactions, not regulation of foreign
5 currency transactions *per se*. As an exercise of its police power, the state seeks to regulate the
6 conduct of persons using this state as a base for securities operations. *Goodrich*, 151 Ariz. At 122,
7 726 P.2d at 219. This exercise of police power is historically rooted. State law exclusively governed
8 securities regulation²⁷ until 1933 and thereafter shared concurrent jurisdiction with federal law²⁸. See
9 I L. Loss & J. Seligman, *Securities Regulation* 3d ed, pp. 31-43 (1998).

10 Federal preemption may be either express or implied. *Morales v. Trans World Airlines, Inc.*,
11 504 U.S. 374, 383, 112 S.Ct. 2031, 2036, 119 L.Ed. 2d 157 (1992). As a progeny of implied
12 preemption doctrine, Respondents' negative preemption claim²⁹ for the Amendment fails before
13 Congress' explicit open season mandate that "[n]othing" in the CEA shall "preempt" the application
14 of any state statute to "any transaction in or involving any commodity" except as specifically
15 preempted in Sec. 16(e) itself. If the statute contains an express preemption clause, statutory
16 construction must first focus on the plain wording of the clause, which necessarily contains the best
17 evidence of Congress' preemptive intent. *Easterwood*, 507 U.S. at 664, 113 S.Ct. at 1737; see
18 *English v. General Electric Company*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2275, 110 L.Ed. 2d 65
19 (1990). In this instance, the plain wording of the open season provision is doubly fatal to
20 Respondents' claim. Not only is the Amendment omitted from the categories plainly preempted in
21 Sec. 16(e), but any other preemption under the CEA is expressly foreclosed by Congress, thereby

22 ²⁷ Arizona enacted blue sky laws regulating the offer and sale of securities as early as 1912. See *Laws 1912*,
23 Ch. 69. The "manifest intention" of state blue sky laws was "preventing the public from being imposed upon by
24 questionable and unsound financial schemes of fortune dreamers and dishonest promoters, and to reach all get-rich-
25 quick schemes offering to the general public their stocks and securities, under whatever name they may choose to act."
26 *Reilly v. Clyne*, 27 Ariz. 432, 441, 234 P. 35, 38 (1925).

²⁸ In enacting the Securities Act of 1933, Congress expressly recognized the concurrent jurisdiction of the
states in regulating securities. *North Star International v. Arizona Corporation Commission*, 720 P.2d 578, 582 (9th Cir.
1983); see also *Underhill Associates, Inc. v. Bradshaw*, 674 F.2d 293, 295-296 (4th Cir. 1982) (1934 Securities
Exchange Act).

²⁹ Jurisdiction Motions, pp. 8-11.

1 precluding any implication of “negative” preemption.

2 **C. Respondents’ Motion to Dismiss for Lack of Jurisdiction Should Be Denied**

3 Respondents have failed to bear their burden of overcoming the presumption of jurisdiction
4 in the ACC to enforce the SAA against Respondents’ violations of that law. In view of the foregoing
5 demonstration of the express limitations on the Amendment under the CEA and of Respondents’
6 failure to adduce any reported opinion authority holding on behalf on their argument, the ACC must
7 not abdicate or surrender its legal duty to enforce the SAA against the Respondents and their Motion
8 to Dismiss RE: Lack of Jurisdiction should be denied.

9
10 **II.**
THE ACC’S POWER TO ORDER RESPONDENTS TO PAY RESTITUTION IN
THIS MATTER IS NOT PREEMPTED BY THE FEDERAL ARBITRATION ACT

11 Pursuant to A.R.S. § 44-2032, the Division’s Notice of Opportunity in this matter requests
12 the granting of relief including, *inter alia*, payment by all Respondents of restitution to the investors
13 in foreign currency trading accounts with Respondent Eastern Vanguard Forex Ltd. (“EVFL”). *See*
14 Notice of Opportunity, p. 12 lines 20-22. Respondents’ Motion to Dismiss Securities Division’s
15 Claim for Restitution asserts such relief is preemptively barred by Sec. 2 of the Federal Arbitration
16 Act (“FAA”), 9 U.S.C.A. § 2, insofar as the investors did not submit to Respondents’ demand for
17 arbitration of claims pursuant to a provision in the EVFL Customer’s Agreement. Jurisdiction
18 Motions, pp. 14-16.

19 **A. The EVFL Arbitration Provision is Invalid Under Arizona Law and**
20 **Unenforceable Under the FAA**

21 Sec. 2 of the FAA provides that a written provision in a contract to arbitrate an existing or
22 future controversy “shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at*
23 *law or in equity for the revocation of any contract.*” (Italics added for emphasis.)³⁰ By this statute,
24 arbitration agreements are valid, irrevocable and enforceable, except to the extent any contract may

25 ³⁰ The Arizona Arbitration Act, A.R.S. 12-1501 *et seq.*, includes similar language: “A written agreement to
26 submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any
controversy thereafter arising between the parties is valid, enforceable and irrevocable, *save upon such grounds as exist*
at law or in equity for the revocation of any contract.” A.R.S. 12-1501. (Italics added for emphasis).

1 be legally revoked. L. Fenster & F. Chlapowski, *The Continuing Vitality of Volt Information*
2 *Sciences, Inc.*, 8 Securities News 1 (Spring 1998). Under the doctrine of separability, the arbitration
3 clause is considered to be an agreement independent and separate from the principal contract. *U.S.*
4 *Insulation, Inc. v. Hilro Construction Company, Inc.*, 146 Ariz. 250, 253, 705 P.2d 490, 493 (Ct.
5 App. 1985),³¹ citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801,
6 1805, 18 L.Ed. 2d 1270 (1967). The enforceability of an arbitration agreement under the FAA is
7 generally governed by state law contract formation principles. *See First Options of Chicago, Inc. v.*
8 *Kaplan*, 514 U.S. 938, 944 115 S.Ct. 1920, 1924, 131 L.Ed. 2d 985 (1995). The interpretation of
9 private contracts is ordinarily a question of state law. *Volt Information Sciences, Inc. v. Board of*
10 *Trustees of Leland Stanford Junior University*, 489 U.S. 468, 474, 109 S.Ct. 1248, 1253, 103 L.Ed.
11 2d 488 (1989). Therefore the enforceability of an arbitration provision under Sec. 2 requires it to be
12 a separately valid contract under state law.

13 Respondents' argument rests exclusively on the following provision at paragraph 16 in the
14 EVFL Customer's Agreement: "EVF has the right *at its sole election* to refer any dispute arising
15 from or relating to this agreement or to any transaction/s contract effected hereunder to arbitration in
16 accordance with the rules or regulations of EVF and/or other appropriate bodies." Hearing Exhibit³²
17 S-54. (Italics added for emphasis.) Customer's Agreements executed through Respondent Forex
18 Investment Services Corporation included an Addendum to Customer's Agreement providing
19 generally that: "THIS AGREEMENT SHALL BE GOVERNED BY THE LAW OF THE STATE
20 OF ARIZONA." Exh. S-54. (Capitals in original.) Such a choice-of-law provision in the underlying
21 contract allows the application of state arbitration law to its arbitration agreement. *See Volt*, 489 U.S.
22 at 470-479, 109 S.Ct. at 1251-1256; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52,
23 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995). Such state law in Arizona is found in the Arizona
24 Arbitration Act, A.R.S. 12-1501 *et seq.*, and the case law thereunder.

25
26 ³¹ The separability doctrine applies to the Arizona Arbitration Act. *Hilro*, 146 Ariz. at 259, 705 P.2d at 499 n.
3.

³² Hearing exhibits hereafter referenced as "Exh."

1 The clause “at its sole election” in the EVLF arbitration provision is a reservation by EVLF
2 of a unilateral option to compel arbitration. Our Court of Appeals squarely addressed just such a
3 unilateral reservation in *Stevens/Leinweber/Sullens, Inc. v. Holm Development and Management,*
4 *Inc.*, 165 Ariz. 25, 795 P.2d 1308 (Ct. App. 1990), where the arbitration provision granted to Holm
5 alone the option of selecting either arbitration or litigation to resolve disputes. *See Holm*, 165 Ariz.
6 at 27, 795 P.2d at 1310.

7 The circumstances of the present case exemplify the rationale behind the
8 United States Supreme Court’s admonition that in the course of favoring agreements
9 to arbitrate, courts must not be less vigilant in ascertaining whether a valid
10 arbitration agreement exists. The arbitration provision at issue as contained in the
11 addendum grants to one party a unilateral option to arbitrate. There is no mutual
12 obligation to submit contractual disputes to an arbitrator. Appellant Holm
13 Development had the absolute option of selecting either arbitration or litigation as
14 the means of dispute resolution ... It is clear from reading the addendum that Holm
15 Development did not promise to do anything in consideration of the rights granted to
16 it in the arbitration provision. Based on the separability doctrine the arbitration
17 provision is an independent and separate agreement, Holm Development cannot
18 “borrow” consideration from the principal contract to support the arbitration
19 provision. As a result, we conclude that the arbitration provision, which clearly lacks
20 mutuality, is void for lack of consideration.

21 A unilateral arbitration option clearly does not promote the public policy
22 favoring arbitration. This court cannot close its eyes to the reality of the facts before
23 us. The arbitration provision at issue here grants the holder of the option absolute
24 discretion to select the means of dispute resolution ... This is so grossly inequitable
25 that it runs counter to the philosophy of encouraging arbitration. By its terms, this
26 arbitration provision undermines the purpose and intent of arbitration.

27 *Id.*, 165 Ariz. at 30, 795 P.2d at 1313. Having concluded that the provision was void for lack
28 of consideration, the court affirmed the denial of a motion to compel arbitration under the Arizona
29 Arbitration Act. *Id.*

30 *Holm* is dispositive that under the separability doctrine the language “at its sole election” in
31 the EVFL arbitration provision is fatal to its viability under Arizona contract and arbitration law.
32 The EVFL provision is void for lack of consideration and therefore expressly unenforceable on
33 “grounds as exist in law or in equity for the revocation of any contract” under Congress’ savings
34 clause exception in Sec. 2 of the FAA. Regardless of any preemptive effect of the FAA, this EVFL
35 arbitration provision cannot invoke it and Respondents’ preemption argument fails with its
36 provision.

1 **B. The *Olde Discount* Decision Cited by Respondents is Not Authority for Their**
2 **Restitution Preemption Argument**

3 Respondents grossly mischaracterize the holding of *Olde Discount Corp. v. Tupman*, 1 F.3d
4 202 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1065, 114 S.Ct. 741, 126 L.Ed. 2d 704 (1994). As a
5 federal abstention doctrine decision,³³ *Olde* merely affirmed a lower court decision not to abstain
6 from issuing an injunction by narrowly holding that a nonfrivolous federal preemption claim under
7 FAA Sec. 2 necessarily falls within an exception to the abstention doctrine of *Younger V. Harris*,
8 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669 (1971). *Olde*, 1 F.3d at 204, 211, 215.³⁴ *Olde* did not
9 hold that “the state’s action to enforce its Securities Act would undermine the plaintiff’s right to
10 arbitrate,” Jurisdiction Motions, p. 15 lines 13-15, or that the FAA preempted state law authorizing
11 state officials to pursue securities fraud claims. *Id.* at lines 15-16. Respondents gleaned these
12 “holdings” from the “III. PREEMPTION” portion of the opinion, which in fact constitutes a
13 separate opinion of Judge Greenberg only as to the preemption issue. *See Olde*, 1 F.3d at 202, 206 n.
14 3.³⁵ Nothing in that separate portion is an opinion *of the court*. *See id.* at 206 n. 3. Indeed, the
15 concurring opinion by Judge Rosenn declares that state securities law is neither expressly preempted
16 by the FAA nor impliedly preempted except to the extent that it actually conflicts with the FAA. *See*
17 *Id.*, 1 F.3d at 216. Rosenn concludes there is no such conflict for preemption purposes in this case.
18 Moreover, the dissenting opinion by Judge Nygaard also concludes that the FAA does not preempt
19 the state securities law at issue authorizing relief in the form of rescission. *See Id.* Not only was no

20
21 ³³ Beside the abstention doctrine issue, the other issue on appeal was the lower court holding that the state law
22 rescission remedy was preempted by the FAA. *See Olde*, 1 F.3d at 206. The appellate court never reached the merits of
23 the preemption issue.

24 ³⁴ The holding is found in the “IV. ABSTENTION” portion of the opinion. *See Olde*, 1 F.3d at 211-215. Only
25 two of the three judges in the panel joined in this holding by separate opinions; the third judge dissented from the
26 holding in a third opinion.

³⁵ Footnote 3 to the opinion declares: “While as a matter of convenience this section of the opinion entitled
 “III. PREEMPTION” is written as if for the court, it in fact is the opinion only of Judge Greenberg.” *Olde*, 1 F.3d at
 206 n. 3. The three-judge appellate panel was badly fractured on the preemption issue. “Judge Greenberg votes to
 affirm on the grounds that the FAA preempts Delaware’s rescission remedy in these circumstances and this opinion
 reflects the reasons why he has reached this conclusion. Judge Rosenn votes to affirm [the district court] on the ground
 that the rescission remedy is barred by reason of contract law as set forth in his separate concurring opinion. Judge
 Nygaard dissents on this issue for the reasons set forth in his separate opinion.” *Id.* at 203-204. The effect

1 holding rendered by *Olde* on the merits of the preemption issue,³⁶ but a two-judge majority of the
2 panel expressly rejected the argument that the FAA preempted the remedy of rescission under a state
3 securities law.

4 Contrary to Respondents' assertions, the issue in *Olde* of FAA preemption against state
5 securities law enforcement was in fact stillborn and no progeny has issued from it over the
6 intervening years to impart authority to such preemption.

7 **C. The EVFL Arbitration Provision is Invalid Under Arizona Law Due to**
8 **Repudiation and Waiver by EVFL**

9 Under Arizona arbitration law, an untimely demand to arbitrate could constitute
10 repudiation/waiver of an arbitration clause if the repudiating party has acted so inconsistently with
11 the arbitration agreement as to waive its right to proceed under the agreement. *City of Cottonwood*
12 *v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 190, 877 P.2d 284, 189 (Ct. App. 1994).
13 Repudiation is a voluntary relinquishment of a known right that usually entails prejudice to the other
14 party. *Fann, id.* Repudiation of an arbitration clause results in waiving the repudiating party's right
15 to arbitration. Proof of waiver requires conduct inconsistent with the repudiation remedy. *Id.*
16 Inconsistency is found, *inter alia*, where a party unreasonably delays requesting arbitration. *Id.* at
17 190-191, at 289-290. Repudiation by unreasonable delay requires not only a failure to adhere to
18 time constraints in the arbitration agreement but also prejudice to the other party. *Id.* at 191, at 290.
19 Repudiation can be inferred from conduct, *id.*, but requires clear evidence of prejudice to the other
20 party as well as egregious delay. *Id.* at 192, at 291.

21 Respondents' failed to notify investors of its election to arbitrate until after July 1, 1998,
22 Exhs. R-81a, b, over six months after the closing of the FISC Phoenix office and the receipt of
23 complaint letters from certain investors, and over four months after Respondents requested a

24 ³⁶ Although the court never reached the merits of the preemption issue, the effect of Judges Greenberg and
25 Rosenn each affirming on different grounds the lower court preliminary injunction against the state rescission remedy
26 was to let stand the lower court holding that the state remedy was preempted by the FAA. This lower court holding,
reported at *Olde Discount Corporation v. Tupman*, 805 F.Supp. 1130, 1139 (D. Del. 1992), has not since been
followed in any reported opinion and apparently withered on the vine as a holding confined to its specific facts and
without broader application.

1 hearing in this matter to litigate the Division's allegations in its Notice of Opportunity. Our Court of
2 Appeals has held in similar circumstances that a delay of five weeks between responding to a
3 lawsuit and then moving to compel arbitration constituted repudiation and waiver of an arbitration
4 provision by unreasonable delay. *See Meineke v. Twin City Fire Insurance Company*, 181 Ariz. 576,
5 892 P.2d 1365 (Ct. App. 1994). Respondents clearly caused prejudice to the investors by delaying
6 their demand for arbitrate until the investors relied on the Division to obtain relief under the SAA,
7 and have waived by unreasonable delay their right to elect arbitration under the Customer's
8 Agreement provision.

9 **D. Conclusion**

10 In view of the foregoing, Respondents Motion to Dismiss Securities Division's Claim for
11 Restitution should be denied.

12 ***

13 For the foregoing reasons, Respondents' Motions to Dismiss should be denied.

14 DATED this 4th day of January, 1999.

15
16 GRANT WOODS
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17
18
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