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ORIGINAL

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BEFORE THE ARIZONA CORPORATION COMMISSION

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WILLIAM A. MUNDELL Arizona Corporation Commission
 Chairman
 JIM IRVIN
 Commissioner
 MARC SPITZER
 Commissioner

DOCKETED

JAN 24 2001

DOCKETED BY	<i>[Signature]</i>
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2001 JAN 24 P 1:21

ARIZONA CORPORATION COMMISSION DOCUMENT CONTROL

In the matter of

7 JOSEPH MICHAEL GUESS, SR.
 2911 E. Calavar Road
 8 Phoenix, Arizona 85032

9 PROGRESSIVE FINANCIAL MANAGEMENT
 2911 E. Calavar Road
 10 Phoenix, Arizona 85032

11 JAMES DOUGLAS SHERRIFFS
 5544 East Helena Drive,
 12 Scottsdale, Arizona 85254

13 RICHARD GORDON DAVIS
 4330 North 30TH Street
 14 Phoenix, Arizona 85016

15 RGD
 4330 North 30TH Street
 16 Phoenix, Arizona 85016

17 RGD ENTERPRISES, INC.
 4330 North 30TH Street
 18 Phoenix, Arizona 85016

19 IRA JOE PATTERSON
 4330 North 30th Street
 20 Phoenix, Arizona 85016

21 RANDALL WAYNE SMITH, JR.
 1905 Springlake Court
 22 Birmingham, Alabama 35215

23 BALLY OVERSEAS TRADING INC.
 1905 Springlake Court
 24 Birmingham, Alabama 35215,

Respondents.

DOCKET NO. S-03280A-⁰⁰~~98~~-0000

MOTION TO ADMIT INTO EVIDENCE A POST-HEARING EXHIBIT

26

1 The Securities Division ("Division") of the Arizona Corporation Commission
2 ("Commission") hereby moves to admit into evidence in the above-captioned proceeding proposed
3 exhibit S-141, which is attached hereto and respectively marked as an original exhibit. Pursuant to
4 A.A.C. R14-3-109(Q), the grounds for this motion are as follows:

5
6 **I.**
BACKGROUND

7 Randall Wayne Smith, Jr. ("Smith") was named as a respondent in the Notice of
8 Opportunity for Hearing Regarding Proposed Order for Relief ("Notice") docketed in this matter
9 on April 6, 2000. The Notice alleged Smith violated the registration and antifraud provisions of the
10 Securities Act of Arizona from February 1997 in connection with his offer and sale of securities
11 with other respondents including Bally Overseas Trading Inc. ("Bally"). *Notice, pp. 3-6, 8-10.* The
12 Notice alternatively alleged that Smith directly or indirectly controlled Bally within the meaning of
13 A.R.S. § 44-1999 and was jointly and severally liable to the same extent as Bally for its violations
14 of A.R.S. § 44-1991. *Notice, p. 10.* Smith was duly served with the Notice. *See Motion to Admit*
15 *into Evidence a Post-hearing Exhibit* (January 4, 2001). However, he failed to appear at the
16 administrative hearing conducted in this matter on July 25-27 and August 31, 2000. *Hearing*
17 *Transcripts, Vols. 1-4.* Smith and Bally thereafter filed written Requests for Hearing with the
18 Commission, which were denied by the Hearing Officer for untimeliness. *Sixth Procedural Order*
19 (September 26, 2000).

20 On August 10, 2000, the United States Attorney for the Northern District of Alabama filed
21 in the United States District Court a criminal Information charging Smith with one count of federal
22 wire fraud in connection with his operation of a fraudulent investment scheme from October 1,
23 1996 to April 30, 1997. *Exhibit S-138c.* A Plea Agreement in the same case was also filed that day
24 in which Smith agreed to plead guilty to the charge alleged in the Information. *Exhibit S-138b.* His
25 guilty plea was entered before the federal court on August 24, 2000. *Exhibit S-138a.* The fraud
26 scheme described in the federal criminal Information and accompanying Plea Agreement was the

1 same investment scheme alleged against Smith and Bally in the Division Notice. Smith agreed in
2 his Plea Agreement with the facts that he operated Bally from his residence as his business through
3 which he received investment funds. *Exhibit S-138b p. 2. See Exhibit S-138c pp. 1-2.* On
4 November 24, 2000, the federal court imposed judgment of guilt on Smith, sentenced him to
5 eighteen months imprisonment followed by three years of supervised release (probation) and
6 imposed criminal restitution of \$2,030,445. A court-certified copy of the federal judgment and
7 commitment order dated November 24, 2000 is attached hereto and marked as proposed exhibit S-
8 141.

9
10 **II.**
ARGUMENT

11 Proposed exhibit S-141 completes the story in regard to the federal criminal prosecution of
12 Smith for his role in the same fraudulent investment scheme alleged against him in the Division
13 Notice. The federal criminal allegations overlap the Division Notice allegations during February,
14 March and April 1997. Moreover, the judgment of guilt is predicated on the factual basis specified
15 in the Plea Agreement by Smith. In that factual basis provision, Smith admitted he operated a
16 fraudulent Ponzi scheme involving investment securities and received investor funds through his
17 operation of Bally. *Exhibit S-138b pp. 2-3.* Finally, the proposed exhibit supports the Division
18 allegations against the other respondents for their violative participation in and promotion of the
19 fraudulent investment program operated by Smith.

20 Since the proposed exhibit document was not created until after the close of hearing, it is
21 reasonable and appropriate for it now to be offered by the Division and admitted into evidence in
22 order to supplement the hearing record. Furthermore, A.A.C. R14-3-109(G) permits the Hearing
23 Officer to consent to the introduction of further evidence even after a party "has rested his case."

24 **III.**
CONCLUSION

25
26 For the foregoing reasons, the Division now moves to admit into evidence in this matter the

1 proposed exhibit S-141. The Division further requests the Hearing Officer to issue a procedural
2 order ruling on this motion as well as on its pending Motion to Admit Into Evidence a Post-
3 Hearing Exhibit (proposed exhibit S-140) that was docketed on January 4, 2001.

4
5 RESPECTFULLY SUBMITTED this 24th day of January, 2001.

6
7 JANET NAPOLITANO
8 Attorney General
9 Consumer Protection & Advocacy Section

10 BY: 

11 MARK C. KNOPS
12 Special Assistant Attorney General
13 MOIRA McCARTHY
14 Assistant Attorney General
15 Attorneys for the Securities Division
16 Arizona Corporation Commission
17
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23
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25
26

1 ORIGINAL AND TEN (10) COPIES of the foregoing
2 filed this 24th day of January, 2001, with:

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

7 COPY of the foregoing mailed this
8 24th day of January, 2001 to:

9 Joseph Michael Guess, Sr.
10 2911 E. Calavar Rd.
11 Phoenix, AZ 85032
12 RESPONDENT PRO SE

13 Peter Strojnik, Esq.
14 3030 N. Central Ave., Suite 1401
15 Phoenix, AZ 85012-2712
16 ATTORNEY FOR JAMES DOUGLAS SHERRIFFS

17 Dale L. States, Esq.
18 6724 N. 43rd Ave.
19 Glendale, AZ 85301
20 ATTORNEY FOR RICHARD G. DAVIS

21 Ira Joe Patterson
22 4330 No. 30th St.
23 Phoenix, AZ 85016
24 RESPONDENT PRO SE

25 Randall Wayne Smith, Jr.
26 1905 Springlake Court
Birmingham, AL 35215
RESPONDENT PRO SE

Christopher B. Parkerson, Esq.
Johnson & Mobley
2101 Fourth Avenue South, Ste. 200
Birmingham, AL 35233

By: Karen Houle

UNITED STATES DISTRICT COURT
Northern District of Alabama

FILED

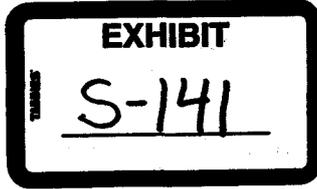
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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES OF AMERICA

v.

RANDALL WAYNE SMITH
Defendant.



Case Number CR 00-S-296-S

ENTERED *kwc*

NOV 24 2000

JUDGMENT IN A CRIMINAL CASE
(For Offense(s) Committed On or After November 1, 1987)

The defendant, RANDALL WAYNE SMITH, was represented by David Cromwell Johnson.

The defendant pleaded guilty to count one. Accordingly, the defendant is adjudged guilty of the following count, involving the indicated offense:

Title & Section	Nature of Offense	Count Number(s)
18 USC 1343	Wire Fraud	1

As pronounced on November 21, 2000, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

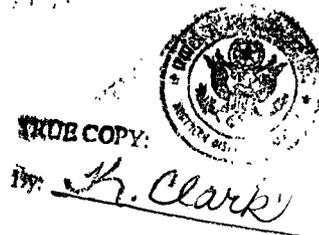
It is ordered that the defendant shall pay to the United States a special assessment of \$100.00, for count one, which shall be due immediately and may be collected in accordance with the Bureau of Prisons Inmate Financial Responsibility Program.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 24th day of November, 2000.

Randall Smith
United States District Judge

Defendant's SSAN: [REDACTED]
Defendant's Date of Birth: [REDACTED]
Defendant's address: [REDACTED]; Birmingham, AL 35243



16

Defendant: RANDALL WAYNE SMITH
Case Number: CR 00-S-296-S

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 18 months.

The defendant shall surrender for service of sentence, as directed, either to the institution designated by the Bureau of Prisons or the United States Marshal on Tuesday, December 26, 2000 by 3:00 p.m.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at _____
_____, with a certified copy of this Judgment.

By _____
United States Marshal

Deputy Marshal

Defendant: RANDALL WAYNE SMITH
Case Number: CR 00-S-296-S

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 36 months. The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

STANDARD CONDITIONS OF SUPERVISED RELEASE

While the defendant is on supervised release pursuant to this Judgment:

- 1) The defendant shall not commit another federal, state, or local crime; specifically, the defendant shall not illegally possess a controlled substance and shall not own or possess a firearm or destructive device.
- 2) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 3) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 4) The defendant shall answer truthfully all inquiries by the probation officer, shall provide the probation officer access to requested financial information, and shall follow the instructions of the probation officer.
- 5) The defendant shall support his or her dependents and meet other family responsibilities.
- 6) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 7) The defendant shall notify the probation officer ten(10) days prior to any change in residence or employment. (On change of residence to a new jurisdiction of a person convicted either of a crime of violence or of a drug trafficking offense, the Probation Office is responsible for complying with the notice provisions of 18 U.S.C. § 4042(b).)
- 8) The defendant shall refrain from excessive use of alcohol, except that a defendant while in the Drug and Alcohol Intensive Counseling and Aftercare Service Program (DAICASP) (or comparable program in another district) shall consume no alcohol. The defendant shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
- 9) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 10) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 11) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 12) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 13) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 14) The defendant shall comply with any directions from the probation officer to serve notice of third party risks the defendant may pose, and shall cooperate with the officer's efforts to confirm compliance.
- 15) The defendant shall comply with the probation office's Policies and Procedures Concerning Court Ordered Financial Obligations to satisfy the balance of any monetary obligation resulting from the sentence imposed in the case. Further, the defendant shall notify the probation office of any change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine, restitution, or assessment fee. If the defendant becomes more than 60 days delinquent in payments of financial obligations, the defendant may be (a) required to attend a financial education or employment preparation program if and as directed by the probation officer, (b) placed on home confinement subject to electronic monitoring for a maximum period of 90 days at the direction of the probation officer (with the defendant to pay the cost of monitoring if the probation officer determines that the defendant has the ability to do so), and/or (c) placed in a residential treatment program or community corrections center for up to 180 days at the direction of the probation officer (with the defendant to pay the cost of subsistence if the probation officer determines that the defendant has the ability to do so).
- 16) Unless excused by a special condition of probation or supervised release in the Judgment or by a subsequent court order, the defendant shall comply with 18 U.S.C. § 3563 (a) (probation) or § 3583 (d) (supervised release) regarding mandatory drug testing (with the defendant to contribute to the cost of drug testing if the probation officer determines that the defendant has the ability to do so). A positive urinalysis may result in the defendant's placement in the probation office's Drug and Alcohol Intensive Counseling and Aftercare Service Program (DAICASP) (or comparable program in another district) at the direction of the probation officer.
- 17) The defendant may be placed in the probation office's Drug and Alcohol Intensive Counseling and Aftercare Service Program (DAICASP) (or comparable program in another district) by virtue of a special condition of probation or supervised release contained in the Judgment, at the direction of the probation officer after a positive urinalysis, or a court order entered during the period of probation or supervision for other good cause shown. This program may include (a) testing by the probation officer or an approved vendor to detect drug or alcohol abuse (with the defendant to contribute to the cost of drug testing if the probation officer determines that the defendant has the ability to do so), (b) a mandatory drug education program (which may include individual or group counseling provided by the probation office or an approved vendor with the defendant to contribute to the cost of drug/alcohol treatment if the probation officer determines that the defendant has the ability to do so), (c) placement in a residential treatment program or community corrections center for up to 180 days at the direction of the probation officer (with the defendant to pay the cost of subsistence if the probation officer determines that the defendant has the ability to do so), and (d) home confinement subject to electronic monitoring for a maximum period of ninety (90) days at the direction of the probation officer (with the defendant to pay the cost of monitoring if the probation officer determines that the defendant has the ability to do so).
- 18) If ordered to a period of supervised release after incarceration, the defendant shall report in person, within 72 hours of release from the custody of the Bureau of Prisons, to the probation office in the district where the defendant is released.

Defendant: RANDALL WAYNE SMITH
Case Number: CR 00-S-296-S

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

- 1) The defendant shall perform 108 hours of community service as directed by the probation officer.
- 2) The mandatory drug testing provisions of 18 U.S.C. § 3583(d) are waived upon the court's finding that the offense of conviction is not drug-related, there is no current or past history of substance abuse, and there is a low risk of future substance abuse by the defendant.
- 3) The defendant shall not incur any new debts (other than normal debts for utilities and rental expenses) or open any new lines of credit without permission of the probation officer unless the defendant is in compliance with the payment of any monetary obligations ordered.
- 4) Pursuant to U.S.S.G. §§ 5D1.3(b) and 5F1.5 and 18 U.S.C. § 3583(d), the defendant shall be prohibited from any form of self-employment involving financial matters or investments during the term of supervised release because a reasonably direct relationship existed between the defendant's occupation, business, and profession and the conduct relevant to the offenses of conviction. Based on the defendant's pattern of criminal activity over a period of 3 years, there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which he was convicted. It is the reasonable belief of this Court that the imposition of such a restriction is reasonably necessary to protect the public. This occupational restriction shall be enforced for the duration of the supervised release term, which is the minimum time and to the minimum extent to necessary to protect the public.

Defendant: **RANDALL WAYNE SMITH**
 Case Number: **CR 00-S-296-S**

Judgment -- Page 5 of 6

RESTITUTION AND FORFEITURE

RESTITUTION

The court, pursuant to the Victim and Witness Restitution Act, finds that the following is/are victim(s) of defendant's criminal conduct and has/have sustained loss in the indicated amounts and orders restitution by the defendant as follows:

<u>Name & address of payee(s)</u>	<u>Amount</u>
Troy Beam [REDACTED] Shippensburg, PA 17257	\$265,000.00
Roberta and Frank Beck [REDACTED] Birmingham, AL 35242	\$22,168.00
Lyndon Ellenburg [REDACTED] Anderson, SC 29624	\$97,500.00
Don Erickson [REDACTED] Falls Church, VA 22042	\$1,300,000.00
Donald Healy [REDACTED] Ponte Vedra Beach, FL 32004-2539	\$56,000.00
Ralph McDermott [REDACTED] Windsor, Nova Scotia Canada B0N2TO	\$205,000.00
Jim Mott [REDACTED] Midlothian, Virginia 23112	\$34,760.00
Maywa Price [REDACTED] Safety Harbor, FL 34895	\$36,885.00
Jeremy Shepherd [REDACTED] [REDACTED] Clearwater, FL 33756	\$7,980.00
Dean Stoiner [REDACTED] Thornton, CO 80233	\$5,152.00

Payments of restitution are to be made to Clerk, U. S. District Court, for transfer to the payee(s).

Restitution, with interest waived, is due and payable immediately and may be collected in accordance with the Bureau of Prisons Inmate Financial Responsibility Program.

If there are multiple payees, any payment not made directly to a payee shall be divided proportionately among the payees named unless otherwise specified here:

Defendant: RANDALL WAYNE SMITH
Case Number: CR 00-S-296-S

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	17
Criminal History Category:	1
Imprisonment Range:	24 months to 30 months
Supervised Release Range:	2 to 3 years
Fine Range:	\$5,000 to \$50,000
Restitution:	\$2,030,445

The court declines to impose a fine due to the defendant's inability to pay both a fine and restitution.

The sentence departs from the guideline range for the following reason(s): The Court finds that the defendant voluntarily disclosed to authorities the existence of the offense he committed when the offense was unlikely to have been discovered otherwise. The Court further finds that the defendant has fully accepted responsibility for the offense. Pursuant to 5K2.16, a downward departure is granted. The Court finds that the guideline level should be Level 14, which when combined with criminal history category I creates a guideline range of 15 to 21 months and a fine range from \$4,000 to \$40,000.