



0000116254

ORIGINAL

63390

EXCEPTION

RECEIVED

2001 AUG -3 P 4:14

AZ CORP COMMISSION
DOCUMENT CONTROL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
Chairman
JIM IRVIN
Commissioner
MARC SPITZER
Commissioner

In the matter of)
)
JOSEPH MICHAEL GUESS, SR.)
2911 E. Calavar Road)
Phoenix, Arizona 85032)
)
PROGRESSIVE FINANCIAL MANAGEMENT)
2911 E. Calavar Road)
Phoenix, Arizona 85032)
)
JAMES DOUGLAS SHERRIFFS)
5544 East Helena Drive,)
Scottsdale, Arizona 85254)
)
RICHARD GORDON DAVIS)
4330 North 30TH Street)
Phoenix, Arizona 85016)
)
RGD)
4330 North 30TH Street)
Phoenix, Arizona 85016)
)
RGD ENTERPRISES, INC.)
4330 North 30TH Street)
Phoenix, Arizona 85016)
)
IRA JOE PATTERSON)
4330 North 30th Street)
Phoenix, Arizona 85016)
)
RANDALL WAYNE SMITH, JR.)
1905 Springlake Court)
Birmingham, Alabama 35215)
)
BALLY OVERSEAS TRADING INC.)
1905 Springlake Court)
Birmingham, Alabama 35215,)
)
Respondents.)

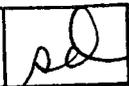
DOCKET NO. S-03280A-00-0000

**SECURITIES DIVISION
EXCEPTIONS TO
RECOMMENDED OPINION AND
ORDER**

Arizona Corporation Commission

DOCKETED

AUG 03 2001

DOCKETED BY 

1 Pursuant to A.A.C. R14-3-110 (B) and the Procedural Order issued by the Administrative
2 Law Judge ("ALJ") in this matter on July 13, 2001, the Securities Division ("Division") of the
3 Arizona Corporation Commission ("Commission") hereby submits its exceptions to certain
4 portions of the recommended Opinion and Order ("recommended decision" or "RD") docketed in
5 the above-captioned proceeding by the Commission's Hearing Division on June 13, 2001

6 **I.**
7 **DISCUSSION**

8 Attached hereto as Exhibit A is the Securities Division Proposed Amendment #1 to the
9 recommended decision. Some of these proposed amendments address mere misspellings or
10 typographical errors while others simply complete the narrative history of the proceedings in this
11 matter. These are self-explanatory and not discussed herein. Most of the remaining amendments
12 concern Findings of Fact ("FOF"), Conclusions of Law ("COL") and portions of the Order related
13 to respondents James Douglas Sherriffs ("Sherriffs") and Richard Gordon Davis ("Davis") that are
14 separately discussed below with some miscellaneous items.

15 A. Respondent Davis

16 The Division has already carefully reviewed the hearing evidence of record against Davis.
17 *Post-Hearing Memorandum by Securities Division ("PHM"), pp. 23-26.* This portion of the PHM
18 is attached hereto as Exhibit B. It is uncontroverted that Davis and his former spouse have been the
19 only shareholders, officers and directors of respondent RGD Enterprises, Inc. *PHM, p. 23 lines 11-*
20 *12.* To properly reflect this evidence, FOF #25 in the recommended decision should therefore be
21 amended to change "majority" to "only." *RD, p. 9 line 5.*

22 Despite its findings and conclusion that Davis violated A.R.S. § 44-1991 by engaging in
23 fraudulent practices meriting a \$10,000 administrative penalty, the recommended decision simply
24 excuses him from any personal restitution obligation. *RD, pp. 25-26 (FOF #145), 26 (FOF #147),*
25 *27 (FOF ##150, 151), 28 (FOF #155), 29 (COL ##8, 9, 12, 13), 31 line 4 (Order).* In view of the
26 evidentiary record summarized in Exhibit B, allowing Davis to thereby escape any personal

1 liability is mistaken, unfair to the defrauded investors crippled by losses and contrary to the ACC
2 policy of remedial relief for victims. Davis has already abandoned and defaulted his own
3 corporation, co-respondent RGD Enterprises, Inc., to Commission imposition in these proceedings
4 of \$232,075 in restitution and \$50,000 in penalties for fraudulent practices in violation of A.R.S. §
5 44-1991. *Decision No. 63390, pp. 8-9.* As a matter of Commission policy, the losses from illegal
6 fraud should not be shifted from violators onto their victims and Davis in particular should not be
7 allowed to walk away from personal liability as he already walked away from his corporate
8 restitution obligation.

9 The Division has urged that joint and several restitution liability for \$232,075 be imposed
10 on Davis personally. *PHM, p. 51 lines 10-20.* At a minimum, Davis should be required to
11 personally disgorge for restitution payment the \$23,000 in preferential payments he received from
12 his co-respondents. *PHM, p. 26 lines 10-21.* The evidence provided at hearing by Division expert
13 witness Mark Klamrznyski established that Davis has received in payments from co-respondents at
14 least \$53,000. *PHM, p. 26 lines 10-21.* This evidence is uncontested. Assuming Davis originally
15 invested \$30,000 of his own funds with co-respondent Bally Overseas Trading Inc., the \$53,000 he
16 was later paid by co-respondents made whole his investment and added \$23,000 extra. Since the
17 investment scheme was wholly fraudulent, the excess \$23,000 could only come from the funds
18 received by his co-respondents from investor victims. Davis should be required to disgorge the
19 excess funds he pocketed and return them to the victims of his fraudulent misconduct.

20 Exhibit A proposes amendments to strike the existing language at the end of FOF #151 and
21 replace it with new language acknowledging the \$23,000 restitution liability. Similarly, Exhibit A
22 proposes to add a sentence to COL #10 for this purpose and to strike COL #12. Finally, Exhibit A
23 provides amendments to the proposed Order that add Davis to the cease and desist order as well as
24 the order of restitution.

25 B. Respondent Sherriffs

26 The Division has previously recommended the imposition of administrative penalties

1 against Sherriffs totaling \$129,000. *PHM*, p. 53 lines 1-14. The recommended decision adopted
2 these amounts. *RD*, pp. 27 (*FOF #153*), 29-30 (*COL ##13, 18*), 30 lines 22 - 31 lines 8 (*order of*
3 *administrative penalties*). Exhibit A now proposes amendments to lessen his penalties for
4 Securities Act violations to \$25,000 and eliminate penalties for his Investment Management Act
5 (“*IMA*”) violations. Such a modification will be an accommodation to Sherriffs in return for the
6 voluntary amending of his Chapter 13 bankruptcy filings in U.S. Bankruptcy Court¹ for the District
7 of Arizona to add the Commission to his schedules of creditors in the amounts of any restitution
8 and penalty obligations that it may impose. Attached hereto as Exhibit C is a letter dated July 30,
9 2001, from legal counsel for Sherriffs assuring the Division of such intent on the part of
10 respondent. Since Sherriffs’ bankruptcy petition was filed before the commencement of this
11 administrative matter before the Commission, no Commission claims were scheduled on Sherriffs’
12 bankruptcy filings and the creditors’ claims deadline has now passed. To avoid the full discharge
13 under Chapter 13 of both restitution and penalty obligations as debts arising before his bankruptcy
14 filings, the Division urges the proposed penalty reduction as a necessary accommodation to
15 Sherriffs to secure the distribution to investors of at least a portion of the restitution obligation the
16 Commission should impose on him.

17 Exhibit A proposes amendments to the recommended decision to correspondingly modify
18 the penalty amounts for Sherriffs specified in *FOF #153*, *COL #13* and the order of administrative
19 penalties for Securities Act violations, and to delete *COL #18* as well as the order of administrative
20 penalties for *IMA* violations.

21 C. Other Items

22 Exhibit A proposes amending *FOF #103* to add the investment advisory fee that Sherriffs
23 charged and received for providing investment advisory services to the D’Angelos. The evidence
24 in the hearing record clearly establishes this fact and is uncontested. *PHM*, pp. 47 lines 23 – 48
25 lines 9. Compensation for providing investment advisory services is a necessary element of the
26

¹ *In re James Sherriffs*, B-00-01793-PHX-RTB (Chapter 13), filed February 16, 2000.

1 definition of an “investment adviser” under the IMA. *See* A.R.S. § 44-3101 (5). Findings of Fact
2 should satisfy each statutory element.

3 Exhibit A also proposes amending FOF #146 (A) by including a broader finding that all
4 “prime bank instrument” (“PBI”) investment programs with such features are inherently
5 fraudulent. Federal courts have already made this determination. *See, e.g., Securities and*
6 *Exchange Commission v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995) (“Prime Bank Instruments do not
7 exist.”) Dr. Boris Kozolchyk,² the distinguished banking expert witness for the Division at the
8 hearing in this matter, also testified to that conclusion. *PHM*, p. 31 lines 2-7. The recommended
9 decision acknowledges in its FOF #110 the expertise of Dr. Kozolchyk in this regard. *RD*, p. 20
10 lines 16-19. In view of the relentless proliferation of PBI schemes, it is timely for the Commission
11 as a securities regulatory agency to announce a generalized finding on this subject that will serve
12 as both official notice and a warning to the public about the inherently fraudulent nature of such
13 programs. Such a finding will be valuable in the regulatory effort to suppress these fraudulent
14 programs.

15 Exhibit A further proposes to amend FOF #146 by adding another misrepresentation as
16 new subsection J about the untrue statement by respondent Joseph Michael Guess, Sr. (“Guess”) to
17 investor Sal Calta that the tax-qualified status of Calta’s invested Individual Retirement Account
18 (“IRA”) funds would be preserved by transfer to another qualified IRA custodian. The uncontested
19 evidence at hearing clearly established that Guess lied to Calta about this fact. *PHM*, P. 34 lines 1-
20 9. The Division originally alleged this misrepresentation in its Notice of Opportunity for Hearing
21 Regarding Proposed Order for Relief, proved this allegation at hearing and briefed it thereafter.
22 The recommended decision should be amended to include this specific fraud violation by Guess.

23
24
25 ² In Arizona Corporation Commission Decision No. 61291 in “the matter of the securities offering by:
26 European Marketing Group, L.C.” *et al.*, the Commission made a finding that “Dr. Kozolchyk was eminently qualified
as an expert in the field of the purported investments which were promoted by EMG’s managers.” *Decision No.*
61291, p. 11. The investments at issue in that case were also for the trading of European bank notes in the secondary
market. *Id.* at pp. 4-5.

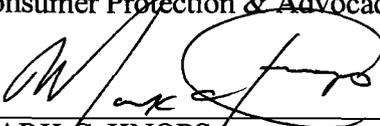
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

II.
CONCLUSION

For the foregoing reasons, the Division hereby requests the Commission to modify the recommended decision by adopting and incorporating therein the proposed amendments specified in attached Exhibit A, together with any additional relief that the Commission in its discretion deems appropriate and authorized by law.

RESPECTFULLY SUBMITTED this 3rd day of August, 2001.

JANET NAPOLITANO
Attorney General
Consumer Protection & Advocacy Section

BY: 
MARK C. KNOPS
Special Assistant Attorney General
MOIRA McCARTHY
Assistant Attorney General
Attorneys for the Securities Division
Arizona Corporation Commission

1 ORIGINAL AND TEN (10) COPIES of the foregoing
2 filed this 3rd day of August, 2001, with:

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

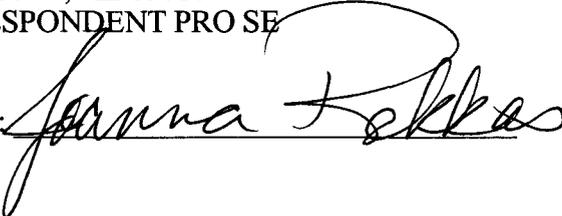
7 COPY of the foregoing mailed this
8 3rd day of August, 2001 to:

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 By: 
26

EXHIBIT

A

THIS AMENDMENT:			
_____ Passed	_____ Passed as amended by _____		
_____ Failed	_____ Not Offered	_____ Withdrawn	

SECURITIES DIVISION PROPOSED AMENDMENT # 1

TIME/DATE PREPARED: 3:00 pm 8/03/01

MATTER: Joseph Michael Guess, Sr. et al.

AGENDA ITEM NO. _____

DOCKET NO: S-03280A-00-0000

OPEN MEETING DATE: 8/28-29/01

Page 2, line 19:

INSERT (after "contracts"): "and other securities"

Page 4, line 23:

DELETE (after "Order,"): "the last of"

Page 4, line 26:

INSERT (new paragraph after "memoranda."):

"On January 4, 2001 and again on January 24, 2001, the Division respectively filed a "Motion to Admit into Evidence a Post-Hearing Exhibit," the former related to verification of timely service on Respondent Smith and the latter to adjudication of his guilt and his sentencing in federal court. On April 24, 2001, by Procedural Order, the Division's last post-hearing exhibits were admitted into evidence."

Page 4, line 27:

INSERT (after "Commission."): "On February 16, 2001, the Commission filed Decision No. 63390 in this matter, which ordered defaulted Respondents PFM, RGD, RGD Inc. and Bally to cease and desist from Securities Act violations and to pay restitution as well as administrative penalties."

**SECURITIES DIVISION PROPOSED AMENDMENT # 1
(CON'T)**

Page 6, line 1:

INSERT (after "violations"): "of"

Page 6, line 26:

DELETE (after "issued"): "in"

Page 9, line 5:

DELETE (after "the"): "majority"

INSERT: "only"

Page 10, line 10:

DELETE (after "Mrs."): "Yvone"

INSERT: "Yvonne"

DELETE (after "Aitken,"): "Ms."

INSERT: "Mrs."

Page 10, line 17:

DELETE (after "Mrs."): "Yvone"

INSERT: "Yvonne"

Page 16, line 5:

DELETE (after "1997"): "."

INSERT: ", "

**SECURITIES DIVISION PROPOSED AMENDMENT # 1
(CON'T)**

Page 19, line 22:

INSERT (after "offered): "and provided"

DELETE (after "services."): "

INSERT: ", for which he charged \$350 that they paid to him."

Page 19, line 23:

DELETE: "Subsequently,"

DELETE: (after "Sherriffs"): "suggested"

INSERT: "recommended"

Page 26, line 2:

DELETE: "instruments:"

INSERT: "instrument programs:"

Page 26, line 5:

INSERT (after "banks:"): "no market-based investment opportunity exists with these features, and investment programs offering such an opportunity are inherently fraudulent."

Page 26, line 19:

DELETE: "and,"

Page 26, line 21:

DELETE (after "investment"): "

INSERT: "; and,

**SECURITIES DIVISION PROPOSED AMENDMENT # 1
(CON'T)**

J. Mr. Guess misrepresented that investment funds received from investor Sal Calta's qualified IRA would be handled to retain the tax-deferred status, while in fact the funds were not transferred to a qualified IRA custodian."

Page 27, line 17:

DELETE (after "Act,"): "since his involvement was passive in the offer and sale of RGD in this instance we do not believe that he should be required to make restitution hereinafter."

INSERT: "he should be required to disgorge as restitution only the \$23,000 he was paid in excess of the \$30,000 he invested with Bally and later recovered."

Page 27, line 24:

DELETE: "recommendations"

INSERT: "recommendation"

Page 27, line 25:

DELETE (after "Guess"): "and Sherriffs are"

INSERT: "is"

DELETE (after "reasonable and"): "they"

INSERT: "he"

DELETE: "each"

Page 27, line 26:

DELETE (after "for"): "their respective"

INSERT: "his"

**SECURITIES DIVISION PROPOSED AMENDMENT # 1
(CON'T)**

DELETE: "additional"

Page 27, line 27:

DELETE: "\$29,000"

INSERT: "\$25,000"

Page 27, line 28:

INSERT (after "the"): "Act and the"

Page 29, line 8:

DELETE: "severely"

INSERT: "severally"

Page 29, line 9:

DELETE: "severely"

INSERT: "severally"

Page 29, line 10:

INSERT (after "\$57,730"): "of this total"

INSERT (after "set-offs."): "Mr. Davis should be jointly and severally liable with Mr. Guess, Mr. Sherriffs and Mr. Patterson for up to \$23,000 of the total, subject to any legal set-offs."

Page 29, line 14:

DELETE:

**SECURITIES DIVISION PROPOSED AMENDMENT # 1
(CON'T)**

“12. Respondent, Mr. Davis, should not be held liable for restitution in any offering.”

Page 29, line 15:

DELETE: “13.”

INSERT: “12.”

Page 29, line 20:

DELETE: “\$25,000”

INSERT: “\$6,500”

Page 29, line 21:

DELETE: “\$25,000”

INSERT: “\$6,500”

Page 29, line 22:

DELETE: “\$50,000”

INSERT: “\$12,000”

Page 29, line 25:

DELETE: “\$13,000”

INSERT: “\$12,000”

Page 29, line 26:

DELETE: “14.”

INSERT: “13.”

**SECURITIES DIVISION PROPOSED AMENDMENT # 1
(CON'T)**

Page 30, line 1:

DELETE: "15."

INSERT: "14."

Page 30, line 4:

DELETE: "16."

INSERT: "15."

Page 30, line 5:

INSERT (after "fraud"): "provision"

Page 30, line 6:

DELETE: "17."

INSERT: "16."

Page 30, line 10:

DELETE: "et.seq."

INSERT: "et seq."

Page 30, lines 11-12:

DELETE:

"18. With respect to Mr. Sherriffs' violations of the IMA, he should be assessed an administrative penalty pursuant A.R.S. § 44-3296 in the amount of \$29,000.

**SECURITIES DIVISION PROPOSED AMENDMENT # 1
(CON'T)**

Page 30, line 18:

INSERT (after "44-1991"): "and Mr. Richard Gordon Davis shall cease and desist from his actions described hereinabove in violation of A.R.S. § 44-1991."

Page 30, line 27:

DELETE (after "Sherriffs, the sum of"): "\$25,000"

INSERT: "\$6,500"

Page 31, line 1:

DELETE (after "Sherriffs, the sum of"): "\$25,000"

INSERT: "\$6,500"

Page 31, line 3:

DELETE (after "Sherriffs, the sum of"): "\$50,000"

INSERT: "\$12,000"

Page 31, lines 5-8:

DELETE:

"IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under A.R.S. § 44-3296, Respondent Mr. James Douglas Sherriffs shall pay as and for administrative penalty for the violation of A.R.S. § 44-3151, the sum of \$29,000."

Page 31, line 15:

DELETE: "Respondents"

INSERT: "Respondent"

**SECURITIES DIVISION PROPOSED AMENDMENT # 1
(CON'T)**

DELETE: “, and Mr. James Douglas Sherriffs”

Page 31, line 25:

DELETE: “severely”

INSERT: “severally”

Page 31, line 26:

DELETE: “severely”

INSERT: “severally”

Page 31, line 27:

INSERT (after “\$232,075”): “, and together with Respondent Mr. Richard Gordon Davis who shall jointly and severally make restitution in an amount not to exceed \$23,000 of the \$232,075,”

EXHIBIT

B

1 this opinion our supreme court underscored the broad reach of indirect liability under the
2 antifraud provision of the SAA.

3 ***Respondent Davis***

4 The Division did not allege the offer or sale of RGD or PFM securities by Davis, but did
5 allege he directly or indirectly violated A.R.S. § 44-1991(B) and (C) in connection with the RGD
6 offering of securities. Davis was a principal of RGD. Investor witness Susan Herrmann testified
7 that she was told that Davis was a partner in RGD who provided its office. *H.T.*, pp. 377 line 23--
8 378 line 12. Davis testified at his EUO that he was the founder of RGD Enterprises, Inc., *Exh. S-*
9 *125, p. 9 lines 23--24*, a respondent Arizona corporation in this matter. *Exh. S-2a and b*. Except
10 for filing annual tax returns in connection with a wholly-owned subsidiary entity, RGD
11 Enterprises, Inc. was dormant after 1979. *Exh. S-125, p. 9 line 11--10 line 8*. Davis and his ex-
12 wife are the sole shareholders, officers and directors of this corporation. *Exh. S-125, pp. 11*
13 *line15--12 line 11; Exh. S-2b*. In early 1997 he invested \$30,000 in Guess' "money management
14 program" involving "the investment of large dollars—large box of dollars which are then taken
15 and reissued on the secondary market issuing notes, discount, and large volumes of profit dollars
16 and with return of principal and earnings for the investors." *Exh. S-125, pp. 19 line 20--20 line*
17 *10, 35 lines 19—23, 36 line 4*. He received payment distributions from this program from April
18 through July 1997 and again in September 1997. *Exh. S-125, p. 22 lines 18-23*. Three payments
19 were \$6000 each, one was \$5000 and the last was \$3000. *Exh. S-125, p. 23 lines 16--23*. He
20 understood the first four payments were from respondent Smith. *Exh. S-125, p. 47 lines 2--18*.
21 Davis testified that "Mike and I set up" RGD Enterprises, Inc. as "the entity that gave a corporate
22 entity to the program." *Exh. S-125, p. 25 lines 3--10*. It was to be the entity or vehicle through
23 which distributions were recorded and distributed. *Exh. S-125, pp. 25 lines 20—24, 31 lines 5--*
24 *10*. For this purpose, "Mr. Sherriffs set up the accounts with the RGD Enterprises name

25
26 defendant has strong overall control, it is not difficult to find that the defendant *indirectly* makes those
representations which are conveyed by his sales representatives." *People v. Blair*, 195 Colo. 462, 463, 579 P.2d
1133, 1144 (1978) (En Banc). (Italics added.)

1 situation,” *Exh. S-125, p. 31, lines 9–10*, which Davis considered an RGD Enterprises, Inc.
 2 corporate account. *Exh. S-125, p. 33 lines 1–20*. Davis denied he was a signatory on this RGD
 3 account. *Exh. S-125, p. 33 lines 21–23*.²⁹

4 Q. Is it fair to say then that any of the funds that flowed into that account
 5 which Mr. Sherriffs administered were funds that flowed into RGD Enterprises, Inc.

6 A. Yes. I would consider it funds that were set up. They had to set up separate
 7 bank accounts, because I had no bank accounts for RGD Enterprises anyway. So I
 8 considered them fair accounts.

9 Q. Was the name of that account RGD Enterprises, Inc. as the account
 10 holder?

11 A. I don’t have a copy of the check with me. It’s RGD Enterprises. I know it
 12 was the first line. I think Sherriffs had his name on it.

13 Q. And when that account was opened, was that opened as an account for
 14 RGD Enterprises, Inc., intended to be an RGD Enterprises, Inc. account?

15 A. Well, I—for this specific use only.

16 Q. Okay. And how did you—what do you define as the use then that the
 17 account was put to?

18 A. The receiving of proceeds from the program and then the
 19 distributionment[*SIC*]—or disbursement of proceeds to investors.
 20 *Exh. S-125, pp. 33 line 24–34 line 20*.

21 From information provided by Guess, Davis prepared an IRS form 1099-INT for each
 22 RGD investor for 1997 on which RGD Enterprises, Inc. was shown as the payer of distributions
 23 made to the investor. *Exh. S-118; Exh. S-125, pp. 25 line 25–26 line 4, 30 lines 2–25, 31 lines*
 24 *13–19*. At his EUO in June 1998, Guess described himself as the “Administrator of RGD
 25 Enterprises” which he identified as an Arizona corporation “owned by Richard Davis.” *Exh. S-*
 26 *109, p. 10 lines 4–21*. By issuing these 1099-INT forms through his corporation, Davis
 implemented his original plan conceived with Guess in early 1997 to operate the RGD
 investment program under the canopy of RGD Enterprises, Inc. These corporate 1099s served to
 reinforce the lulling fiction that the 1997 payments made to RGD investors were “interest”
 distributions from profits earned by the trading program and to conceal the Ponzi nature of those
 payments. Without Davis’ corporate camouflage of legitimacy from the start of the RGD
 program, Guess and the other RGD principals may have been impaired in recruiting investors
 into their program.

²⁹ Division witness Mark Klamrzynski testified that Davis was in fact a signatory on the RGD account opened and used by Sherriffs for investor funds. *H.T., pp. 601 line 24–602 line 2*.

1 Davis admitted at his EUO that he was among the “initial group” or “working group to
2 pull it all together and make it work,” with his role being “besides investment, part of putting
3 forth the corporate structure, RGD Enterprises.” *Exh. S-125, p. 3 lines 5-14.*

4 Q. Were you—how did it come about that this whole thing fell under RGD
5 Enterprises? Was that an offer by you?

6 A. To give it a—to give it a local kind of establishment type of situation.
7 Credibility to try to develop something to move on up the –

8 Q. So—so it was strictly for the corporate structure of RGD Enterprises, Inc.?
9 Is that –

10 A. See, that came—yeah. That came on after, you know. That was an
11 afterthought, is let’s get the ball rolling here type of thing.

12 Q. So it was—was it—was it the idea, well, hey, I’ve already got a
13 corporation formed here, why don’t we just bring it its umbrella type thing?

14 A. That was part of my concept, yes.

15 Q. Were you actively involved in this trading program?

16 A. No.

17 Q. So, in effect you were the president of something that you didn’t have any
18 active involvement in.

19 A. Well, I was the president of my existing corporation, RGD Enterprises.

20 Q. Okay. And this—you said that RGD Enterprises sort of ceased to be
21 anything in 1979, wasn’t it?

22 A. It ceased in doing any day-to-day activity, yes.

23 Q. Until Mike Guess came down the pike, right?

24 A. Right.

25 Q. And you brought this investment program under the umbrella of RGD
26 Enterprises as a corporate structure, right?

 A. It ended up that way, yes.

 Q. So that was the first active thing that RGD Enterprises had done since ’79?

 A. That’s right. Yes.

Exh. S-125, pp. 59 line 2--60 line 18.

 Davis’ involvement in the RGD offering went well beyond merely preparing Form 1099s.
He provided the investment program with his initials—RGD—and authorized it to operate under
the umbrella of his shell corporation RGD Enterprises, Inc. He admitted he allowed RGD to open
and operate a bank account that he considered a corporate account. He was in fact a signatory on
that account. Moreover, Division witness Mark Klamrzynski testified that another bank account
was opened on September 19, 1997 in the name of RGD Enterprises, Inc. with Guess and
Sherriffs as signatories. This account had the same federal tax identification number as RGD
Enterprises, Inc. *H.T., pp. 650 line 2—651 line 5.* Investor funds from Sal Calta were deposited

1 into this account. *H.T.*, pp. 649 line 3—650 line 8; *Exh. S-73*. Investor witness Susan Herrmann
2 testified that she telephoned Davis on November 4, 1997 to complain about the breakdown in
3 payments to her and Davis responded “I’ll get right on this.” *H.T.*, p. 328 lines 1—6, 367 line
4 24—370 line 10. With other RGD principals, Davis met with attorney Fred Schaffer about their
5 investment program. *Exhs. S-125*, p. 39 line 7—12; *Exh. S-126f*. Their purpose was to develop “a
6 refined program downstream,” *Exh. S-125*, p. 54 lines 6--14, embodied in the draft “RGD Capital
7 Management Fund, L.L.C.” private offering memo admitted as *Exh. S-126e*. *Exh. S-125 pp. 38*
8 *line 20--41 line 12, 62 line 12--64 line 6*. According to this “Fund” draft, the “Fund” manager was
9 to be RGD Enterprises, Inc., an Arizona corporation, with Davis as President. *Exh. S-126e*, p. 5.

10 Davis’ role as an RGD principal close to Guess also entitled him to preferential treatment.
11 Of the \$30,000 he invested with Bally in early 1997, he received back \$26,000 in payments that
12 same year, an amount equal to most of his principal. *Exhs. S-118, S-127*. He testified in October
13 1998 that “I feel very secure that I’ll get my money back,” *Exh. S-125*, p. 50 lines 18—19, and
14 that “I’m sure that I will receive my principal back.” *Exh. S-125*, p. 51 lines 7--8. *See also Exh.*
15 *S-125*, p. 65 lines 8--13. Indeed he did. Division witness Mark Klamrzynski testified that beside
16 the \$26,000 Davis was paid in 1997, he was paid another \$27,000 from the PFM account in
17 November 1998 for a total of \$53,000. *H.T.*, pp. 660 line 12—661 line 3, p. 672 lines 4--18; *Exh.*
18 *S-130*. He also testified that one \$20,000 “preferential payment” check to Davis from PFM in
19 1998 was annotated “Prin. Ret.” for principal return, as were other checks for much smaller
20 amounts paid from that account to investors at that time. *H.T.*, pp. 670 line 13—674 line 23.
21 Unlike the other RGD investors, Davis got back his \$30,000 principal plus \$23,000 extra.

22 **1. Untrue Statements and Misleading Omissions of Material Fact**

23 The elements of securities fraud under A. R. S. § 1991(2) are as follows:

- 24 1. in connection with a transaction or transactions;
- 25 2. within or from Arizona;
- 26 3. involving an offer to sell or buy securities, or their sale or purchase;

EXHIBIT
C

THE LAW FIRM OF
PETER STROJNIK
ATTORNEY AT LAW

July 30, 2001
BY FAX 594-7438 AND FIRST CLASS MAIL
ONE PAGE NO COVER

Mark C. Knops, Esq.
Senior Attorney
Arizona Corporation Commission
1300 West Washington 3rd Fl.
Phoenix, Arizona 85007-2929

Re: In The Matter Of Guess et al et ux

Dear Mark:

This will confirm that Mr. Sherriffs will file a Motion to Amend The Bankruptcy Schedule, or a like motion, to include any administrative penalty and/or judgment issued by the Corporation Commission arising out of the above captioned proceeding.

Very Truly Yours,


Peter Strojnik

PJS:ps
CC: Client