



COMMISSIONER
MARC SPITZER
COMMISSIONER



ARIZONA CORPORATION COMMISSION

ORIGINAL

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OPEN MEETING ITEM

MEMORANDUM

TO: Chairman William A. Mundell
Commissioner Jim Irvin
Commissioner Marc Spitzer

FROM: Mark Sendrow *MS*
Director of Securities

DATE: September 24, 2001

RE: Respondent Randall Wayne Smith, Jr. (In the matter of Joseph Michael Gress, Sr. et al., S-03280A-00-0000)

CC: Brian C. McNeil, Executive Secretary

Arizona Corporation Commission

DOCKETED

SEP 25 2001

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Attached is a proposed default Order to Cease and Desist, Order of Restitution and Order for Administrative Penalties against respondent Randall Wayne Smith, Jr. ("Smith") in the above-referenced administrative proceedings. Smith was originally named a respondent together with four other individuals and four entities in a Notice of Opportunity for Hearing Regarding Proposed Order for Relief ("Notice") issued by the Securities Division ("Division") on April 6, 2000 and thereafter duly served on all respondents. Despite the advisory in that Notice of a right to a hearing, Smith and the four entity respondents failed to timely request a hearing or enter an appearance at the hearing held for four of the individual respondents in this matter on July 25-27 and August 31, 2000. Two weeks after the close of hearing, a Request for Hearing was filed by an Alabama attorney on behalf of Smith on September 18, 2000. In its response filed on September 22, 2000, the Division opposed the hearing request on grounds of untimeliness. On September 26, 2000, the Hearing Division issued a Sixth Procedural Order in this matter denying the Smith request on those grounds. The Alabama attorney acting on behalf of Smith never entered any appearance before the Commission as counsel for Smith. On October 3, 2000, the Division filed and thereafter served by mail on Smith a Notice of Intent to Apply for Default Order Against Respondent Randall Wayne Smith, Jr. No response to this default notice was filed by or on behalf of Smith.

The uncontested allegations against Smith in the original Notice are summarized as follows. From at least February 1997, Smith conducted business within Arizona by offering and selling unregistered and nonexempt securities in the form of investment contracts and certificates of participation in a profit-sharing agreement, all purporting to earn investor profits from a bank

debenture trading program. Smith has never been registered in Arizona as a securities salesman or dealer. In connection with the offer and sale of such securities, Smith made untrue statements and misleading omissions of material facts and also engaged in transactions, practices or courses of business which operated or would operate as a fraud or deceit on offerees and investors. The Notice also alleged that Smith controlled respondent entity Bally Overseas Trading Inc. ("Bally") and was thereby jointly and severally liable to the same extent as Bally for its antifraud violations.

On February 16, 2001, the Commission entered Decision No. 63390 against Bally and the other defaulted entity respondents in this matter, imposing on them an order to cease and desist violating the Securities Act, an order of restitution and an order for administrative penalties. On August 30, 2001, the Commission entered Decision No. 64005 against all the individual respondents except Smith, imposing on them an order to cease and desist violations, an order of restitution and an order for administrative penalties. Smith has declined to enter into a consent order with the Commission regarding the violations alleged against him by the Notice.

On August 10, 2000, the United States Attorney for the Northern District of Alabama filed in the United States District Court a criminal Information charging Smith with one count of federal wire fraud in connection with his operation of a fraudulent investment scheme from October 1, 1996 to April 30, 1997. Pursuant to a plea agreement, Smith entered a guilty plea to the charge in federal court on August 24, 2000. The fraud scheme described in the federal criminal Information and accompanying plea agreement was the same investment scheme alleged against Smith and Bally in the Division Notice. Smith admitted in his plea agreement that he operated Bally from his residence as his business through which he received investment funds. On November 24, 2000, the federal court in Birmingham, Alabama imposed judgment of guilt on Smith, sentenced him to eighteen months imprisonment followed by three years of supervised release (probation) and imposed criminal restitution of \$2,030,445 to ten investors not a part of the Arizona RGD scheme. Smith is currently serving his sentence as inmate #22522-001 at the Federal Prison Camp at Maxwell Air Force Base in Montgomery, Alabama.

The Commission may now enter a default order against Smith in this matter. The proposed order requires him to permanently cease and desist from any violation of the Securities Act and to pay restitution and administrative penalties. The restitution and penalty amounts are based on the uncontested evidence of violations and investor losses admitted at the administrative hearing. The proposed penalty total is substantially less than the maximum assessable against Smith, but is sufficient for deterrence purposes.

WMS: mck

Originator: Mark C. Knops
Assistant Attorney General Assigned: Moira McCarthy

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2
3 WILLIAM A. MUNDELL
4 Chairman
5 JIM IRVIN
6 Commissioner
7 MARC SPITZER
8 Commissioner

9 **In the matter of**

10 JOSEPH MICHAEL GUESS, SR.
11 2911 E. Calavar Road
12 Phoenix, Arizona 85032

13 PROGRESSIVE FINANCIAL
14 MANAGEMENT
15 2911 E. Calavar Road
16 Phoenix, Arizona 85032

17 JAMES DOUGLAS SHERRIFFS
18 5544 East Helena Drive
19 Scottsdale, Arizona 85254

20 RICHARD GORDON DAVIS
21 4330 North 30TH Street
22 Phoenix, Arizona 85016

23 RGD
24 4330 North 30TH Street
25 Phoenix, Arizona 85016

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

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

RANDALL WAYNE SMITH, JR.
P.O. Box 130581
Birmingham, Alabama 35213-0581

BALLY OVERSEAS TRADING INC.
c/o Smith, Randall
P.O. Box 130581
Birmingham, Alabama 35213-0581,

Respondents.

) DOCKET NO. S-03280A-00-0000

) DECISION NO. _____

) **ORDER TO CEASE AND DESIST, ORDER**
) **OF RESTITUTION AND ORDER FOR**
) **ADMINISTRATIVE PENALTY**

) **RE: RANDALL WAYNE SMITH, JR.**

1 On April 6, 2000, the Securities Division ("Division") of the Arizona Corporation
2 Commission ("Commission") issued a Notice of Opportunity for Hearing Regarding Proposed
3 Order for Relief ("Initial Notice") in this matter against respondent Randall Wayne Smith, Jr.
4 ("Smith") and the other above-captioned respondents. Pursuant to A.A.C. R14-4-304(B)(5) and
5 (E)(1), Smith was duly served with a copy of the Initial Notice by International Registered Mail
6 delivered to his last known business address on or about June 26, 2000. The Initial Notice included
7 an advisory that any respondent would be afforded a hearing who filed a written request with the
8 Commission within ten days after service. Smith failed to timely request a hearing.

9 An administrative hearing was conducted in this matter on July 25-27 and August 31, 2000.
10 Smith entered no appearance during this hearing. On October 3, 2000, the Division filed a Notice
11 of Intent to Apply for Default Order Against Respondent Randall Wayne Smith, Jr., a copy of
12 which was duly served on Smith pursuant to A.A.C. R14-3-107(B). On February 16, 2001 and
13 August 30, 2001 respectively, the Commission entered orders against all other respondents in this
14 matter by Decision Nos. 63390 and 64005.

15 I.

16 FINDINGS OF FACT

17 1. Smith, also known as Randall W. Smith, variously represented himself at relevant
18 times as the Administrator, Joint Venture Manager and Managing Partner of the Joint Venture
19 Investment Management Program, also known as the Joint Venture Private Placement Asset
20 Management Program, as well as President, Manager, Managing Partner and Managing Director of
21 co-respondent Bally Overseas Trading Inc. ("Bally"). His last known mail address is P.O. Box
22 130581, Birmingham, Alabama 35213-0581.

23 2. Bally is a British Virgin Islands company that at relevant times had a
24 "communications office" at 1905 Springlake Court, Birmingham, Alabama 35215, also a former
25 address for Smith. As Joint Venture Managing Partner, Bally operated a Joint Venture Investment
26 Management Program, also known as the Joint Venture Private Placement Asset Management

1 Program, in Arizona through Smith and co-respondents Joseph Michael Guess, Sr. ("Guess"),
2 Progressive Financial Management, James Douglas Sherriffs ("Sherriffs"), Richard Gordon Davis
3 ("Davis"), RGD, RGD Enterprises, Inc. ("RGD Enterprises") and Ira Joe Patterson.

4 3. Smith was the controlling person of Bally who operated its investment programs at
5 all relevant times.

6 4. From at least February 1997, Smith and Bally offered and sold to the general public
7 within Arizona financial interests in Joint Venture Investment Management Programs, also known
8 variously as Joint Venture Private Placement Asset Management Programs and/or Private
9 Placement Investment Trading Programs and/or Asset Enhancement Programs and/or Asset
10 Enhancement Trading Programs and/or Capital Management Programs and/or High Yield
11 Investment Programs.

12 5. According to program offering documents and related oral representations, offerees
13 could invest money for a period of time as Limited Venture Partners and their funds pooled for
14 safekeeping in an escrow account with those of other investors at Regions Bank in Birmingham,
15 Alabama, until transferred to a trading bank for exclusive use in the trading of discounted debt
16 instruments issued by major world banks.

17 6. Smith and Bally offered successive programs with total initial investment principals
18 of from one million to ten million dollars with 108% of each program principal guaranteed by a
19 top fifty West European Bank.

20 7. Programs offered weekly or later monthly returns of trading profits varying
21 respectively from 12% weekly to 12% or even 18% monthly. Smith and would retain a 10% share
22 of such investor profits as a fee for administration.

23 8. Investors would execute a Specific Power of Attorney to Smith to manage their
24 program investment account as a fiduciary. On behalf of Bally, Smith would execute Joint Venture
25 Investment Management Program Agreements or Joint Venture Private Placement Asset
26 Management Agreements with investors, along with Escrow Agreements and Joint Venture Profit

1 Share Agreements.

2 9. From at least March 1997, Guess, Sherriffs and Davis formed RGD as a "Joint
3 Venture" under the auspices of RGD Enterprises to offer and sell within and from Arizona the
4 above investment program operated by Smith and Bally. Guess functioned as RGD manager and
5 lead salesman. Sherriffs steered investors to RGD and handled the transfer of funds to and from the
6 RGD bank accounts. Davis provided use of the RGD Enterprises mantle to RGD for tax reporting
7 and other purposes.

8 10. On behalf of RGD, Guess executed agreements with investors that tracked the terms
9 of those used by Smith and Bally, except that RGD reduced the monthly profit returnable to most
10 of its investors to 4.5% or 5%, with only one later investor receiving 10%.

11 11. These RGD investor agreements in turn provided for RGD to retain any profits
12 exceeding these investor returns as its fee for administration.

13 12. Funds from RGD investors were pooled in an RGD escrow bank account in Arizona
14 for safekeeping until transfer to the trading company or trading bank. While so aggregating RGD
15 investor funds, Guess or RGD then executed agreements with Smith and Bally to invest these
16 funds at the higher 12% weekly or 18% monthly return on principal offered by the latter.

17 13. RGD would thereby retain as its profit share the spread between the returns it
18 offered to its investors and the returns it received from Smith and Bally.

19 14. Besides the anticipated profit sharing described above, the RGD principals were
20 also paid directly by Smith to promote their recruitment of investors. In each of the months of
21 April, May, June and July 1997, Smith sent them about \$31,100 to divide among themselves and
22 others. These payments ceased after July 1997. Out of the \$124,400 total that Smith provided,
23 Guess, Sherriffs and Davis each took over \$20,000. A portion of these promotional funds were
24 also paid to some investors as purported profits earned from their investments.

25 15. During the administrative hearing in this matter, a schedule of investors,
26 investments and investor losses pertaining to RGD was admitted into evidence on August 31, 2000

1 as Exhibit S-133. According to this uncontested hearing exhibit, at least \$598,5000 was invested
2 through RGD in at least 15 transactions by eight individuals or couples who have since lost over
3 \$232,075 of that total.

4 16. From about February 1997 or thereafter, Smith offered and/or sold securities within
5 Arizona in the form of investment contracts and certificates of participation in a profit-sharing
6 agreement.

7 17. The securities referred to above were not registered under A.R.S. §§ 44-1871
8 through 44-1875, or 44-1891 through 44-1902; were not securities for which a notice filing had been
9 made under A.R.S. § 44-3321; were not exempt under A.R.S. §§ 44-1843 or 44-1843.01; were not
10 offered or sold in exempt transactions under A.R.S. § 44-1844; and were not exempt under any rule
11 or order promulgated by the Commission.

12 18. In connection with his offers to sell and sale of securities, Smith acted as a dealer
13 and/or salesmen within Arizona, although not registered pursuant to the provisions of Article 9 of
14 the Securities Act of Arizona, A.R.S. § 44-1801 *et seq.* ("Securities Act").

15 19. In connection with the foregoing offers and sales of securities within Arizona, Smith
16 directly or indirectly made untrue statements of material fact or omitted to state material facts which
17 were necessary in order to make the statements made not misleading in light of the circumstances
18 under which they were made, as follows:

- 19 a) stated there was a European trading market for discounted debt instruments from
20 major banks that generated very high profits with no risk to the investor, while in
21 fact no such market exists;
- 22 b) stated that investor funds would be held in escrow for safekeeping until transfer to
23 the trading bank, while in fact funds were misused for other purposes;
- 24 c) stated that the investment principal would be protected by a bank guarantee, while
25 in fact no such guarantee could be obtained for funds invested in the RGD or
26 Bally trading program;

- 1 d) failed to disclose the misuse of investor funds for personal expenditures;
- 2 e) failed to disclose the misuse of investor funds for payments to investors;
- 3 f) failed to disclose his business experience and background;
- 4 g) failed to disclose financial statements reflecting the financial condition of Bally.

5 20. In connection with his offers and sales of securities within and/or from Arizona,
6 Smith directly or indirectly engaged in transactions, practices or courses of business which operated
7 or would operate as a fraud or deceit upon offerees and investors, as follows:

- 8 a) Smith misused investor proceeds for personal and other unauthorized uses;
- 9 b) Smith misused investor proceeds to make Ponzi-type payments to investors that
10 were falsely represented as trading profits.

11 **II.**

12 **CONCLUSIONS OF LAW**

13 1. The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona
14 Constitution and the Securities Act.

15 2. Smith offered or sold securities within or from Arizona, within the meaning of A.R.S.
16 §§ 44-1801(15), 44-1801(21), and 44-1801(26).

17 3. Smith violated A.R.S. § 44-1841 by offering or selling securities that were neither
18 registered nor exempt from registration.

19 4. Smith violated A.R.S. § 44-1842 by offering or selling securities while neither
20 registered as a dealer or salesman nor exempt from registration.

21 5. Smith violated A.R.S. § 44-1991 by making untrue statements or misleading omissions
22 of material facts.

23 6. Smith violated A.R.S. § 44-1991 by engaging in transactions, practices or courses of
24 business which operated or would operate as a fraud or deceit.

25 7. Smith directly or indirectly controlled Bally within the meaning of A.R.S. § 44-1999
26 and is jointly and severally liable to the same extent as Bally for its violations of A.R.S. § 44-1991.

1 IT IS FURTHER ORDERED that Smith be jointly and severally liable to the same extent
2 as Bally for its violations of A.R.S. § 44-1991 as determined by Decision No. 63390.

3 IT IS FURTHER ORDERED that this Order shall become effective immediately.

4 **BY ORDER OF THE ARIZONA CORPORATION COMMISSION**

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6
7 CHAIRMAN

COMMISSIONER

COMMISSIONER

8 IN WITNESS WHEREOF, I, BRIAN C. McNEIL,
9 Executive Secretary of the Arizona Corporation
10 Commission, have hereunto set my hand and caused the
11 official seal of the Commission to be affixed at the
12 Capitol, in the City of Phoenix, this _____ day of
13 _____, 2001.

14 _____
15 BRIAN C. McNEIL
16 Executive Secretary

17
18 _____
19 DISSENT

20 This document is available in alternative formats by contacting Shelly M. Hood, ADA Coordinator,
21 voice phone number 602-542-3931, E-mail shood@cc.state.az.us.

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