

ORIGINAL OPEN MEETING ITEM



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COMMISSIONERS
MARC SPITZER - Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON
KRISTIN K. MAYES



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ARIZONA CORPORATION COMMISSION

2003 NOV -4 A 10: 10

AZ CORP COMMISSION
DOCUMENT CONTROL

DATE: November 4, 2003
DOCKET NO: S-03435A-01-0000

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Philip J. Dion III. The recommendation has been filed in the form of an Opinion and Order on:

JAMES T. M. VERBIC
(NOTICE OF OPPORTUNITY)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00 p.m.** on or before:

NOVEMBER 13, 2003

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Open Meeting to be held on:

NOVEMBER 20, 2003

For more information, you may contact Docket Control at (602)542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Secretary's Office at (602) 542-3931.

Arizona Corporation Commission
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BRIAN C. McNEIL
EXECUTIVE SECRETARY

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 MARC SPITZER, Chairman
4 WILLIAM A. MUNDELL
5 JEFF HATCH-MILLER
6 MIKE GLEASON
7 KRISTIN K. MAYES

8 IN THE MATTER OF:

9 JAMES T. M. VERBIC
(CRD # 2125770)
7880 N. 71st Street
Paradise Valley, AZ 85253

10 Respondent.

DOCKET NO. S-03435A-01-0000

DECISION NO. _____

OPINION AND ORDER

11 DATE OF HEARING:

April 7, 2003

12 PLACE OF HEARING:

Phoenix, Arizona

13 ADMINISTRATIVE LAW JUDGE:

Philip J. Dion III

14 APPEARANCES:

Amy J. Leeson, Special Assistant Attorney General, on behalf of the Securities Division of the Arizona Corporation Commission; and

15
16 Michael H. Ference, Sichenzia, Ross, Friedman & Ference, on behalf of Respondent.

17 **BY THE COMMISSION:**

18 * * * * *

19 Having considered the entire record herein and being fully advised in the premises, the
20 Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

21 FINDINGS OF FACT

22 1. On December 14, 2001, the Securities Division ("Division") of the Arizona
23 Corporation Commission ("Commission") filed a Notice of Opportunity for Hearing Regarding
24 Proposed Order of Revocation and For Other Affirmative Action ("Notice") against James T. M.
25 Verbic ("Verbic" or "Respondent") in which the Division alleged that Respondent engaged in acts,
26 practices and transactions that constitute violations of the Arizona Securities Act ("Act").

27 2. On December 31, 2001, Respondent, through his attorney, filed a request for hearing.
28

1 3. On April 7, 2003, a full public hearing was conducted before a duly authorized
2 Administrative Law Judge at the Commission's offices in Phoenix, Arizona. Respondent appeared
3 and was represented by counsel. The Division also appeared and was represented by counsel.
4 During the hearing, the parties submitted some stipulated facts and exhibits. Based upon those facts
5 and exhibits, the parties argued their positions in this matter. At the conclusion of the hearing, the
6 matter was taken under advisement.

7 4. Verbic became a registered securities salesman in Arizona on June 28, 1991. He was
8 associated with Merrill Lynch, Pierce, Fenner & Smith, Incorporation ("Merrill") from that date until
9 January 3, 2000. During the period of his association with Merrill, Verbic worked in Merrill's
10 Scottsdale, Arizona branch.

11 5. Verbic's last known address is 7880 North 71st Street, Paradise Valley, Arizona
12 85253.

13 6. Pursuant to A.R.S. § 44-1949, Verbic's registration was automatically suspended on
14 January 3, 2000, when his employment with Merrill ended. Since that date, Verbic has not been
15 registered in association with a dealer, and pursuant to A.R.S. § 44-1974(B), his registration expired
16 on December 31, 2000. Nonetheless, pursuant to A.R.S. §§ 44-1963(D) and 44-1947(D), the
17 Commission has the power to bring this action and to suspend or revoke Verbic's registration as a
18 securities salesman.

19 7. Since the expiration of his registration, Verbic has not re-applied for any of his
20 securities licenses in any jurisdiction, and in fact all of his licenses have lapsed.

21 8. During the period from at least January 1996, until approximately April 1999, Verbic
22 was the Merrill "Financial Consultant" (i.e., registered securities salesman) with responsibility for the
23 Merrill accounts legally or beneficially owned by a certain couple, who will be referred to in this
24 matter as Customer and wife, or collectively as the Customers.

25 9. Neither Customer nor his wife is a relative of Verbic.

26 10. Neither Customer nor his wife was a person in the business of lending funds during
27 the time period relevant to this matter.

28 11. The Division alleged that Verbic received three loans from his Customer. The

1 Division further alleged that Verbic's receipt of the loans violated the Act, specifically A.R.S. § 44-
2 1962(A)(10) and A.A.C. R14-4-130(A).

3 **Alleged Loan Number One**

4 12. Around October 1996, Verbic told Customer that another Merrill registered securities
5 salesman was acquainted with a contractor who wanted to borrow money short-term to fund
6 construction costs for a real estate project. Verbic told Customer that the lender could expect to
7 receive a high interest rate, relative to the current prime rate at that time.

8 13. Customer did not know the contractor or the schedule for completion of the
9 construction. He did not request or receive financial statements of the contractor, did not request or
10 receive information regarding the location where the construction would take place; and did not have
11 any other information a lender would normally review prior to making a business loan or construction
12 loan.

13 14. Customer agreed to make a \$30,000 loan to the contractor. Pursuant to the agreement,
14 Customer made the loan by a personal check in the amount of \$30,000, payable to Verbic's wife,
15 which Customer sent to Verbic and his wife at their home.

16 15. Customer did not ask for or receive a promissory note or other writing from either the
17 contractor or from Verbic. The loan had no stated maturity date, interest rate, or amortization
18 schedule.

19 16. The only evidence Customer had of the loan, was his bank account statement.
20 However, it is undisputed that if the Customer had obtained the cancelled check, it would have shown
21 that the \$30,000 was deposited in a joint personal checking account of Verbic and his wife.

22 17. Verbic lives in Phoenix, Arizona, while the Customer resides in Sedona, Arizona. The
23 contractor was allegedly located in Phoenix, Arizona. Therefore, Verbic argued that he acted as the
24 intermediary as a matter of convenience to his Customer.

25 18. Verbic argued that he gave the contractor the proceeds of the loan in full. He further
26 argued he received from the contractor the principal and interest payments from the contractor. He
27 also argued that he passed those payments on to the Customer in full.

28 19. The record is unclear as to whether or not those funds were actually paid to the

1 contractor and whether or not the contractor actually paid back the loan with interest. However, the
2 Customer received repayment with interest, between 1996 and 1998 in the form of five bank
3 cashier's checks from Verbic's wife, totaling \$37,480, plus a final cash payment of \$2,880.

4 **Alleged Loan Number Two**

5 20. On August 8, 1997, Customer made a personal check in the amount of \$100,000
6 payable to the order of Internext, and sent the check to Pratap Kesav ("Bob") Kondamoori. Mr.
7 Kondamoori was a promoter and officer of Internext Compression, Inc., among other things.

8 21. Accompanying the check, Customer sent an instruction to Mr. Kondamoori that
9 \$50,000 should be used to purchase Internext stock for the Customer, and the remaining \$50,000 was
10 to be used to purchase Internext stock for Verbic. Customer made that instruction pursuant to a prior
11 discussion and agreement between Customer and Verbic.

12 22. Also on August 8, 1997, Verbic, or Verbic's wife acting on his behalf, sent to
13 Customer an IOU that had been signed by Verbic's wife. The IOU contained a promise to pay the
14 Customer \$50,000.

15 23. The \$100,000 check that Customer sent to Kondamoori on August 8, 1997 was never
16 negotiated. Neither Verbic, nor the Customer received Internext stock certificates. Consequently,
17 Verbic did not owe, or make payments of principal or interest to the Customer with regard to the
18 August 8, 1997 check.

19 24. Verbic argued that since the check was never negotiated, he never received a "loan"
20 from the Customer. Therefore, Verbic argued he did not violate the Act.

21 25. The Division argued that Verbic had done everything in his power to affect the
22 borrowing of \$50,000 from the Customer. Kondamoori or other persons associated with Internext
23 who were not under the control of either Verbic or the Customer had the sole power to choose
24 whether or not to negotiate the \$100,000 check. Verbic agreed to borrow the \$50,000 and he
25 performed his side of the agreement by sending, or telling his wife to send, the IOU to the Customer.
26 Therefore, the Division argued Verbic's conduct in connection with the August 8, 1997 events
27 constituted dishonest or unethical conduct, and grounds for revocation or suspension under A.R.S. §
28 44-1962(A)(10). The Division argued that Rule 14-4-130(A) declares that the dishonest or unethical

1 practices which constitute grounds for revocation or suspension, "shall include but not be limited to"
2 the twenty practices listed in the rule. Accordingly, the Division stated it is not necessary to find that
3 the August 8, 1997 events constituted a "loan" in order to find Verbic's actions violated the Act.

4 **Alleged Loan Number Three**

5 26. On January 5, 1999, Verbic disclosed to Merrill that he was engaged in an outside
6 business activity, BJ Music, by providing a written disclosure form to his compliance manager. The
7 disclosure stated Verbic owned 50 percent of the business.

8 27. In January, 1999, Customer made a \$30,000 loan, the proceeds of which Verbic
9 allegedly used in the BJ Music business venture. BJ Music was never organized as a corporation,
10 partnership, or other entity.

11 28. Verbic and his wife both executed a promissory note dated January 18, 1999, in which
12 they promised to pay \$30,000 plus interest to Customer, by May 15, 1999. Verbic's partner in the BJ
13 Music business did not sign the promissory note.

14 29. Customer wrote a personal check in the amount of \$30,000, dated January 19, 1999,
15 and sent it to Verbic and his wife at their home.

16 30. Customer received repayment of this loan plus interest, in the form of bank cashier's
17 checks from Verbic's wife.

18 31. The Division argued that because BJ Music was never organized as a corporation,
19 partnership or other entity, BJ Music was incapable of borrowing money, of owning a bank account
20 or cashing a check, of being sued for repayment of a debt, or of owning any assets of any kind.
21 Therefore, BJ Music could not encumber itself and the loan was made to Verbic as an alter ego of BJ
22 Music.

23 32. Verbic argued that although BJ Music was not organized as a corporation or a
24 partnership, the loan was made for the benefit of the organization and not Verbic personally.
25 Respondent's attorney argued that Verbic's lack of familiarity with corporate organization and his
26 failure to properly incorporate BJ Music does not invalidate the fact the loan was made to BJ Music
27 as an entity, and not Verbic personally.

28 33. The evidence shows that the Customer's check was deposited into the joint account of

1 Mr. and Mrs. Verbic. The evidence further shows that \$6,000 was immediately withdrawn as cash,
2 while the remaining \$24,000 was deposited into the joint account.

3 34. The Division noted that the first bank account which bore the name BJ Music was a
4 Bank of America account titled in the name of James T. Verbic dba BJ Music and was not opened
5 until October, 1999, several months after the Customer's loan.

6 35. Verbic and his wife told their attorney that they had borrowed \$30,000 from Customer
7 in January 1999, according to a letter their attorney wrote, dated May 20, 1999. The letter does not
8 even mention BJ Music.

9 **Conclusion**

10 36. The Securities Act and the rules the Commission has created under that statute's
11 authority, forbid an Arizona-registered securities salesman from borrowing money or securities from
12 his customer. In addition, the Securities Act and related rules provide that the Commission may
13 revoke or suspend a salesman's registration if the Commission finds that the salesman has engaged
14 in dishonest or unethical conduct in the securities industry.

15 37. A registered or licensed individual is responsible for knowing and complying with the
16 law applicable to his profession in Arizona.

17 38. Regarding the first alleged loan, the Division did not establish by a preponderance of
18 evidence that a loan was made to Mr. Verbic. Based on the evidence presented, it appears that Verbic
19 and his wife only acted as a conduit through which the loan passed to the contractor. Therefore, we
20 do not find sufficient evidence to establish that Verbic has violated the Act regarding the first loan.
21 However, we cannot condone Verbic's actions, or his business practices in this situation. Verbic
22 accepted money from a client and deposited it into his personal bank account. Such actions, on their
23 face, are highly suspicious, but there was insufficient evidence presented to refute Verbic's claim that
24 he acted as a conduit.

25 39. Regarding the alleged second loan, the evidence is clear that Verbic did not receive
26 any financial benefit in that transaction. It is also clear that A.A.C. R14-4-130(A) does not
27 specifically state that the attempt to borrow money from a client is a dishonest or unethical practice.
28 However, the record has established that Verbic, through his wife, signed an IOU to Customer for

1 purposes of obtaining a loan from the Customer to purchase stock. Although a "loan" and its
2 obligations did not occur, Verbic did everything that was in his power to affect the borrowing of
3 \$50,000 from the Customer. Verbic's actions show that he clearly intended to borrow money from
4 his client. The fortuitous action of the check not being cashed cannot relieve Verbic of his
5 responsibility to his Customer. Therefore, we find that although a "loan" may not have occurred,
6 Verbic's clear intent and his actions in furtherance of borrowing money from his Customer are
7 sufficient to find that Verbic engaged in unethical conduct under the Act.

8 40. As to the third alleged loan, Verbic's argument that the loan was made to BJ Music
9 and not him personally is not persuasive. Further, his explanation as to why he did not incorporate or
10 otherwise organize the company is not convincing. Verbic was a registered salesman of securities
11 who bought and sold various securities, including stock in corporations, for his clients. To argue that
12 someone in his position, with his experience, was unfamiliar with how to organize a company is not
13 credible. Therefore, we find that Verbic borrowed money from his client in violation of the Act.

14 41. We further find the use of Mrs. Verbic, who has no formal association with Merrill or
15 any securities training; to negotiate checks from the Customer and purchase bank cashier's checks,
16 and the use of a FedEx account belonging to his wife's mother to send repayment checks to the
17 Customer represent questionable tactics which are representative of Verbic's other actions in this
18 matter.

19 42. Further, when examined in light of the other facts in this proceeding, Verbic's
20 argument that he was too busy to negotiate the checks in this matter and that it was easier for his wife
21 to conduct those transactions and sign her name on those checks, is unpersuasive and lacks
22 credibility.

23 43. The Division requested that Verbic's registration be suspended for a period of at least
24 six months. The Division did not request a fine or restitution, as the Customer received all of his
25 principal and interest from the activities in this matter.

26 44. Verbic stated that he has been unregistered and has not attempted to register as a
27 securities salesman for over 3 years, and has thereby effectively been suspended for a period of 39
28 months, and counting, to date; that he does not currently possess any valid securities licenses; and

1 that the Customer made, not lost money on each transaction. Therefore, Verbic argued there is no
2 need to suspend a registration that lapsed years ago. Accordingly, as a matter of equity, Verbic
3 respectfully requested that no further suspension be imposed.

4 45. In weighing the aggravating and mitigation factors in this case, we find that Verbic's
5 license should be suspended and that he should be required to pay a fine in this matter.

6 CONCLUSIONS OF LAW

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

9 2. Respondent's conduct is grounds to suspend his registration as a securities salesman
10 with the Commission pursuant to A.R.S. § 44-1962. Specifically, Verbic engaged in unethical
11 practices in the securities industry, as specified in A.R.S. § 42-1962(A)(10) and A.A.C. R14-4-
12 130(15), by borrowing money or attempting to borrow money from a Customer, who is neither a
13 relative of Verbic nor a person in the business of lending funds at the time of the loans.

14 3. Respondent's conduct is grounds for an administrative penalty pursuant to A.R.S. § 44-
15 2036.

16 4. An administrative penalty of \$2,000 is reasonable in this case.

17 5. Although Respondent's conduct is grounds for an order of restitution pursuant to
18 A.R.S. § 44-2032, restitution is inapplicable in this case as the Customer has received payment of his
19 principal and interest and there is no allegation that the Customer was injured financially as a result of
20 Verbic's actions in this case.

21 ORDER

22 IT IS THEREFORE ORDERED that pursuant to the authority granted to the Commission
23 under A.R.S. § 44-2036, Respondent shall pay \$2,000 within sixty days of the effective date of this
24 Order as an administrative penalty for the violations of A.R.S. § 44-1962.

25 IT IS FURTHER ORDERED that administrative penalty shall be made payable to the "State
26 of Arizona" for deposit into the general fund of the State of Arizona.

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IT IS FURTHER ORDERED that the administrative penalty ordered hereinabove shall bear interest at the rate of ten percent per year for any outstanding balance from sixty days of the effective date of this Order.

IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under A.R.S. § 44-1962, Mr. Verbic's registration as a securities salesman in Arizona is suspended for the period of sixty (60) days from the effective date of this Decision.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN COMMISSIONER COMMISSIONER

CHAIRMAN COMMISSIONER COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this ____ day of _____, 2003.

BRIAN C. McNEIL
EXECUTIVE SECRETARY

DISSENT _____

DISSENT _____

PDJ:mlj

1 SERVICE LIST FOR: JAMES T. M. VERBIC

2 DOCKET NO. S-03435A-01-0000

3 Michael H. Ference
4 Sichenzia, Ross, Friedman & Ference, L.L.P.
5 1065 Avenue of Americas, 21st Floor
6 New York, NY 10018
7 Attorneys for James T. M. Verbic

8 Armand Salese
9 Salese & McCarthy, P.C.
10 The Steinfield Mansion
11 300 North Main, Suite 203
12 Tucson, Arizona 85701
13 Attorneys for James T. M. Verbic

14 Moira McCarthy
15 Assistant Attorney General
16 ARIZONA ATTORNEY GENERAL'S
17 OFFICE
18 1275 West Washington Street
19 Phoenix, Arizona 85007

20 Matt Neubert, Acting Director
21 Securities Division
22 ARIZONA CORPORATION COMMISSION
23 1300 West Washington Street
24 Phoenix, Arizona 85007

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