

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: <sup>650</sup> OF 2002

IN THE MATTER OF THE COMPANIES LAW (2002 REVISION)  
AND IN THE MATTER OF MUTUAL FUNDS LAW (2001 REVISION)

AND IN THE MATTER OF APODACA INVESTMENT OFFSHORE (CAYMAN), LTD.

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PETITION

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**TO: HER MAJESTY'S GRAND COURT OF THE CAYMAN ISLANDS**

The Humble Petition of THE CAYMAN ISLANDS MONETARY AUTHORITY (the "Petitioner" hereinafter sometimes referred to as "the Authority")

SHOWETH as follows:

1. Apodaca Investment Offshore Ltd. was incorporated in the Cayman Islands as of 1<sup>st</sup> February 1998. It was originally licensed as a registered mutual fund under Section 4(3) of the Mutual Funds Law (2001 Revision) ("the Law") on 21<sup>st</sup> October 1998. On 21<sup>st</sup> January 1999, Apodaca Investment Offshore Ltd. changed its name to Apodaca Investment Offshore (Cayman), Ltd. (the "Company").
2. The Company has an authorized share capital of US\$50,000 divided into 4,990,000 redeemable shares of U\$0.01 par value each and 100 management shares of US\$1.00 par value each. Except for the management shares, the shares are non-voting. There are no preemptive rights attached to the shares. Shares were originally offered at a price of US\$1,000 per share, and except by special arrangement, the minimum initial subscription for each investor was US\$1,000,000.
3. During its tenure, the Company issued at least four private offering memoranda, dated 31<sup>st</sup> August 1998, 1<sup>st</sup> June 1999 and two dated 1<sup>st</sup> May 2001, one for the sub-fund, Apodaca Venture Offshore, and one for the main fund.

4. The Company's directors are Messrs. Jerry C. Apodaca ("Mr. Apodaca") and Paul Brahe (who replaced Michael C. Fitzsimmons), both of San Francisco, California (hereinafter called the "Directors").
5. The registered office and Administrator of the Company had been Hemisphere Fund Managers Limited ("Hemisphere"), who resigned on 1<sup>st</sup> November 2000 due to the difficulty in obtaining accounts and timely information. Maples & Calder then assumed the role as registered office, but on 12<sup>th</sup> April 2001 they notified the Authority that they were no longer willing to act in this capacity due to non-payment of fees. Potential new administrators, TMF Fund Administrators BV, of the Netherlands, were in extended discussion with the Directors but declined to act given the absence of accurate and timely information. It would appear that no financial records have been maintained since 1<sup>st</sup> November 2000.
6. The Investment Advisor for the Fund is Apodaca Investment Group, LLC (the "Advisor"), whose managing director is Mr. Apodaca. Bank of America Securities (formerly known as NationsBanc Montgomery Securities prior to the institution's merger with Bank of America) is the prime broker and custodian of the Company.
7. The Company's external auditors, Rothstein, Kass & Company, San Francisco, (who had not been approved by the Authority) had not released their audit report for the year ended 31<sup>st</sup> December 2000 as they were still awaiting payment of the audit fee. After his appointment, the Controller, Mr. Simon Whicker of KPMG, did arrange for payment to be made, however, the audit report was still not released. An unqualified audit report had been issued for the year ended 31<sup>st</sup> December 1999 by the former auditors, Arthur Andersen LLP.
8. On 15<sup>th</sup> March 2001, the Authority received an e-mail message from an investor advising of their wish to make a redemption and enquiring as to who has replaced Hemisphere as Administrator of the Company. This was followed up with another message on 25<sup>th</sup> April 2001 that indicated the investor might proceed to litigation.
9. On 9<sup>th</sup> April 2001 the Authority received an e-mail message from another investor, wanting to know who was the administrator of the Company and informing the Authority that the Mr. Apodaca was not replying to his requests.
10. The Authority made extensive efforts to contact the Directors and on 28<sup>th</sup> August 2001 received a letter from Mr. Apodaca. On 29<sup>th</sup> August 2001 the Authority telephoned Mr. Apodaca to discuss the concerns over the management of the Company. It was evident to the

Authority that Mr. Apodaca was unaware of the basic provisions of the Law with respect to the Company. The Fund had failed to pay the annual fees for 2001 and had not filed the annual audited accounts for 2000, both in violation of Section 4 of the Law. The Fund had also failed to pay annual fees to the Registrar of Companies since 1998. Failure to pay fees placed the Fund in danger of being struck off.

11. Due to the regulatory concerns, on 29<sup>th</sup> October 2001 the Managing Director of the Authority exercised his powers under Section 30 (3)(e) of the Law to appoint a person to control the affairs of the Company. Mr. Simon Whicker of KPMG was appointed controller of the Company (the "Controller").
12. The Controller submitted his Report to the Authority on 22<sup>nd</sup> November 2001. The Controller's initial finding gave cause for concern as to the effective management of the Company. No financial records appeared to have been maintained since 1<sup>st</sup> November 2000. There is conflicting information as to which assets belong to the Company and the whereabouts of those assets. In addition, the Controller had contacted a number of the parties shown as advisors in the private offering memoranda, who advised that they had not consented to their names being used and some indicated no involvement with or provision of services to the Company at all. Furthermore, the Controller reported there had been no written correspondence with shareholders for over a year.
13. The Controller also reported that the assets of the Fund, to which he had access and which were under his control totalled US\$458,509. He was unable to specify what shareholders existed, as the information that the Controller obtained from Hemisphere was believed to be out of date. Hemisphere's records indicated that as at 31<sup>st</sup> October 2000, the number of shares issued was 4,322,357 and the amount invested was US\$7,380,322.
14. The Controller recommended that, due to fundamental breakdown in the effective management of the Fund, the Controller should remain in place while efforts be made to obtain information from Mr. Apodaca. If Mr. Apodaca refused to cooperate, then it was suggested that the Company be wound up and liquidators appointed.
15. On 29<sup>th</sup> January 2002 the Controller subsequently issued an Addendum to the Report. In this report, the Controller provided information regarding his discussion with the Fund's shareholders and the continued lack of success in communicating and obtaining information from Mr. Apodaca. The Controller's recommendation at the time of the Addendum to the Report was that the Controller remain in place and pursue legal action against Mr. Apodaca, if necessary.

16. The Controller subsequently advised the Authority that on 29<sup>th</sup> March 2002, pursuant to an application by the Controller, a Temporary Restraining Order was granted and an Order to Show Cause Why a Preliminary Injunction Should Not Be Issued was issued by the United States District Court of the Northern District of California ("California Court"). On 23<sup>rd</sup> April 2002 the same California Court issued a Preliminary Injunction Order against Mr. Apodaca and Apodaca Investment Group, Inc. requiring that the defendants, inter alia, restrain their activities, freeze certain assets, provide an accounting of the Fund's assets and produce all documentation relevant to the Company's affairs to the Controller.
  
17. Pursuant to Section 30(11)(b) of the Law, the Petitioner applies under Section 94 of the Companies Law (2002 Revision) for the Company to be wound up by the Court on the grounds that it is just and equitable for the following reasons:-
  - (1) The reputation of the Company has been destroyed following the actions of Mr. Apodaca and carrying on its business has become impossible.
  
  - (2) The participating shareholders will redeem their shares as soon as they are able to do so. The Controller has written to the investors to inform them of the liquidation. Only one has responded acknowledging the liquidation of the Company.
  
  - (3) It is unrealistic to anticipate that further investment can be attracted into the company.
  
  - (4) It is expedient in the public interest that the Company be wound up.

Your Petitioner therefore humbly prays that:-

1. That the Company be wound up by the Court under the provisions of the Companies Law (2002 Revision);
  
2. That Theodore Bullmore and Simon Whicker of KPMG, PO Box 493 GT, Grand Cayman be appointed Joint Official Liquidators of the Company;
  
3. That the Court do dispense with the requirement that the Joint Official Liquidators post security pursuant to Section 106 of the Companies Law (2002 Revision);

4. That the Joint Official Liquidators may exercise any of the powers listed in Section 109 of the Companies Law (2002 Revision) without the sanction or intervention of the Court;
5. That the costs of this Petition be paid out of the assets of the Company as an expense of the liquidation.
6. The Official Liquidators be at liberty to and do pay themselves, their agents, employees, attorneys, solicitors and whomsoever else they may employ or instruct, remuneration and costs in priority to all other debts of the Company pursuant to Section 123 of the Companies Law (2002 Revision), and:

- (i) the remuneration of the Official Liquidators and their staff instructed in connection with the performance of their duties be fixed and approved at the following discounted hourly rates, subject to variation from time to time, as agreed with the Company's directors:

Partner	US\$450.00/Hour
Director	US\$400.00/Hour
Manager	US\$275.00/Hour
Senior Accountant	US\$190.00/Hour

- (ii) the Official Liquidators be authorized to pay out of the assets of the company any invoices rendered in respect of their fees and disbursements as and when these invoices become payable provided that this Honorable Court's approval of the payment of the fees and expenses will be required on a quarterly basis and, in the event that any such invoice or part of an invoice is not ratified by the Court, the Official Liquidators will refund the full amount relating to that invoice or part of an invoice within 7 days of the Court's determination;
- (iii) the remuneration of any other agents, employed or instructed by or on behalf of the Official Liquidators in connection with the performance of their duties be fixed and approved at the rate or rates in the country in which such person is ordinarily employed or engaged in practice;
- (iv) the Official Liquidators be at liberty to pay their agents, employees, attorneys, solicitors and whomsoever else they employ or instruct either weekly or monthly or at such other intervals as they consider appropriate;

- (v) the Official Liquidators be at liberty to meet all disbursements reasonably incurred in connection with the performance of their duties;

and for the avoidance of doubt all payments made pursuant to paragraphs 7(i)-(iv) above shall be made as and when they fall due out of the assets of the Company and shall be expenses in the Liquidation.

7. The Official Liquidators shall provide to the Authority copies of all reports filed with this Court and/or sent to creditors or contributories of the Company.
8. The Official Liquidators shall serve on the Authority copies of all applications made to this Court for directions or other relief and any evidence in support thereof, such service to be within a reasonable time of date of the hearing of any such applications.
9. Such other orders and directions may be made as the Court thinks fit.

AND your Petitioner will ever pray etc.

Dated the *24* day of August 2002



Legal Counsel for the Petitioner

NOTE: This petition is intended to be served on the Company, the Registrar of Companies and on Theodore Bullmore and Simon Whicker of KPMG.

#### INDORSEMENT

This Petition having been presented to the Grand Court of the Cayman Islands on the \_\_\_\_\_ day of \_\_\_\_\_ 2002 will be heard at the Grand Court of the Cayman Islands on *18 OCT* *2002* at *10* o'clock (or as soon thereafter as the Petition can be heard).

This Petition was presented by the Cayman Islands Monetary Authority whose address for service is Elizabethan Square, PO Box 10052 APO, Grand Cayman, Cayman Islands.