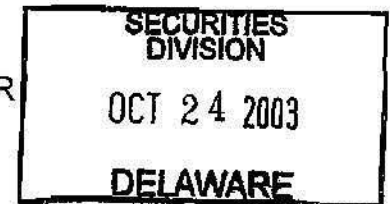


BEFORE THE SECURITIES COMMISSIONER
OF THE STATE OF DELAWARE



IN THE MATTER OF:

DUANE J. ACKERMAN, and
DENNIS J. ACKERMAN,

Respondents.

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Case No. 00-06-01

**ADMINISTRATIVE HEARING OFFICER'S
OPINION AND ORDER**

Proceedings

On or about July 19, 2002, the Delaware Division of Securities ("Securities Division") commenced an administrative action with the Delaware Securities Commissioner pursuant to the provisions of the Delaware Securities Act (Title 6, Chapter 73 of the Delaware Code) against Duane Ackerman and Dennis Ackerman of Orlando, Florida.

In its administrative complaint, the Securities Division alleged that between May and July of 1999, Respondents Dennis Ackerman and Duane Ackerman engaged in fraudulent conduct in connection with the offer and sale of a security to _____ of Newark, Delaware. The Securities Division also alleged that the Ackermans' conduct was in violation of the registration provisions of the Delaware Securities Act. Both Respondents answered the complaint individually.

A hearing was held on July 8, 2003, in the offices of the Delaware Department of Justice in Wilmington, Delaware. The hearing was scheduled and conducted according to the Rules and Regulations Pursuant to the Delaware

Securities Act. Respondents did not appear. The Securities Division presented a *prima facie* case of the allegations in its complaint. Deputy Attorney General Catherine Damavandi appeared as counsel for the Securities Division.

, the alleged victim, and William P. Babby, an investigator for the Securities Division, gave testimony at the hearing.

The Hearing Officer considered the testimony presented at the hearing, as well as the documentary evidence admitted into the record. This is the Hearing Officer's Opinion and Order in this matter.

DELAWARE SECURITIES LAW

Delaware Securities Act

"The purpose of the Delaware Securities Act is to prevent the public from being victimized by unscrupulous or overreaching broker-dealers, investment advisors or agents in the context of selling securities or giving investment advice, as well as to remedy any harm caused by securities law violations." 6 Del. C. §7301(b).

Securities Fraud

Section 7303 of the Delaware Securities Act prohibits fraud in the offer or sale of a security. Specifically, the statute provides that:

It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly:

- (1) To employ any device, scheme, or artifice to defraud;
- (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
- (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

In order to establish a violation of 6 Del. C. § 7303(2), the Securities Division must prove that a Respondent "(1) made a misstatement or omission (2) of material fact (3) with scienter (4) in connection with a purchase or sale of a security (5) upon which the [victim] relied and (6) that reliance proximately caused the [victim's] injuries." Hubbard v. Hibbard Brown & Co., Del. Supr., 633 A.2d 345, 349 (1993).

Delaware has adopted the federal materiality standard enunciated in TSC Industries v. Northway, 426 U.S. 438, 449 (1976). See Hubbard at 352-53; Zirn v. VLI Corp., Del. Supr., 621 A.2d 773, 779 (1993). A fact is material if "there is a substantial likelihood that a reasonable shareholder would consider it important" in making his or her investment decision. 426 U.S. at 449. Furthermore, "to fulfill the materiality requirement 'there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.'" Id. "The issue of materiality may be characterized as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts." Id. at 450.

Scienter is defined as a "mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194, n.12 (1976). Scienter includes "misrepresentations made knowingly or willfully, or with reckless disregard for their truth or falsity, or without a genuine belief in their truth." U.S. v. Boyer, 694 F.2d 58, 59 (3d Cir. 1982)(citing McLean v. Alexander,

599 F.2d 1190 (1979), explaining the civil scienter standard for Rule 10b-5, §10(b) and Delaware common law fraud).

In Delaware, “our time-honored definition of proximate cause has been the but-for rule.” Russell v. K-Mart Corp., Del. Supr., 761 A.2d 1, 5 (2000) (internal citations omitted). “A proximate cause is one that ‘in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred.’” Delaware Elec. Coop., Inc. v. Duphily, Del. Supr., 703 A.2d 1202, 1209 (1997) (citing Culver v. Bennett, Del. Supr., 588 A.2d 1094, 1097 (1991)).

Promissory Notes

“Section 7302(a)(13) of Title 6, Del. C. defines the term ‘security’ to include ‘any note.’” XComp v. Ropp, Del. Ch., 2002 WL 1753168, *5 (July 19, 2002). Delaware follows the U.S. Supreme Court’s determination that a promissory note is presumed to be a security. Id (citing Reeves v. Ernst & Young, 494 U.S. 56, 65 (1990)).

Willful Conduct

“All that is required for a finding of willfulness under the securities laws is that the actor intentionally commit the act that constitutes the violation. Flowers v. Hubbard, Del. Ch., 1991 WL 216094, *4 (October 22, 1991)(citing Hinkle Northwest, Inc. v. SEC, 641 F.2d 1304, 1307 (9th Cir. 1981) and Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1985)).

Registration of Securities

Section 7304 of the Delaware Securities Act states that “[i]t is unlawful for any person to offer or sell any security in this State unless (1) it is registered under this chapter; (2) the security or transaction is exempted under §7309 of this title; or (3) it is a federal covered security for which a notice filing has been made pursuant to the provisions of §7309A of this title.”

Agent Registration

Section 7313 of the Delaware Securities Act states that “[i]t is unlawful for any person to transact business in this State as a broker-dealer or agent unless the person is registered under this Chapter.”

Remedial Powers of the Securities Commissioner

Pursuant to §7325(b) of the Delaware Securities Act, “[t]he Commissioner may make, amend and rescind rules, regulations, forms and orders to carry out and define the provisions of this chapter. Such orders may provide for fines, assessment of costs, restitution to investors, conditional or probationary registration, censure or reprimand, special reporting requirements, or other provisions which the Commissioner determines to be in the public interest.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the evidence presented at the hearing and applicable law, the Hearing Officer makes the following findings of fact and conclusions of law:

Offer and Sale of an Unregistered Security – Duane Ackerman

1. In May 1999, Respondent Duane Ackerman recommended U.S. Capital Funding promissory notes to _____ by sending

advertising materials about these promissory notes to their Newark, Delaware home. (Testimony of _____, Hearing Transcript of July 8, 2003, p. 14; State's Exhibit 1.)

2. On or about June 25, 1999, _____ having agreed to the purchase of the promissory note, forwarded a check in the amount of \$25,000.00 from their Newark, Delaware home to Duane Ackerman's place of business at A&A Insurance and Financial Brokers in Orlando, Florida. (Testimony of _____, Hearing Transcript of July 8, 2003, pp. 18-20; State's Exhibits 3 and 4.)

3. The promissory note that Duane Ackerman offered, and later sold, to the _____ was a security. (Testimony of _____, Hearing Transcript of July 8, 2003, p. 15; State's Exhibits 3 and 4.)

4. The promissory note that Duane Ackerman offered and sold to the _____ was not registered with the Delaware Securities Commissioner. (Testimony of William P. Babby, Hearing Transcript of July 8, 2003, p. 32.)

5. Duane Ackerman's conduct in willfully offering and selling the unregistered promissory note to the _____ was in violation of 6 Del. C. §7304.

Offer of an Unregistered Security – Dennis Ackerman

6. In connection with the offer and sale of the security referenced in Paragraph 1, Respondent Dennis Ackerman also willfully offered the U.S. Capital Funding promissory note to _____ by sending advertising materials about these promissory notes to their Newark, Delaware home. (Testimony of _____, Hearing Transcript of July 8, 2003, p. 14; State's Exhibit 1.)

7. The promissory note that Dennis Ackerman offered to the [redacted] was a security. (Testimony of [redacted], Hearing Transcript of July 8, 2003, p. 15; State's Exhibits 3 and 4.)

8. The promissory note that Dennis Ackerman offered to the [redacted] was not registered with the Delaware Securities Commissioner. (Testimony of William P. Babby, Hearing Transcript of July 8, 2003, p. 32.)

9. Dennis Ackerman's conduct in offering the unregistered promissory note to the [redacted] was a willful violation of 6 Del. C. §7304.

Unregistered Broker-Dealer Agent – Duane Ackerman

10. In connection with the offer and sale of the security referred to in Paragraphs 1 through 4, Duane Ackerman was not registered as a broker-dealer agent with the Delaware Securities Commissioner. (Testimony of William P. Babby, Hearing Transcript of July 8, 2003, p. 32.)

11. Duane Ackerman's conduct in offering and selling the unregistered promissory note to the [redacted] was a willful violation of 6 Del. C. §7313.

Fraud in the Sale of a Security – Duane Ackerman

12. In connection with the offer and sale of securities referred to in Paragraphs 1 through 4, Duane Ackerman represented to the [redacted] that the U.S. Capital Funding promissory note was "an ideal, short term, safe investment" with "strength and security." Describing the note as appropriate for conservative investors, Duane Ackerman also stated that the note promised a 9.25% return, and had "rock-solid safety" with its "principal guaranteed." (State's Exhibit 1.)

13. Duane Ackerman's representations were false. The issuance of the promissory notes was in fact a Ponzi scheme,¹ of which Duane Ackerman was aware. This finding is based upon the following: (1) Duane Ackerman was a sales "MVP" with the principals of American Benefits Services and U.S. Capital Funding, Ray Levy and Ronalee Orlick. (Testimony of William P. Babby, Hearing Transcript of July 8, 2003, pp. 32-33; State's Exhibit 11). (2) Duane Ackerman received their internal memoranda and correspondence, and attended internal meetings. (State's Exhibit 11; Testimony of William P. Babby, Hearing Transcript of July 8, 2003, pp. 32 and 34-37.) (3) The securities of American Benefits Services and U.S. Capital Funding were both advertised as having the principal guaranteed, insured, no sales charges and requiring a \$25,000 minimum investment. (State's Exhibits 1 and 11). (4) Through the internal memoranda, meetings and correspondence, Duane Ackerman was informed that the returns to investors were either "their own money coming back to them" (State's Exhibit 11, Attachment G) or the money that was in the trust accounts "and which would ordinarily be used to purchase additional policies, will be used to repay this investor" (State's Exhibit 11, Attachment D). (5) Duane Ackerman was also advised that he "must make sure that there is a complete understanding of the monthly income program. It is being perceived wrong [by investors]." (Testimony of William P. Babby, Hearing Transcript of July 8, 2003, pp. 32 and 34-37; State's Exhibit 11, Attachment G.) (6) Furthermore, details about U.S.

¹ A "Ponzi scheme" is a fraudulent investment plan whereby an enterprise lacking profitable business operations creates the illusion of business profit by paying out to earlier investors apparent dividends or income payments using the principal of later investors.

Capital Funding were discussed with Duane Ackerman as early as March 31, 1999. (State's Exhibit 11, Attachments E and F.)

14. Duane Ackerman did not disclose that the purchase of the promissory note involved a high degree of risk, nor did he disclose to the [redacted] that they could lose the entire principal of their investment. (Testimony of [redacted], Hearing Transcript of July 8, 2003, pp. 29-30.)

15. Duane Ackerman intended to defraud the [redacted] in connection with the sale of the promissory note. This finding is based upon the following facts:

(1) As detailed in Paragraph 13, Duane Ackerman knew the U.S. Capital Funding note, like the American Benefits Services note, was part of a Ponzi scheme and not a safe investment. (State's Exhibit 11.)

(2) Duane Ackerman's business, A&A Insurance and Financial Brokers, generated \$4,000,000 in sales and \$400,000 in commissions between January and July 1999 from American Benefits Services sales alone. (State's Exhibit 11.) Therefore, Duane Ackerman had a motive to lie and mislead regarding the safety of U.S. Capital Funding.

16. Duane Ackerman's misrepresentations and omissions regarding the safety of the U.S. Capital Funding note were material; that is, they were the kind of misrepresentations and omissions that would affect the reasonable investor in making his or her investment decision.

17. The [redacted] relied upon Duane Ackerman's misrepresentations and omissions regarding the safety of the investment in making their decision to invest \$25,000.00 in U.S. Capital Funding in June 1999. Mr. [redacted] testified that

the advertising materials of the U.S. Capital Funding note made it a "no-brainer" to purchase because "there were no risks." (Testimony of [REDACTED], Hearing Transcript of July 8, 2003, pp. 29-30.)

18. After receiving interest payments totaling \$1,140.40, the [REDACTED] lost the \$25,000.00 principal they had invested in U.S. Capital Funding. (Testimony of [REDACTED], Hearing Transcript of July 8, 2003, pp. 27-30; State's Exhibits 5, 9, and 10.)

19. The [REDACTED] reliance upon Duane Ackerman's representations and omissions proximately caused their \$25,000.00 loss. The record does not contain any evidence of superseding causes occurring from the time the [REDACTED] relied upon Duane Ackerman's representations and omissions and the time they suffered their \$25,000.00 loss.

20. Duane Ackerman's conduct, accordingly, was a willful violation of 6 Del. C. §7303.

Fraud in the Offer of a Security – Dennis Ackerman

21. In connection with the offer of the security referred to in Paragraphs 1 and 6, Dennis Ackerman represented to the [REDACTED] that the U.S. Capital Funding promissory note was "an ideal, short term, safe investment" with "strength and security." Dennis Ackerman described this promissory note as appropriate for conservative investors, having a return rate of 9.25% with "rock-solid safety" and its "principal guaranteed." (State's Exhibit 1.)

22. Dennis Ackerman's representations were false. The issuance of the promissory notes was in fact a Ponzi scheme. This finding is based upon the

following: (1) Dennis Ackerman's business partner, Duane Ackerman, received direct information from the principals of U.S. Capital Funding and its sister security American Benefits Services that the investments were Ponzi schemes, set forth more fully in Paragraph 13 above. (Testimony of William P. Babby, Hearing Transcript of July 8, 2003, pp. 32 and 34-37; State's Exhibit 11.) (2) As an owner of A&A Insurance and Financial Brokers, Dennis was also aware of the business workings of the company and took part in the correspondence and updates sent out to current and prospective customers. (State's Exhibits 1, 2, and 8; Testimony of _____, Hearing Transcript of July 8, 2003, pp. 27-28.)

23. Dennis Ackerman did not disclose that the purchase of the promissory note involved a high degree of risk, nor did he disclose to the _____ that they could lose the entire principal of their investment. (Testimony of _____, Hearing Transcript of July 8, 2003, pp. 29-30.)

24. Dennis Ackerman intended to defraud the _____ in connection with the sale of the promissory note. This finding is based upon the following facts:

(1) Dennis Ackerman knew that the U.S. Capital Funding note, like the American Benefits Services note, was part of a Ponzi scheme and not a safe investment. (State's Exhibit 11.)

(2) Duane and Dennis Ackerman were business partners at A&A Insurance and Financial Brokers. (State's Exhibits 1 and 2.) A&A Insurance and Financial Brokers generated \$4,000,000 in sales and \$400,000 in commissions between January and July 1999 from American Benefits Services sales alone.

(State's Exhibit's 11). Therefore, Dennis Ackerman had a motive to lie and mislead regarding the safety of U.S. Capital Funding.

25. Dennis Ackerman's misrepresentations and omissions regarding the safety of the U.S. Capital Funding note were material; that is, they were the kind of misrepresentations and omissions that would affect the reasonable investor in making his or her investment decision.

26. The relied upon Dennis Ackerman's misrepresentations and omissions regarding the safety of the investment in making their decision to invest \$25,000.00 in U.S. Capital Funding in June 1999. Mr. testified that the advertising materials of the U.S. Capital Funding note made it a "no-brainer" to purchase because "there were no risks." (Testimony of Hearing Transcript of July 8, 2003, pp. 29-30.)

27. After receiving interest payments totaling \$1,140.40, the lost the \$25,000.00 principal they had invested in U.S. Capital Funding. (Testimony of , Hearing Transcript of July 8, 2003, pp. 27-30, State's Exhibits 5, 9, and 10.)

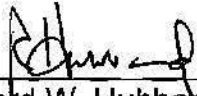
28. The reliance upon Dennis Ackerman's misrepresentations and omissions proximately caused their \$25,000.00 loss. The record does not contain any evidence of superseding causes occurring from the time the relied upon Dennis Ackerman's misrepresentations and omissions and the time they suffered their \$25,000.00 loss.

29. Dennis Ackerman's conduct, accordingly, was a willful violation of 6 Del. C. §7303.

REMEDIES

In light of the above, the following order is in the public interest:: Duane Ackerman and Dennis Ackerman shall make restitution by delivering to the Delaware Division of Securities, within thirty (30) days of the date of this order, a certified check made payable to _____ in the amount of \$25,000.00, which is the principal lost by the _____. The Securities Division shall then deliver such check to the _____ within a reasonable period of time. This restitution obligation shall be joint and several between Duane Ackerman and Dennis Ackerman.

IT IS SO ORDERED this 24th day of October, 2003.



Richard W. Hubbard
Administrative Hearing Officer