BEFORE THE SECURITIES COMMISSIONER
OF THE STATE OF DELAWARE

IN THE MATTER OF:	)	
	)	
DONALD MATTEI, and	)	**Case No. 00-2-5**
HDN, INC.,	)	
	)	
Respondents.	)	

ORDER

On March 23, 2006, the Hearing Officer issued an Opinion and Order in this matter dismissing the administrative charges against the Respondents.

On March 27, 2006, the Securities Division filed a Motion for Reconsideration of the Opinion and Order of March 23, 2006. On April 4, 2006, counsel for Mr. Mattei filed his response.

The Respondent argues that the Rules and Regulations Pursuant to the Delaware Securities Act do not provide for a motion for reconsideration, and the motion should be denied on that basis, among other reasons. Although it is true there is no specific provision for a motion for reconsideration, section 230 of the Rules and Regulations does generally permit motions. Therefore, I am willing to entertain the Motion for Reconsideration.

However, counsel for Mr. Mattei also argues that the grounds for a motion for reconsideration are limited under Delaware law, and that the Motion for Reconsideration fails to fit within any category of permissible grounds for reconsideration. Specifically, counsel argues that the Motion for Reconsideration merely restates arguments previously made and rejected. Such arguments are not a proper basis for a motion for reconsideration.

Plummer v. Sherman, 2004 WL 63414 (Del. Super.). Counsel's argument in this regard appears to be correct.

Although the Motion for Reconsideration should be denied for the foregoing reason, if I were to address the same issues that have already been decided, I would reach the same conclusions. The force of the Securities Division's argument that the March 23, 2006 Opinion and Order was legally incorrect is greatly weakened by its failure to address the fact that three federal district courts have found state securities actions to be preempted under the facts of the instant case. Instead, the motion addresses only *Temple v. Gorman,* 201 F.Supp.2d 1238 (S.D.Fla. 2002), as if that opinion were an aberration. It is easier to be dismissive of one opinion than it is to be dismissive of three opinions, but the reality is that there are three opinions on this point that can be said to constitute a majority rule. There are no opinions on point that reach a contrary conclusion. The Motion for Reconsideration bases most of its arguments on cases that were decided before "The National Securities Market Improvement Act of 1996" (NSMIA), which contains the preemptive provisions, was even enacted into law, and thus have no relevance to the preemption issue.

Counsel for the Securities Division suggests that the March 23, 2006 Opinion and Order was based on faulty speculation, but it is a fact, not speculation, that Delaware courts have shown a preference for following federal law in the securities area. *See Hubbard v. Hibbard Brown & Co.*, 633 A.2d 345, 352-53 (Del. 1993).

The Securities Division urges an interpretation of federal law contrary to the rule articulated in the three opinions identified in the Opinion and Order. In asking whether the Delaware courts would be likely to reject the current federal judicial approach in this area, I

searched for a reason why they would do so and could not find one. The facts of this case do not cry out for hanging the results of the investors' bad investment decisions on Mr. Mattei.

To the extent counsel suggests the Hearing Officer should not be concerned about how the Delaware courts are likely to rule in these cases, I disagree. I do not think it does the investor complainants any favor for the State to prevail at the administrative level only to see the decision reversed on appeal. To the contrary, it would amplify their disappointment and result in a complete waste of the State's resources. Ultimately, the law is what the courts say it is, not what I personally think. Therefore, I see an effort to ascertain how the courts would rule as being consistent with an effort to interpret the law.

Finally, it is possible that the rule of *Temple v. Gorman, supra*, will ultimately be rejected in the federal courts. Counsel for the Securities Division has ably argued the reasons why it should be. However, at this time it appears to be the majority rule. For me to anticipate that this rule of preemption will eventually be rejected would be rank speculation.

WHEREFORE, for the foregoing reasons, IT IS ORDERED that the Motion for Reconsideration is denied.

Richard W. Hubbard
Hearing Officer

Dated: May 8, 2006